

NATIONAL CARE SERVICE (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the National Care Service (Scotland) Bill, introduced in the Scottish Parliament on 20 June 2022.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 17–FM);
 - a Policy Memorandum (SP Bill 17–PM);
 - a Delegated Powers Memorandum (SP Bill 17–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 17–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

NOTE ON INTERPRETATION

Interpretation legislation

5. The Bill's freestanding text, that is its sections and schedules, fall to be interpreted in accordance with the [Interpretation and Legislative Reform \(Scotland\) Act 2010](#).
6. Text that the Bill inserts into other enactments falls to be interpreted in accordance with the interpretation legislation that applies to that enactment. For example, text inserted into the Regulation of Care (Scotland) Act 2001 falls to be interpreted in accordance with the [Scotland Act 1998 \(Transitory and Transitional Provisions\) \(Publication and Interpretation etc. of Acts of the Scottish Parliament\) Order 1999](#).

References to the National Care Service and the services it provides

7. Many of the provisions in Part 1 of the Bill refer to the National Care Service and the services it provides. How those references are to be understood as a matter of law is addressed by section 35.

8. As these Notes follow the Bill in frequently referring to the National Care Service, it may be helpful to clarify at the outset that the National Care Service is not a single legal entity but an umbrella term encompassing:

- the care boards established under Chapter 1 of Part 1 of the Bill, and
- the Scottish Ministers, but only insofar as they are acting under powers or duties they have because of the Bill or regulations made in exercise of certain powers conferred by the Bill.

9. Where the Bill refers to a service that the National Care Service provides, it is referring to a service provided by any of the institutions comprising the National Care Service. Of course those institutions will have a range of “back-office” services, such as human resources, facilities management and so forth. Those are not the services that are meant by references in Part 1 of the Bill to services that are provided by the National Care Service. Section 35(3) provides that a reference in Part 1 of the Bill to services provided by the National Care Service is to the care and support services that the institutions provide. The institutions’ role in providing care and support services will derive from functions to provide services being conferred on them by regulations made under Chapter 6 of Part 1.

10. Many of the enactments from which the National Care Service institutions will derive their functions distinguish between providing a service and securing the provision of a service. For example, [section 12\(1\) of the Social Work \(Scotland\) Act 1968](#) states that local authorities are “to provide or secure the provision of ... [certain] facilities”. Similarly, [section 13A\(1\) of that Act](#) distinguishes between providing accommodation and making arrangements for the appropriate and adequate provision of accommodation. Section 35(4) of the Bill clarifies that a reference in Part 1 to a National Care Service institution providing a service includes its securing the provision of a service (for example by contracting a third party to provide the service). This does not change the nature of any function that may be transferred to the National Care Service by regulations under Chapter 6 of Part 1. If an enactment that confers on a person the function of providing a service does not permit the person to contract out the provision of the service, section 35(4) will not change that position. The purpose of section 35(4) is to ensure that the references in Part 1 of the Bill to a service being provided catch those services that are being provided under an arrangement with a National Care Service institution, rather than being provided by the institution directly, where the law allows for that.

OVERVIEW OF THE BILL

11. The Bill is divided into the following Parts:

- Part 1 establishes the National Care Service. It makes the Scottish Ministers responsible for organising the National Care Service, enables them to establish new public institutions called care boards to comprise the National Care Service and gives

the Ministers power to make regulations transferring health and social care functions to the institutions comprising the National Care Service.

- Part 2 gives the Scottish Ministers’ powers to make records about people’s health and social care more consistent and better integrated.
- Part 3 contains modifications to existing laws relating to the provision and regulation of care.
- Part 4 contains provisions usually found at the end of a Bill, namely the power to make ancillary regulations, further elaboration in relation to regulation-making powers elsewhere in the Bill and the sections dealing with commencement and short title.

PART 1: THE NATIONAL CARE SERVICE

Chapter 1: Principles and institutions of the National Care Service

12. Chapter 1 of Part 1 of the Bill provides the legal foundations for the National Care Service.

13. Section 1 defines the National Care Service principles, which are then referred to in:

- section 2(2), which requires the Scottish Ministers to run the National Care Service in the way that seems to them to best reflect the principles,
- Chapter 2 of Part 1, which as further explained below, requires care boards and the Scottish Ministers to have strategies for how they will deliver front-line care and support services in ways that best reflect the principles.

14. Sections 2 and 3 establish the Scottish Ministers’ overarching responsibilities for the National Care Service. Section 2 makes them responsible for there being a national service designed to improve the wellbeing of the people of Scotland. This Ministerial responsibility is the foundation for the National Care Service, in the same way that the Ministerial responsibility created by [section 1 of the National Health Service \(Scotland\) Act 1978](#) is the foundation for the National Health Service in Scotland. Section 3 gives the Scottish Ministers responsibility for ensuring that there is continuous improvement in the way that the National Care Service delivers services.

15. Sections 4 and 5 make provision about care boards. A care board is a statutory body which can be given legal responsibilities to provide services to individuals by regulations under Chapter 6 of Part 1. Section 2 is not prescriptive about how the Scottish Ministers are to promote a national service to improve the wellbeing of the people of Scotland. Conferring functions on care boards to provide, or arrange for the provision of, services is one of the ways in which they might fulfil that duty, in the same way as the Ministerial duty under section 1 of the National Health Service Act is in part fulfilled by service-delivery functions being conferred on health boards and special health boards.

16. Section 4 provides for two types of care board: local care boards and special care boards. Local care boards are boards with responsibility for particular geographical areas. The Scottish Ministers have a duty under subsection (2) to establish local care boards, and while it is for them to identify in regulations the area that each local care board is responsible for, they must arrange

the areas of the boards so that no part of Scotland is without a local care board or has more than one.

17. A special care board need not be given a particular geographical area of responsibility. The purpose of establishing a special care board might, for example, be to have it provide certain services throughout all of Scotland.

18. Section 4(5) incorporates schedules 1 and 2 into the Bill. They are discussed later in these Notes.

19. Section 5 provides a clear statutory basis for the Scottish Ministers funding care boards, and providing financial backing for them in other ways such as acting as their guarantor or undertaking to indemnify them against losses.

Chapter 2: Strategic planning

Overview of Part 1, Chapter 2

20. Chapter 2 of Part 1 of the Bill requires care boards and the Scottish Ministers (if they are directly delivering or arranging for the delivery of care and support services) to have in place a strategic plan. An institution's strategic plan is a document setting out the arrangements that the institution has in place for delivering services and an account of how those arrangements have been designed to reflect the National Care Service principles set out in section 1 (this latter part of a strategic plan is referred to as an ethical commissioning strategy). In the case of a care board, a strategic plan also has to set out its vision, objectives and budget projections. A strategic plan prepared by the Scottish Ministers has to cover those matters too, but only in relation to care and support services, not in relation to their wider responsibilities. A strategic plan must be periodically consulted on and revised.

The Scottish Ministers' strategic plan

21. Section 6 requires the Scottish Ministers to have a strategic plan, but only if they are delivering, or arranging for the delivery, of services directly as a National Care Service institution. That may not be a role the Scottish Ministers assume, or they may relinquish it, preferring to leave the delivery of all front-line services to care boards. As a strategic plan is concerned with how a National Care Service institution plans to deliver its services, if the Scottish Ministers are not delivering services as a National Care Service institution they cannot have a strategic plan for doing so.

22. If, and for so long as, the Scottish Ministers are delivering services as a National Care Service institution, they are required to have a strategic plan for those services. Before adopting a new strategic plan they must consult publicly on it in draft.

23. At a minimum the Scottish Ministers must adopt, and therefore consult on, a new strategic plan every 3 years. The periodic cycle of updating strategic plans may be disrupted if, during the lifetime of a plan, the Scottish Ministers assume responsibility for delivering a further service as a National Care Service institution. In that event, the strategic plan operating immediately before

the adoption of the new responsibility would no longer be a plan covering all of the services referred to in subsection (1) of section 6 and so the Scottish Ministers would need to adopt a new strategic plan covering all of the services being provided by them as a National Care Service institution as soon as possible in order to bring themselves back into compliance with the duty in subsection (2).

24. A further way in which the cycle of updating strategic plans may be disrupted would be if the Scottish Ministers ceased to have responsibility for delivering any services as a National Care Service institution. In that event the conditions in subsection (1) would no longer be met, and so the Scottish Ministers would no longer be required to have a strategic plan.

Care boards' strategic plans

25. Section 7 requires care boards to have strategic plans. In order to adopt a new strategic plan, a care board must follow the process set out in section 8. It is a 3 step process:

- the care board must first consult other public-sector organisations on a draft of its plan,
- then it has to consult the public on a draft of its plan (which may, but need not be, the same draft it consulted the other public-sector organisations about),
- finally it has to get the Scottish Ministers to approve its draft plan.

26. The consultative aspects of the process differ slightly as between local care boards and special care boards (for discussion of the two types of care board see paragraphs 16 and 17 above).

27. In the first phase of consultation, both types of care board must consult their community planning partners, meaning the bodies with whom they have to engage in community planning under [Part 2 of the Community Empowerment \(Scotland\) Act 2015](#) (schedule 2 of the Bill adds care boards to the list of bodies required to engage in community planning under the 2015 Act). That means any local authority in whose area the care board provides services and all of the other persons listed in [schedule 1 of the 2015 Act](#), which includes health boards and emergency services. In the case of a local care board, there is also a requirement to consult any neighbouring local care board.

28. The second phase of consultation is consultation with the public. Local care boards are required to consult the public in the area for which they are responsible. As special care boards will not necessarily have specific geographical areas of responsibility, they are required to carry out a national public consultation.

29. The final step of the section 8 process is for a care board's draft strategic plan to be approved by the Scottish Ministers. They can require changes to be made to a draft before they will approve it, which is one of the ways in which the Scottish Ministers can exercise control over care boards in order to fulfil their overarching responsibilities for the National Care Service under sections 2 and 3. Since care boards cannot be certain when the Scottish Ministers will approve a draft plan, their duty under section 9(1)(b) is only to seek to ensure that there is no gap between the lifetime of one strategic plan ending and its successor beginning.

30. Care boards must seek to renew their strategic plans at least every 3 years. Like the Scottish Ministers, a care board may be required to replace a strategic plan earlier than it originally intended if a new function is conferred on it (see paragraph 23 above).

Chapter 3: Information and support

The National Care Service charter

31. Sections 11 and 12 of the Bill provide for a National Care Service charter.

32. The charter is a document summarising people's rights and responsibilities in relation to the National Care Service and describing the mechanisms available to uphold those rights. It can also include any other information that the Scottish Ministers consider it appropriate to include in it. The charter's principal function is to describe rights, responsibilities and mechanisms for upholding them that otherwise exist. Section 11(4) makes clear that nothing in the charter can be taken to give rise to a new right or responsibility nor to alter existing ones.

33. Section 11 requires the Scottish Ministers to produce the charter and make it publicly available. Subsection (1) of section 12 requires them to consult when producing the first version of the charter and subsection (2) requires them to lay a copy of it before the Scottish Parliament. Section 12 further requires the Scottish Ministers to review the charter at least every 5 years. A review of the charter also entails consultation in accordance with subsection (1). Only following a review may the Scottish Ministers revise the charter, and if they do they must lay a copy of the new version of the charter before the Parliament to comply with section 12(2).

34. Subsections (5) and (6) of section 12 allow for work on preparing the charter to begin before the National Care Service is operational. Subsection (5) allows for the possibility that the Scottish Ministers may prepare the first charter before any duties to provide care or support services have been transferred to a National Care Service institution by regulations under Chapter 6 of Part 1. In that event, the references in sections 11 and 12 to people being provided with services by the National Care Service would not refer to anyone, because nobody would be being provided with services by the National Care Service. Thus there would be nobody whose rights and responsibilities could be summarised in the charter, nor anyone who should particularly be consulted in preparing the charter. To address this problem, section 12(5) allows the references to people who are receiving services from the National Care Service to be read as referring to people who the Scottish Ministers intend the National Care Service to start providing services to within the next 12 months, so that when it does begin doing so the charter can be available. Section 12(6) ensures that consultation in relation to the charter that has been carried out before the consultation duty has been enacted and brought into force can be taken into account in the event of a dispute about whether the duty has been fulfilled.

Advocacy

35. Section 13 allows the Scottish Ministers to make provision about advocacy in connection with the National Care Service. Those regulations will be subject to the affirmative procedure and may modify other enactments (see section 46).

Complaints

Complaints service

36. Section 14 requires the Scottish Ministers to establish a service for receiving complaints about services provided by the National Care Service and passing them on to be dealt with by the person that the provider of the service thinks is best placed to deal with them. The Scottish Ministers need not provide the service directly, they may fulfil the duty by contracting another person to provide the service (see section 35(4)).

Dealing with complaints

37. Section 15 gives the Scottish Ministers power to make provision in regulations about the handling of complaints about services provided by the National Care Service and other social services within the meaning of [section 46 of the Public Services Reform \(Scotland\) Act 2010](#).

38. Regulations under section 15 are subject to the affirmative procedure and may modify other enactments (see section 46). For example, if the intention were to confer a new complaints-handling function on a body established by statute, the regulation-making power may be used to amend that statute so that the new function appears alongside the body's other functions in the statute rather than being hidden away on its own in regulations.

39. If regulations under section 15 would give a person listed in [schedule 6 of the Public Services Reform \(Scotland\) Act 2010](#) a new function, or modify or take away one of those person's existing functions, the regulations will require the consent of the Scottish Parliamentary Corporate Body. This is consistent with the rule in [section 19 of the Public Services Reform Act](#). The persons listed in schedule 6 of that Act are commissions and commissioners which are funded by the Scottish Parliamentary Corporate Body.

Chapter 4: Scottish Ministers' powers to intervene

Powers in relation to care boards

Directions to care boards

40. Section 16 places care boards under a legal duty to comply with any direction issued to them by the Scottish Ministers.

Removal of care board members

41. Section 17 allows the Scottish Ministers to remove all of the members of a care board if, following an inquiry, the Ministers are satisfied that the board has failed to carry out any of its functions. The removal of the boards' members would be effected by regulations, which would be subject to no parliamentary procedure besides the requirement to lay them before the Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

42. If the Scottish Ministers are concerned that action needs to be taken to remedy a service failure, or prevent one from arising, while the inquiry is ongoing, section 19 provides a mechanism for them to have another person temporarily discharge a care board's function on its behalf.

43. Section 17(4) clarifies that failing to carry out a function includes failing to fulfil the function of complying with a section 16 direction. This clarification is included because the equivalent provision in relation to health boards ([section 77 of the National Health Service \(Scotland\) Act 1978](#)) mentions failing to comply with subordinate legislation and directions separately from failing to carry out functions under the Act.

Transfer of care board's functions in an emergency

44. Section 18 allows the Scottish Ministers to direct another person to discharge a function of a care board for the duration of an emergency if they think the other person would be more effective in performing the function during the emergency.

Transfer of care board's functions due to service failure

45. Section 19 allows the Scottish Ministers, by direction, to give themselves or another care board the role of performing a function of a care board if they are of the opinion that the board has failed, is failing or likely to fail in performing the function.

Power in relation to contractors

46. Sections 20 to 22 allow the Scottish Ministers to intervene, subject to obtaining a court's authorisation, in relation to a supply of goods or services to the National Care Service. If the Scottish Ministers are satisfied that the test in section 21(1) is met, and the court does not consider that an unreasonable view to hold, the court may issue an emergency intervention order.

47. The court is given wide discretion about the terms of an emergency intervention order; amongst other things such an order could authorise a person nominated by the Scottish Ministers to enter the premises of the provider of the goods or services and take effective control of operations there. The court can vary the order's terms at any time at the request of the provider or the Scottish Ministers.

48. The initial period of an emergency intervention order cannot exceed 12 months. That can be extended by a court by up to 6 months, but only one extension is permitted. The effective period of an order can be cut short by the court revoking it at the request of the provider or the Scottish Ministers.

Chapter 5: Functions connected to the provision of care

Research

49. Section 23 makes clear that the Scottish Ministers and care boards can carry out research relevant to the services that the National Care Service provides and can assist others (including financially) in doing so.

Training

50. Section 24 makes clear that the Scottish Ministers and care boards can do things to support training relevant to the work of the National Care Service. That may mean providing courses

themselves, financially supporting other training providers with grants or giving financial aid to those undertaking training courses.

Support for other activities

51. Section 25 makes clear that the Scottish Ministers can financially assist anyone engaged in an activity connected to services that the National Care Service provides.

Compulsory purchase

52. Section 26 allows the Scottish Ministers and care boards to compulsorily purchase land in connection with their National Care Service functions.

53. Schedule 4 adds compulsory purchases under section 24 to the list of compulsory purchase powers in [section 1\(1\) of the Acquisition of Land \(Authorisation Procedure\) \(Scotland\) Act 1947](#). This means that any compulsory purchase under section 24 will require to be authorised by a compulsory purchase order through the process set out in schedule 1 of the 1947 Act.

Chapter 6: Allocation of care functions, etc.

Overview of Chapter 6

54. Chapter 6 of Part 1 confers powers on the Scottish Ministers to:

- determine which functions are to be exercised by which National Care Service institution, and
- transfer people and property in consequence of functions being transferred.

Power to transfer functions from local authorities

55. Section 27 allows the Scottish Ministers to make regulations transferring functions from local authorities to themselves or to care boards. The power is limited to transferring functions conferred by one of the enactments listed in schedule 3. That is a list of the principal enactments from which local authorities derive their social care functions. Powers and duties in other enactments associated with a transferred social care function may be adapted in consequence of the transfer by ancillary regulations under section 45.

56. Section 46 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 were 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.

57. Section 30 makes it a pre-condition to transferring children's services or justice services under section 27 that the Scottish Ministers first carry out a public consultation on the proposed transfer. Section 30 then requires that when asking the Scottish Parliament to approve the draft regulations to effect the transfer of the children's or justice service in question, the Scottish

Ministers put before the Parliament an account of how they carried out the required public consultation and a summary of the responses they received.

Power to bring aspects of healthcare into the National Care Service

58. Section 28 allows the Scottish Ministers to make regulations transferring the functions of National Health Service institutions, specifically health boards and special health boards, to care boards or to the Scottish Ministers in their capacity as a National Care Service institution.

59. The Scottish Ministers are already a National Health Service institution, in the sense that they have functions under the National Health Service (Scotland) Act 1978. The Scottish Ministers may wish to treat some of those functions as National Care Service functions so that, for example, the requirement to have a strategic plan applies in relation to them. Since the Scottish Ministers cannot transfer to themselves a function they already have, section 28 allows the Ministers by regulations to designate any of their functions under the National Health Service Act as National Care Service functions. This means that references in the Bill to services provided by the National Care Service will include services provided by the Scottish Ministers in exercise of functions that they have designated as National Care Service functions.

60. Section 46 provides for regulations under section 28 to be subject to the affirmative procedure and allows those regulations to modify Acts of the Scottish or the UK Parliament for a similar reason to that discussed in paragraph 56 above.

Power to reorganise the National Care Service

61. Whereas sections 27 and 28 allow new functions to be conferred for the first time on a National Care Service institution, section 29 allows the Scottish Ministers by regulations to redistribute functions within the National Care Service. For example, they might decide that it would be better for a service that was being provided by local care boards to be provided on a national basis by a single special care board (or vice-versa).

62. Section 46 provides for regulations under section 29 to be subject to the affirmative procedure and allows those regulations to modify Acts of the Scottish or the UK Parliament for a similar reason to that discussed in paragraph 56 above.

Consultation before bringing children's and justice services into the National Care Service

63. Section 30 is explained in paragraph 57 above.

Transfers of staff

64. Where a function is transferred from one institution to another by regulations under any of sections 27 to 29, it may be appropriate to transfer the staff who were performing the function too. Section 31 enables the Scottish Ministers to do so by regulations. Subsection (4) ensures that any staff who are transferred in that way enjoy the protections of the [Transfer of Undertakings \(Protection of Employment\) Regulations 2006](#). Regulations under section 31 are subject to the negative procedure (see section 46).

65. The power to transfer staff is limited by subsection (2), which prevents the staff of a health board or a special health board being transferred into the employment of a National Care Service institution. See also in this regard paragraph 133 below.

Transfers of property and liabilities, etc.

66. Just as it may be appropriate to transfer staff in consequence of a transfer of a function to a National Care Service institution, so too it might be appropriate to transfer property and liabilities associated with the function. Section 32 allows the Scottish Ministers to do that by regulations. Regulations under section 32 are subject to the negative procedure (see section 46).

Chapter 7: Final provisions for Part 1

67. Section 34 formally incorporates schedule 4 into the Bill. It modifies other enactments in consequence of Part 1 of the Bill, and is discussed more fully below.

68. Section 35 is an interpretative provision already explained in paragraphs 7 to 10 of these Notes.

PART 2: HEALTH AND SOCIAL CARE INFORMATION

Care records

69. Section 36 gives the Scottish Ministers power by regulations to establish a scheme for sharing information to improve the efficiency and effectiveness of services provided by, and on behalf of, the National Care Service and the National Health Service. The regulations will provide a lawful basis for information relevant to the delivery of those services to be shared.

70. Regulations under section 36 will be subject to the affirmative procedure (see section 46).

Information standard

71. Section 37 makes provision about information standards. An information standard is a document setting out how certain information is to be processed, which includes how it is stored, formatted, indexed and so forth. Section 37 creates a duty for National Care Service and National Health Service institutions to abide by information standards and to require their contractors to do so too.

PART 3: REFORMS CONNECTED TO DELIVERY AND REGULATION OF CARE

Rights to breaks for carers

72. Section 38 amends the Carers (Scotland) Act 2016 to ensure that carers get the support that they need to take sufficient breaks from providing care to cared-for persons. Subsections (11) to (14) of section 38 make changes to other statutes in consequence of the changes made to the Carers Act.

73. Subsections (2) and (4) ensure that being able to take sufficient breaks from providing care to cared-for persons is an “identified personal outcome” of every carer. They also ensure that where a carer is unable to take such breaks, the need for support to do so is an “identified need” of the carer. (See sections 4 and 5, as read with sections 8 and 14, of the Carers Act.)

74. Subsection (8) places a new duty on local authorities to provide the support that a carer needs to enable the carer to take sufficient breaks from providing care for the cared-for person. Subsections (6) and (7) ensure that this duty is not subject to local or national eligibility criteria.

75. Subsection (9) confers a new power on the Scottish Ministers to make further provision by regulations in connection with the support to be provided to a carer under the new duty. The regulations may, for example, make provision about what is meant by the expression “sufficient breaks”. This replaces a more limited power in section 25(2) of the Carers Act. Regulations under this replacement power are subject to the affirmative procedure (see section 42(2)(h) of the Carers Act).

76. The new duty applies where the support that a carer needs cannot be met by the services or assistance referred to in paragraphs (a) or (b) of section 24(1) of the Carers Act. Although paragraph (a) refers to services or assistance provided to the cared-for person, this does not include any such care provided in order to enable the carer to take a break from providing care. By virtue of paragraph (b), where the need for support can be met by services or assistance provided generally to persons in the area where the carer resides, then that support will not need to be provided under the new duty.

77. Subsections (3) and (5) ensure that every adult carer support plan and every young carer statement under the Carers Act (see sections 9 and 15) includes information about the support provided, or to be provided, to meet any identified need for support to enable the carer to take sufficient breaks from providing care.

78. Subsection (10) ensures that local carer strategies under section 31 of the Carers Act must set out plans to promote a variety of providers of support to relevant carers, and to promote the variety of support provided. Local authorities are already required to promote these things under section 19(2) of the Social Care (Self-directed Support) (Scotland) Act 2013. In addition, this subsection ensures that local carer strategies take account of the support needed to enable relevant carers to take breaks from providing care (see also section 25(5) of the Carers Act).

Enactments relating to carers: minor modifications

79. Section 39 makes minor changes to two enactments. Subsection (2) removes some unnecessary definitions from the Carers (Scotland) Act 2016. Subsection (4) removes two unnecessary words from the Social Care (Self-directed Support) (Scotland) Act 2013.

Visits to or by care home residents

80. The Scottish Ministers have a power to make regulations under section 78(2) of the Public Services Reform (Scotland) Act 2010 imposing requirements in relation to care services (a term defined in [section 47 of that Act](#)). Section 40 of the Bill inserts a new subsection (2A) into section

78 of the 2010 Act, placing a duty on Ministers to exercise that power in order to require providers of care home services to comply with any direction Ministers make about either or both of visits to residents of care home accommodation or by such residents. A direction of this nature is referred to as a “visiting direction” in the Bill.

81. A further provision, subsection (2B), is inserted into section 78 of the 2010 Act by section 40, requiring Ministers to consult with Public Health Scotland and any other person Ministers consider appropriate before issuing a visiting direction. Ministers will also have power to vary or revoke a visiting direction.

Reserving right to participate in procurement by type of organisation

82. The Public Contracts (Scotland) Regulations 2015 were made to implement Directive 2014/24/EU of the European Parliament and of the Council on public procurement. They impose obligations on public bodies in relation to how they award public contracts for the execution of works, the supply of products and the provision of services.

83. Section 41 amends the 2015 Regulations to insert a new regulation 76A. This will allow, in certain circumstances, the list of bidders for a contract to be limited to those who meet a particular description.

