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**RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES
IN RELATION TO
THE SCOTTISH GOVERNMENT CONSULTATION
ON THE
NATIONAL CARE SERVICE (SCOTLAND) BILL**

For the purposes of responding to the Bill the following documentation has been considered:

The National Care Service (Scotland) Bill

Explanatory Notes

Delegated Powers Memorandum

Financial Memorandum

Policy Memorandum

Statements of Legislative Competence

In addition, consideration has been given to The Independent Review of Adult Social Care, February 2021 and the National Care Services: Consultation Analysis produced by Price Waterhouse Cooper.

General questions

1. The Policy Memorandum accompanying the Bill describes its purpose as being “to improve the quality and consistency of social work and social care services in Scotland”. Will the Bill, as introduced, be successful in achieving this purpose? If not, why not?

- *The Bill provides a framework for the provision of social work and social care services to be centralised under the auspices of an organisational structure similar to that used for the provision of health services in Scotland. From an organisational perspective such changes will provide greater consistency in the*



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provision of services as between different parts of Scotland compared to the current system which is devolved to individual local authorities. However, the Bill simply sets out the mechanism for achieving that new structure, with little in the way of detail as to precisely which services will come under the auspices of the National Care Service, nor how the provision of such services will be effected across each national care board. Whilst it would be hoped that the new structure would improve the quality of the services across Scotland, a great deal will depend upon how the proposed changes are carried out. There is clearly a risk that the quality of services previously provided effectively on a local model is diluted when provision is attempted on a larger, national, scale. That will require to be closely monitored once greater detail is known about which services are proposed to be transferred to the national care service, and the manner in which it is proposed that is done.

- *It is recognised that the Bill anticipates a gradual transition from the current provision of services at a local authority level over to the newly created National Care Service, but there is little in the Bill regarding transitional arrangements. It may be the intention to furnish more detail about the logistics of transitioning the services in secondary legislation. As the Bill stands at the moment, however, it could be several years before areas which are currently worst served by social care services could hope to see any improvement. In the meantime, there is a lack of certainty regarding what the impact of the proposed changes will be for end users, and there are no interim measures proposed for areas or services which are recognised as being currently badly served.*
- *The provision of a range of services, including care, at a local level can provide a good holistic approach to a vulnerable person's circumstances. The Bill recognises the need for further consultation regarding the potential integration of services such as children's services and criminal justice. It is clear, however, that some services will remain within the remit of the local authority whilst others will come under the auspices of the newly formed care boards. There will necessarily remain cases where individuals require to access services from bodies bearing different responsibilities (with different budgets) for services. Whilst the Bill sets out the framework for the new national care service and allows for services to be transferred from a local authority, it does not contain provisions to strengthen co-operation between national care boards and local authorities in respect of services being provided across the different bodies. There is a concern that this could result in the loss of cohesive responsibility for the overall care provided, particularly in complicated cases.*



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2. Is the Bill the best way to improve the quality and consistency of social work and social care services? If not, what alternative approach should be taken?

The Bill appears to set out an effective framework for implementing the changes proposed in the IRASC. Those proposals were generally recognised by various service bodies as positive changes. Clearly the detail of the proposals is still to be introduced by way of secondary legislation and that gives rise to concerns as to the likely pace of the change, the efficacy of the transition, and maintaining the quality of services in the interim. What can be stated at this stage is that the Bill appears to be the appropriate first step in improving the quality and consistency of social work and social care services.

3. Are there any specific aspects of the Bill which you disagree with or that you would like to see amended?

Given the framework nature of the legislation there is little which is suggested at this stage by way of amendment. Comments and drafting suggestions are made below in respect of individual sections.

