PURPOSE

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

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

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION AMENDED AT STAGE 2

Section 12 – Power to modify section 3

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

3. Section 12 provides that Scottish Ministers may, by regulations, amend section 3 (which contains the options for self-directed support) and, under paragraph (b) as introduced, to make any consequential changes necessary to sections 4, 6 and 7.

Reason for taking this power

4. A core aim of the Bill is to encourage flexibility in the way that support is provided to individuals. The Bill’s section 3 contains 4 different options for self-directed support. However, Ministers are keen not to unnecessarily limit any future practice which may not have been foreseen at the time of the Bill. As a result section 12 of the Bill provides flexibility for Ministers to adapt the options (by amendment or by addition/removal) so as to reflect future practice. Section 12(b) means that if the options are changed by regulation, or new options are added, then there is a power to ensure that the various other parts of the Bill (or rather the final Act) which refer to the options section can have their internal references
updated in order to refer to the full and current list of SDS options. In introducing the Bill Ministers recognised that as this power allows for the amendment of one of the core provisions of the Bill, this provision should, accordingly, be subject to the affirmative procedure. There are no current plans to use the powers.

Stage 2 amendments

5. At Stage 1 the Subordinate Legislation Committee was concerned that there was no statutory requirement placed on Scottish Ministers to consult before bringing forward regulations in relation to Section 12. The Bill has been amended at Stage 2, by the addition of a new section 20(4), to add a further requirement that regulations under section 12 will be subject to statutory consultation.

6. In addition, section 12 has been amended at Stage 2 to add section 13(2)(b) and section 21(1A) to the list of provisions which may be amended consequentially by virtue of regulations made under section 12. This ensures that all of the relevant internal references to SDS options can be updated in response to any revision to the options provided within section 3.

Section 21 – Power to modify application of Act

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

7. This section allows Ministers, by regulations, to disapply sections 4(2) and 7(2) in specified circumstances. This is distinct from the related provisions, dealt with in section 13, relating to ineligibility, or the unavailability, of direct payments only. The practical effect of section 21 is that it would allow Ministers to bring forward regulations in order to remove the options from either people or services for which self-directed support is not considered appropriate. The Bill at introduction included specific provision to allow (but not to require) regulations made under section 21 to deem a person to have chosen “option 3” for self-directed support (services arranged on the person’s behalf). Finally, it allowed any other section of the Bill to be disapplied or modified depending on those circumstances.

Reasons for taking power

8. The power in section 21 allows Ministers flexibility to disapply the self-directed support framework for particular persons or for particular services when it is considered necessary. There may be persons or services which do not currently, or may not in future, lend themselves to the self-directed support approach and this power will allow Ministers to make appropriate provision. This power only applies to services for adults and children, and does not apply to services for carers.

Stage 2 amendments

9. In light of the potential breadth of the power to disapply the options the Subordinate Legislation Committee invited the Scottish Government to consider that the section 21 power
ought to be subject to a statutory requirement to consult with interested bodies on any draft regulations.

10. In response to the concerns raised by the Subordinate Legislation Committee the Bill has been amended at Stage 2 to add a requirement that regulations under section 21 will be subject to statutory consultation.

11. In addition, the provision permitting Ministers to use regulations to deem a person to have chosen option 3 has been replaced with a provision requiring any such regulations to include provision deeming a person to have chosen Option 3. This would mean that Ministers could not use regulations to disapply option 3, which would remain the default when no other options are available. In practical terms this will prevent Scottish Ministers from using subordinate legislation in order to “switch off” the provision of social care and support to any particular user group or any particular circumstance. This represents a further limitation on the discretion of Ministers in relation to this power.
This document relates to the Social Care (Self-directed Support)(Scotland) Bill as amended at Stage 2 (SP Bill 10A)

SOCIAL CARE (SELF-DIRECTED SUPPORT) (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM