

Education, Children and Young People Committee

27th Meeting, 2022 (Session 6), Wednesday 9 November 2022

National Care Service (Scotland) Bill – Panel 2

Introduction

At its meeting on 5 October 2022, the Committee considered its approach towards scrutiny of the National Care Service (Scotland) Bill and agreed its final approach via correspondence on 7 October 2022.

National Care Service (Scotland) Bill

[The National Care Service \(Scotland\) Bill](#) establishes the National Care Service.

The Bill allows Scottish Ministers to transfer social care responsibility from local authorities to a new, national service. This could include adult and children's services, as well as areas such as justice social work.

Scottish Ministers will also be able to transfer healthcare functions from the NHS to the National Care Service.

The Bill was introduced on 20 June 2022.

The Bill is accompanied by a [Policy Memorandum](#), [Explanatory Notes](#) and a [Financial Memorandum](#). Other documents relating to this Bill are available on the [Scottish Parliament's website](#).

Committee Meeting

This morning, the Committee will hear from two panels. The first panel is comprised of practitioners and the Regulator and the second will examine the Bill from a legal and human rights perspective.

Other Committees scrutinising the Bill

The ECYP Committee is a secondary committee, tasked with examining the elements of the Bill relating to children and young people's services.

The lead Committee is the Health, Social Care and Sport Committee. The Local Government, Housing and Planning Committee is also a designated secondary Committee.

Supporting information

A SPICe briefing, prepared for this session, is included in [Annexe A](#) of this paper. This briefing provides information on the issues being considered at this evidence session including—

- Human rights approach
- Impact Assessments
- UNCRC
- Co-design of future services
- The Promise
- Framework Legislation

A [SPICe briefing](#) is also available online which looks at the Bill as a whole.

The Committee may also wish to be aware of [a letter](#) that was sent by the Promise to the Convener of the Health, Social Care and Sport Committee in relation to this Bill.

Education, Children and Young People Committee Clerking Team
4 November 2022

Annexe A

SPICe

The Information Centre
An t-Ionad Fiosrachaidh

Education, Children and Young People Committee

Wednesday 9th October 2022 (Session 6)

National Care Service Bill – Stage 1 Scrutiny – Human rights approach and legal impact

Introduction

In the second part of this morning's session members will be hearing from a panel to provide views on the Bill in relation to human rights and whether a human rights approach has been adopted in the Bill, along with representatives from organisations that can share about the legal impact of the Bill on children and young people.

Human Rights Approach

Defining human rights, equity and equality

The Equality and Human Rights Commission define human rights as the basic rights and freedoms that belong to everyone, from birth to death, regardless of where they are from and how they choose to live, and are based on shared values such as dignity, fairness, respect, equality and independence.

They describe equality as:

“Ensuring that every individual has an equal opportunity to make the most of their lives and talents.”

The campaigning organisation, [Social Change](#) explain that equity is different, and focuses on addressing needs people have or disadvantage to bring about equality, not on equal treatment or apparent equal access.

“The difference between equality and equity must be emphasised. Although both promote fairness, equality achieves this through treating everyone the

same regardless of need, while equity achieves this through treating people differently dependent on need. However, this different treatment may be the key to reaching equality”.

The Scottish Human Rights Commission (SHRC) states that the Bill ‘could embed more concrete human rights standards and duties throughout the Bill’. They state that the Bill should anticipate legislation that encompasses a wide range of conventions or covenants covering different rights.

The [PANEL principles](#) emphasise participation and empowerment – people should be involved in decisions that affect their rights and be fully supported to take part in developing policy and practice which affect their lives. The policy memorandum states:

“The Scottish Government is committed to engaging with people with experience to co-design the detail of the new system, to finalise new structures and approaches to minimise the historic gap between legislative intent and delivery. For that reason, the Bill creates a framework for the National Care Service, but leaves space for more decisions to be made at later stages through codesign with those who have lived experience of the social care system, and flexibility for the service to develop and evolve over time.” Para 7

Social Work Scotland would have liked to have seen the co-design process develop proposals before legislation was brought forward.

Impact Assessments

The Scottish Government has already published the following impact assessments for the bill:

- [Equality Impact Assessment](#)
- [Island Communities Impact Assessment](#)
- [Data protection impact assessment](#)
- [Business and Regulatory Impact Assessment](#)
- [Children’s Rights and Wellbeing Impact Assessment](#)
- [Fairer Scotland duty assessment](#)

The [Children’s Rights and Wellbeing Impact Assessment](#) will be of specific interest to the committee. In their impact assessment the Scottish Government point to several positive impacts they believe the Bill will have on children’s services, including to:

- address variation in access to and quality of services
- move to a more consistent national approach
- set standards of care and strategic planning
- reduce variation in thresholds for services
- improve accountability to Ministers and shift focus to early intervention
- improve alignment with community health services
- improve transitions between children’s and adult services

However, the Scottish Government have not fully assessed the negative impacts of the Bill for any area of rights or group of children and young people at this stage. They did note that public consultation for the NCS responses have highlighted potential negative impacts. The government noted two specifically:

- transitions for care experienced young people could be hindered by separating social work services from housing services
- integrating children's and adult services in the NCS could lead to children's services being subsumed in a large complex organisation which has a predominantly adult focus.

UNCRC

The United Nations Convention on the Rights of the Child (UNCRC) is an international treaty setting out civil, political, economic, social and cultural rights that children and young people under 18 are entitled to.

The rights in the UNCRC apply to every child and young person whatever their ethnicity, sex, religion, language, abilities or any other status, whatever they think or say, whatever their family background. It is the most widely ratified treaty in the world, it has been ratified by 196 State Parties.

The Scottish Government in their [Children's Rights and Wellbeing Impact Assessment](#) have reflected on the impact on the UNCRC, at this stage the Scottish Government have assessed that the following articles are impacted:

Article 3 – The best interests of the child to be the primary consideration.

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 12 – Respect of the views of the child

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the

child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The CRWIA for the Bill does not assess the potential for impacts on rights under the UNCRC as a result of potential future instruments made under the Bill. The [CRWIA states](#) that further CRWIAs will be undertaken as part of any future process to determine whether to transfer children's services into the NCS. It is likely that a decision on whether to change the structure of how children's services would impact on a wide range of rights under the UNCRC. For example, Article 19 (on the protection from violence, injury, abuse, or neglect), or Article 20 (on special protection for children in care).

Co-design of future services

The Policy Memorandum states--

“The Scottish Government is committed to engaging with people with experience to co-design the detail of the new system, to finalise new structures and approaches to minimise the historic gap between legislative intent and delivery. For that reason the Bill creates a framework for the National Care Service, but leaves space for more decisions to be made at later stages through codesign with those who have lived experience of the social care system, and flexibility for the service to develop and evolve over time. Some of those future decisions will be implemented through secondary legislation, others will be for policy and practice.” (para 7)

This is reflected in the drafting of the statutory consultation for the National Care Service charter (s12) which provides that Ministers should have “particular regard” for the views of service users and staff.

However, the provisions around transferring Children's services into the NCS would only require ministers to consult publicly and provide Parliament a summary of the “process by which they consulted”. (s30)

Ensuring that children and young people's voices are heard and understood, particularly children and young people with complex needs or experience of trauma, is not a straightforward task. A meaningful process which includes the views of children will require more than a traditional Government consultation (see for example Children in Scotland's [Meaningful Participation and Engagement of Children and Young People](#).) An example of an extensive project which sought the views of young people directly is the Promise, see below.

The Government's CWRIA recognises this complexity. It stated—

“In order to ensure that the people who access and deliver social care support can engage effectively in the co-design process, the Scottish Government will

establish a NCS Design School. It will offer training and support to the organisations and the people who access and deliver social care support to overcome barriers to participation and support them to work in partnership with design services. The NCS Design School draws inspiration from the design school model developed and delivered by The Promise Scotland in partnership with the Scottish Government Office of the Chief Designer. The design school is scheduled to be launched in summer 2022. Due to this link with The Promise design school model, the NCS Design School should have features built into its design that makes it accessible to children and easy for children and young people to participate in.”

