

Health, Social Care and Sport Committee
Scottish Parliament
Edinburgh
EH99 1SP

[by email only]

11 October 2024

Dear Committee

Follow-up to oral evidence on the National Care Service (Scotland) Bill

Thank you for inviting us to provide oral evidence on Stage 2 of the National Care Service (Scotland) Bill on 1 October 2024, and for the opportunity to follow up in writing on a number of points raised during the session.

In our evidence, delivered by the Commission's Executive Director Jan Savage, we discussed a number of areas where we consider that further Stage 2 amendments could provide the opportunity to strengthen the impact of the Bill on promoting the human rights of the people who will engage with a National Care Service, namely by:

- Amending the language of Section 1(c) to better reflect human rights standards, in particular, **the right to independent living** under Article 19 CRPD
- Inserting a new Section to clarify the **legal effect of the Principles**
- Amending Section 14 to **make clear the international human rights standards of access to justice that should be reflected in a complaints system** – that is, adequate, affordable, timely and effective
- Inserting a new Section to clarify the **effect of the Charter**
- Inserting a new Section to provide for a **right to independent advocacy**

As requested, the Commission is pleased to offer further detail on each element in writing.

Bridgeside House, 99 McDonald Road, Edinburgh, EH7 4NS
0131 297 5750

hello@scottishhumanrights.com
www.scottishhumanrights.com

1. The right to independent living

We welcome the clarification of the meaning of “human rights” by reference to international human rights treaties and reference to the concept of “living independently in the community” at Section 1(c)(ii). However, as discussed in our evidence, we believe that the Bill could be strengthened by clearer articulation of the specific meaning of “living independently”, to ensure accountability against specific standards articulated by the UN in relation to Article 19 of the UN Convention on the Rights of Persons with Disabilities.

For example, the Section could be amended to read “best addressed by the provision of support for an individual living independently in the community *in terms of Article 19 CRPD*”. This provides direct read across to CRPD standards rather than leaving open to interpretation what the phrase “living independently” means which would assist with interpretation should the application of the Principles be the subject of judicial consideration. Doing so here would have impacts across the Bill and have a direct effect on commissioning and standards, as various Sections make clear that the NCS National Strategy, local strategies and Social Care Standards would have to give effect to the Principles.

Recommendation: insert wording to define independent living with specific reference to Article 19 CRPD.

2. Effect of the Principles

Whilst the Principles at Stage 2 are stronger in their articulation of human rights standards, there remains no statement on the face of the Bill of the effect of the Principles to provide clarity on how they may be applied in any judicial proceedings and improve access to justice.

There is precedent for this in other legislation to establish new public services. During the passage of the Social Security (Scotland) Act 2018, an amendment added a section to establish the effect of the Scottish social security principles:

2 Effect of the principles

(1) *The Scottish social security principles are set out in section 1 so that—*
(a) *they can be reflected in the Scottish social security charter as required by section 15(3), and*

(b) the Scottish Commission on Social Security can have regard to them as required by section 97(6).

(2) A court or tribunal in civil or criminal proceedings may take the Scottish social security principles into account when determining any question arising in the proceedings to which the principles are relevant.

(3) Breach of the principles does not of itself give rise to grounds for any legal action.

Ref: Section 2 of the Social Security (Scotland) Act 2018:

[Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

This allows for the Principles to be considered in legal proceedings, such as judicial review, and thus would improve accountability.

Recommendation: Insert a section as above which clarifies the effect of the National Care Service Principles in law.

3. Complaints

Despite the Committee's earlier focus on this, further detail on a complaints service has not been added by the Scottish Government's proposed Stage 2 amendments.

In our Stage 1 evidence, we highlighted that accountability is a core element of a human rights based approach and we called for adequate and effective remedies when things go wrong, as is required under international human rights law.

Much of the detail on how the complaints mechanism will operate is missing from the Bill, and stakeholders such as SPSO have warned that the proposals envisaged by the Scottish Government risk adding further complexity to a complaints landscape that is already challenging to navigate.

We appreciate that the Scottish Government plans to co-design the complaints system. While co-design is to be welcomed, the broad attributes that any complaints mechanism must have should be set out clearly on the face of the Bill, and be subject to full parliamentary scrutiny. This would provide clear parameters for the process of co-design, ensuring that the resultant system complies with human rights best practice.

International human rights law tells us that remedies must be:

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- Adequate – this includes transparency and appropriate advice and advocacy;
- Affordable;
- Timely – no unreasonable delays and urgent when needed;
- Effective – for example, this includes appropriate compensation when a complaint is upheld.

In its Stage 1 report, the Committee called on the Scottish Government to ensure that any complaints system reflects the following key features in its design:

- It enables complaints to be resolved locally wherever possible and only to be escalated to a national system if no local resolution can be found;
- It should be independent;
- It should make suitable provision for penalties and redress in the event a complaint is upheld;
- It provides access to appropriate support for people making a complaint.

The Commission shares the Committee’s view that any process that is co-designed should be made subject to a procedure that would allow for enhanced parliamentary scrutiny.

Recommendation: Add detail on the face of the Bill around the key attributes required by an effective complaints mechanism, as outlined above, and include stakeholders such as the SPSO in the development of more detailed proposals around complaints.

4. Effect of the Charter

As discussed in our evidence, we believe the Bill would be strengthened by providing clarity on the face of the Bill about the legal effect of the Charter.

Whilst we do not take issue with the content of the Charter and the co-design process used to develop it, the Bill does not include provisions which will provide redress or enforcement, which is a necessary aspect if the Bill is to achieve the human rights based approach that is intended.

The Bill states that “Nothing in the charter is to— (a) give rise to any new rights, (b) impose any new responsibilities, or (c) alter in any way an existing right or responsibility.” This is in contrast to the model in the Social Security (Scotland) Act 2018 which both created a Charter, and specified the effect of the Charter. This was a strengthening provision added in by amendment; while it does not create a legally

enforceable right, it does allow the Charter to be brought in as relevant to legal proceedings. The relevant section of that Act is copied below:

19 Effect of the charter

(1) A court or tribunal in civil or criminal proceedings may take the Scottish social security charter into account when determining any question arising in the proceedings to which the charter is relevant.

(2) Breach of the charter does not of itself give rise to grounds for any legal action.

Section 19 of the Social Security Scotland Act 2018

[Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)

Recommendation: Add a section mirroring Section 19 of the Social Security (Scotland) Act 2018 to give legal effect to the National Care Service Charter.

5. Independent advocacy

The effect of Section 13 of the proposed Bill is that by regulation, Scottish Ministers **may** make provision regarding advocacy but are not required to. Taking the comparator of social security legislation again, that Act placed a right to advocacy on the face of that legislation, ensuring that all disabled people who are eligible for support via Social Security Scotland have a legal right to advocacy.

10 Right to advocacy

(1) Every individual to whom subsection (3) applies has a right of access to independent advocacy in connection with the determination of the individual's entitlement to be given assistance through the Scottish social security system.

(2) It is the duty of the Scottish Ministers to ensure that independent advocacy services are available to the extent necessary for that right to be exercised by the individuals who have it.

(3) This subsection applies to an individual if, owing to a disability, the individual requires an advocate's help to engage effectively with the process for determining entitlement to be given assistance through the Scottish social security system.

(4) For the purposes of this section—

(a) "advocacy services" means services of support and representation that are made available for the purpose of enabling an individual to whom they are provided to have as much control of, or capacity to influence, the decisions that determine the individual's entitlement to be given assistance

*through the Scottish social security system as is, in the circumstances, appropriate,
(b) advocacy services are independent if they are provided by a person other than the Scottish Ministers*

Section 10 of the Social Security (Scotland) Act 2018
[Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

Recommendation: Add an amendment to mirror Section 10 of the Social Security Scotland Act 2018 to include the right to independent advocacy in the National Care Service. The Committee may wish to consider further whether this should be extended beyond disabled people and include older persons and other groups.

The Commission will be very pleased to continue to assist the Committee in its ongoing consideration of the National Care Service Bill at Stage 2 as it impacts on the promotion of the human rights of people in Scotland.

Yours sincerely



Professor Angela O'Hagan
Chair