PATIENT RIGHTS (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Patient Rights (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section Z1 – Patient rights charter

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament.

Provision

2. Section Z1 places a duty on Scottish Ministers to make an order containing a charter of rights and responsibilities to be conferred upon patients, to be known as the Patient Rights Charter. It is provided that the Charter must include all existing statutory rights and responsibilities conferred upon patients and may also confer new rights and responsibilities upon patients. The Charter must not include rights and responsibilities in relation to specific treatments or medicines and the provision does not enable the Scottish Ministers to confer such rights and responsibilities upon patients. The rights and responsibilities contained within the Charter are to apply to all patients of relevant NHS bodies, but may also include rights and responsibilities to apply to specific groups of patients only. The Scottish Ministers must review the Charter from time to time, and make revisions by order when they consider it appropriate to do so.

3. Prior to making an order either containing or revising the Charter, Scottish Ministers must consult such persons as they consider appropriate.

Reason for taking power

4. This was a non-Government amendment made at Stage 2 of the Bill process.
5. The Scottish Government understands that the intention behind section Z1 is to bring together into a single document the rights and responsibilities which patients have when they receive health care. It appears that section Z1 means that the Scottish Ministers would have to identify all existing legislation that gives rights or responsibilities to patients, and restate or list that legislation in a statutory instrument. It is not clear to the Scottish Government whether the reference to existing statutory rights is intended to pick up statutory rights conferred in the future. It is also not clear whether the provisions seek to, or would require the Scottish Ministers to, list or restate reserved legislation. The Scottish Government has some concerns that this provision may raise issues of legislative competence (albeit that the provisions could possibly be read down to avoid this). It is noted that there is no reference to patients’ common law rights.

6. The Scottish Government is concerned that providing that a Patient Rights Charter is to be set out in secondary legislation is inflexible, and issues as to the length and usability of the Charter for patients could arise. The Scottish Government intends to work together with the relevant Committee member who lodged the amendment at stage 2, in order to amend section Z1 so that its provisions are clearer and more workable.

Reason for choice of procedure

7. Due to the relevant amendment being technically deficient, the Committee member opted not to move the amendment which would have resulted in section Z1 being subject to affirmative resolution. By default the Order is therefore subject to negative resolution of the Scottish Parliament.

8. As stated above, the Scottish Government is concerned that it is inappropriate for the Patient Rights Charter to be set out in a statutory instrument. However, it is the Scottish Government’s position that, if the Patient Rights Charter is to be contained within an order, this should be subject to negative resolution, which will allow more flexibility to revise the Charter regularly and to take account of changes to other legislation (reserved and devolved) which may have an impact on the Charter.

Section 7(1) – Treatment time guarantee: further provision

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

Provision

9. Section 7(1) provides that the Scottish Ministers must, by regulations, make further provision about the treatment time guarantee. Section 7(2) provides that the regulations must set out the descriptions of patients who are eligible for the treatment time guarantee and how the waiting time is to be calculated. This reflects the provisions as drafted in the Bill as introduced.

Reason for choice of procedure

10. Section 21(2) of the Bill has been amended at stage 2 so that regulations made under section 7(1) are subject to affirmative procedure. This change was made in response to the recommendation by the Subordinate Legislation Committee and the Health and Sport Committee that the exercise of the power in section 7(1) should be subject to affirmative procedure because
of the significance of the guarantee and the significance and effect on the operation of that guarantee as regards the designation of eligible patients and the method of calculating the waiting time. The Scottish Government was content to follow this recommendation.

Section 7(3) – Treatment time guarantee: further provision

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

Provision

11. Section 7(3) gives power to Scottish Ministers to specify, by regulations, the treatments and services which will not be covered by the treatment time guarantee, the action a Health Board must take to ensure it complies with the treatment time guarantee, the circumstances in which the maximum waiting time for a patient can be recalculated or extended, or when the responsibility for a treatment time guarantee may transfer to a different Health Board, and the information that a Health Board is to provide to patients about the treatment time guarantee. This reflects the provisions as drafted in the Bill as introduced.

Reason for choice of procedure

12. Section 21(2) of the Bill has been amended at stage 2 so that regulations made under section 7(3) are subject to affirmative procedure. This change was made in response to the recommendation by the Subordinate Legislation Committee and the Health and Sport Committee that the exercise of the power in section 7(3) should be subject to affirmative procedure because of the significance, through the exercise of the power, of the exclusion of specified treatments and services from the guarantee. The Scottish Government was content to follow this recommendation.

Section 7(4) – Treatment time guarantee: further provision

Power conferred on: Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

Provision

13. This provision gives Scottish Ministers the power to change the maximum waiting time of 12 weeks to a different time period, and allow the maximum waiting time to be different for different categories of treatment or service. This reflects the provisions as drafted in the Bill as introduced.

Reason for choice of procedure

14. Section 21(2) of the Bill has been amended at stage 2 so that regulations made under section 7(4) are subject to affirmative procedure. This change was made in response to the recommendation by the Subordinate Legislation Committee and the Health and Sport Committee that the exercise of the power in section 7(4) should be subject to affirmative procedure given the significant impact the exercise of the power may have on the nature of the guarantee and on the
extent of the right afforded by sections 1(1) and 6(1) of the Bill. The Scottish Government was content to follow this recommendation.

Section 11(4) – Arrangements for handling and responding to patient feedback etc.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Provision

15. Section 11(3)(a)(ii) and (4)(a) provides that the Scottish Ministers may make regulations about the arrangements which relevant NHS bodies and their service providers must have in place to handle feedback, comments, concerns and complaints.

Reason for adjusting power

16. The scope of the power under section 11 was broadened by virtue of amendments at stage 2 so that the Bill now imposes a duty on Scottish Ministers to ensure that each Health Board, Special Health Board and the Common Services Agency has a suitable process in place for handling feedback, comments, concerns and complaints. The amendments also mean that there is specific provision to say that the arrangements for complaints procedure must include identifying best practice. The reason behind these amendments is to recognise that patients may not necessarily want to complain, but may (also) want to provide feedback or comments, or raise a concern. The intention is to ensure that patients and members of the public are able to feed in a range of views and that these will be monitored by relevant NHS bodies to improve the performance of its function.

Reason for choice of procedure

17. As per the Bill as introduced, regulations made under the provision at 11(3)(a)(ii) and (4)(a) will be subject to negative procedure.

Section 21(1)(c) – Orders, regulations and directions

Power conferred on: Scottish Ministers
Power exercisable by: order or regulations made by statutory instrument
Parliamentary procedure: affirmative or negative procedure of the Scottish Parliament

Provision

18. This provision allows Scottish Ministers, when making orders or regulations under this Act, to make such consequential, supplemental, incidental, transitional, transitory or saving provision as appears to the Scottish Ministers to be necessary or expedient.

19. Section 21(1)(c) was amended at stage 2 to ensure that this power does not apply to commencement orders. The Subordinate Legislation Committee said that it did not consider that it was appropriate to make ancillary provisions of substance in commencement orders which are subject to no parliamentary procedure. The Scottish Government was content to follow the
recommendation from the Subordinate Legislation Committee that the power in section 21(1)(c) should not apply to commencement orders.

Section 22(3) – Short title and commencement

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: no procedure

Provision

20. Section 22(3) provides for all sections of the enacted Bill (other than sections 20, 21 and 22) to come into force on such a day as the Scottish Ministers appoint by order.

21. This provision was amended at stage 2 to remove the power in section 22(3) to appoint different days for different purposes, in terms of when the provisions in the Act come into force. This position will now be covered by section 8(2) the Interpretation and Legislative Reform (Scotland) Act 2010.
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