PATIENTS RIGHTS (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 Patient Rights (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.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill is divided into 22 sections and 1 schedule. These address 4 key aspects of health care provision:

Rights and Principles (sections 1-5)

4. The Bill sets out the manner in which health care will be delivered and is underpinned by a schedule of Health Care Principles. Each relevant NHS body is duty bound to have regard to these Principles when performing its functions. The Bill also introduces the right of patients to make complaints, raise concerns or give feedback about the health care they have received.

The treatment time guarantee (sections 6-10)

5. The Bill provides for a treatment time guarantee and specifies the measures a Health Board must take if it fails to meet the treatment time guarantee for an eligible patient. Patient eligibility and the treatments and services excluded from the guarantee will be set out in regulations.

Complaints and patient feedback (sections 11-13)

6. The Bill ensures that relevant NHS bodies and their service providers have adequate arrangements in place to handle complaints or feedback received from patients. This includes
This document relates to the Patients Rights (Scotland) Bill (SP Bill 42) as introduced in the Scottish Parliament on 17 March 2010

publicising the complaints process, advertising the details of the advice and support available to patients and monitoring any complaints received.

Support (sections 14-17)

7. The Bill will legislate for an independent patient advice and support service (PASS), with a staff of patient rights officers. The PASS and its staff will promote awareness of patient rights and responsibilities, provide advice and support to those wishing to make a complaint, raise concerns or give feedback and provide information and advice on the health service.

Rationale for subordinate legislation

8. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:
   - the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
   - the need to make proper use of valuable Parliamentary time; and
   - the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

9. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate. Powers that are referred to here as being exercisable by regulations or orders are made by statutory instrument.

Delegated powers

Section 1(4) – (Patient Rights) - Power to modify subsection (2) following consultation with appropriate parties

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

Provision

10. The provision in section 1(4) gives Scottish Ministers the power by order to modify the provisions in section 1(2) as regards the manner in which health care is delivered to patients. Prior to making an order, Scottish Ministers must consult with such persons as they consider appropriate.

Reason for taking power

11. Section 1(2) sets out the manner in which health care is to be delivered. Read together with section 1(1), it establishes that it is the right of every person that the health care received is patient focused; that it is to have regard to the importance of providing the optimum benefit to the patient’s health and wellbeing; that it allows and encourages patients to participate as fully as
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possible in decisions about their health care; and that information and support is provided to patients to enable their participation.

12. Scottish Ministers may wish to review the manner in which health care is delivered to take account of changing patient expectations. Any review and subsequent amendments will be taken forward in close consultation with relevant stakeholders with the aim of strengthening and developing the delivery of health care services to reflect patient needs.

Choice of procedure

13. Section 1(4) gives Scottish Ministers the power to modify how health care is delivered and could significantly alter the right set out at 1(1). It is therefore considered that the higher level of scrutiny afforded by affirmative procedure is appropriate.

Section 4(2) – (Health Care Principles) - Power to modify the health care principles following consultation with appropriate parties

<table>
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<tr>
<th>Power conferred on:</th>
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Provision

14. This provision allows Scottish Ministers to modify the Health Care Principles set out in the schedule, following consultation with such persons as they consider appropriate.

Reason for taking power

15. The general rights set out in section 1(2) are underpinned by a schedule of Health Care Principles where each relevant health care body must have regard to in performing their functions.

16. The Health Care Principles relate to patient focused care; quality care and treatment; patient participation; communication; complaints; and waste. They set out to achieve best practice in health care provision and provide guidance to health care practitioners and staff.

17. The provision in 4(2) recognises that Scottish Ministers may wish to review the Health Care Principles to take account of changing patient expectations. The power to amend the schedule allows the Principles to be expanded or modified to address other aspects of health care provision over time and ensure greater consistency in how health care is delivered across the NHS in Scotland. Any review and subsequent amendments will be taken forward in close consultation with health service providers, voluntary organisations, representative groups and the public.