A more fundamental concern relates to the lack of clarity around the level of transfer of function which will actually be undertaken following the Bill becoming law and the proposed mechanism for effecting such transfer. By way of the combination of the function transfer provisions (section 27) and the section on ancillary provision (section 45) the Bill has the potential for significant reorganisation of social work and care service provision with less democratic oversight than if it were to be achieved solely by primary legislation. Although transfer of functions will be subject to affirmative procedure, this is not the same as full parliamentary oversight to primary legislation. Whilst there is provision for consultation prior to regulations transferring children's or justice services, that ought not to be a substitute for full legislative scrutiny. Any transfer of function from a local authority to a care board is a significant step. There is a danger that, following the Bill's passing, regulations to transfer functions or otherwise amend care legislation could be passed on the misplaced perception that the change contained therein has already been approved in principle by the passing of the Bill. Consideration should be given to whether the approach taken in the Bill is appropriate. It is acknowledged in the Bill and associated materials that there are special concerns in respect of children's and justice services. Those concerns are shared and in our view the statutes relevant to those services should be removed from schedule 3 given that no relevant consultation has yet taken place. Any alteration of provision of children's



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services and justice services should only be undertaken by focussed amendment of primary legislation following appropriate consultation.

4. Is there anything additional you would like to see included in the Bill and is anything missing?

Whilst it is appreciated that the Bill is intended as a first step in implementing changes it is not clear how matters are intended to progress following implementation of this framework legislation. In absence of any detail about the services which will come under the auspices of the NCS, any timescales for transition or clearly identified budget, there is a concern that it will be difficult to maintain momentum following the Bill being passed.

There is a lack of provision in the Bill regarding the interrelation between the proposed national care boards and local authorities. It was clearly recognised by the introduction of Health and Social Care Partnerships that the provision of services is optimised when there is co-ordination between relevant bodies regarding the range of services which are being provided to individual service users. That is something which could be reflected in the Bill, even if the detail of any proposed co-ordination between the bodies requires to be set out in secondary legislation rather than in the Bill itself.

As mentioned below, as regards powers of intervention there may be an overlap between the position of the Scottish Ministers and that of the Care Inspectorate which could be better clarified in the proposed legislation.

5. The Scottish Government proposes that the details of many aspects of the proposed National Care Service will be outlined in future secondary legislation rather than being included in the Bill itself. Do you have any comments on this approach? Are there any aspects of the Bill where you would like to have seen more detail in the Bill itself?

In introducing a general framework the Bill has the benefit of beginning the process at a relatively early stage, but as highlighted above, there is a risk that the momentum is not maintained, that there would be delays in delivering on the substance of the national care service, and that practical elements such as which services will come under the auspices of the NCS, or from where additional funding will be obtained, will present major obstacles to efficiently delivering the new system.



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As mentioned above, there is a concern regarding the level of scrutiny which can be afforded to secondary legislation, particularly in relation to the potential inclusion of children's and justice services. Further consideration of this aspect is recommended.

6. The Bill proposes to give Scottish Ministers powers to transfer a broad range of social care, social work and community health functions to the National Care Service using future secondary legislation. Do you have any views about the services that may or may not be included in the National Care Service, either now or in the future?

No.

7. Do you have any general comments on financial implications of the Bill and the proposed creation of a National Care Service for the long-term funding of social care, social work and community healthcare?

It is clear from the Financial Memorandum that it is impossible to attempt to identify the costs involved in creating and maintaining the national care service given the lack of detail at this stage regarding what will come under the auspices of the organisation.

It is hoped that there will be some savings which arise from centralisation, and some equivalence of the cost of providing services through the national care boards compared to the local authority model. However, it is clear, even at this early stage, that there will be some additional costs, particularly in relation to additional elements introduced by the Bill such as more supported breaks for unpaid carers. It is also clear that the transfer of funding from the local authority model to the national model is likely to be complex. It is not at all clear at this stage how those current parts of funding which are raised at a local level are to be met from central funding, nor how provision is to be put in place for new elements proposed to be introduced.

The resolution of these issues will likely take time, and there is a concern that this will create a significant barrier to the introduction of the National Care Service, or at least significantly delay its introduction.

8. The Bill is accompanied by the following impact assessments:
 - *Equality impact assessment*



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- *Business and regulatory impact assessment*
- *Child rights and wellbeing impact assessment*
- *Data protection impact assessment*
- *Fairer Scotland duty assessment*
- *Island communities impact assessment*

Do you have any comments on the contents and conclusions of these impact assessments or about the potential impact of the Bill on specific groups or sectors?

No.

Financial memorandum questions

The following questions are for respondents with a specific interest in the financial memorandum accompanying the Bill. Respondents are free to choose to respond to all, some or none of these questions.

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?
2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the financial memorandum (FM)?
3. Did you have sufficient time to contribute to the consultation exercise?
4. If the Bill has any financial implications for you or your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.
5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?
6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?
7. Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?

N/A



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Specific provisions

This section of the call for evidence invites comments on individual sections of the Bill. There is no obligation to complete this section of the call for evidence and respondents can choose to restrict their comments to certain sections of the Bill.

Section 1: National Care Service principles

Section 1 defines the National Care Service principles.

In providing comments on this section of the Bill, please consider:

- Whether you agree with these principles as drafted?
- Whether there is anything in the principles you would disagree with or wish to amend?
- Whether there is anything important missing from these principles?
- Whether an alternative approach would be preferable?

The principles reflect the aspirations identified in the IRASC and are generally to be welcomed as a statement of intent. There is a risk, however, that the setting out of the principles at the start of the legislation could be misleading.

By virtue of section 2(2) the impact of the principles is limited in so far as it is provided simply that in discharging their duty to promote a care service to the people of Scotland the Scottish Ministers must do so in a way that seems to them to best reflect the National Care Service principles (emphasis added). The effect of this provision is to render the principles akin to guidance to be applied by the Scottish Ministers in making a decision which is otherwise entirely at their discretion.

It is also noted that the principles are to be reflected in Scottish Ministers' decision making, but are not in fact referred to in respect of the proposed National Care Boards. If the principles are intended to inform decision making about the provision of the national care service it is surprising that the proposed national care boards would not also be required to take cognisance of the principles in discharging their duties.

Whilst at Chapter 3 it is provided that the Scottish Ministers will prepare a National Care Service Charter outlining the rights and responsibilities of the National Care Service, there is no reference to the principles requiring to be reflected in such a charter. Indeed, section 11(4) specifically limits the import of the charter by highlighting that it is not to give rise to any new rights, impose any new responsibilities or alter any existing right or responsibility. This underlines the fact that the National Care Service principles would not be intended to form part of any such charter, or at least only in the limited form of discretionary guidance.



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At Chapter 2, which relates to strategic planning to be put in place by the Scottish Ministers and/or the national care boards when providing a service, the strategic plan must incorporate certain elements, one of which is an ethical commissioning strategy in relation to providing the service. It is provided at section 10 that such ethical commissioning strategy means the strategy for ensuring that arrangements for providing the service ‘best reflect the National Care Service principles’. So, there is clear intention to make sure that the principles are used as guidance at the point of commissioning services. It is not clear why the principles would not also be used for guidance in relation to the other important elements of the strategic plan referred to in the Bill, viz, the vision for the service, or the objectives in relation to the service.

Whilst, therefore, section 1 provides an attractive introduction to the legislation, it may give a misleading impression that the principles enunciated have a wider effect than simply being guidance applicable (i) to the Scottish Ministers to be weighed, at their sole discretion, when making decisions about promoting a national care service and (ii) to the national care boards in respect of one part of their strategy for providing services limited to the commissioning of such services. It would be more in keeping with the concept of ‘principles’ for these to inform all elements of decision making and create a standard by which all decisions can be tested. In the restricted form contained in the Bill it would be more accurate, and perhaps more appropriate, to identify these as ‘guidance statements’ or ‘declarations’ rather than ‘principles’.

Sections 2 and 3: Accountability to Scottish Ministers

Sections 2 and 3 establish Scottish Ministers’ overarching responsibilities for the National Care Service, namely to “promote in Scotland a care service designed to secure improvement in the wellbeing of the people of Scotland” and to monitor and improve the quality of services provided by the National Care Service. These provisions have the effect that the National Care Service will be directly accountable to Scottish Ministers.

