scottishcare

The voice of the independent care sector in Scotland

**Public Bodies (Joint Working) (Scotland) Act 2014**

**Draft Regulations and Orders Relating to Public Bodies (Joint Working) (Scotland) Act 2014 – Set 2**

## Introduction and General Points

1. Scottish Care welcomes this opportunity to contribute to the consultation on Set 2 of the draft Regulations and Orders relating to the Public Bodies (Joint Working) (Scotland) Act 2014. Please find below some points of general comment together with our response to the specific questions as requested.
2. Scottish Care is the representative body for independent social care services in Scotland. This encompasses private and voluntary sector providers of care home, care at home and housing support services across the country. Scottish Care counts over 400 organisations as members, which totals over 830 individual services. Scottish Care is committed to supporting a quality orientated, independent sector that offers real choice and value for money. Our aim is to create an environment in which care providers can continue to deliver and develop the high quality care that communities require and deserve.
3. In relation to older people's care, this sector provides 85% of the care home places in Scotland and over 50% of home care hours. There are more older people in care homes any night of the week than in hospitals - as at 31st March 2013 there were 911 care homes for older people providing 38,508 beds to 32,888 residents any night of the year, with 88% of these residents located within the independent sector.
4. Independent care and support services in Scotland have an annual turnover of over £1bn. Over 60% of Scotland's total social services workforce are employed in care homes, care at home and housing support services and of these, nearly 79% are employed by the voluntary and private sectors. The independent sector has become the largest provider in social care in Scotland (41%) and this development has meant more choices for people and more savings for the public purse, but correspondingly the need for a more highly skilled workforce. The thrust of integration has to reflect this and focus on the *joint working* of all service provision and not just of the *public bodies.*
5. Scottish Care on behalf of the independent sector has been the conduit for representation for the Reshaping Care for Older People programme and the Change Fund. In relation to health and social care integration in particular, Scottish Care is involved in a range of Scottish Government oversight groups including the Ministerial Strategy Group, Delivery Group, National Steering Group for Joint Strategic Commissioning, Development of Outcomes Group, Workforce Group and the Integration Act Implementation Group.
6. Scottish Care particularly welcomes the opportunity offered by the Regulations to reinforce the policy commitment to full partnership working. We accepted that there was less scope to fully address the involvement of the third and independent sectors on the face of the Public Bodies (Joint Working) (Scotland) Bill. It is therefore critically important that the secondary legislation strengthens the focus on wider partnership with the third and

independent social care sectors, who are the majority providers of social care for older people in most partnership areas.

7. From a provider perspective we remain concerned, as Scottish Care initially expressed in its response to the Bill consultation, that the legislation contains some inconsistent and possibly injudicious use of language in referring to the private and voluntary sectors as *commercial and non-commercial providers of social care.* In relation to Reshaping Care the terminology used has been *the Independent and Third sectors*, and it would at least be consistent to continue that usage. We note that this is also the terminology used in the Policy Memorandum and the Regulations' accompanying text. Given they are all providing public care, the most neutral distinction would be between *statutory and non-statutory* and then to use *private* and *voluntary* if there is a particular need to distinguish further within the non-statutory category. By continuing to distinguish sectors in this unhelpful way, Scottish Care members are concerned that its implications will put the independent sector at a distinct disadvantage in local relationships and partnership working. In reality, the independent sector can often offer high quality care services in a way that provides value for money for the public sector. To the extent that the term *commercial* is useful it would apply to all care providers, given their need to operate effectively as businesses, to cover cost, and to achieve some element of return for reinvestment. If these terms have been used for reasons relating to legal recognition in the legislation, we feel it is necessary for the accompanying guidance to provide clarification on what is meant by them.

**Scottish Care's Response to Questions Posed in the Consultation**

**Annex 1(D)**

1. **Do these draft Regulations include the right groups of people?**
   Yes.

2. **If no, what other groups should be included within the draft Regulations?**
   N/A

3. **Are there any further comments you would like to offer on these draft Regulations?**
   A notable absence in the groups of standard consultees is the regulatory bodies, of which the Care Inspectorate and the Scottish Social Services Council are of most significance to the independent sector. Scottish Care's members all operate regulated social care services and feel that the proactive involvement of the regulatory bodies is important at an early stage in strategic and locality planning, particularly as these bodies can act as real barriers or facilitators to delivering care and support differently. Scottish Care recognises that some of the regulatory bodies also have scrutiny roles in health and social care integration, but within the Regulations and the Guidance there must be clarity of their critical role at local strategic planning and delivery levels. This will be of crucial importance when partnerships move forward and identify new models of care to be provided in an area. An effective vehicle whereby regulators can comment on proposals at an early stage and have regular

positive dialogue with the partnership can make a difference to the flexibility, effectiveness and efficiency of a new service or form of provision.

The importance of the methodology of consultation must be clearly recognised in the Regulations. It is essential that integration authorities are aware of and engaged with all relevant groups of consultees at the various preparation and planning stages. By this, we don't just mean any additional groups not listed in the Regulations but also the different fora that exist and operate within the prescribed groups. We welcome the inclusion of commercial and non-commercial providers of social care as standard consultees (despite afore-mentioned concerns about the terminology). However, it is not enough for integration authorities to identify only a section of these consultees to engage with when making decisions. For instance, it will be necessary for integration authorities to continue to engage with Scottish Care and other national bodies as recognised representatives of a sector, yet it is of critical importance that they also expend sufficient time and energy in identifying local bodies to involve in consultation. This can be done by making use of existing care home forums, home care area meetings etc, but it must be recognised that the participation of social care providers in an area is of equal importance to the involvement of users and carers who interact with these services.

Furthermore, the Regulations must incorporate a mechanism of governance and accountability in relation to how views elicited from consultation exercises are taken on board by integration authorities. Consultation is not enough in itself to ensure a joined-up, inclusive and effective approach to the planning and implementation of health and social care integration if there are not adequate means by which contributing groups can see evidence of their views being taken on board, or clear explanation as to why they have not. Transparency and openness will be key to the success of local integration and if people feel that they have not been given enough information, are excluded from meaningful decisions or are treated with an element of tokenism then the legislation's policy ambition will not be achieved. Scottish Care therefore strongly believes that the Regulations must include a requirement on integration authorities to provide a formal response to the inputs received from consultees.

**Annex 2(D)**

1. **Are there any additional non-voting members who should be included in the Integration Joint Board?**
   Yes.

2. **If you answered 'yes', please list those you feel should be included:**
   The glaring and untenable omission from the list of non-voting members is an independent sector representative. If the policy rationale is to improve services, provide seamless care and support regardless of sector and to make best use of resources, this simply cannot be

achieved without the independent sector having genuine and equal involvement at all levels of decision-making, planning and implementation.

As afore stated, the independent sector currently provides 85% of care home places and 50% of home care hours across Scotland. Aside from the sheer levels of care and support provision which alone make it impossible to exclude the sector, it offers a wide range of knowledge and skills which make it a valuable partner. With statutory bodies continuing to divest in social care, the independent sector provides a real option for maximising resource use and investment to provide innovative, quality services.

However, it can only do so if it has a seat at the table at the highest level of decision-making. We know from experience that instances where high level decisions on the direction and delivery of care and support are made without providers, barriers and concerns are often encountered at the implementation level which would have been easily surmountable had the independent sector been involved in the making of those early decisions. By failing to secure the sector's place on integration joint boards, the opportunity to make use of its knowledge, expertise, skills and resources will be missed. What's more, if the independent sector is not involved at a governance level and able to accept a degree of corporate responsibility for the success of integration at a local level, there is a greater risk of oppositional and reactionary responses to decisions which have been taken without the sector's involvement. It is only through the sector's full participation in planning and setting the strategic direction that the most effective local proposals can be agreed and effected to deliver positive outcomes – both for integration itself and for the health, wellbeing and lives of local people.

It must be clearly noted that the sector is willing and able, indeed enthusiastic, about being a *positive* partner in local integration arrangements and it has demonstrated its ability to be a responsible partner through the Reshaping Care for Older People programme and the Change Fund. We know that this partnership has been welcomed and valued by other sectors at a local level and to fail to embed the independent sector's involvement in joint boards through the Regulations would jeopardise progress, continuity and opportunities which have resulted from these constructive working relationships.

