ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Adult Support and Protection (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

POLICY CONTEXT

2. The Bill is in 4 parts. Part 1 implements the policy proposals set out in the Scottish Executive consultation paper Protecting Vulnerable Adults – Securing their Safety published in July 2005. This Part’s overall purpose is to put in place modern, strengthened and consistent measures to afford greater protection for adults at risk from abuse in Scotland. It will improve and enhance protective measures for adults at risk, whether in hospital, care services, or at home.

OUTLINE OF THE BILL PROVISIONS

3. In summary, Part 1 provides:

- a set of guiding principles intended to assist those operating the provisions, and to have regard to the intended purpose and outcomes desired (Part 1);
- new duties to investigate and intervene where abuse is known or suspected, powers to remove an adult at risk of serious abuse and, if necessary and in the last resort, to exclude the perpetrator in exceptional circumstances (Part 1);
- for the delivery of improved inter-agency co-operation and pro-active prevention arrangements, with the main impact falling on local authorities, including a requirement to establish formal Adult Protection Committees (APCs) (Part 1).

In addition, Parts 2 and 3 of the Bill contain important legislative amendments to improve the operational effectiveness, flexibility and fairness of existing primary legislation. These are to:

- the Adults with Incapacity (Scotland) Act 2000 (Parts 2 and 3);
This document relates to the Adult Support and Protection (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 30 March 2006

- the Social Work (Scotland) Act 1968 concerning the operation of Direct Payments, the provision of social services between councils, and the Liable Relatives rule (Part 3);
- the National Assistance Act 1948 (Part 3); and
- the Mental Health (Care And Treatment) (Scotland) Act 2003 (Part 3).

RATIONALE FOR SUBORDINATE LEGISLATION

4. The Bill contains a number of delegated powers provisions which are explained in more detail below. While a number of the powers are new, others update or link with powers which already exist within primary legislation, notably in relation to the Adults with Incapacity (Scotland) Act 2000, and the Social Work (Scotland) Act 1968. The delegated powers conferred by the Bill are, for the most part, either of a procedural or technical nature or relate to matters which because of their nature require a flexible procedure, and thus it is felt appropriate that they be dealt with by subordinate legislation.

5. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has carefully considered the importance of each matter against the need to:

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation; and
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

6. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for regulations or orders, balancing the need for appropriate level of scrutiny with the need to avoid misusing Parliamentary time. As a general principle, affirmative procedure is used where the order or regulation making powers are to be used to textually amend primary legislation. There are 4 such provisions within the Bill - section 3(2), section 64, section 65, and section 68. The Executive considers that all other enabling powers are not unusual or significant enough to justify affirmative procedure and has therefore opted to apply negative procedures when those powers are exercised.

PART 1 – ADULTS AT RISK OF ABUSE

Section 3(2) – Power to amend the ‘adult at risk’ definition

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<th>Power conferred on:</th>
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7. Section 3 applies to the definition of an adult at risk who is unable to protect himself or herself from abuse because they are affected by disability, mental disorder, illness, infirmity or ageing. It is drafted in an inclusive way to ensure a broad category of adults who are more
vulnerable to types of abuse are covered by its meaning. Operational experience and improved care practice may however highlight cases where amendment or additions to the definition are necessary, and section 3(2) enables the Scottish Ministers to do so. It is recognised however that it would be unhelpful and confusing to make such changes frequently, and the intention is to use such provision sparingly, and only after consideration by the Scottish Parliament. Accordingly, by virtue of section 70 of the Bill, it is considered appropriate that this power is exercisable by statutory instrument which is subject to affirmative procedure as provided for by section 70(4)(a). This provides the Scottish Ministers with the flexibility to ensure that, where such change is necessary and appropriate, protection is afforded to adults at risk of abuse but retains a higher level of Parliamentary scrutiny given that the order would amend primary legislation.

Section 5(1)(e) – Power to allow for extending/amending the co-operation duties to other public bodies

Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by statutory instrument
Parliamentary procedure: Negative resolution

8. This section should be read in conjunction with sections 40 to 45 which relate to the creation and operation of APCs. Many local authorities do have multi-disciplinary adult protection policies in place but these are at varying stages of development. However, it is not always the case that a local authority will know that an adult at risk is already receiving care or attention from another agency due to an abusive experience. In order to ensure effective intervention takes place, it is necessary to require the co-operation of other agencies or bodies who may know of, or suspect, abuse of an adult at risk. This duty to co-operate with the council to ensure effective investigation of suspected or known abuse will be conducted in a way consistent with the Bill’s guiding principles insofar as this duty is consistent with the exercise of a body’s functions. Practice and experience, or the establishment of new public bodies, or changes made to functions of public bodies, may highlight a need to add to the existing bodies not identified at this stage in section 5 to ensure operational effectiveness. Section 5(1)(e) enables the Scottish Ministers to do so.

9. By virtue of section 54 of the Bill, this power is exercisable by statutory instrument which is subject to negative procedure as provided for by section 54(3). By enabling the Scottish Ministers to deal with this matter by subordinate legislation this provides them with the flexibility to ensure that where such change is necessary and appropriate the duty to co-operate with a local authority can be extended swiftly.

Section 23(2)(a) – Power to prescribe the type of documents to be served with any power of arrest which is attached to a banning order

Power conferred on: Lord President of Court of Session
Power exercisable by: Act of Sederunt
Parliamentary procedure: None

10. This section should be read in conjunction with section 38 relating to the procedures to be applied when applying for orders under this Bill. The purpose of this section is to increase the protection of adults at risk from abuse from other individuals by allowing the sheriff to attach a
power of arrest to a banning order. The intention is to mirror the procedures which operate under the Protection from Abuse (Scotland) Act 2002 which allow Rules of Court to make provision about certain technical matters relevant to court proceedings. Under section 23(2), before the power of arrest can have effect, it must be served on the subject of the banning order together with any additional documents that are to be prescribed by Rules of Court. The intention of requiring additional documents to be served is to ensure that the subject of the banning order is made aware of those documents that are relevant to the power of arrest and necessary to enable that person to have a full understanding of the court order.

11. The Rules of Court will be made by Act of Sederunt and, as is invariably the case with such Acts, attract no parliamentary procedure. Rules of Court provide a flexible means of ensuring that the required other documents are consistent with other similar court procedures and enables the Rules Councils to ensure that any future changes in relation to court documentation and wider court procedures continue to apply to this proposed legislation.

Section 24(1), 24(1)(b) and 24(2) and 24(2)(b) – Power to prescribe other classes of person who are authorised to serve notice to the police of a banning order with attached power or arrest, and to prescribe other documents to accompany such orders

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<td>None</td>
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12. Sections 24(1) and (2) require the police to be notified where a power of arrest has been attached to a banning order, and when such an order is varied or recalled. Under these sections, notification to the police is achieved by the person in whose favour the court order was obtained, or such other person as may be prescribed in Rules of Court, delivering documents that are to be prescribed in Rules of Court to the chief constable of the police area in which the order has effect. This is to ensure that the police have possession of all the documents that are relevant to the arrest powers that are conferred on them under section 23 of the Bill. A relevant document would be the application for an order with power of arrest, and certificate of service of such an order. In the context of a banning order issued by the court with a power of arrest, it may be that the applicant for the order is the victim of abuse, or is someone with legal authority to act on the victim’s behalf, and it may prove difficult for such a person to serve notice in the proper manner. It is also important to avoid mistakes being made in the proper service of documents and it is considered that flexibility is necessary to enable a different person e.g. a sheriff officer to serve notice, as may be prescribed by Rules of Court. Proceeding in this way avoids the need for primary legislation to effect procedural changes designed to improve efficiency and effectiveness of court orders.

13. It is therefore submitted that it is appropriate for Rules of Court to determine whether intimation to the police can be carried out by a person other than the person in whose favour the court order was granted, and for Rules of Court to specify the documents to be served.

14. The Rules of Court will be made by Act of Sederunt and, as is invariably the case with such Acts, attract no parliamentary procedure. Rules of Court provide a flexible means of ensuring that the required other documents are consistent with other similar court procedures and
enables the Rules Councils to ensure that any future changes in relation to court documentation and wider court procedures continue to apply to this proposed legislation.

Section 39(1)(d) – Power to prescribe additional functions of adult protection committees (APCs)

Power conferred on: The Scottish Ministers  
Power exercisable by: Orders made by statutory instrument  
Parliamentary procedure: Negative resolution

15. Section 39 specifies the functions and operational requirements of APCs. Committees are to operate at a strategic level on a multi-agency basis and with a dual function – protection of adults from abuse and detection of abuse of adults. As such, they will oversee investigative practice, and ensure procedures are in place to share information and develop practice which enhances protective measures. In fulfilling this role it will be important for Committee members to co-operate effectively and constructively. This is a novel area of law and the functions set out in subsections (a) to (c) are those which appear to be essential for the proper operation of Committees. As experience and practice evolve, additional functions not identified at this stage may be necessary for the effective operation of Committees. Section 39(1)(d) enables the Scottish Ministers to do so.

16. By virtue of section 70 of the Bill, this power is exercisable by statutory instrument which is subject to negative procedure as provided for by section 70(3). By creating this power it enables the Scottish Ministers to deal with this matter by subordinate legislation, providing them with the flexibility to ensure that where such change is necessary and desirable for the operational effectiveness of Committees in expeditiously promoting good practice relating to adults at risk.

Section 39(3)(e) – Power to prescribe additional public bodies or office holders to which the functions of APCs are to apply

Power conferred on: The Scottish Ministers  
Power exercisable by: Orders made by statutory instrument  
Parliamentary procedure: Negative resolution

17. The bodies specified in section 39(3) are those which presently have a key role in affording protection to adults at risk of abuse at the local level. Practice and experience, or the establishment of new public bodies, or changes made to functions of public bodies, may highlight a need to add to the existing bodies or office holders which operate at local level mentioned in subsection (3)(a) to (d) to ensure operational effectiveness of APCs. Section 39(3)(e) enables the Scottish Ministers to do so.

18. By virtue of section 70 of the Bill, this power is exercisable by statutory instrument which is subject to negative procedure as provided for by section 70(3). By enabling the Scottish Ministers to deal with this matter by subordinate legislation this provides them with the flexibility to ensure that where such change is necessary and desirable for the operational
effectiveness of Committees in relation to adults at risk, additional public bodies or office holders may be added swiftly.

Section 41(2)(d) – Power to prescribe others entitled to attend APCs
Section 42(2)(e) – Power to prescribe others to provide information to APCs
Section 43(b)(vi) – Power to prescribe others to receive copies of the biennial report prepared by APCs

Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by statutory instrument
Parliamentary procedure: Negative resolution

19. These 3 provisions all relate to the functions and operational procedures of APCs, and the intention is to ensure consistency with the provision mentioned at 39(3)(e) above which relates to those public bodies or office holders which may be added to APC’s. So, where a new body is named as having a role and function relevant to the Committee it must be permitted to attend meetings, is obliged to provide information, and is entitled to receive the Biennial Report.

20. By virtue of section 70 of the Bill, this power is exercisable by statutory instrument which is subject to negative procedure as provided for by section 70(3). By enabling the Scottish Ministers to deal with this matter by subordinate legislation this provides them with the flexibility to ensure that where such change is necessary and desirable for the operational effectiveness of Committees in relation to adults at risk, the relevant duties are consistently applied.

Sections 49(1) and 49(2)(d) – Power to define individuals who may be authorised to perform functions given to councils

Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by statutory instrument
Parliamentary procedure: Negative resolution

21. The purpose of sections 49(1) and 49(2)(d) is to enable Scottish Ministers to prescribe by order those individuals who are to be able to perform functions given to councils to investigate, interview, examine, and remove adults known or believed to be at risk from abuse. Given the need to act with sensitivity and professionalism in situations where interventions must be carried out, it is important that those authorised to intervene are suitably qualified and trained to do so. It is intended the order will initially include any qualified social work officer. It will be necessary to keep under review the types of individuals able to perform such functions, and to be able to amend categories of individuals when necessary.

22. In relation to section 49(2), and with reference to section 8, only a registered health professional can conduct a medical examination of an adult at risk. There may be occasions when such an examination would best be made by a health professional already working with the adult concerned e.g. a psychologist, or where a health practitioner with specific skills or qualifications is required to conduct an examination e.g. a speech and language therapist. Given the developing and expanding role now performed by such allied health professionals in
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providing care and support, the flexibility to prescribe certain categories of other health professional competent to perform medical examinations is desired.

23. By virtue of section 70 of the Bill, this power is exercisable by statutory instrument which is subject to negative procedure as provided for by section 70(3). By enabling the Scottish Ministers to deal with this matter by subordinate legislation this provides them with the flexibility to ensure those able to perform such functions can, where necessary, be amended expeditiously.

PART 2 – ADULTS WITH INCAPACITY

24. Parts 2 and 3 of the Bill amend the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”). These provisions make:

- substantial changes to the regime for intromission with the funds of an adult;
- changes affecting orders about incapable adults’ nearest relatives;
- changes in connection with powers of attorney; and
- changes in connection with intervention orders and guardianship orders.

Section 54 – inserts section 26(3A) in the 2000 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution

25. Subsection (3)(f) of section 54 inserts this new provision in the 2000 Act. The Bill provides that an organisation as well as an individual can apply for authority to intromit with funds. This new subsection provides that the Public Guardian must refuse an application made by an organisation where she is not satisfied that it satisfies prescribed matters. It is anticipated that the matters that will be prescribed will include suitable accounting systems, sufficient indemnity cover and employment of suitable staff to deal with such intromissions. It is considered appropriate to prescribe such matters in regulations as they are of a procedural nature and require, because of their nature, a flexible approach to accommodate change and improvement in light of experience. The Public Guardian is consulting stakeholders and developing operational procedures and guidance for organisations. Regulations made under this section are subject to negative procedure by virtue of section 86(1) of the 2000 Act. It is considered appropriate to deal with this by negative resolution procedure as it provides Scottish Ministers with the flexibility to amend these prescribed matters, if required, in light of experience.

Section 53(7) – inserts section 22A(3)(a) in the 2000 Act
Section 56 – inserts sections 26B(5)(a) and 26D(5) in the 2000 Act
Section 60 – inserts section 56A(b) in the 2000 Act
Section 61(10) inserts section 75A(b) in the 2000 Act

26. None of the above provisions contain new delegated powers. However, as they link into an existing scheme in the 2000 Act where the Scottish Ministers may prescribe the form and
content of the registers maintained by the Public Guardian it is considered appropriate to explain their effect. Section 53(7) makes provision for the revocation of continuing or welfare powers of attorney. This includes a requirement for the Public Guardian to enter prescribed particulars on receipt of a revocation notice. Section 56 makes provision for joint and reserve withdrawals. This includes a requirement for the Public Guardian when granting the application to enter prescribed particulars in the register maintained by her under section 6(2)(b)(iii) of the 2000 Act. Sections 60 and 61 make provision for intervention orders and guardianship orders respectively. This includes a requirement that where a person authorised under an intervention order or a guardian dies the person’s personal representative shall, if they are aware of the existence of an authority to intervene or of the existence of a guardianship, notify the Public Guardian who shall enter prescribed particulars in the registers maintained by her under section 6(2)(b)(iv) and (v).

27. Section 7 of the 2000 Act provides that the Scottish Ministers may prescribe the form and content of the registers to be established and maintained under section 6(2)(b). Regulations made under section 7 of the 2000 Act are subject to negative resolution procedure. None have been made to date. It is considered that it continues to be appropriate for Scottish Ministers to be able to prescribe the form and content of the registers established and maintained by the Public Guardian under section 6(2)(b) and that the new provisions should be subject to these registration requirements.

Section 55(1) – inserts section 26A(3)(b) in the 2000 Act
Section 56(2) – inserts section 26B(7) in the 2000 Act

Power conferred on: The Scottish Ministers
Powers exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution

28. Section 55(1) inserts a new section 26A into the 2000 Act. This provides that the Public Guardian may, on application, issue a certificate of authority to a person who wishes to apply to intromit with funds but cannot do so because of a lack of information as to the adult’s accounts. The certificate will authorise a bank or other financial institution to provide confidential information about an adult’s account or accounts, required for the purposes of making an application for authority to intromit with funds. The new section 26A(3) applies various provisions of section 26 to such applications including subsections (3) and (7) which make provision for prescribing the period for objecting to the granting of the application. Section 56(2) inserts a new section 26B into the 2000 Act. This provides for the making of applications to intromit with funds by joint withdrawing. The new section 26B(7) applies section 26(7) to (9) to a decision of the Public Guardian to grant or refuse such an application. As described above section 26(7) makes provision for prescribing the objecting to the granting of the application. It is considered that it continues to be appropriate for Scottish Ministers to able to prescribe the period for such objections as this is of a procedural nature and therefore requires a flexible approach to accommodate change and improvement.
Section 61(1)(d) – inserts section 57(6B)(c) in the 2000 Act

Power conferred on: The Scottish Ministers
Powers exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution

29. The new provision under section 57(6B)(c) of the 2000 Act gives Scottish Ministers power to make regulations prescribing additional categories of medical practitioners who may prepare a report on an examination and assessment of an adult with incapacity for the purposes of section 57(3) and (by incorporation), section 53(4). The purpose of this paragraph is to provide a greater degree of flexibility for the Scottish Ministers to extend the range of medical practitioners who can complete a specialist report to support applications for intervention and guardianship orders under the 2000 Act. At present it is only medical practitioners approved by a Health Board or the State Hospitals Board for Scotland under section 22 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) who may provide a report in the context of an application for these orders. Prior to the 2003 Act, under sections 53 and 57 one of the reports had to be completed by a medical practitioner approved for the purposes of section 20 of the Mental Health (Scotland) Act 1984.

30. The standards of training and expertise required of a section 22 doctor are now mandatory unlike for section 20 doctors, and are also more stringent than previously, and there will therefore be fewer section 22 doctors than there were section 20 doctors to prepare such reports, particularly in remoter areas. This has given rise to concerns that there may be difficulty in obtaining reports to support applications under the 2000 Act and consequential delays. This new regulation making power provides the flexibility to extend this category by regulations in the event: (a) that the change in requirements under the 2003 Act does indeed cause difficulty; and (b) other types of training and accreditation come on stream which would meet the requirements for a mental disorder specialist report to accompany applications for intervention and guardianship orders. If regulations were made under this paragraph this would be done in consultation with the Mental Welfare Commission and other key stakeholders. The Bill also provides for reports from medical practitioners where the adult is abroad and this regulation making power would provide for flexibility for the requirements relating to that particular situation to be adjusted in line with any extension to the range of medical practitioners who can complete specialist reports under sections 53 and 57.

PART 3 – ADULT SUPPORT ETC.: MISCELLANEOUS AMENDMENTS AND REPEALS

Section 63 – Direct payments: sub-delegation to councils

Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by statutory instrument
Parliamentary procedure: Negative resolution

31. Section 63 of the Bill amends section 12B(6) of the Social Work (Scotland) Act 1968 by making provision for Scottish Ministers to delegate their functions under section 12B of the Act when the Scottish Ministers make regulations under this section. The effect is that local
authorities are able to exercise the flexibility that is necessary for designing a direct payments care package for any individual service user.

32. Subordinate legislation made under section 12B of the 1968 Act is proposed in three areas. Firstly, regulations will provide that local authorities can determine whether in any individual case exceptional circumstances exist which would justify using direct payments to secure such services from a category of close relative that is normally prevented. This change was supported by a public consultation held in November 2004. Secondly, they will authorise the payment of direct payments to other payees whom the local authority are satisfied are capable of managing the payments, with or without assistance, if the local authority is not satisfied that the beneficiary is so capable. Thirdly, they will remove the duty on local authorities to pay direct payments for those aged under 18 unless the authority is satisfied that the payment will safeguard or promote the welfare of the person.

Section 64(1)(c) – inserts sections 86(6) and (7) in the Social Work (Scotland) Act 1968 (“the 1968 Act”) – adjustments between councils in relation to social services etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: For regulations made under section 86(6) and regulations under 87(7), negative resolution procedure where the regulations only make provision for ordinary residence as respects the matters provided for in section 86(6). Where regulations are made under section 87(7) which modify sections 86(2), (3) or (5)(b) of the 1968 Act, affirmative resolution procedure.

33. The provisions in section 64(1)(c) amend section 86 of the 1968 Act. Inserted subsection (6) makes provision for adjustments between local authorities in relation to expenditure incurred by them in providing community care services to an individual when that individual moves between local authority areas. It is distinct from the provisions in the 1968 Act dealing with charging the individual (see section 87 of the 1968 Act), but the “expenditure” which an authority can recover under the existing provisions of section 86 of the 1968 Act should be its net expenditure, after deducting any amount which it can charge the individual for under section 87 of the 1968 Act.

34. Section 64(1)(c) of the Bill inserts new subsections (4) to (10) to section 86 of the 1968 Act. Section 86(4) and (5) of the 1968 Act allow adjustments to be made where a local authority (“the responsible authority”) performs a function under the 1968 Act, Part II of the Children (Scotland) Act 1995 (c.36) or sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13) (together “the mental health and community care enactments”) by making arrangements with a person (“the provider”), in terms of which the provider undertakes to accommodate an individual.

35. Where the provider is another local authority, any expenditure incurred by the provider is recoverable from the responsible authority (section 86(5)(a) of the 1968 Act) and any period during which the individual is accommodated under the arrangements is to be disregarded in
determining the person’s ordinary residence for the purposes of section 86(1) of the 1968 Act (section 86(5)(b)). The purpose of section 86(5)(b) is to allow the responsible authority to, in turn, recover its net expenditure (after deducting any amount which it may charge the individual for under section 87 of the 1968 Act) in respect of the arrangements if the individual was, before the provision of that accommodation, ordinarily resident in another local authority area (i.e. other than the responsible authority’s area).

Section 86(6) and (7) of the 1968 Act

36. Section 86(6) to (10) of the 1968 Act (the enabling powers being section 86(6) and (7)) allow the Scottish Ministers to make regulations governing expenditure adjustments between local authorities where one local authority (“the other authority”) makes an arrangement with another authority (“the providing authority”) for the providing authority to provide services or facilities, but not accommodation, to an individual. This is where the purpose of the arrangement is to enable the other authority to perform a function under the mental health and community care enactments. Subject to the next paragraph, such regulations attract negative resolution procedure (subject to annulment in pursuance of a resolution of the Scottish Parliament) (see section 90 of the 1968 Act).

37. As a separate matter, section 87(7) of the 1968 Act will also allow the Scottish Ministers to make regulations which modify sections 86(2), 86(3) and new 86(5)(b), which make provision for ordinary residence. Where such regulations are made containing such modifications, they will attract affirmative resolution procedure under section 87(9).

38. It is intended that the regulation making power in section 86(6) and (7) will be used to make provision initially for “supported accommodation” such as alcohol or drug treatment centres, where care services and facilities are provided but the accommodation is not. It is intended that regulations will set out the detailed circumstances in which a local authority should retain financial responsibility for the services and facilities provided by the providing authority under the mental health and community care enactments with the aim of ensuring a fair distribution of financial responsibility among authorities.

39. The types of services and facilities provided in this context, their costs, and the ways in which they are provided, are very varied and constantly changing. It is considered that subordinate legislation is the most appropriate approach due to the flexibility of such a power. Unless regulations also make modifications to section 86(2), (3) and (5)(b) of the 1968 Act, such regulations will be by negative resolution of the Scottish Parliament. We consider that negative resolution procedure is appropriate in this instance. Given the variety and changing nature of these services and facilities, their provision and their costs, in our view it would be unduly restrictive to have affirmative procedure.

40. Regulations will be subject to affirmative procedure where they modify sections 86(2), (3) and (5)(b) of the 1968 Act dealing with ordinary residence. It is considered necessary to have the power to modify those provisions, again because of the changing nature (and costs) of care service provision, and to ensure that there is always a fair distribution of financial responsibility among local authorities. It is considered that draft affirmative procedure provides the appropriate level of scrutiny by the Scottish Parliament.
Section 64(2) – amends section 2 of the Community Care and Health (Scotland) Act 2002 (asp 5) (“the 2002 Act”)

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution

41. Section 2 of the 2002 Act already allows the Scottish Ministers to make provision by regulations for (amongst other matters) what is and is not to be regarded as “accommodation” under section 87(2) of the 1968 Act and sections 22, 26 and 65 of the National Assistance Act 1948 (c.29) (“the 1948 Act”). Those provisions of the 1968 Act and the 1948 Act together form the basis of the current charging scheme for accommodation provided under the 1968 Act and under section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The main detail of the scheme is set out in the National Assistance (Assessment of Resources) Regulations 1992 (S.I. 1992/2977), as amended.

42. Section 64(2) of the Bill amends the power in section 2 of the 2002 Act to enable the Scottish Ministers to also provide what is and what is not to be regarded as “accommodation” under section 86 of the 1968 Act. The amendment is intended to ensure that the meaning of “accommodation” in section 86 of the 1968 Act can be aligned where necessary with the meaning in section 87(2) of the 1968 Act (and under sections 22, 26 and 65 of the 1948 Act), when the existing power under section 2 of the 2002 Act to alter the meaning of “accommodation” in those sections is exercised.

43. As explained in the previous entry for section 64(1)(c) of the Bill, section 86 of the 1968 Act is intended to allow adjustments between local authorities for expenditure incurred by them in providing community care services to an individual when that individual moves between local authority areas.

44. The purpose of aligning the meaning of “accommodation” in section 86 with the charging provisions in section 87 of the 1968 Act (and under sections 22, 26 and 65 of the 1948 Act) is so that where a relevant local authority can charge the individual for providing services, it can only recover its net (rather than gross) expenditure from the authority ultimately responsible for funding the cost of providing those services. Again, this is intended to ensure a fair distribution of financial responsibility among authorities. It is considered that draft affirmative procedure provides the appropriate level of scrutiny by the Scottish Parliament.


Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative resolution

45. Section 87A of the 1968 Act will provide a power for the Scottish Ministers to apply or disapply by regulations the 1968 Act in its application to persons in Scotland whose accommodation has been arranged by a local authority in any other part of the United Kingdom,
the Channel Islands or the Isle of Man. This is intended to allow the Scottish Ministers to make reciprocal provision following the commencement of section 5 of the Community Care and Health (Scotland) Act 2002 (asp 5) (“the 2002 Act”). Section 5 of 2002 Act provides powers to enable the Scottish Ministers to make regulations allowing Scottish local authorities to make arrangements for the provision of accommodation in other parts of the UK, the Channel Islands and the Isle of Man. Section 5(2) of the 2002 Act allows the Scottish Ministers to make regulations modifying the 1968 Act in its application to such arrangements. Section 5 of the 2002 Act is yet to be commenced.

46. The purpose of the powers in section 87A of the 1968 Act is to enable the Scottish Ministers to achieve consistency as far as possible between Scotland and the other countries when section 5 of the 2002 Act (and associated regulations made under it) are commenced. Work on the commencement of section 5 and the reciprocal provisions required in the other parts of the UK, the Channel Islands and Isle of Man is still ongoing. It is considered that subordinate legislation is the most appropriate approach due to the flexibility of such a power, and given that the 2002 Act already contains regulation making power to amend the 1968 Act for persons having their accommodation provided outside Scotland.

47. It is considered that draft affirmative procedure provides the appropriate level of scrutiny by the Scottish Parliament.

PART 4 – FINAL PROVISIONS

Section 68(1) – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution/affirmative if it amends an Act

48. This section provides that the Scottish Ministers may by order make such supplemental, incidental, consequential, transitory, transitional or saving provision that they consider appropriate for the purposes of, or in connection with, the Bill. Subsection (2) provides that such an order may modify any enactment, instrument or document.

49. This provision is considered to be necessary to allow flexibility if further changes are found to be necessary as a result of the provisions in the Bill some of which may not become apparent until after the Bill is commenced. The power whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it necessary or expedient for the purposes of, or in consequence of the provisions of the Bill. Section 70(4) provides that any order made under this section will be subject to affirmative procedure if it amends primary legislation. It is submitted that this provides the appropriate level of parliamentary scrutiny for the powers conferred.
Section 71 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

50. This section provides that the provisions of the Bill will come into force by order made by the Scottish Ministers. Only Part 4 of the Bill will come into force on Royal Assent, except for section 69 which introduces the minor and consequential amendments and repeals in schedules 1 and 2 to the Bill (that section and the schedules will be commenced by commencement order).

51. The Executive considers that the remainder of the Bill should be commenced at such times as the Scottish Ministers think appropriate or expedient. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation. Whilst the order, in common with the usual practice for such orders, is not subject to any parliamentary procedure as such, the Subordinate Legislation Committee will have the opportunity to consider the instrument in terms of its remit.”
This document relates to the Adult Support and Protection (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 30 March 2006

ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM