PURPOSE

1. This memorandum has been prepared by Gil Paterson MSP, the Member in charge of the Bill. It has been provided to assist the Subordinate Legislation Committee with its consideration, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Palliative Care (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of the provision, explains why the matter is to be left to subordinate legislation and explains the choice of procedure. It should be read in conjunction with the Explanatory Notes, Policy Memorandum and Financial Memorandum for the Bill.

POLICY CONTEXT

2. The objective of the Bill is to secure access to palliative care (including end of life care) in Scotland for everyone with a progressive life-limiting condition and their family members. The Bill aims to secure this by:

- placing the Scottish Ministers under a statutory obligation to provide palliative care for those with life-limiting conditions and their family members; and
- setting up reporting arrangements so that the palliative care provided can be monitored by the Scottish Ministers and the Parliament.

3. These reporting arrangements require the Scottish Ministers to report on the provision of palliative care in relation to a number of indicators established in the Bill. The Scottish Ministers will be required to lay an annual report before the Parliament which compiles the information submitted by providers to enable the Parliament to scrutinise, compare and contrast the delivery of palliative care services nationwide.

CONTENT OF THE BILL

4. The Bill is divided into two sections which include the following proposed measures—

- Section 1 adds a new Part (Part IIIA) (Palliative Care), which comprises three new sections (sections 48A, 48B 48C), and a new schedule (Schedule 9A) (Reporting and Indicators) into the National Health Service (Scotland) Act 1978 (c.29). Part IIIA sets out the requirements for the provision of palliative care by the Scottish Ministers and the reporting arrangements for the Scottish Ministers.
This document relates to the Palliative Care (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 1 June 2010

- Section 2 provides for commencement of the Bill and sets out the short title.

DELEGATED POWERS

5. The Bill contains four provisions which give powers to the Scottish Ministers to make subordinate legislation. The powers are new, and no existing power is being amended or repealed. The power is explained in detail in the following paragraphs but in considering whether and how the provision should be set out in subordinate legislation rather than on the face of the Bill the member has had regard to:

- the need to strike the correct balance between the importance of enabling full parliamentary scrutiny of the core provisions in the Bill process and making proper use of parliamentary time;
- enabling a flexible and responsive approach by those who will have the duty of operating and enforcing the provisions of the Bill; and
- the possible need to change provisions in a manner which responds to the operation of the Bill.

New section 48B(3) – (Reports to the Scottish Parliament) - Power to modify the terms of new Schedule 9A, paragraph 1, indicators

Powers conferred on: Scottish Ministers
Powers exercised by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution procedure

Provision

6. New section 48B(1) requires the Scottish Ministers to lay annually before the Scottish Parliament a report. Subsection (2) introduces Schedule 9A to the National Health Service (Scotland) Act 1978 (c. 29) which sets out the information on which the Scottish Ministers are required to report under subsection (1).

7. Section 48B(3) gives the Scottish Ministers the power to modify paragraph 1 (indicators) of Schedule 9A. In terms of subsection (3)(a), the Scottish Ministers may add a new indicator or alter an existing one. It also provides that an indicator added by the Scottish Ministers can be subsequently altered. Subsection (3)(b) provides for the subsequent removal of an indicator, but only one that has been added by the Scottish Ministers under subsection (3)(a).

8. Section (1)(3) of the Bill amends section 105(2A) (Orders, regulations and directions) of the National Health Service (Scotland) Act 1978 so that orders made by the Scottish Ministers under sections 48B(3) are subject to affirmative resolution procedure.

Reason for taking power

9. The requirement that the Scottish Ministers must report is in new section 48B(1). The information to be reported on is set out in new Schedule 9A and is that which is considered important and relevant at the time the Bill was drafted. The importance and relevance of this information may change in light of developments in the provision of palliative care.
10. It is submitted that this is an appropriate matter for subordinate legislation, as it would allow changes to be made to the indicators in light of operational experience, without requiring primary legislation. These developments are not foreseeable at this stage, and so some flexibility is beneficial.

**Choice of procedure**

11. The power described above enables amendment to primary legislation. In addition, the nature of the addition or alteration of an indicator may substantially change the policy intention of the Bill. It is therefore considered appropriate that affirmative resolution procedure is followed in the making of any orders under these powers.

**New section 48B(4), (5) and (6) – (Reports to the Scottish Parliament) - Power to modify the terms of new Schedule 9A, requirements and definitions**

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**Provision**

12. New section 48B(1) requires the Scottish Ministers to lay before the Scottish Parliament, a report. Subsection (2) introduces Schedule 9A to the National Health Service (Scotland) Act 1978 (c. 29) which sets out the information on which the Scottish Ministers are required to report under subsection (1). Section 105(2) (Orders, regulations and directions) of the National Health Service (Scotland) Act 1978 applies to new sections 48B(4), (5) and (6) so that orders made by the Scottish Ministers under these provisions are subject to annulment in pursuance of a resolution.

**New section 48B(4)**

13. Section 48B(4) provides the Scottish Ministers with the power to modify the **requirements** set out in paragraphs 5 and 6 of Schedule 9A.

14. Paragraph 5 prescribes the related requirements for indicator 6 which requires the provision of information in relation to the place and cause of death of any person with a life-limiting condition who has received palliative care. Information is required so as to capture all deaths occurring in or at the following places: hospital; hospice; accommodation provided by a care home service; private address; and any other place.

15. Paragraph 6 prescribes the related requirements for indicator 8 which requires the provision of information in relation to the number of persons in receipt of palliative care who have died in hospital, contrary to their expressed preference. Information is required so as to capture the reasons for admission to hospital. Figures are to be provided to show the total number of persons falling within three categories: unexpected change in symptoms; inability to relieve pain; and any other reason.

16. In terms of section 48B(4)(a), the Scottish Ministers may alter a requirement. It also provides that a requirement altered can be subsequently altered. Subsection (4)(b) provides for
the subsequent removal of any part of a requirement, but only to the extent that that part has been added by the Scottish Ministers under subsection (4)(a).

**New section 48B(5)**

17. Section 48B(5) provides the Scottish Ministers with the power to modify paragraph 7 (interpretation) of Schedule 9A. In terms of subsection (5)(a), the Scottish Ministers may add a new interpretation of a definition, or alter an existing one. It also provides that a definition added can be subsequently altered. Subsection (5)(b) provides for the subsequent removal of a definition, but only one that has been added by the Scottish Ministers under subsection (5)(a).

**New section 48B(6)**

18. Section 48B(6) provides the Scottish Ministers with the power to add or modify Schedule 9A in connection with requirements in relation to indicators altered or added under section 48B(3)(a). Subsection (6)(b) provides for the subsequent removal of requirements in relation to indicators, but only one that has been added by the Scottish Ministers under subsection (6)(a).

**Reason for taking power**

19. The requirement that the Scottish Ministers must report is in new section 48B(1). The information to be reported on is set out in new Schedule 9A, and is that which is considered important and relevant at the time the Bill was drafted. The importance and relevance of this information may change in light of developments in the provision of palliative care.

20. It is submitted that this is an appropriate matter for subordinate legislation as it would allow changes to be made to the requirements or definitions, in light of operational experience without requiring primary legislation. These developments are not foreseeable at this stage, and so some flexibility is beneficial.

**Choice of procedure**

21. The powers described above enable amendment to primary legislation. However, the provisions at subsections (4), (5) and (6) prescribe only supplementary information to the core indicators. It is therefore considered appropriate that negative resolution procedure is followed in the making of any orders under these powers.
PALLIATIVE CARE (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM