



25th June 2024

Subject: Urgent concern over the 'reserved procurement process' – NCS Bill Stage 2

Dear Mr Gray MSP,

Representing over 400 organisations delivering residential care, nursing care, day care, care at home and housing support services, Scottish Care continually seeks to support the independent sector on behalf of providers and those accessing care and support through them.

In this capacity we have reviewed the [Government's proposed Stage 2 amendments of the NCS Bill](#), and have significant concerns over the continued inclusion of Section 41 (reserving right to participate in procurement by type of organisation) and its efforts to limit contracts to certain businesses or suppliers.

Whilst the Government has noted the expansion of the reserved process will not require all contracts to be awarded only to third sector bodies, and use of the reserved procurement process is a choice which will not prevent profit-making providers bidding for contracts through other procurement processes, there are grave unintended consequences of any legislation that serves to limit the choice of social care provision. These are detailed below:

- Adhering to the Social Care (Self-directed Support) (Scotland) Act 2013

Every person who requires social care and support has the right to choose a provider for their care. Statutory provisions that give precedence to commissioners' choice of procured service over the expressly desired service of the individual, would be a denial of this legal right.

- Exacerbating market failure

Given an already imbalanced and monopsonic social care market, Scottish Care opposes any extension to public bodies' ability to purchase services from suppliers of limited criteria. A proper mixed market model is essential.

In our recent briefing report ([Myth-Busting: The First Steps of The Care Revolution](#)), Scottish Care detailed the ongoing sustainability crisis facing the independent sector, due to imbalanced commissioning procedures. Legislative efforts to further limit procurement options and subsequent funding will worsen provider sustainability and their ability to deliver person-led, human rights-based care. This will particularly be felt in rural communities without access to an economy of scale. Compounding this, the amendment will limit other sources of funding through disincentivising much needed investment in the independent sector's existing provision.

The [New Deal for Business](#) was designed to support business to thrive, with fairness at its heart. Arbitrary classifications of independent care providers would result in an inherent unfairness for these vital community organisations. Scottish Care also notes the prevalence of women-led business across the independent social care sector, and the subsequent disproportionate impact of the reserved procurement process on these. As a matter of urgency, and in keeping with the New Deal for Business, a Business and Regulatory Impact Assessment and/or Equality Impact Assessment must be conducted prior to formalising this amendment to fully assess these impacts.

**Letter to Neil Gray - Cabinet Secretary for Health and Social Care of Scotland
Cc Maree Todd, Minister for Social Care, Mental Wellbeing and Sport; Health, Social Care and Sport Committee**

- Unethical Commissioning

Scottish Care welcomes the Scottish Government's drive towards ethical commissioning and continues to support its implementation through our ['Ethical Commissioning and Procurement'](#) project. In this regard, Scottish Care was buoyed by [comments from Maree Todd MSP](#), at our recent conference:

"Ethical procurement offers a real opportunity because we've got a mixed market economy. It gives us an opportunity to make sure that the important thing is not the ideology – so not the business, not whether it's council-owned, not whether it's third sector-owned: it's about the quality of care that's delivered."

Given this, Scottish Care must re-emphasise the position of the Health, Social Care and Support Committee, who stressed the *"inherent contradiction between reserving the right to participate in procurement by type of organisation, and the principles of ethical commissioning"* (NCS Bill Stage 1 [Recommendation Report](#) – Paragraphs 89 - 92). Such a contradiction impedes any efforts to implement ethical commissioning.

- Incompatibility with best procurement practice

Section 41 conflicts with the Scottish Government's own Procurement of [Care and Support Services: Best Practice Guidance](#). Page 34, Paragraph 8.21 states:

"Evaluating existing arrangements for delivering the service against best value principles will require a public body to consider: whether the service is effective and of good quality, what it costs and whether it is cost-efficient, whether it promotes equal opportunities, [and] whether it contributes to sustainable development."

The amendment as it stands will serve to bypass necessary checks to procurement procedures by providing the ability to discount eligible providers based on arbitrary categorisation of their business model.

Given the impact of this amendment on social care provision across the country, we kindly request a meeting as matter of urgency.

The NCS should enable businesses to provide adult social care rather than impede them. Scottish Care therefore stresses the need to work collaboratively with yourself to address this amendment, noting your previous role as Cabinet Secretary for Wellbeing Economy, Fair Work and Energy, alongside your current role as Cabinet Secretary for NHS Recovery, Health and Social Care.

Your Sincerely,



Karen Hedge
Deputy CEO, Scottish Care

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