

SOLAR - National Care Service Consultation Response

The Society of Local Authority Lawyers and Administrators in Scotland ('SOLAR') welcomes the opportunity to respond to the National Care Service (NCS) consultation. The proposals outlined within the consultation document are complex and significant. The questions proposed within the consultation are not all directed from a viewpoint that SOLAR can answer. There is also not enough detail in the consultation document about the structure, role and statutory positioning of the NCS to provide constructive comment on many aspects of the proposal. Therefore SOLAR has chosen to submit a response which highlights key issues and complexities which it believes should be taken into account in finalising proposals, and the issues that have to be clarified before informed decisions are made.

SOLAR's members cover a significant breadth of legal expertise in areas of work pertinent to this consultation, including Commissioning, Data Protection, Employment, Governance, IJB's and partnership working, Social Work and Social Care (across Adult, Community Care, Children's Services). Given the extent of this consultation and the constraints of a short turnaround, the relevant sections of this document have been prepared by different members of SOLAR and will read accordingly. The response as a whole, is however submitted by SOLAR on behalf of its members.

SOLAR anticipates that there will be further development and consultation following this initial consultation; we looking forward to opportunities to contribute to development of detailed and workable proposals.

1. Establishment of the NCS

(Pages 49 – 53 of the Consultation document)

The Consultation document sets out an ambition to raise the quality of services and ensure minimum standards nationally. We suspect nobody would disagree with this ambition being virtuous. The proposal is to establish a new organisation, the NCS, as a significant part of realising that ambition. What is not clear from the Consultation is the scope of the services to fall within the NCS: the Consultation document refers to a wide range of services across social

care; different disciplines of statutory social work; health care and wider community and justice services, some of which are clearly beyond the Independent Review of Adult Social Care (IRASC). Accordingly, the Consultation document does not afford these areas substantive consideration as to their current functioning and any need for change.

SOLAR's view is that there is a general lack of evidence in the Feeley Report and the Consultation document that the changes being proposed would deliver the outcomes sought in the Feeley Report. It is noted that there is no options appraisal demonstrating that the proposals will deliver the benefits sought. Such a seismic change of the delivery of social work and social care services should be evidence based and outcome led.

An overall observation is made that within the consultation document there is a disappointing failure to take account of the considerable efforts made within Local Authorities over the last 10 years to implement the aims of the Christie Commission.

The proposed reform comes just 6 years after the major reform of the integration of health and social care agenda under the Public Bodies (Joint Working) (Scotland) Act 2014, which has seen the establishment of the Integration Joint Boards. That did not include some typical aspects of public body reform, such as the transfer of staff, which seem to be part of the current proposals. The effort, cost and disruption caused by such reform should not be underestimated. It also is something of a rush to judgment on the current integration authority model. Historically, major reforms in local government and health services have come at intervals of at least 20-25 years. The model proposed here is for a separate body to be established for Social Care, in what is already a fairly crowded and complex landscape for service delivery, regulation and governance.

A National Care Service, will not of itself create equality of service experience for service users, possibly the opposite because inevitably there are areas of greater and lesser need and resources naturally pool to areas of greater need. A local infrastructure and delivery model operates in this way as a national model would – it is all relative. Under a National Service, resources will pool towards the big urban centres. Or what's the safeguard to ensure it

doesn't? Do we guarantee everyone will have e.g. home care, regardless of where they live in Scotland? Our National Health Service does not create equal access to services - everyone in Scotland is not 50 miles from a Cancer centre of excellence or specialist Maternity and Gynae services - again they are centred in bigger urban centres. That's under the NHS, a national service, so how would NCS operate to ensure equality of social care provision?

Our view is that the proposed transfer of services from local government to central government is contrary to the Christie commission, the Local Government Review and the European Charter of Local Self Government.

2. Scope of the NCS

(pages 54 to 88 of the Consultation document)

There is not enough detail in the consultation document to be able to provide particularly constructive comments on many of the proposals. Our comments therefore aim to highlight some of the complexities around services (e.g. protective services) that should be taken into account in finalising proposals, and the issues that have to be clarified before decisions are made.

- Legislative responsibility – on page 64 of the Consultation document the proposal is that Statutory duties should sit within the NCS. SOLAR has a fundamental concern that it is not clear what role local authorities will continue to play in delivering statutory services although the consultation does indicate that the intention is that there will at least be some ongoing role as a “commissioned service”. We believe that there will be significant issues which will need to be considered if statutory powers and duties are transferred to the NCS but local authorities are still expected to carry out those duties in practice. We are unclear about the extent to which the NCS would be able to direct a local authority to carry out functions which the local authority no longer has. We are particularly concerned about the delivery of statutory protective functions where there is an element of compulsion or where currently local authorities or officers can require things to be done (for example adult support and protection, mental health, child protection, criminal justice). At the moment it is clear that the local authority has certain powers and duties (e.g. to seek emergency orders or make statutory inquiries);

this aligns with the employment of staff who are required to carry out those duties and exercise the powers they are given. They are also able to access the support services (e.g. the expert legal services within local authorities that deal with the whole range of social work functions) to allow them to do so. Transferring statutory powers and duties to a NCS without any employees who currently undertake or support those functions raises numerous questions that are not addressed in the consultation:

- In whom will the powers and duties be vested?
 - How will that impact on the role and functions of local authorities?
 - Is it proposed that a local authority continues to exercise functions (for example applying for court orders) when it has no statutory basis for doing so?
- We do not believe that the consultation recognises the difference between delivering services and exercising statutory powers and duties. There is a clear difference between a Criminal Justice Social Worker being commissioned to provide a service of completing a breach report and the power to compel an offender to comply with their directions. Careful consideration will be needed in relation to this to avoid unintended consequences and difficulties in relation to the exercise of statutory functions, powers and duties.
 - We do not believe that the consultation accurately reflects the current position in relation to the statutory framework for children’s services. There is a clear statutory framework for children with only very limited instances of legislation applying to both children and adults. We recognise that some refinement particularly around the definitions of “adults” and “children” may be helpful, but this can be achieved through normal legislative change.
 - We do not believe that the consultation accurately reflects the difference between ‘social care’ and ‘social work’. It is noted that the proposal is to transfer the accountability for ‘social care’ to the Scottish Ministers from local government. However, it is not clear, what is meant by ‘social care’. The terms are used interchangeably throughout the consultation document and the Feeley Report. It is not clear whether the intention is to transfer both social care services and social work statutory functions to the NCS. Social care and social work, although they cross over, are not the same. ‘Social work’ has a statutory function and plays an important role in public protection such as: (i) taking the necessary steps to intervene in families lives

by using legal measures to protect the safety and welfare of children; (ii) effecting compulsory treatment or conditions which have been imposed by legal orders or licences; or, (iii) intervening to support adults with incapacity and vulnerable adults in need of protection has not been fully explained or understood within the consultation document. Consideration needs to be given to what is meant by 'social care' and it would be beneficial for this to be defined.

- Accountability - it is not clear from the consultation document how service providers and those who hold statutory powers and duties would be held to account. For example, if local authorities remain the implementing authority for Compulsory Supervision Orders but the NCS hold all the powers and duties related to children and families Social Work, who will be held to account? It would not be possible for an implementation authority which does not have any relevant powers or duties and which also does not have any control over resources to implement the Order.
- Workforce – there is an implication that the workforce will remain with the current employer but this requires clarification because the answer will be relevant to the points already made above. For example, if statutory powers and duties are transferred to a new public body, local authorities would be unable to employ staff to carry out those duties given the limitations of the Local Government (Scotland) Act 1973. This will require to be considered further. If local authorities are permitted to continue to employ staff, but without the relevant statutory functions, powers and duties, detailed legislative change would be required. That legislative change would need to address those areas where officers personally exercise statutory functions, usually in relation to protective services. For example, a Mental Health Officer has certain duties personal to him/her and a "Council officer" holds certain powers and duties under Adult Support and Protection legislation. How might they continue to have the necessary authority and obligation without the link to the Council's own functions, powers and duties? We note that the role of the Chief Social Work Officer is not addressed in the consultation. The CSWO has a general oversight role but does also have powers and duties in relation to specific matters, most importantly in relation to secure accommodation. This needs to be considered further. The local authority is currently the provider of last resort in the event of provider failure.

Consideration needs to be given to who this responsibility will sit with and the ability to be able to employ staff for that purpose.

- Evidence from current IJBs – no evidence is provided regarding outcomes from Health and Social Care Partnerships that include children’s services versus those that don’t. It would be helpful to analyse evidence before proposals are finalised.
- The implications of fragmenting strategic planning across a whole of system of support that currently exists requires consideration. Consideration needs to be given to linkages in services, for example housing and education. If social work functions are not transferring to the NCS consideration needs to be given to implications of not having social work’s legal powers and expertise inextricably linked with the delivery of care.
- Separating children’s Social Work services from Education is at least as significant, if not more so, as separating them from Adult Social Work services. Indeed the proposed separation of children’s Social Work services from the range of other local authority services could be very detrimental to outcomes. For example, expert legal advice and the experience and response of services such as Housing and Education, can be crucial elements in Child Protection, working in-house alongside Social Work.
- The statement on current difficulties within Mental Health services is extremely general and not supported by any evidence. It is therefore difficult to make any comment in relation to this proposal.

3. Reformed Integration Joint Boards: Community Health and Social Care Boards

(pages 89 to 94 of the Consultation paper)

The consultation documentation notes that the aim of reforming IJBs into CHSCBs is to improve local discretion and decision making. However, and paradoxically:-

- this is proposed within the context of establishing a national structure for the planning, commissioning and delivery of social care
- the Chief Executive of the CHSCB will no longer be accountable to the Chief Executives of the local authority and health board, but to the NCS

- as CHSCBs will be funded directly from the Scottish Government and will be accountable to Ministers, there will be no council or health board input or decision making or budgeting and funding decisions
- the development of CHSCBs does not take account of existing local arrangements and effectively removes the responsibility for statutory social work and social care from local authorities, taking away local and democratic responsibility and accountability for these services

There is no indication of how the NCS and the NHS will interact, which is likely to be just as significant a partnership as has been that of councils and health boards under the 2014 Act.

Governance

Health boards, councils and IJBs are subject to their own versions of a best value duty. There is no indication of such a regime applying to the NCS or the CHSCBs.

As was and is the case with IJBs, the NCS and the CHSCBs will be subject to the plethora of statutory regulatory regimes, such as FOISA, EIRS, GDPR/DPA, SPSO. In addition, the CHSCBs will require HR and employment advice, procurement and contracts advice. The burden of compliance and securing compliance will be substantial.

Currently, under the statutory partnership regime, IJBs secure such services at little, or usually no, cost from council and health board. The extension of the powers, the changed status of the CHSCBs, and the new relationship between CHSCBs (service commissioners and clients) and councils and health boards (service providers and contractors) make it unrealistic at best for those arrangements to continue.

There would also be a requirement as directly funded and employing bodies to have significant IT systems infrastructure, including financial ledger and reporting systems, purchase to pay systems and HR / payroll systems.

Clinical and care governance features very little in the consultation document. In particular, the important statutory role of the Chief Social Work Officer is not dealt with.

Public protection is currently overseen by the Chief Officers Group (COG), with Adult Protection work progressed by local Adult Protection Committee. Other key elements of public protection are also overseen in this manner – Child Protection, MAPPA, Violence

Against Women & Girls. There is no explicit mention of current or proposed public protection arrangements (adult protection, child protection, MAPPA, domestic violence) through Chief Officer Groups. Those work well in ensuring clear focus on local protection activity.

Finance and accounts

Local input to budgets, most significantly the partnership arrangements covered by integration schemes, will be lost when budgets are fixed centrally.

There is no clarity concerning the mechanisms through which Ministers will allocate budget to NCS, nor for NCS allocating budgets to CHSCBs.

It is unclear what, if any, responsibility the new CHSCBs will have in terms of capital budget planning and assets.

There is currently no information on the process for removing funding from local authorities and transferring that funding to the CHSCBs, which will be a major undertaking. The disentanglement of the budget for a whole service area is not a straightforward exercise.

There will be an increase in the burden of financial administration for the CHSCBs which will need financial systems, accounts payable, internal audit, proper/accountable officer, etc.

Clarity will also be required on the VAT status of the National Care Service and new boards proposed as this could have significant financial implications. Local authorities are able to fully reclaim VAT costs through the partial exemption rules that apply for local government bodies which is of significant financial benefit. It is not clear if implications around VAT recovery by the proposed new bodies have been considered.

Membership

The consultation is lacking in information about membership of CHSCBs. More detail is needed as to what that means; what organisations or communities will be represented and how; what powers members will have and how that will be “more effective”. It is stated that councillors will have places on CHSCBs but no further information is provided in terms of numbers or status.

The place of professional advisers on the CHSCBs is not touched upon, and in particular the role of advisers such as the statutory Chief Social Work Officer. As with IJBs, a balance between elected/appointed board members and professional advisers is required.

Where CHCSB members are appointed by the Ministers they become answerable to the Ministers. Members of IJBs do not have those ties and are accountable to the bodies or groups they were appointed to represent.

Role and responsibilities

It is suggested that CHSCBs will commission services directly from council, health board, third and independent sectors. To secure best value and value for money those commissioning decisions will require choices to be made amongst bodies potentially competing to provide services.

There are advantages to be gained from a national service providing a “national” service and approach and guidance in relation to procurement, commissioning, care standards, workforce planning and standards, and complex/high cost cases. Those advantages could accrue with the present IJBs and the current statutory responsibility for service delivery shared amongst IJB, council and health board. Proposals for the enhanced CHSCBs do not indicate where improvements will be found or the value they will add as an intermediary between the national service and the bodies delivering services.

4. Commissioning of Services

(pages 95 to 105 of the Consultation paper)

It is unclear from the details provided in the Consultation whether the CHSCBs would be fully autonomous or effectively branch offices of the NCS. Likewise, it is unclear if the CHSCBs be exclusively commissioning bodies or if they will also be able to deliver services. This confusion and that regarding the role of the local authority is caused by e.g. the following proposals:

- at page 52, it is proposed that the National Care Service and CHSCBs will “work in concert with the NHS, local authorities, and the third and independent sectors to plan, commission and deliver the support and services”;

- at page 91, it is proposed that CHSCBs “will be able to commission services from local authorities, the NHS and the third and independent sectors;”
- at page 64, it is proposed that “duties and responsibilities for social work and adult and children and families’ social care services should be located within the NCS”.

Taking the last point further, the duties and responsibilities for social work and the provision of social care services for adults, children and families, that relate to the commissioning function include the Social Work (Sc) Act 1968’s s12 duty to promote social welfare; its s12A duty to assess needs ; the equivalent provisions in the Children (Scot) Act 1995; and the duty to offer SDS options under the Social Care (Self-directed Support)(Scot) Act 2013.

Have all such duties to be transferred to the NCS? If not, how can Chief Social Work Officers and local authorities remain legally responsible for matters where it appears from the consultation, they would have no strategic input or financial say in the delivery of the relevant services to which these legal responsibilities apply?

Will local authorities be left with a discretionary power to provide care services to adults and children? If so, what will be their incentive to do so? How would such service provision be financed? As an alternative will local authorities be obliged to provide such services?

Regarding the proposal that the NCS develop and manage a National Commissioning and Procurement Structure of Standards and Processes for ethical commissioning and procuring of social care services and supports, which structure will amongst many other matters: detail core criteria that **must** be considered when decisions are being made on how to meet the needs of the individual and deliver the service, the decisions regarding how to meet needs is inextricably linked to the assessment of needs. Which party will be assessing the individual’s needs? How do the rights of the individual under the Self-directed Support legislation square with the core criteria’s emphasis on workforce terms and conditions?

Will this opportunity be taken to combine into one piece of legislation the current statutory assessment processes under the Social Work (Scot) Act 1968 and the Children (Scot) Act 1995 with the requirement to give the supported person the opportunity to choose one of the options for self-directed support? The vocabulary used to describe the social work client and his/her circumstances could also be usefully harmonised and made fit for the 21st century.

Two aspects of the Structure of Standards and Processes are expressly mandated. Will the CHSCBs have discretion regarding the others? E.g. the use of standard terms and templates? Templates for what specifically? The consultation is not clear on these points.

Regarding the core criteria that emphasise workforce terms and conditions, these stray into employment law which is not devolved to the Scottish Parliament, far less to the NCS and CHSCBs. There is therefore a risk of legal challenge if such terms and conditions are mandated, even if it is not clear at which body's door this risk would lie.

The proposal that the NCS will be responsible for the commissioning, procurement and contract management of national contracts and framework agreements for complex and specialist services including the following:

- care for people whose care needs are particularly complex and specialist;
- custodial settings including prison;
- residential care homes;
- care home contract.

Given that just one national contract - the NCHC- took years to develop and agree, has the scale and scope of this proposal been thoroughly assessed?

If so, what is the projected time-frame to undertake and complete such significant pieces of work and how will existing contracts which currently sit with local authorities be managed?

There is a tension that may be difficult to reconcile between placing the needs, rights and preferences of service users at the heart of the decision-making process; and improving commissioning and procurement processes in order to provide a vehicle for raising the quality of social care support and for enhancing the conditions and experience of the social care workforce.

In relation to the proposed shift from competitive to collaborative commissioning, whilst the focus of commissioning and procurement decisions being on the person's needs is welcomed, there is still a place for competition and further detail is needed on what "collaborative commissioning" means and what it would entail. Again, there may be issues to consider

around whether any necessary changes to procurement law, (if required) would fall within the devolved powers of the Scottish Parliament.

Using services agreements in order to implement national policy on employment law over which the Scottish Parliament has no devolved competence, is a risky strategy. To date we are unaware of there having been a successful challenge regarding the use of this vehicle to promote the Scottish Local Government Living Wage, but expanding into other areas of employment law may increase the risk further the risk of such a challenge, particularly as there are very recent examples of the competency of the Scottish Parliament being successfully challenged with reference to the extent of its devolved powers.

The focus upon supporting people to achieve their outcomes may necessitate a review of s12A of the Social Work (Scot) Act 1968¹ and a shift from its focus on community care services, though this will bring with it challenges on how to objectively measure success in the context of contract-management.

5. Using data to support care

(Pages 35 to 40 of the Consultation document)

SOLAR believe that there are information governance challenges which will need to be considered and addressed in detail in order to ensure successful delivery of a NCS. These concerns are outlined thematically below.

Statutory roles and responsibilities

The consultation recognises that social care occupies an exceedingly complex landscape in terms of delivery. Social care services are provided by a plethora of agencies encompassing central and local government, national and community health care providers, private providers, charities and the voluntary sector. In terms of personal data processing, each of these organisations exist as data controllers in their own right and, under data protection

¹ Where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority— (a) shall make an assessment of the needs of that person for those services; and (b) shall then decide, having regard to..... whether the needs of the person being assessed call for the provision of any such services.

legislation, carry specific obligations around how personal data should be collected, managed, shared and disposed of.

The consultation appears to indicate that a NCS would exist with an over-arching responsibility around commissioning and delivery of social care services, however it is not clear whether it intends to change the existing statutory responsibilities in relation to the actual delivery of services. There are implications from a data controller perspective depending on the approach taken, and it is important that these are considered and incorporated into any final model. It should also be noted that within existing health and social care integration, there is no single model for an IJB and the IJBs differ in terms of which functions have been delegated to them, which adds to the complexity of the system which is to be centralised.

Under data protection legislation, any organisation which determines the purpose for which personal data is processed acts as a controller in respect of that data. Where more than one organisation is jointly responsible for the delivery of services (for example, when one organisation commissions a service and others are responsible for the service delivery), the organisations can become joint controllers in respect of that personal data. Managing data protection governance in a joint processing context becomes increasingly more complicated as the number of organisations involved in the processing increases. There are also practical challenges in bringing organisations which exist and operate autonomously together in terms of practical delivery. Experience of these challenges has been gained through the operation of Health and Social Care partnerships which generally only involve partnership across three organisations (Local Authority, Health Board, and IJB). The practical challenges in bringing three organisations together to deliver delegated services has been immense. It is likely that these challenges would only multiply as the number of agencies involved as joint controllers of the data increases. It is therefore important that the introduction of a National Care Service also delivers very clear and well understood boundaries in terms of roles and responsibilities. Failing to do so risks adding another cook to an already busy kitchen without there being a clear chef in charge.

Centralising the statutory responsibility for the delivery of social care within the NCS and removing it from existing organisations may reduce the need for joint data control, however it will also create alternative challenges for consideration. In order to ensure compliance with

the Public Records (Scotland) Act 2011, the historical records relating to the delivery of social care services must belong to the agency which has statutory responsibility for them. Centralisation of a National Care Service would also be likely to result in a centralisation of historical record-keeping which would require management and resource. Consideration should also be given to the potential experience of service users wishing to access their records if the connection between the record and the creating organisation is effectively broken

A national record or system

The consultation alludes to the creation of a single national social care record or social care system. While standardisation around record keeping is to be welcomed, the complexities of social care engagement are unlikely to lend themselves to a single templated record and this proposal is unlikely to be workable in practice.

The consultation also proposes to create a national social care system enabling all relevant providers to access a single version of the truth. While attractive in theory, the practical challenges of delivering such a system would be immense. As noted above, the implications of joint data controllership would need to be considered together with clear direction around the responsibility for maintaining 'the record' long term. Consideration would also need to be required around responsibility for the accuracy and updating of information, and how access could be audited, managed and maintained. Again, noting the complex landscape of organisations involved in the delivery of social care services, all of which would be likely to require a bespoke view and need to be able to add information to a national record, the management of access control on a national scale would be resource intensive. This assumes that a suitably secure national system could be identified and accessed by so many partners individually. There would also be immense technical challenges involved in extracting data from the many existing line of business applications used to store this data at present.

In addition, there are concerns that given the range of matters recorded on these systems, sometimes minor in nature and the lack of a certainty in the minds of the individuals concerned as to who would access, why they would access it and when their information will be accessed , the sharing of the information through the use of the single record would be neither proportionate nor in accordance with law for the purposes of Article 8 of the ECHR

for the same reasons set out in the Supreme Court decision of *The Christian Institute and others v the Lord Advocate* [2016] UKSC 51

Data Subject rights (lawful processing, access, rectification, erasure)

The consultation presents a confusing picture in terms of lawful processing in that it suggests that individuals will be provided with a degree of control regarding the circulation of their information while also proposing to mandate the provision of certain information to the National Care Service through legislation.

It is recommended that considerable consultation is undertaken with social care clients and society more generally in order to better understand the balance between individual desires to only tell their stories once (supported by a national record) versus a desire to maintain control over information flows. This consultation would inform the necessary data protection impact assessment which would accompany any move towards a national record or system.

References to seeking consent from data subjects around when and what personal data is shared about them would appear to misunderstand the constraints placed upon public authorities in the use of consent as a lawful basis of processing personal data which is necessary for the delivery of its tasks. A National Care Service must ensure that it is fully transparent with data subjects around the level of control they will effectively have over their personal data and permission to be referred to a social care service should not be confused with autonomy over the dataset necessary to be shared to deliver that service. Equally, where personal data will be processed as necessary to an organisation's public task or legal obligation, this must be clearly presented to data subjects without suggestion that they have a level of control beyond their statutory right to object.

The practicalities of operating data subject rights, particularly in terms of access, rectification and erasure, should also be considered in the context of a national system. There are also practical issues such as a remote, centralised controller of data not being able to appreciate particular sensitivities which might result in a controller with staff more immediately familiar with a case identifying material as being exempt from a subject access request, for example.

6. Workforce

Consideration should be given to the following issues in finalising proposals:

- The proposals do not address the current workforce issues. The proposals need to focus on improving outcomes. Issues are arising out of the inability to recruit the right staff.
- The TUPE arrangements and harmonising of contracts, pensions and conditions of service if staff are to be transferred from NHS and Councils into a new organisation.
- Will national commissioning lead to LA staff TUPEing to independent sector if the NCS commissions them to provide services currently provided in house? Have Trade Unions been sighted on the thinking given the equal pay claims settled in recent years?
- There are issues regarding national job evaluation framework – if the function is updated, staff can't stay on local authority employment due to equal value/ pay comparisons.
- Expectations on parity of pay and conditions will be raised for those working for third & Independent providers
- Lack of clarity about whether CHSCBs will actually employ many staff directly, suggestion in the consultation is that it would be extremely limited. Will staff remain employed by LAs/NHS? Is it legally possible for staff to remain employed by LA's when it doesn't hold the statutory function. Will staff be employed by the NCS and then services commissioned from them? How do independent and third sector fit in?

7. Other Issues

(i) Accessing care and support

(pages 16 to 27 of the Consultation paper)

This section overall lacks clarity and purposeful information on the proposals made to make a detailed and informed comment on the proposed accessing of care and support and the use of the Getting It Right for Everyone National Practice Model and how this might impact public bodies, health and social care staff and service users.

An explanation as to how a national care service would be resourced needs to be explored. The financial model in which the national care service is to follow will determine the finance available to each local area and impact on the care that individuals will be able to access in that area. There also needs to be clarity on whether or not it is intended that the national care service shall be fully funded and what that looks like in a practical scenario. Where care is not fully funded, then eligibility criteria will still have to be applied to individuals to determine who is entitled to free care and who has to contribute to the care that they receive.

The idea of a single planning process is not a new concept and there has not yet been a successful way or plan of implementing this, even on a smaller scale between internal organisational departments. There is a lack of clarity around the resource implications in implementing this single plan process and raises a lot of issues with the expectations and reliance on staff to deliver under a new practice model.

The Self-Directed Support legislation is a complex piece of legislation to navigate for professionals in social care, who work regularly with the legislation. So, it is difficult to understand how a vulnerable individual who is seeking support through the legislation would successfully be able to do this without comprehensive support and guidance from a professional. There is a lack of clarity on how a national care service would improve this without knowing how the complexity of the legislation and its eligibility criteria would be addressed.

An example of the differences that occurs in an island setting, where health and social care is provided in a different way from Local Authorities on the mainland.

For example, in the Shetland Islands, care is delivered using a structure that is locally designed and facilitated by the Local Authority. This localised approach has created high quality care provision for service users in the Islands. The organisation of the care sector in Shetland is a major factor in the delivery of positive results for those accessing services and support. All but one care home in Shetland is run by the Local Authority. Additionally, all residential and supported living and adult outreach services are provided by the Local Authority. This means that there is already a robust philosophy of partnership working between Care and Social Work Services in the provision of personalised suites of care for vulnerable adults and families.

Further, Shetland currently provides person-centred care which takes into account the rights and views of the service user. This “no one size fits all” principle is in line with the views put forward within the Independent Review of Adult Social Care in Scotland. The local approach to service planning and provision means that those involved in supporting individuals have a significant amount of local knowledge which can be utilised in support of the most vulnerable in the community.

It is of significant concern that, in adopting the proposals set out in the National Care Service Consultation which point to centralisation, a negative impact will be felt in terms of the ability to provide as swift, Islands-centric response to care needs and, as a result, it will not be possible to sustain the current high levels of quality in care provision due to the elevated costs of providing care in remote and rural locations, uncertainty and instability for the workforce due to potential centralisation/depletion of that workforce and loss of knowledge of local networks and services which are vital in supporting vulnerable individuals in isolated locations.

(ii) Residential Care Charges

(pages 45 to 48 of the Consultation paper)

The Residential charging regime is mandated by UK primary and secondary legislation: the National Assistance Act 1948; and the National Assistance (Assessment of Resources) Regulations 1992 (as amended) UKSI 1992/2977; which is underpinned by statutory guidance. This legislation is based in full-cost recovery by the LA. However, residential charging schemes is a local decision for partnerships, reflecting local prioritisation to meet local circumstances. For example, in some council areas where residential charges are considerably higher than the norm, partnerships will make grant funding available to meet the additional costs. We consider that any charging scheme requires not only to be effective in order to supplement the grant based funding available, but also to be sufficiently fluid to continue to address those local priorities and circumstances.

The consultation paper does not contain any proposal for how a National Care Service would improve that position and we are concerned that there will not be sufficient flexibility to address different costs in different areas such as between cities and rural areas.

The rules of means charging embodied within legislation are well established. Several legal challenges in respect of the application of the legislation has contributed further to the certainty and consistency of approach of those rules, for example, the approach to notional capital; disposal of assets by a person in residential accommodation. Given the lack of detail in the consultation as to potential changes to means testing which Scottish Government may be considering, it is difficult to comment further.

As detailed above, the rules of residential charging are underpinned by the National Assistance Act 1948. This not being Scottish legislation, consideration should be given as to the Scottish Government's legislative competence in this area.

(iii) Complaints and Putting Things Right

(pages 41 to 44 of the Consultation paper)

There is already in existence a complaints handling body responsible for overseeing the complaints process in Scotland, which provides a consistent model for public bodies to adhere to. The SPSO already has set procedures in place for social care, health and the IJB.

Any new complaints handling procedure introduced would be comparable to the current model in place with the SPSO. The consistency in which the complaints handling procedure is applied by public bodies is an entirely separate issue, but one that will not be resolved by the introduction of a new standardised procedure.

The legal authority to create a model complaints handling procedure for public bodies currently lies with the SPSO. No other body has been given that legal responsibility, so it is challenging to understand why the national care service over any other regulatory body should be afforded that power. Alternatively, the role and remit of the SPSO could be altered

to produce a singular complaints handling procedure based on the current principles adhered to by public bodies that the national care service could follow and apply.

There is the potential to introduce a commissioner into the process for health and social care, but this is already within the remit of the SPSO in Scotland. However, the role of commissioners and regulatory bodies, e.g. Office of the Public Guardian & Mental Welfare Commissioner in similar circumstances are not responsible for administering the complaints handling procedure. Therefore, it is difficult to understand why this should be introduced into health and social care. There are already a range of other regulatory bodies that already exist who are responsible for looking after vulnerable adults' rights and any further regulatory action would appear unnecessary.

The NCS would effectively be investigating complaints about itself, this would not be a good and proper governance model. There does not appear to be any basis within the Feeley report or the consultation document as to why this proposal would be more beneficial than the SPSO continuing to handle complaints.

There is a significant lack of clarity within the proposal to make any informed comments on how a measure of experience of those receiving care and support would assist in the measuring of the quality of services provided.

(iv) Benefit of In House Lawyers/ Risk of not having In House Lawyers

As a body representing local authority solicitors, SOLAR is particularly interested in how legal advice will be provided to the National Care Service, and whether advice will be provided in house, sought from external providers or whether other alternatives are being considered.

We consider that there are considerable benefits to legal advice being provided by a local authority in house legal team, as follows:

- Knowledge of how local authorities work and a depth of knowledge of wider areas such as social work, education, housing, procurement and data protection for

example. The splitting up of legal teams and knowledge will result in poorer legal advice for both the NCS and the local authorities.

- Having easy accessible legal knowledge results in early intervention and prevention of issues arising.
- As a member of the organisation, in house lawyers also fully understand the strategy, objectives and priorities of the organisation and consequentially, will deliver not only bespoke legal advice which addresses the particular situation, but which also considers the “bigger picture” from a legal perspective which that situation might present.
- Situated with other teams within the organisation, in house lawyers are an integral part of the business, proactively identifying legal issues at the outset and contributing to not only legal advice, but to policy development, risk management and business development.
- Understanding the objectives and needs of the business also allows in house lawyers to be better placed to focus on solutions, whilst protecting the organisation from risk.
- The absence of chargeable hours targets allows in house lawyers to focus fully on the task in hand, as well as the wider issues.

SOLAR

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