84. Inserted regulation 76A includes a power to modify its own terms by further regulations, so that the Scottish Ministers can alter the types of contract that can be restricted and the type of body that bidding can be limited to. Regulations under proposed section 76A will be subject to the negative procedure by virtue of [regulation 83A of the 2015 Regulations](#).

Cancellation of care service’s registration

85. Section 42 modifies section 64 of the Public Services Reform (Scotland) Act 2010 to enable the Scottish Ministers to prescribe by order circumstances in which Social Care and Social Work Improvement Scotland (otherwise known as the Care Inspectorate) can move directly to proposing to cancel a care service’s registration without first issuing an improvement notice and waiting for the period specified in that notice to expire.

86. Section 47 of the Public Services Reform Act defines care services. Section 80 of that Act makes it a criminal offence to provide a care service without being registered with the Care Inspectorate. Under the Public Services Reform Act as enacted, the process for the Care Inspectorate to cancel a care service provider’s registration ordinarily requires first sending the provider an improvement notice under section 62, which warns the provider that unless there is a significant improvement within a period specified in the notice, the Care Inspectorate intends to cancel the registration. Only after that period has expired can the Care Inspectorate formally propose to cancel the registration under section 64. Where a formal proposal to cancel registration is made, the provider has 14 days in which to make representations to the Care Inspectorate (section 72 of the Public Services Reform Act).

Assistance in inspections from Healthcare Improvement Scotland

87. Section 43 inserts a new section 57A into the Public Services Reform (Scotland) Act 2010 to authorise Healthcare Improvement Scotland to assist Social Care and Social Work Improvement Scotland (otherwise known as the Care Inspectorate) in carrying out an inspection of a care service and to charge for any assistance provided.

PART 4: FINAL PROVISIONS

Interpretation

88. Section 44 defines “health board” and “special health board”, which are expressions used in both Parts 1 and 2 of the Bill.

Ancillary provision

89. Section 45 confers a power to make ancillary provision by regulations on the Scottish Ministers. Section 46 provides that regulations made under section 45:

- may modify any enactment including the Act that the Bill itself will become (if it is passed by the Scottish Parliament and receives Royal Assent),
- are subject to the affirmative procedure if they textually amend an Act of the Scottish Parliament or the UK Parliament, but otherwise are subject to the negative procedure.

Regulation-making powers

90. Section 46 makes further provision about the regulation-making powers that the Bill confers on the Scottish Ministers.

91. Subsection (1) makes clear that the powers can be used to make different provision for different purposes and also for different areas. For example, regulations under section 27 might transfer the function of providing a service from a local authority to a National Care Service institution in one set of circumstances but not another.

92. Subsection (2) provides that certain regulation-making powers conferred by the Bill can be used to modify enactments. The word enactment is defined for this purpose by schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010, it includes Acts of the Scottish Parliament and Acts of the UK Parliament. There is a general presumption that a regulation-making power cannot be used to modify an Act of Parliament. Subsection (2) overcomes that presumption in relation to the powers it specifies. However, it confines the power to modify the Act that the Bill itself will become (if it is passed by the Scottish Parliament and receives Royal Assent) to ancillary regulations under section 45.

93. Subsections (3) to (6) set out the parliamentary scrutiny procedure that is to apply to regulations made under the powers that the Bill confers. Those subsections refer to:

- the negative procedure, which is defined by [section 28 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#), and

- the affirmative procedure, which is defined by [section 29 of that Act](#).

Commencement

94. Section 47 deals with the coming into force of the Bill's provisions. The formal provisions in Part 4 will come into force on the day after the Bill receives Royal Assent. All of the other provisions fall to be commenced by the Scottish Ministers by regulations.

95. Regulations that do nothing beyond commencing provisions of the Bill will have to be laid before the Scottish Parliament in accordance with [section 30 of the Interpretation and Legislative Reform \(Scotland\) Act 2010](#).

Short title

96. Section 48 assigns the short title of the Act that the Bill will become (if it is passed and receives Royal Assent).

SCHEDULE 1: CARE BOARDS: CONSTITUTION AND OPERATION

Status

97. Paragraph 1 of schedule 1 states that care boards are bodies corporate. This means that they have legal personality separate from that of the people who comprise them so that, ordinarily, those people will not be personally liable for things done, or not done, by the boards of which they are members.

98. Paragraph 2 of schedule 1 confirms that care boards are not emanations of the Crown. The Crown, which for this purpose broadly means the executive branch of government, enjoys certain privileges and immunities in law. Those privileges and immunities will not attach to care boards.

Powers

99. Paragraph 3 of schedule 1 enables a care board to do what it considers appropriate in order to perform its functions.

Procedure

100. Paragraphs 4 to 7 of schedule 1 make provision about how care boards operate internally.

101. Paragraph 4 allows them to set up committees, which can have sub-committees.

102. Paragraph 5 makes clear that it is for care boards to set their own procedural rules and those of its committees and their sub-committees, although in relation to matters of procedure as with all else care boards are bound by section 16 to comply with directions from the Scottish Ministers.

103. Paragraph 6(1) allows a care board to delegate its functions or aspects of them, which means that not everything a care board does has to be done by all of its members. But subparagraph (2) underscores that delegating a function does not absolve the care board of responsibility, nor does it prevent the care board from carrying the function out rather than leaving it to its delegate.

104. Paragraph 7 makes clear that a problem with the membership of a care board does not affect the validity of anything it does. A care board is comprised by its members so if, for any length of time, there were a problem with its membership (for example if it were to have fewer than the minimum number of members specified in regulations under section 4) there may be doubts about the legal validity of anything done by the improperly constituted board. Paragraph 7 dispels those doubts.

Accountability

Accounts and audit

105. Paragraph 8 of schedule 1 requires a care board to prepare accounting records for each financial year and submit them to the Auditor General for Scotland for audit. The phrase “financial year” is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

106. As a result of this statutory requirement for a care board to send its accounts to the Auditor General for Scotland, sections 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000 apply. Amongst other things, those sections provide for the accounts, and the auditor’s report on them, to be laid before the Scottish Parliament and published (see section 22(5) of that Act).

107. In addition, because sections 21 and 22 of the Public Finance and Accountability Act apply to the accounts of a care board:

- the principal accountable officer for the Scottish Administration can designate someone to be its accountable officer (see section 15 of that Act), and
- the Auditor General for Scotland can look into whether it has been using its resources appropriately (see section 23 of that Act).

Annual report

108. Paragraph 9 of schedule 1 requires each care board to report to the Scottish Ministers after each financial year on what it has done in that year. The phrase “financial year” is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

109. The reporting obligation under paragraph 9 is in addition to the reporting obligation under section 32 of the Public Services Reform (Scotland) Act 2010, which requires a care board to publish after each financial year a report about (amongst other things) what it has done in that financial year to promote and increase sustainable economic growth. Care boards are subject to that duty by reason of the amendment made to the Public Services Reform Act by paragraph 5(3) of schedule 2.

Members

110. As paragraph 10 of schedule 1 provides, a care board consists of its members. The minimum and maximum number of members that a care board can have is to be specified by the Scottish Ministers in regulations under section 4. All of a care board's members are to be appointed by the Scottish Ministers. Paragraph 11(2) of schedule 1 provides for the Scottish Ministers to make further provision about the appointment of members, including specification of the criteria to be used, by regulations. Certain people are disqualified from appointment by paragraph 15, which can also be amended by regulations.

111. Amendments made by schedule 2 mean that the appointment of members will need to be carried out in accordance with the code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland, and the Gender Representation on Public Boards (Scotland) Act 2018.

112. On appointing someone as a member, the Scottish Ministers are to specify how long the person is to remain a member as a result of that appointment (see paragraph 12). The person may continue as a member beyond that period by being re-appointed by the Scottish Ministers for another period. Paragraph 14 sets out the circumstances in which someone will cease to be a member of a care board before the period of appointment is over.

Staff

113. Paragraphs 16 to 19 of schedule 1 are about the staff of a care board. Each care board must have a chief executive, who is to be appointed by the Scottish Ministers (see paragraph 16). It is for care boards to decide what other staff to appoint and in what capacities (see paragraph 17), but any staff they do appoint are appointed on terms and conditions set by the Scottish Ministers (see paragraph 18). The Scottish Ministers' approval is also required for any arrangements made about paying pensions, allowances or gratuities to staff (see paragraph 19).

SCHEDULE 2: CARE BOARDS: APPLICATION OF PUBLIC AUTHORITIES LEGISLATION

Ethical Standards in Public Life etc. (Scotland) Act 2000

114. Paragraph 1 of schedule 2 adds care boards to the list of bodies in [schedule 3 of the schedule 3 of the Ethical Standards in Public Life etc. \(Scotland\) Act 2000](#). This means that each care board will need to:

- have a code of conduct for its members, whose compliance with the code will be policed by the Standards Commission for Scotland, and
- maintain a public register of its members' interests.

Scottish Public Services Ombudsman Act 2002

115. Paragraph 2 of schedule 2 adds care boards to the list of bodies in schedule 2 of the Scottish Public Services Ombudsman Act 2002. The effect is to:

- make care boards amendable to investigation by the ombudsman (see [section 5 of the 2002 Act](#)),
- oblige them to have their own complaints handling procedure that complies with the statement of principles published by the ombudsman under [section 16A of the 2002 Act](#),
- pave the way for care boards being subject to the further requirement to have a complaints handling procedure that complies with a model complaints handling procedure prepared by the ombudsman (see [sections 16B](#) and [16C](#) of the 2002 Act).

Freedom of Information (Scotland) Act 2002

116. Paragraph 3 of schedule 2 adds care boards to the list of Scottish public authorities in [schedule 1 of the Freedom of Information \(Scotland\) Act 2002](#). This means that they will be subject to the requirements that Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme for the pro-active publication of information they hold.

117. Being a public authority within the meaning of the Freedom of Information Act also makes a care board a “Scottish public authority” to which the [Environmental Information \(Scotland\) Regulations 2004](#) apply.

118. In addition, as a public authority within the meaning of the Freedom of Information Act, a care board is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of [section 7 of the Data Protection Act 2018](#) (subject to the Secretary of State not making regulations under that section to remove its “public authority” status). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data](#). There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

119. In addition, being a public authority within the meaning of the Freedom of Information Act makes care boards subject to the duties imposed by [section 44 of the Climate Change \(Scotland\) Act 2009](#), and as such liable to monitoring and investigation under [Part 4 of that Act](#).

Public Appointments and Public Bodies etc. (Scotland) Act 2003

120. Paragraph 4 of schedule 2 adds care boards to the list of specified authorities in [schedule 2 of the Public Appointments and Public Bodies etc. \(Scotland\) Act 2003](#). This means that the Scottish Ministers, when appointing a care board’s members, will need to comply with the code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland.

Public Services Reform (Scotland) Act 2010

121. Paragraph 5(2) of schedule 2 adds care boards to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010. This means that they are bodies in relation to which an order can be made under section 14 of the Public Services Reform Act. Such an order can (subject to restrictions, including a new restriction discussed in paragraph 133 below, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

122. Paragraph 5(3) of schedule 2 adds care boards to the list of bodies in schedule 8 of the Public Services Reform Act. This means that each board will be subject to the duties to report after each financial year on:

- expenditure (see section 31 of the Public Services Reform Act), and
- the steps it has taken to promote and increase sustainable growth and improve its efficiency, effectiveness and economy (see section 32 of that Act).

Public Records (Scotland) Act 2011

123. Paragraph 6 of schedule 2 makes care boards subject to the duties created by [the Public Records \(Scotland\) Act 2011](#) to produce, implement and keep under review a records management plan.

Procurement Reform (Scotland) Act 2014

124. Paragraph 7 of schedule 2 adds care boards to the list of contracting authorities subject to the duties created by the Procurement Reform (Scotland) Act 2014 regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement.

Community Empowerment (Scotland) Act 2015

125. Paragraph 8(2) of schedule 2 adds local care boards to the list of persons in section 13 of the Community Empowerment (Scotland) Act 2015 who have a duty to facilitate community planning and take reasonable steps to ensure that community planning partnerships (established under that Act) carry out their functions efficiently and effectively.

126. Paragraph 8(3) adds care boards to the list of persons in schedule 1 of the Community Empowerment Act. This makes care boards community planning partners for the purposes of Part 2 of that Act.

127. Paragraph 8(4) adds care boards to the list of persons in schedule 3 of the Community Empowerment Act. This makes a care board a “relevant authority” for the purposes of Part 5 of that Act, which means its assets may fall to be transferred under that Part to a community transfer body as defined in section 77.

British Sign Language (Scotland) Act 2015

128. Paragraph 9 of schedule 2 makes care boards listed authorities for the purposes of the [British Sign Language \(Scotland\) Act 2015](#), which means that they are required to periodically produce a plan about the measures they are taking in relation to British Sign Language (see sections 2 and 3 of the Act).

Gender Representation on Public Boards (Scotland) Act 2018

129. Paragraph 10 of schedule 2 adds care boards to the list of bodies in [schedule 1 of the Gender Representation on Public Boards \(Scotland\) Act 2018](#). This means that in appointing care board members, the Scottish Ministers must give preference to a woman if there are equally qualified candidates of either gender and appointing a woman would result in, or be a step towards, 50% of the board's membership being women (see [section 4 of the 2018 Act](#)). In addition, the 2018 Act requires that steps be taken to encourage women to apply to be care board members (see [section 5](#)).

SCHEDULE 4: MODIFICATIONS IN CONNECTION WITH PART 1

Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947

130. See paragraph 53 above in relation to the compulsory purchase power under section 26.

Local Government (Scotland) Act 1973

131. Chapter 6 of Part 1 of the Bill gives the Scottish Ministers the power to transfer social care functions from local authorities to the institutions of the National Care Service. Where there is a complete transfer of the function of providing a social care service away from local authorities, there will no longer be a clear legal basis for a local authority to continue providing the service. It may be, however, that a National Care Service institution would want to enter into a contract with a local authority to have it continue providing a care home service for example.

132. Paragraph 2 of schedule 4 amends the Local Government (Scotland) Act 1973 to provide a clear legal basis for local authorities' continued involvement in providing services when it is no longer their statutory duty to provide them. Their continued involvement, by virtue of the amendment, will be as a contractor.

Public Services Reform (Scotland) Act 2010

133. Chapter 6 of Part 1 of the Bill gives the Scottish Ministers powers to transfer the functions of health boards and special health boards to National Care Service institutions. Section 31 generally allows the Scottish Ministers to transfer staff in consequence of a transfer of functions, but subsection (2) precludes that power being used to transfer health board and special health board staff. In theory, that restriction could be bypassed by transferring functions from a health board or special health board to a National Care Service institution using an order under the Public Services Reform (Scotland) Act 2010 instead of regulations under Chapter 6 of Part 1 of the Bill. To foreclose that possibility, paragraph 3 of schedule 4 amends section 14 of the Public Services Reform Act so that an order made under it cannot be used to effect a transfer of functions that could be effected instead by regulations under Chapter 6 of Part 1 of the Bill.

This document relates to the National Care Service (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 20 June 2022

NATIONAL CARE SERVICE (SCOTLAND) BILL

EXPLANATORY NOTES

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