It is not enough for integration authorities to have the *option* of inviting the sector on to joint boards. The sector is actively involved and engaged at a local level in terms of transitional arrangements across the country but it is clear that in some partnership areas, statutory partners are waiting to see what the Regulations say in order to determine who will be invited to join joint boards. To deliver integration successfully in line with the legislation's policy ambition, there must be consistency across the country and this cannot be guaranteed by leaving such an important factor to local determination. If service delivery and strategic planning are to be truly joined up, the independent sector absolutely must be included as a prescribed non-voting member on integration joint boards.

3. **Are there any other areas related to the operation of the Integration Joint Board that should also be covered by this draft Order?**

Scottish Care believes that the Regulations need to be strengthened in relation to voting, particularly the distinctions between voting and non-voting members and what governance there will be around decision-making in this way. There is a concern that non-voting members may not be treated as full participants on joint boards given their lack of voting rights, therefore a statement within the Regulations to emphasise their equal role in everything but unavoidable statutory decisions is vital to alleviate these concerns. We also want to see reference to a feedback model and principles for it, whereby any proposal put forward for consideration by non-voting members will be dealt with in a way that is transparent and any decisions are justified and communicated clearly.

The Regulations must also be amended to recognise that the power to select non-voting members of integration boards must reside with the representative groups themselves and not with integration authorities. For many of the prescribed member groups, their constituents will be disparate, varied and with varying degrees of capacity to engage at a strategic level. It is therefore only common sense that membership groups themselves, who have knowledge and expertise in their area, are given the authority to select who would best represent their interests and experiences on the joint board. This method of selection would be of most benefit to the integration authority, as it can be better assured of having the right people at the right tables.

To extend this important point further, it is the view of Scottish Care and its members that the Regulations must make provisions for the deputising for attendance at integration joint boards. This is of particular pertinence to non-voting members whose capacity to attend meetings may, on occasion, be limited for genuine reasons. By allowing a secondary representative who could attend meetings in the absence of the formal board member, a degree of continuity of representation is enabled. This means that no groups would be excluded from important decisions and the integration authority would have assurance that any agreed direction had been discussed with all relevant parties within the joint board. It would also support the sustainability of engagement for smaller but no less important groups in a local authority area.

4. **Are there any further comments you would like to offer on this draft Order?**

It would be helpful for the section on 'Expenses' to be slightly amended to clarify that the reimbursement of expenses is available to *all* members of the integration joint boards. Whilst we believe this is the intention, this amendment would serve to remove any ambiguity therefore ensuring that all members, some of whom may struggle to attend without some financial recompense, are treated equally and consistently across the country.

Finally, Scottish Care feels there needs to be some thought given to who the 'staff-side representative' is referring to on joint boards, as this is not clear within the Regulations or

the accompanying explanatory text. We would strongly argue that any staff-side representative has to reflect the whole health and social care workforce in a given area including those in the third and independent sectors.

**Annex 3(D)**

1. **Do you agree with the proposed minimum membership of the integration joint monitoring committee, as set out in the draft Order?**
   No.

2. **If you answered 'no', please list those you feel should be included:**
   See response to Annex 2(D).

3. **Are there any other areas related to the operation of the integration joint monitoring committee that should also be covered by the draft Order?**
   As above.

4. **Are there any further comments you would like to offer on this draft Order?**
   As above.

**Annex 4(D)**

1. **The draft Regulations prescribe the groups of people that should be represented on the strategic planning group. Do you think the groups of people listed are the right set of people that need to be represented on the strategic planning group?**
   Yes.

2. **If no, what changes would you propose?**
   N/A.

3. **Are there any further comments you would like to offer on these draft Regulations?**
   The use of the term: 'social care professionals', to define a representative group is ambiguous and requires clarification within the Regulations. A large number of professionals working in social care do so in the independent sector as carers, nurses, homecare workers and in many other roles. We would hope that this is who is being referred to, albeit unclearly, and welcome the decision to capture the views of these crucial members of the health and social care workforce. As this group is at the frontline of service delivery and serve as the visual, practical manifestation of care and support for those in receipt of services and their families and carers, it is absolutely critical that they are consulted with effectively to ensure proposals and plans are meaningful, deliverable and effective in achieving the ambitions of integration. In light of this, integration authorities

must be absolutely clear how they are going to significantly involve and engage this vast and disparate workforce in decision-making, and the Regulations and accompanying Guidance must reflect this.

Scottish Care welcomes the emphasis placed on the role of the independent sector in strategic planning. Indeed, as highlighted earlier, it is impossible to plan, develop and deliver efficient and effective care and support services without the central involvement of the majority provider of these services in Scotland and without utilising the capacity, skillset, resources and flexibility that this sector can offer to local partnerships. However, we remain concerned about the use of language in reference to the independent sector's involvement. The Regulations' accompanying text states that integration authorities must 'treat the third and independent sectors as key partners', without any explanation as to what this means in practice. Whilst the level of other groups' involvement is spelled out more clearly, the third and independent sector's role is left open to local interpretation of what 'key partners' look like strategically and operationally. It is also important to have consistency and clarity around the use of terms such as 'treat', 'embed' and 'involve', which are currently used vaguely and interchangeably and which are feared to reflect a tokenistic level of engagement. To alleviate these concerns, to support integration authorities to understand and implement the intentions of the legislation correctly and to best utilise the capabilities of these sectors, the Regulations and Guidance should use consistent language throughout.

**Annex 5(D)**

1. **Do you agree with the prescribed matters to be included in the performance report?**
   Broadly, yes.

2. **If no, please explain why:**
   Whilst Scottish Care generally agrees with the prescribed matters, there is a fundamental flaw in terminology in the accompanying text to these Regulations. This error is in the use of the phrase 'institutional to community based care and support'. Whilst the intention is positive, the use of the word 'institutional' is confusing and open to misinterpretation. It is generally accepted that 'institutional' refers to acute services and, correctly, there needs to be a shift in resource away from these services to preventative, community-based support. However it can also be incorrectly used to indicate care home services. Scottish Care and other bodies have argued for many years that care homes are community assets and not examples of institutional care and therefore cannot be referred to as such. Indeed, the accepted terminology is reflected in the legislation's policy rationale – a care home is considered to be 'home, or a homely setting' and is a real asset and resource to how we ensure people receive the right care, at the right place and at the right time whilst preventing unnecessary acute admissions. Whilst the phrase is not used in the Regulations, if it is incorrectly and inconsistently carried over to the accompanying Guidance, there is a very real risk that local strategic direction and resulting performance reports against this will

be fundamentally flawed in their focus. We therefore advice that any future references to the direction of shifting resources is from *acute services* to community based care and support.

Secondly, the requirements in relation to reporting on financial performance appear to be far too vague and open to unhelpful manipulation. By simply requiring particular information relating to underspend or overspend, performance reports will not succeed in providing any meaningful detail on how this relates to the achievement of the overall aims of integration. There can be underspend, but this does not mean that resources, including financial resources, have been allocated wisely or to positive effect. Instead, information about financial performance needs to be reported against the overall aims of a partnership's approach to integrating health and social care, detailing why certain decisions have been taken and how these have been implemented. It is central to this financial reporting that meaningful information is included relating to impact, value for money and return on investment. Only by adopting this approach will Scottish Ministers, local partners and local people be able to evidence progress and provide comparisons with other years and other partnerships.

3. **Are there any additional matters you think should be prescribed in the performance report?**
   Yes.

4. **If yes, please tell us which additional matters should be prescribed and why:**
   The importance of performance reports lies not only in what is reported on but how these reports are produced, commented on and what accountability there is back to consultees who have been involved in shaping the progress of integration at a local level. In order for Scottish Ministers to be able to accept the accuracy and credibility of these performance reports, they must prescribe that the integration authority details how it has developed each report collaboratively with local partners, how it has taken on board the views of others and the extent of its local publication. It is absolutely imperative that performance reports are not developed in isolation by integration authorities but that they are an accurate annual account of local integration being jointly developed, approved and delivered at all levels. This also reemphasises the importance of ensuring that the correct groups are represented on the integration joint board, including the independent sector, in order that the ongoing process of performance reporting is effectively monitored and all parties accept a degree of corporate responsibility both for the report and the overall development of health and social care integration locally.

5. **Should Scottish Ministers prescribe the form that annual performance reports should take?**
   Providing the afore-mentioned points relating to content and methodology are addressed within the prescribed matters, it would be unnecessary and unhelpful for Scottish Ministers to insist on a standardised reporting format. Instead, they should allow for some flexibility

so that partnerships can report on performance in a way that is both meaningful and reflects local factors.

6. **If you answered yes, what form should Scottish Ministers prescribe?**

   N/A.

7. **Are there any further comments you would like to offer on these draft Regulations?**
   No.