In providing comments on these sections of the Bill, please consider:

- Whether you agree with Scottish Ministers being given these overarching responsibilities?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?



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- Whether an alternative approach would be preferable?

These sections have been framed very widely, giving the Scottish Ministers a wide discretion regarding what might be encompassed by the duty 'to promote' a care service, and the manner in which that might be achieved. It is notable that the sections are not prescriptive and would allow, for example, an alternative to care boards if that was considered expedient by the Scottish Ministers to fulfil their duty.

It is no doubt intentional that a high degree of flexibility and discretion has been retained by the wording of these sections, and to that end no amendment is suggested.

Sections 4 and 5 / Schedules 1 and 2: Establishment and abolition of care boards

Sections 4 and 5 make provision for the establishment and abolition of care boards and for financial assistance for boards. As set out in the Policy

Memorandum, the Bill "makes provision for the Scottish Ministers to establish and fund these boards, called "care boards" in the Bill, to plan and deliver NCS service locally, replacing current Integration Authorities". The Policy Memorandum continues: "There is also provision for "special care boards" to deliver national functions if needed".

Connected to Section 4 and annexed to the Bill, Schedule 1 sets out detailed provisions related to the constitution and operation of care boards while Schedule 2 makes consequential amendments to public authorities legislation.

In providing comments on these sections of the Bill, please consider:

- Whether you support the establishment of care boards as set out in these sections of the Bill and provisions on financial assistance for boards?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?
- Whether an alternative approach would be preferable?

The establishment of care boards accords with the recommendation in the IRACS and generally received favourable comments from relevant bodies commenting on the recommendations. Section 4 accords with the approved intention of the legislation.

It is noted that at section 5, which relates to the financial assistance for care boards, is discretionary in so far as the Scottish Ministers "may" provide any financial assistance to care boards that they consider appropriate. It is not clear why the section has been worded



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to allow the provision of financial assistance to be discretionary. The remaining part of the section allows the Scottish Ministers to provide what financial assistance ‘they consider appropriate’, and that already provides flexibility for the purposes of this section. The recommendations, and indeed the Policy Memorandum, appear to envisage that there would be an absolute duty on the Scottish Ministers to provide financial assistance to the national care boards. In that context it is suggested that section 5 should be mandatory with the word ‘may’ changed to ‘shall’.

Chapter 2: Strategic planning and ethical commissioning

This Chapter of the Bill requires care boards to have a strategic plan setting out their vision, objectives and budgets for their care board area and incorporating an ethical commissioning strategy. Scottish Ministers must also have a strategic plan and an ethical commissioning strategy for any services provided at the national level. The Policy Memorandum states that ethical commissioning strategies should set out “arrangements for providing services and how those arrangements have been designed to ensure they best reflect the NCS principles”.

In providing comments on this chapter of the Bill, please consider:

- Whether you agree with these provisions?
- Whether there is anything important missing from this chapter of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this chapter of the Bill?
- Whether an alternative approach would be preferable?

As mentioned above, the Chapter sets out a number of elements which require to be incorporated into the strategy, but only one element, that relating to ethical commissioning of services, requires to attempt to reflect the National Care Service principles. It is not clear why the Scottish Ministers, or the national care boards, as the case may be, ought not to have regard to the principles when setting out their strategy the vision and/or objective for the service.

A clear aim of the legislation is to improve the consistency of provision of care services across Scotland. This Chapter requires a care board to consult on the proposed strategic plan and views are to be sought from community planning partners, any bordering local care board and thereafter residents within the care board area. The draft strategic plans of each national care board are then to be provided to the Scottish Ministers for approval.

There are three suggestions relating to the specific drafting of this chapter:



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- 1 *It may improve consistency to outline the method of and timescales for the required consultation with external bodies;*
- 2 *It may facilitate consistency if the review by the Scottish Ministers includes specific provision for the Scottish Ministers to compare the strategic plans provided by different local care boards in determining whether to approve the draft plan;*
- 3 *Whilst it is provided at section 9(2)(a) that the period of the strategic plan must not exceed 3 years, and the provision at 9(2)(c) should ensure that there is no gap between successive strategic plans, if Scottish Minister's approval is delayed it could potentially extend the period of the strategic plan beyond the stipulated 3 years. It would be prudent to include a caveat for extension beyond the three years in that limited circumstance.*

Sections 11 and 12: National Care Service Charter

Sections 11 and 12 of the Bill make provision for the Scottish Ministers to prepare and publish a National Care Service charter, to be co-designed with those with lived or living experience and reviewed on a five-yearly basis. According to the Policy Memorandum, the Charter “will set out what people can expect from the NCS and provide a clear pathway to recourse should the rights in the Charter not be met”. The first and subsequent versions of the charter must be subject to public consultation and a copy must be laid before the Scottish Parliament

In providing comments on these sections of the Bill, please consider:

- Whether you agree with provisions to create a National Care Service charter?
- Whether there is anything important missing from these provisions?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this chapter of the Bill?
- Whether an alternative approach would be preferable?

As mentioned above, it is noted that the National Care Services principles are not required to be incorporated into the National Care Service charter, and in any event the limiting provisions of section 11(4) ensure that no new rights or responsibilities are created by virtue of such a charter.

There is a clear parallel with the Patient Safety Charter produced for those using health services. Such a charter can have the benefit of setting out in one document, in clear terms, what can be expected by users of a service. The inclusion of a description of the processes available for upholding rights contained at section 11(2)(b) is welcomed.



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Section 13: Independent advocacy

Section 13 of the Bill gives Scottish Ministers powers to make provision via secondary legislation for independent advocacy services in connection with services provided by the National Care Service. The Policy Memorandum highlights the emphasis placed by the Independent Review of Adult Social Care on the importance of access to independent advocacy and brokerage services, including peer services, “in empowering people accessing support and unpaid carers” and ensuring “that their voices are heard”. It goes on to state the Scottish Government’s intention to “develop and implement a coherent, consolidated and consistent approach to independent advocacy services across the range of NCS services” and to do this through co-design with people with lived or living experience of accessing services.

In providing comments on this section of the Bill, please consider:

- Whether you agree with these provisions?
- Whether there is anything important missing from this section of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this section of the Bill?
- Whether an alternative approach would be preferable?

Provision of independent advocacy services in connection with provision of NCS services formed a key part of the IRACS. The suggestion was widely welcomed by bodies responding to the review and appeared to be an important aspect of the proposed legislation. Against that background it is not clear why section 13 is framed as a discretionary power on the part of the Scottish Ministers. The provision is merely framework, with no restriction as to the quantity, form or timescale for implementation of any independent advocacy services. Making this section mandatory would accord better with the recommendation of IRACS.

Sections 14 and 15: Complaints

Sections 14 and 15 of the Bill make provision for a complaints service and for the handling of complaints. To underpin these complaints and redress processes, the Policy Memorandum indicates that Scottish Ministers intend, separate from the Bill, to develop a model for the role of National Care Service Commissioner through co-design with people with lived and living experience of accessing health and social care services.

In providing comments on these sections of the Bill, please consider:



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- Whether you agree with these provisions?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?
- Whether an alternative approach would be preferable?

The proposal to establish the role of a National Care Service Commissioner is welcomed. The mandatory form of section 14 is noted.

It is recommended that in considering regulations making provision about the handling of relevant complaints consideration is given to providing access to independent advocacy services for this purpose, and also to the need for legal aid assistance in appropriate cases.

Chapter 4: Ministers' powers to intervene

Sections 16 to 22 of the Bill establish powers for Ministers to intervene with respect to care boards and contractors, for instance in case of an emergency or of service failure.

In providing comments on this chapter of the Bill, please consider:

- Whether you agree with these provisions?
- Whether there is anything important missing from this chapter of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this chapter of the Bill?
- Whether an alternative approach would be preferable?

Section 20 provides for the Scottish Ministers to intervene with contractors in specific circumstances where it is their opinion that there is a failure or risk of failure in the provision of goods or services (see section 20(1)). The mechanism for such intervention is to apply for a court order. In terms of section 20(4) the court only requires to be satisfied that it is reasonable for the Scottish Ministers to hold the opinion about the matters set out at section 21(1). The result is that there is a very low threshold for granting of the intervention order by the court. Effectively there would be little or no scrutiny by the court of the appropriateness of such an order beyond being satisfied that the Scottish Ministers held such an opinion. The scope for any review of the determination would be similarly limited. A greater element of scrutiny would be introduced if the reference to 'opinion' at section 21 were to an 'informed' or 'reasonable' opinion.



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At section 20(3)(a) the Scottish Ministers can nominate 'a person' to intervene with contractors. There is no provision that such a person requires to be registered in terms of section 59-61 of the Public Services Reform (Scotland) Act 2010, although that might be thought to be implicit by virtue of section 80 of the 2010 Act which makes it a strict liability offence to provide care services if not registered with the Care Inspectorate. If it is intended that the person intervening does not require to be registered to provide the service, then some consideration should be given to consequential amendments to the 2010 Act to ensure that the person nominated does not commit an offence under section 80.

It is not clear from the Bill how the powers at this part are intended to work alongside the powers afforded to the Care Inspectorate under sections 62, 64 and 65 of the Public Services Reform (Scotland) Act 2010. There may be circumstances where the powers afforded to the Scottish Ministers by this part of the Bill could usefully supplement the current powers afforded to the Care Inspectorate, for example in circumstances where an administrator is appointed to a financially failing care operator and in absence of registration would otherwise be unable to continue providing services. However, the current wording of section 20 itself does not clearly circumvent the prohibition on provision of services by an unregistered provider contained at sections 59-61 of the 2010 Act when read together with section 80 of that Act.

The Care Inspectorate will no doubt comment on these provisions in more detail to the extent that they overlap with the Care Inspectorate's current powers. In this response on behalf of the Faculty it is simply highlighted that there is potential duplication between the Care Inspectorate and the Scottish Ministers in relation to such powers of intervention. It would be advisable that: (i) the Bill should provide for the Scottish Ministers to notify the Care Inspectorate of its intention to seek the necessary court order under section 20; (ii) further consequential amendment of the Public Services Reform (Scotland) Act 2010 should be considered if the intention of section 20 of the Bill is to circumvent sections 59 – 61 thereof in specific circumstances, notwithstanding the strict liability provision at section 80; and (iii) consideration should be given as to whether the provisions in section 63 of the 2010 Act (which apply to improvement notices served on local authorities) require to be amended to extend them to care boards in light of the possible transfer of functions from local authorities to care boards under the legislation.



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Chapter 5: Connected functions (research, training, other activities and compulsory purchase)

Chapter 5 of the Bill establishes certain functions connected to the provision of care, including enabling Scottish Ministers and care boards to:

- conduct, assist in conducting or give financial assistance in relation to
- research;
- to provide training or to provide financial support to undertake training;
- to provide financial assistance to undertake other activities connected to the services provided to individuals by the National Care Service;
- and to compulsorily purchase land required to exercise a relevant function.

In providing comments on this chapter of the Bill, please consider:

- Whether you agree with these provisions?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?
- Whether an alternative approach would be preferable?

The drafting of section 26(4)(b)(ii) is not clear and an amendment is suggested as follows:

Delete the words “by the creation of a new right” and substitute the words “necessary for use of the land acquired under section 26(1)”

Chapter 6 and Schedule 3: Transfer of functions, including scope of services

Chapter 6 confers powers on Scottish Ministers to transfer functions between institutions as part of the National Care Service, These powers include the power to transfer functions from local authorities, to bring aspects of healthcare into the National Care Service, to re-organise the National Care Service and to transfer staff, property and liabilities.

Items of legislation conferring specific functions on a local authority which may be transferred into the National Care Service are listed in Schedule 3, annexed to the Bill.

In providing comments on these sections of the Bill, please consider:



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- Whether you agree with Scottish Ministers being given these powers?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?
- Whether an alternative approach would be preferable?

It is appreciated that the wording of this Chapter has been kept general, and that the intention would be to use secondary legislation to effect changes.

As mentioned above, consideration should be given to including provision in the Bill for co-ordination of provision of services as between local authorities and care boards.

As mentioned above, there is a concern about the level of scrutiny which can be afforded to secondary legislation, particularly as regards the potential transfer of children's and justice services.

A drafting suggestion is made in respect of section 27, to insert the words "social care" before the word "function" on the basis that the enactments mentioned in schedule 3 arguably confer wider functions on local authorities beyond those that the section would attempt to transfer.

Section 30: Inclusion of children's services and justice services

Chapter 6 also makes provision for the future inclusion of children's services and justice services within the scope of the National Care Service, subject to a public consultation on the proposed inclusion of these services. It is proposed that the future inclusion of these services within the scope of the National Care Service would be achieved via secondary legislation.

In providing comments on this section of the Bill, please consider:

- Whether you agree with proposals to include children's services and justice services within the scope of the National Care Service, either now or in the future?
- Whether there is anything important missing from this section of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this section of the Bill?
- Whether an alternative approach would be preferable?



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The Faculty do not have a view for this response on the proposal to include children's services and justice services within the scope of the National Care Service but welcome the public consultation on the same.

It is recommended that careful consideration is given as to whether the current proposals afford the best approach to allowing for public consultation then proper parliamentary process. In the meantime, the reference to statutes conferring specific functions on local authorities in relation to children's services and justice services should be excluded from Schedule 3 pending the consultation process.

In connection with the consultation duty imposed at section 30(2) it would be helpful to identify the scope and timescale for such consultation.

Chapter 7 and Schedule 4: Consequential modifications / Interpretation of Part 1

Chapter 7 makes consequential modifications to the following legislation to reflect proposals set out in this part of the Bill (set out in Schedule 4, annexed to the Bill):

- Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947
- Local Government (Scotland) Act 1973
- Public Services Reform (Scotland) Act 2010

For the purposes of interpreting Part 1 of the Bill, Chapter 7 defines the National Care Service as comprising "care boards" and "the Scottish Ministers insofar as they are exercising a function" conferred on them by virtue of Part 1 of the Bill or an aspect of healthcare that has been "designated as a National Care Service function".

In providing comments on this chapter of the Bill, please consider:

- Whether you agree with these provisions?
- Whether there is anything important missing from this chapter of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this chapter of the Bill?
- Whether an alternative approach would be preferable?

Subject to the comments already made in respect of potential further amendments to the Public Services Reform (Scotland) Act 2010 there is no further comment on this section of the Bill.



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Part 2: Health and social care information

Part 2 of the Bill gives the Scottish Ministers powers to establish a scheme for care records to be shared between the proposed National Care Service and the National Health Service. It also makes provision for Scottish Ministers to produce an information standard which will set out how certain information is to be processed.

In providing comments on this part of the Bill, please consider:

- Whether you agree with these provisions?
- Whether there is anything important missing from this part of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this part of the Bill?
- Whether an alternative approach would be preferable?

As identified by IRASC, the sharing of care records would be a positive way in which care services and consistency in the service can be improved.

It is obviously important to safeguard the sharing of such personal information so far as is possible and that appears to be what is intended by reference to information standards at section 37. The section has been framed in very general terms and there would be benefit in making specific provision that an information standard will include basic data protection.

Section 36 should include reference to any information sharing between the National Care Service and the National Health Service being regulated in accordance with the relevant information standard.

Sections 38 and 39: Right to breaks for carers

Sections 36 and 37 of the Bill propose amendments to the Carers (Scotland) Act 2016 and consequent changes to the Social Care (Self-directed Support) (Scotland) Act 2013, principally with a view to establishing a right to breaks for carers.

In providing comments on these sections of the Bill, please consider:

- Whether you agree with the proposed amendments to the Carers (Scotland) Act 2016?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?



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- Whether an alternative approach would be preferable?

These sections reflect the proposal set out in the IRASC and the principle of the legislation is to be welcomed.

The use of the word “sufficient” in describing the breaks required is open to interpretation, and it is not clear from the proposed amendments how any dispute as to what would constitute ‘sufficient’ is to be determined. It is recommended that some mechanism is included in the proposed amendments for determination of what would constitute ‘sufficient’, for example would that be a matter for the local authority acting reasonably, or by reference to an expert view from a professional? In absence of any such mechanism the current wording seems liable to give rise to disputes.

Section 40: Implementation of Anne’s Law

Section 40 of the Bill proposes amendments to the Public Services Reform (Scotland) Act 2010 with a view to supporting implementation of “Anne’s Law” related to visits to or by care home residents.

In providing comments on this section of the Bill, please consider:

- Whether you agree with the proposed amendments to the Public Services Reform (Scotland) Act 2010?
- Whether there is anything important missing from this section of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this section of the Bill?
- Whether an alternative approach would be preferable?

The Bill appears to put in legislative form the guidance which is already in place and provides a proper statutory basis for ‘Anne’s Law’.

Section 41: Reserved right to participate in certain contracts

Section 41 of the Bill proposes amendments to the Public Contracts (Scotland) Regulations 2015 to allow the right to bid for contracts for certain services to be reserved to certain types of organisation.



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In providing comments on this section of the Bill, please consider:

- Whether you agree with the proposed amendments to the Public Contracts (Scotland) Regulations 2015?
- Whether there is anything important missing from this section of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this section of the Bill?
- Whether an alternative approach would be preferable?

N/A

Sections 42 and 43: Regulation of social services

Sections 42 and 43 of the Bill propose amendments to the Public Services Reform (Scotland) 2010 Act to stipulate additional circumstances in which registration of a care service may be cancelled and to authorise Healthcare Improvement Scotland to assist the Care Inspectorate in carrying out investigations of care services.

In providing comments on these sections of the Bill, please consider:

- Whether you agree with the proposed amendments to the Public Services Reform (Scotland) Act 2010?
- Whether there is anything important missing from these sections of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to these sections of the Bill?
- Whether an alternative approach would be preferable?

Section 42 simply allows for additional circumstances in which registration of a care service may be cancelled to be stipulated. The operative detail is to be provided in secondary legislation therefore no specific comment can be made beyond welcoming the potential for more flexibility to be introduced into the system.

Section 43 would provide a statutory footing for the co-operation between Healthcare Improvement Scotland and the Care Inspectorate which proved useful during the pandemic. The use of the word "assist" proposed to be inserted into section 57A of the 2010 Act is potentially ambiguous, or at least could give rise to dispute as to the extent of powers



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afforded to Healthcare Improvement Scotland when assisting the Care Inspectorate in an inspection. If the intention is to allow Healthcare Improvement Scotland to have similar rights of entry to those afforded to the Care Inspectorate then that should be made clear. It might be helpful to make reference to the inspection rights provided under the Public Services Reform (Social Services Inspection)(Scotland) Regulations 2011 in order to put the scope of powers being conferred on Healthcare Improvement Scotland beyond argument.

Part 4: Final provisions

As well as defining what is meant by “health board” and “special health board” for the purposes of interpreting the contents of the Bill, setting out ancillary provisions, defining the date of commencement of the legislation and setting out its short title, Part 4 of the Bill sets out regulation-making powers to be conferred on Scottish Ministers via secondary legislation.

In providing comments on this part of the Bill, please consider:

- Whether you agree with regulation-making powers conferred on Scottish Ministers by section 46 of the Bill?
- Whether there is anything important missing from this part of the Bill?
- Whether there is anything you would disagree with or there are amendments you would wish to propose to this part of the Bill?
- Whether an alternative approach would be preferable?

Subject to the comments above regarding the potential for secondary legislation to be subjected to a lower level of scrutiny, the general approach taken to delegated legislation in the Bill appears to be appropriate.