The Promise

An [Independent Care Review \(Care Review\)](#) was commissioned in 2017 and reported in 2020. This was a root and branch review of the care system which listened to the voices of over 5,500 people with experience of the care system or who work within it. The Independent Care Review did not focus on the structural differences of children’s services in local authorities across Scotland.

The review findings were published in February 2020, setting out the steps toward significant reform to the care system for children and young people. The main findings were set out in the main report [The Promise](#).

COSLA in their written evidence to the committee stated:

“The Independent Care Review, which was based on evidence, data, and the voice of those with lived experience, did not conclude that a National Care Service should be established which includes Children’s Services, but, instead, concluded that change should take place locally.”

In [a letter to the Health and Sport Committee](#) ahead of their scrutiny of the NCS bill Fraser McKinlay, Chief Executive of The Promise wrote:

“Children and families repeatedly told the Independent Care Review the way the system works is a primary barrier to change, as the services they experience are disconnected which severely impacts their ability to seek and receive support. Structural and legislative change to improve the quality and consistency of social services is urgent and necessary work. It is also work which presents significant risk of worsening experiences and outcomes if not fully scoped and understood in the context of existing policy commitments.”

He also noted:

“As the Bill currently stands, our concern is that there is a potential disconnect between the legislative process now underway and the developing evidence for making a decision on whether to include children’s services as part of the National Care Service... Children and families have been clear that what matters most is that they can easily access the support they need, when they need it, regardless of structures or legislative underpinning. Services must be responsive to the specific needs of individual children and families, offering

holistic support that is not siloed or complex to access due to the systems and frameworks put in place by decision-makers.”

To establish whether including children and families within the proposed National Care Service would keep the promise already made, [The Promise Scotland commissioned research and analysis of the 1,095 published responses from the Scottish Government consultation](#). The Promise also shared findings from a series of workshops carried out with care experienced young people and professionals who support them in the same report.

The analysis suggests that organisations’ and individuals’ views on the proposal to include children’s services in an NCS are complex and nuanced. Around half of the organisational responses analysed indicated it was not possible to say at this stage whether children’s services should be included. Numerous concerns were expressed about the consultation proposal and process.

However, the report concluded that “there is not enough information at present to reach a view on the impact and value of a National Care Service for children and families”. To support decision-making, twelve core questions were identified relating to the inclusion of children and families’ services:

1. What actual difference would creating an NCS make in children’s lives?
2. How will an NCS function in relation to children’s services? How will it actually work?
3. How will an NCS ensure listening to and meaningfully involving children and young people is embedded in decision-making and service development at all levels, strategic and individual?
4. How will an NCS create better integration of services and transitions between them?
5. How will an NCS make the experience of children and families more straightforward, seamless and easy to navigate?
6. How will links to services that are not included in the NCS, such as education, early years learning and childcare, and housing be protected and strengthened?
7. What are the implications for statutory responsibilities, including public and child protection and corporate parenting, which currently sit with local authorities?
8. How will an NCS enable the relationship-based practice and culture that children want and need?
9. How will an NCS allow for local innovation and flexibility in response to local needs? How will an NCS enable consistent and fair provision of services across Scotland?

10. How will an NCS ensure that children and young people's needs are seen and understood, and not lost under adults' needs or in the view from an adult lens?
11. How will an NCS support and develop its workforce?
12. How can we make sure that an NCS helps us to keep the Promise and improves outcomes for children and families?

Framework legislation

While framework or 'skeleton' legislation is not new, the challenges and particularities of it with regard to scrutiny are worthy of some attention. The next sections explain what framework legislation is and considers some of the scrutiny challenges it presents.

The section of the Bill relating to children's services is a framework section of the bill, and many consultation responses argue this makes it difficult to assess the merits of this part of the Bill because of the lack of detail.

[The Law Society in particular](#) raise a number of points on the different parts of the bill, relating to rights and duties, accountability and enforcement, any statutory basis for the co-design process, and safeguards to ensure that the process is meaningful, inclusive of all relevant stakeholders and 'that Scottish Ministers are appropriately held to account by Parliament for the design and implementation of the National Care Service.'

What is framework legislation?

Framework sections of legislation will typically provide powers to Ministers to make new laws by [secondary legislation](#) to fill in the detail of the Act at a later point. The [Cabinet Office 'Guide to Making Legislation'](#) states:

"A bill or provision that consists primarily of powers and leaves the substance of the policy, or significant aspects of it, to delegated legislation is sometimes called a framework (or 'skeleton') bill or provision."

The [House of Lords Delegated Powers and Regulatory Reform Committee](#), which considers bills that give powers to make secondary legislation, states:

"A bill is, in effect, a skeleton bill or a bill contains skeleton clauses where the provision on the face of the bill is so insubstantial that the real operation of the Act, or sections of an Act, would be entirely by the regulations or orders made under it."

Scrutiny Challenge

Since framework bills do not include full details on how a policy will be implemented, legislatures are unable to scrutinise such details at the time of considering a bill. The [House of Lord's Delegated Powers and Regulatory Reform Committee \(DPRRC\) published a report in 2021](#) in which it states that:

“Far too often primary legislation has been stripped out by skeleton provisions and the inappropriate use of wide delegated powers. This means that it is increasingly difficult for Parliament to understand what legislation will mean in practice and to challenge its potential consequences on people affected by it in their daily lives.”

Secondary legislation can be passed quicker than primary legislation, because it receives more limited parliamentary scrutiny. It cannot, for example, be amended - simply accepted or rejected. This limits the extent to which a legislature can shape secondary legislation.

Secondary legislation is subject to different kinds of laying procedures. The different procedures allow for different levels of scrutiny. Typically, Scottish Statutory Instruments (the most common form of secondary legislation) are laid before the Scottish Parliament subject one of the following procedures:

- affirmative
- negative
- no procedure or laid only
- provisional affirmative
- super-affirmative.

The NCS Bill would provide Ministers with a number of powers to make secondary legislation. In each case the procedure is specified as either affirmative or negative. The parliamentary process for each procedure is explained on the [Scottish Parliament's website](#). See also section on the role of the [Delegated Powers and Law Reform Committee](#).

Given this, it is important that, when scrutinising any primary legislation granting delegated powers, a legislature is content not only with the powers themselves, but also with the procedure which will apply to any future secondary legislation.

Which are the framework elements of the National Care Service Bill?

The NCS Bill contains substantive provisions that would give powers to Scottish Ministers to make secondary legislation. The [policy memorandum](#), published alongside the NCS Bill states:

“The Scottish Government is committed to engaging with people with experience to co-design the detail of the new system, to finalise new structures and approaches to minimise the historic gap between legislative intent and delivery. For that reason, the bill creates a framework for the NCS, but leaves space for more decisions to be made at later stages through co-design with those who have lived experience of the social care system, and flexibility for the service to develop and evolve over time. Some of those future decisions will be implemented through secondary legislation, others will be for policy and practice.”

The Scottish Government has also provided a [Delegated Powers Memorandum](#), which explains the provisions in the Bill that give Ministers powers to make secondary legislation. This document sets out a rationale for why the Scottish Government thinks those powers and the parliamentary procedures to which the Bill proposes any secondary legislation would be subject to are appropriate.

Transferring Children's Services

As mentioned in the committee's first paper for this session section 46 of the Bill provides for regulations under section 27 to be subject to the affirmative procedure and allows those regulations to modify Acts of the Scottish or the UK Parliament. This means that if, for example, a function was being transferred from a local authority to a care board for all purposes, regulations under section 27 could amend the Act that establishes the function to replace its references to a local authority with references to a care board.

Acts which could be amended which are specifically relating to children's services include, but are not limited to:

- Social Work (Scotland) Act 1968
- Children Act 1975
- Foster Children (Scotland) Act 1984
- Children (Scotland) Act 1995
- Adoption and Children (Scotland) Act 2007
- Children's Hearings (Scotland) Act 2011
- Children and Young People (Scotland) Act 2014
- Carers (Scotland) Act 2016
- Age of Criminal Responsibility (Scotland) Act 2019

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4th November 2022

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

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