Choice of procedure

18. Given that the use of this power will likely be made in conjunction with Parliamentary agreement to change section 1(2), it is felt that an equal level of scrutiny is required for the provision at 4(2) as that at 1(4). The Health Care Principles are a fundamental element of the
Bill and each relevant NHS body is duty bound to have regard to these to support the delivery of the right set out in 1(1). Therefore, it is considered that affirmative resolution procedure is appropriate.

Section 7(1) – (Treatment time guarantee: further provision) - Duty to make provision about the treatment time guarantee

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

Provision

19. 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 which are eligible for the treatment time guarantee and how the waiting time is to be calculated.

Reason for taking power

20. The Bill provides for a treatment time guarantee which will provide eligible patients with the right to receive an agreed treatment within 12 weeks from agreement to treatment, to the start of that treatment. It is considered, however, that it is more appropriate for the details of how that guarantee will operate and be delivered to be provided in secondary, rather than primary, legislation, given the level of detail which will be provided, and the fact that a measure of flexibility is required to amend these details in response to different circumstances both now and in the future.

Choice of procedure

21. Scottish Ministers will have a duty to make regulations on those matters central to the operation of the guarantee. These regulations will address matters of detail as to the operation of the treatment time guarantee, together with administrative and procedural matters which are technical in nature. Therefore, given the detailed nature of these provisions and the need for flexibility in implementing the treatment time guarantee within the framework of the Bill, it is considered that negative resolution procedure is appropriate.

Section 7(3) - (Treatment time guarantee: further provision) - Further provisions about the treatment time guarantee

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

Provision

22. 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.

**Reason for taking power**

23. The current intention is that the treatment time guarantee will not apply to certain treatments and services, which will be listed in regulations. Specifying the exclusions in secondary legislation will ensure flexibility to respond to progress on treatment and waiting times which may mean that certain treatments and services which are initially excluded become included in the treatment time guarantee in the future.

**Choice of procedure**

24. Similarly to section 7(1), the regulations will address further matters of detail as to the operation of the treatment time guarantee, as well as administrative and technical matters and it would not be an effective use of Parliament’s time to make this subject to the affirmative procedure. The provisions allow Regulations to implement further details of the treatment time guarantee within the framework of the Bill and, given the need for flexibility in doing this, it is considered that negative resolution procedure is appropriate.

**Section 7(4) - (Treatment time guarantee: further provision) - Power to amend the maximum waiting time**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** order made by statutory instrument  
**Parliamentary procedure:** negative resolution of the Scottish Parliament

**Provision**

25. 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.

**Reason for taking power**

26. This provision allows the Scottish Ministers flexibility to amend the length of the maximum waiting period to respond to changing circumstances, for example health care providers may become able to provide certain treatments in less than 12 weeks.

**Choice of procedure**

27. It is considered that the negative procedure provides an appropriate level of scrutiny for this power, given the limited nature of the enabling power and the need for flexibility if changes are required to respond to changing circumstances regarding treatment times. Any modification to the maximum waiting time will be administrative in nature, and this procedure is considered an appropriate balance between speed and flexibility on the one hand, and the need for scrutiny of a provision of this nature.
Section 11(4) – (Complaints and other feedback) - Power to ensure adequate arrangements are in place to deal with complaints

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

Provision

28. 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 complaints.

Reason for taking power

29. The Bill imposes a duty on Scottish Ministers to ensure that each Health Board, Special Health Board and the Common Services Agency has a suitable complaints process, publicises how complaints are to be made and handled and makes patients aware of the advice and support available to them when they make a complaint. This provision gives Scottish Ministers the power to make provision about the arrangements required including those which service providers should have in place for dealing with complaints.

30. Section 11(4)(a) gives Scottish Ministers power to make regulations providing for the arrangements mentioned in section 11(1) and (2) and the matters described in 11(3) regarding complaints procedures.

31. Section 11(3)(a)(ii) read together with 11(4)(a), allows Scottish Ministers to specify in regulations who else can make a complaint other than the patient or someone on their behalf. This could include a parent or guardian of a child, a relative of someone who has died and any other person who is affected, or likely to be affected by the action, omission or decision of the NHS body which is the subject of the complaint. As there are complex issues surrounding patient confidentiality and qualification of ‘next of kin’, it is considered appropriate to address this in secondary legislation rather than on the face of the Bill.

Choice of procedure

32. Any regulations made under the provision at 11(4) will be concerned with matters of detail rather than principle. In order to achieve the correct balance between Parliamentary scrutiny and flexibility, negative procedure is considered appropriate.
Section 14(2) – (Patient Advice and Support Service: Establishment and Funding) – Establishment and funding of the Patient Advice and Support Service

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

Provision

33. Section 14(2) inserts a new section 10ZA into the National Health Service (Scotland) Act 1978. This section requires the Common Services Agency to secure the provision of the patient advice and support service in relation to each “relevant body”. Section 10ZA(6) provides that a “relevant body” is a Health Board and such other body as the Scottish Ministers may by order specify.

Reason for taking power

34. The Bill provides for the establishment of a Patient Advice and Support Service which will replace and enhance the current Independent Advice and Support Service (IASS). It is intended that the NHS’s Common Services Agency will be required to secure a package of Patient Advice and Support Services (PASS), to enable greater consistency in the provision across Scotland.

35. It is intended that each territorial Health Board will have a PASS. If a patient has an issue with a Special Health Board, then they would consult the PASS as provided by the territorial Health Board that is most convenient for them. However, Scottish Ministers wish to have the flexibility to expand the provision of the service in the future to allow a Special Health Board, such as the National Waiting Times Centre, to also have its own PASS.

Choice of procedure

36. The decision to include other bodies into the requirement to provide a PASS is not considered contentious. Negative resolution procedure is therefore considered appropriate. It should be noted that as these orders will be made in terms of powers in the National Health Service (Scotland) Act 1978, they will be subject to the provisions of section 105(1), (2), (6) and (7) of that Act.

Section 15(6) – (Patient Advice and Support Service) – Further provision about the Patient Advice and Support Service

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

Provision

37. This provision allows Scottish Ministers to make further provisions about the patient advice and support service.
Reason for taking power

38. The functions of the PASS include promoting awareness and understanding of patient rights and responsibilities, providing advice and support in relation to local resolution if things go wrong and signposting people to advocacy or other sources of advice and support. The provision at 15(6) allows Scottish Ministers to expand these functions to include other relevant issues.

39. Section 15(2) requires that the PASS reports on its activities. The provision at 15(6) also allows Scottish Ministers to specify in regulations further details about this requirement such as timing, method and format of the report.

Choice of procedure

40. Given that such regulations will be almost entirely administrative and procedural in nature, it is submitted that negative resolution procedure is appropriate. It would not be a good use of parliamentary time to make this power subject to affirmative procedure.

Section 20(1) – Ancillary provision

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

Provision

41. This provision allows Scottish Ministers to make subordinate legislation to make provisions which are required for the full implementation of the Bill.

Reason for taking power

42. The new procedures introduced by the Bill may give rise to the need for ancillary provisions. Scottish Ministers may need to make such provision by order to support the full implementation of the Bill. This provision empowers Scottish Ministers to make provisions concerning any incidental, supplemental, consequential, transitional, transitory or saving matters where this is thought to be necessary or expedient.

43. Without these powers to make ancillary provision, it might be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. It would not be an effective use of Parliament’s time, or the Scottish Government’s resources to deal with such matters through primary legislation. They are best addressed through subordinate legislation.

Choice of procedure

44. In terms of section 21(3), these orders are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of the text of an Act. In that case, in terms of section 21(2)(b), affirmative resolution procedure applies. This approach on procedure is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.
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

45. 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.

Reason for taking this power

46. This is a standard commencement by order power. As usual with commencement orders, no provision is made for laying the order in Parliament as the power is to commence provisions which the Parliament has already scrutinised, together with any consequential or transitory arrangements.

Choice of procedure

47. Whilst the order will not be subject to Parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.
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