



The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

29th Report, 2012 (Session 4)

Social Care (Self-directed Support) (Scotland) Bill

Published by the Scottish Parliament on 23 May 2012

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The Scottish Parliament
Pàrlamaid na h-Alba

Subordinate Legislation Committee

Remit and membership

Remit:

The remit of the Subordinate Legislation Committee is to consider and report on—

(a) any—

(i) subordinate legislation laid before the Parliament;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1;

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

(Standing Orders of the Scottish Parliament, Rule 6.11)

Membership:

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Michael McMahon
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The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meetings on 8, 15 and 22 May, the Subordinate Legislation Committee considered the delegated powers provisions in the Social Care (Self-directed Support) (Scotland) Bill (“the Bill”) at Stage 1. The Committee submits this report to the Health and Sport Committee as lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has provided a Delegated Powers Memorandum (DPM)¹ setting out the need for the delegated powers, how they may be exercised and the choice of procedure applicable to their exercise.
3. Scottish Government officials also provided oral evidence to the Committee at its meeting on 15 May 2012. The *Official Report* of the meeting is available on the Parliament website.²

OVERVIEW OF THE BILL

4. The Social Care (Self-directed Support) (Scotland) Bill was introduced in the Parliament on 29 February 2012 by Nicola Sturgeon MSP. It is a Government Bill which makes provision about the manner in which local authorities provide certain support and services. In particular, it is intended to provide individuals who require those services with the power to direct the way in which they receive them. The Bill applies to both adult and child social care.
5. Local authorities presently have duties to promote social welfare, as laid down in Part II of the Social Work (Scotland) Act 1968 (“the 1968 Act”). In particular, this includes assessing whether individuals to whom they owe a duty

¹ Social Care (Self-directed Support) (Scotland) Bill. Delegated Powers Memorandum. Available at: [http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20\(Self%20directed%20Support\)%20\(Scotland\)%20Bill/DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Social%20Care%20(Self%20directed%20Support)%20(Scotland)%20Bill/DPM.pdf)

² Scottish Parliament Subordinate Legislation Committee, *Official Report*, 15 May 2012. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7026&mode=pdf>

under the 1968 Act are in need of community care services, and providing services to meet those needs.

6. Local authorities also have a duty to promote the welfare of children in their area who are in need by providing services appropriate to those children's needs, under sections 22 to 24 of the Children (Scotland) Act 1995 ("the 1995 Act").

7. The Bill does not replace these duties. However, it does set out a number of principles which local authorities must have regard to in exercising their functions under Part II of the 1968 Act, sections 22 to 24 of the 1995 Act and under the Bill itself.

8. The starting point is that individuals must have as much involvement in the assessment of their needs and in the provision of support or services to them as they wish (section 1(2)). Local authorities are required to provide any reasonable assistance to enable individuals to express a view and to make an informed choice in choosing an option for "self-directed" support (section 1(3)). Local authorities are also obliged to collaborate with individuals in assessing their needs and providing support and services (section 1(4)).

9. The central element of the Bill is that individuals are to be given a choice as to how the services which they need are delivered to them. There are four options for self-directed support established by the Bill:

- Option 1: the making of a direct payment by the local authority to the supported person for the provision of support.
- Option 2: the selection of support by the supported person and the making of arrangements for the provision of it by the local authority on behalf of the supported person.
- Option 3: the selection of support and the making of arrangements for the provision of it by the local authority.
- Option 4: the selection by the supported person of Option 1, 2 or 3 for each type of support.

DELEGATED POWERS PROVISIONS

10. The Committee considered each of the delegated powers provisions in the Bill.

11. The Committee determined that it did not need to draw the attention of the Parliament to the delegated powers contained in sections 18 (new section 15(4)(h) of the Community care and Health (Scotland) Act 2002) or 26 (commencement) of the Bill.

12. The Committee's comments and, where appropriate, recommendations on the other delegated powers are detailed below.

Section 12 – Power to modify section 3

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure

Background

13. Section 12 enables the Scottish Ministers to make regulations which modify section 3 of the Bill. So far as it is necessary in consequence of any modification to section 3, they may also modify sections 4, 6 and 7.

14. Section 3 lists the options for self-directed support made available under the Bill. The supported individual is to be offered a choice of these options, and sections 4, 6 and 7 make provision about making that choice of support for adults, adult carers and children respectively.

Breadth of the power

15. It appeared to the Committee that the power in section 12 would enable the Scottish Ministers to make any modification to section 3 that they saw fit. It accordingly asked the Ministers to explain why such a broad power was considered to be necessary, and whether consideration had been given to limiting its scope. The Scottish Government officials advised the Committee that:

“ensuring flexibility and future proofing the range of options that is available to individuals were the main reasons behind including in the bill the power to modify the options.”³

16. They further explained that:

“The power in section 12 could have been drawn differently. For example, it could have allowed ministers to vary, remove or add an option. What it does is allow ministers to modify section 3 ...

The power is wide, but a narrower drawing up of it would have amounted to the same thing.”⁴

17. The officials subsequently confirmed to the Committee that it was not this present administration’s policy intention to use the power in section 12 to restrict the choice available to individuals. The Scottish Government’s legal adviser offered the opinion that:

“we are open to suggestions about how the power might be drawn more narrowly to achieve the aim. However, if, say, the power were drawn so that options could be added or removed, all the options could just be removed. It is simply theoretical. The Parliament could refuse to agree to regulations under the affirmative procedure. If a future Government with different

³ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 415.

⁴ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 417.

intentions with regard to the use of the power rejected the original intentions, the Parliament could refuse it.”⁵

18. The Committee recognises that the intention of the Scottish Ministers in seeking this power is to ensure that the Bill contains sufficient flexibility to allow it to be adapted to innovations in social work practice. In principle, it accepts that it may be reasonable to delegate power for that purpose, were the power to be exercised solely as this administration appears to propose.

19. However, it continues to have concerns in relation to the breadth of this power. Although the Scottish Government officials spoke of using the power to amend the definitions of the existing options specified in the Bill⁶, they accepted that it might be used to add new options in the future. They appeared to suggest, at least hypothetically, that however the power was framed it might be used to remove options and so to restrict the effectiveness of the choices available to individuals.

20. Given that section 3 of the Bill is recognised by the Scottish Government as one of its core provisions, and that the principle of choice in the delivery of services is central to the Bill, the Committee does not expect to see this power exercised so as to remove individuals’ ability to choose among the options. It observes that specific powers to restrict choice are to be found in sections 13 and 21 of the Bill. The Committee continues to be concerned that the entire policy and purpose of the Bill might be defeated by the making of regulations under section 12 so as to remove the element of choice. It accepts that this is in no way the policy of the present administration. However, given the significance of this matter, it suggests that the Scottish Government may wish to consider whether the power can be revised so as to provide that it cannot be used to remove the element of choice by reducing the options in section 3 to a single option.

Parliamentary procedure

21. As this power appeared to the Committee to be a particularly significant one, it explored with the Scottish Government why it considered the affirmative procedure to provide a sufficient level of parliamentary scrutiny. In particular, it wished to establish whether consideration had been given to a form of super-affirmative procedure to ensure an opportunity for detailed consultation on any draft regulations. In response, the Scottish Government’s legal adviser stated:

“It is a similar story to the one that you heard from the bill team for the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill. The options had been widely consulted on prior to the bill’s introduction. I assure you that there are no plans to use the power at present, and that any making of regulations would be done with extensive consultation with stakeholders.”⁷

22. The position adopted by the Scottish Government appeared to be that it views super-affirmative procedure as entailing detailed consultation followed by

⁵ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 418.

⁶ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 416.

⁷ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 417.

the affirmative procedure, and as it already proposes to consult then a form of super-affirmative procedure would not go any further.⁸

23. The Committee does not consider that it is accurate to draw parallels between the parliamentary procedure applicable to the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill and the procedure applicable to this power. The Scottish Government's legal adviser on that Bill informed the Committee that:

“The Scottish Government will consult on regulations before it makes them. Indeed, there will be a **statutory obligation** to consult the Convention of Scottish Local Authorities and such other bodies as ministers think appropriate.”⁹ *[emphasis added]*

24. The Committee contrasts that with the position in relation to section 12, where there is no such statutory requirement to consult. While the Committee welcomes the stated intention of the Scottish Ministers to consult voluntarily before exercising the section 12 power, it observes that statutory consultation with prescribed bodies is, on the face of it, a greater safeguard on the exercise of the power.

25. Having considered the example of the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill, the Committee considers that the Government ought to include a similar statutory consultation requirement in section 12. It takes the view that, in particular, the Government should consult local authorities (or representative bodies such as COSLA), as well as organisations appearing to represent the interests of individuals to whom the Bill applies.

26. The Committee draws the power in section 12 to the attention of the lead Committee as it considers it to be particularly broad in its scope, and observes that it appears to be possible for it to operate in the future so as to defeat the entire policy and purpose of the Bill by reducing the options for choice in section 3 to a single option.

27. The Committee accordingly recommends that the Scottish Government consider whether the power might be revised so that it may not be used in that manner, while still enabling the Government to achieve its stated aim of preserving sufficient flexibility to adapt the Bill to keep pace with changing social work practice in future.

28. The Committee considers that the section 12 power ought to be subject to a statutory requirement to consult interested bodies on any draft regulations. Were it subject to such a requirement, the Committee would be content that the regulations are subject to the affirmative procedure.

⁸ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 419.

⁹ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 410.

Section 13 – Power to make further provision about direct payments

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative procedure

Background

29. Section 13 allows the Scottish Ministers to make further provision via subordinate legislation about direct payments, and section 13(2) sets out a non-exhaustive list of ways in which this power may be exercised. In their Delegated Powers Memorandum, the Scottish Ministers characterise the purposes for which section 13 might be exercised as being largely technical. Section 13(2)(a) enables the Scottish Ministers to specify descriptions of persons who are ineligible for direct payments and section 13(2)(b) enables them to specify circumstances in which the right to choose to receive direct payments need not be offered.

Parliamentary procedure

30. It appeared to the Committee that provision under section 13(2)(a) and (b) would be substantive and would go beyond the merely technical. Accordingly, it asked the Scottish Government officials to explain why it was considered that the negative procedure provided a sufficient level of parliamentary scrutiny for regulations of that nature.

31. The Scottish Government officials advised the Committee that this power derived from the existing provisions in relation to direct payments which are to be found in section 12B of the 1968 Act. They highlighted that regulations under section 12B may similarly restrict access to direct payments and that those regulations are subject to the negative procedure. They further indicated that it was intended to carry forward the existing regulations following the Bill's enactment, although consultation would take place and the form might be different¹⁰. For these reasons, the Scottish Ministers considered that the negative procedure was appropriate.

Comment

32. The Committee does not consider that the adoption of a particular procedure in relation to an earlier delegated power is necessarily determinative of the appropriate procedure to be adopted in relation to section 13. It notes that section 12B of the 1968 Act was inserted in 1996, and that the approach to delegated powers adopted by Parliament at that time may not necessarily be the approach favoured by the Scottish Parliament nowadays.

33. However, the Committee accepts that it is not the Scottish Ministers' intention to innovate substantially in relation to restrictions on access to direct payments, and indeed officials suggested that the Bill would "carry on" the existing

¹⁰ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 420.

regulations¹¹. In these circumstances, the Committee accepts that it is appropriate that this power is subject to the negative procedure.

34. The Committee is satisfied in principle with the power in section 13, and that it is subject to the negative procedure.

Section 19 – Guidance and directions

Power conferred on:	the Scottish Ministers
Power exercisable by:	guidance/directions
Parliamentary procedure:	no parliamentary procedure

Background

35. When read with section 53 of the Scotland Act 1998, section 5(1) of the 1968 Act provides that local authorities are to perform their functions under the 1968 Act and their functions under Part II of the 1995 Act under the general guidance of the Scottish Ministers. Section 19(a) amends section 5(1) to extend the Ministers' powers to issue guidance to include guidance on functions conferred by the Bill.

36. Similarly, section 5(1A) of the 1968 Act provides that the Scottish Ministers may issue directions to local authorities as to the manner in which they exercise the functions conferred upon them by a number of Acts listed in subsection (1B). Section 19(b) adds the Bill to that list so that the Ministers may issue directions in relation to it.

Comment

37. The Committee considers that delegating powers to issue guidance and directions of this sort is, in the circumstances, appropriate. However, it notes that neither guidance issued under section 5(1) nor directions issued under section 5(1A) of the 1968 Act are subject to any form of parliamentary procedure. Nor does the 1968 Act require their publication in any other form. It accordingly welcomes the fact that the Scottish Ministers have convened a group of interested persons to assist in the development of the statutory guidance and delegated legislation necessary to implement the Bill.

38. The Committee accordingly finds the powers inserted into section 5 of the Social Work (Scotland) Act 1968 by section 19 to be acceptable in principle, and is content that they are not subject to any parliamentary procedure as this reflects the existing position under section 5(1) and 5(1A) of the Social Work (Scotland) Act 1968.

¹¹ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 420.

Section 20(1)(b) – Regulations: general

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure when being exercised in conjunction with sections 12 and 21, and negative procedure when being exercised in conjunction with section 13

Background

39. Section 20(1)(b) provides a “bolt on” ancillary power to allow the Scottish Ministers to include supplementary, incidental, consequential, transitory, transitional and savings provision when making subordinate legislation under any of the other regulation-making powers in the Bill (i.e. the powers in sections 12, 13 and 21). The inclusion of bolt-on provision does not alter the level of parliamentary scrutiny which applies in relation to the individual powers themselves.

40. The Committee was concerned that, in a Bill which contains only three substantive delegated powers, and which includes standalone powers to make ancillary provision by order, it was difficult to identify an obvious need for this power. This concern was fortified by the fact that two of the substantive powers (sections 12 and 21) of themselves contained specific powers to make ancillary provision. It accordingly sought further information from the Scottish Government on the interaction of this power with the specific powers in sections 12(b) and 21(2).

41. The Scottish Government indicated that the existence of those specific powers did not, in its view, prevent the exercise of the section 20(1)(b) power in conjunction with the powers in section 12 or 21. When asked why this was considered necessary, its legal adviser commented:

“It is not possible to speculate without knowing the terms of any changes to section 3. As I said, the specific power in section 12(b) would be used to amend the bill consequentially. If another amendment were needed to a further enactment—say, regulations regarding direct payments—we could use the power in section 20(1)(b) to make a consequential change there. However, we cannot speculate without knowing”.¹²

Comment

42. It appears to the Committee that the ancillary powers provisions of the Bill are complex, and it is not apparent why this degree of complexity is required. It observes that regulations under section 12, which of themselves are of a significant nature, might contain wide-ranging ancillary provision made under a combination of section 12(b) and 20(1)(b).

43. To the extent that section 20(1)(b) might be exercised in conjunction with section 13, the Committee accepts that it enables the Scottish Ministers to make

¹² Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 419.

ancillary and transitional provision in the same instrument as the related substantive provisions, and acknowledges that this may improve transparency and clarity for the end user. It is less clear to the Committee that a situation whereby the ancillary provisions in section 12(b) or 21(2) might be combined with further ancillary provisions in section 20(1)(b) does anything to promote transparency or clarity.

44. The Committee accordingly recommends that the Scottish Government consider whether it is appropriate that the significant powers in section 12(a) and 21(1) are capable of attracting two separate sets of ancillary powers, and whether as a result the power in section 20(1)(b) is necessary save in relation to section 13.

45. As the procedure which applies to the exercise of this power will be determined by the procedure applicable to the principal power being exercised, the Committee considers this to be acceptable in principle.

Section 21 – Power to modify application of Act

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative procedure

Background

46. Section 21 confers power upon the Scottish Ministers to make provision for or in connection with disapplying sections 4(2) or 7(2) of the Bill. Sections 4(2) and 7(2) are key to the Bill, as it is those provisions which require local authorities to give supported persons the opportunity to choose one of the section 3 options for delivery of support.

47. Section 4(2) requires local authorities to give supported adults the opportunity to choose one of the options for self-directed support listed in section 3, unless the authority considers the supported adult ineligible to receive direct payments. Section 7(2) places a similar obligation upon local authorities in respect of supported children or a member of a supported child's family to whom services are to be provided under section 22 of the 1995 Act.

48. Where regulations disapply section 4(2) or 7(2), section 21(2)(a) provides that the person may also be deemed to have chosen Option 3, and section 21(2)(b) provides that the regulations may disapply or modify any other section of the Bill.

Interaction with section 13

49. It appeared to the Committee that the powers in this section and in section 13(2)(a) and (b) were intended to be used in a similar way, to restrict the choice available to individuals. It accordingly asked the Scottish Government to explain why both powers were necessary and the criteria it would apply to determine which power ought to be exercised in any given case.

50. The Scottish Government officials made it clear that section 21 potentially has a much greater impact on the operation of the Bill than section 13. They stated:

“Any way in which section 21 was used would say, “You have no choice. In these circumstances, the local authority will provide the services as the local authority sees fit.” However, sections 13(2)(a) and 13(2)(b) would be able to restrict the choice and to say, “You have a choice, but your choice is between options two and three and option four”.¹³

51. They went on to specify that the section 21 powers were only intended to be deployed to remove any element of choice, and that they would not be used to restrict access to a particular option.

52. The Committee notes the Scottish Government’s position, and accepts that in principle it is appropriate to make a distinction between these powers based on their intended use.

Circumstances in which the power might be exercised

53. The Committee was concerned to note from the Delegated Powers Memorandum that, when the Bill was introduced, the Scottish Government did not know what the section 21 power would be used for. In particular, it was concerned that the DPM at paragraph 24 recorded that there were divergent views within the Scottish Government on that point. It accordingly asked whether those views had been reconciled, and whether the Scottish Government could advise as to the circumstances in which the power might be exercised.

54. The Scottish Government officials gave two examples of circumstances where the power might be deployed. It might be used in relation to child protection services which local authorities delivered in reliance on their powers to promote the welfare of children in need in terms of section 22 of the 1995 Act (as distinct from their child protection functions under other sections of that Act, to which the Bill does not apply). Officials also appeared to envisage its use where Option 2 was not considered appropriate:

“In relation to option 2 in the bill, which is not the direct payments option, there have been discussions with consultees around some of the recipients of social care who are at the outside edges of those whom social work departments support—people whose need arises from homelessness, drug addiction or alcohol addiction. The sector may not be ready to respond to the increased flexibility of option 2—the individual service fund option—in the short term, at least. Therefore, it was felt that a power to modify the application of the act was necessary”.¹⁴

55. The Committee accepts that, in some circumstances, such as those mentioned in paragraph 54 above, it might be necessary to disapply the element of choice. It notes, however, that there is an inconsistency between the position

¹³ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 421.

¹⁴ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Cols 420-421.

adopted in paragraph 51 above and the suggestion that it might be appropriate to deploy section 21 where Option 2 (rather than Option 1) was felt to be inappropriate. It accordingly suggests that the Scottish Government may wish to clarify whether it considers it necessary to remove the element of choice entirely in respect of persons whose need arises from homelessness, drug addiction or alcohol addiction, or whether it is merely Option 2 which is not appropriate for those persons. If it is the latter, then it is asked to explain how this may be reconciled with its stated position that section 21 should only be used to remove choice entirely, and not to interfere with the available options.

Operation of the power

56. The Committee sought additional information in relation to three aspects of the way in which the power is intended to operate.

57. As section 21(1) provides only for the disapplication of subsection (2) of sections 4 and 7, it sought clarity on the position in relation to the remainder of sections 4 and 7 should subsection (2) be disapplied. The Scottish Government advised that, in its view, any other provisions in sections 4 and 7 would be disapplied by necessary implication if subsection (2) were disapplied.¹⁵

58. The Committee notes this explanation, although it does not consider the position to be entirely free from doubt. It considers it at least arguable that, if section 4(2) or 7(2) is disapplied, then the supported person has not made a choice in pursuance of that subsection or subsection (3)(b), and accordingly is deemed to have chosen Option 3 by virtue of subsection (4). As competing interpretations appear to be open, the Committee recommends that the Scottish Government consider whether the drafting of the section 21 power could be clarified so as to put the matter beyond doubt.

59. The Committee observed that, although sections 4, 6 and 7 were in very similar terms, the section 21(1) power could not be used to disapply section 6 (which relates to the choice to be given to adult carers). It sought an explanation as to why carers fell to be treated differently. The Scottish Government confirmed that this was an intentional omission, on the basis that the principal powers to provide support to adults (section 12 of the 1968 Act) and to children (section 22 of the 1995 Act) were “enormously wide”¹⁶. By contrast, the power to provide support to adult carers is contained in the Bill itself and it is a limited power. The officials advised that, while circumstances could be envisaged where the power might be needed in connection with sections 4 and 7, it was not possible to justify extending it to section 6 as no such circumstances were envisaged.¹⁷

60. The Committee notes the position, and observes that the omission does not in any way prejudice adult carers, who appear in fact to have a greater degree of protection than others who are entitled to a choice under the Bill.

61. Section 21(2)(b) provides that regulations made under section 21(1) may include provision disapplying or modifying any other section in the Bill. On the face

¹⁵ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 422.

¹⁶ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 423.

¹⁷ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 423.

of it, this power enables the Scottish Ministers to disapply or modify the Bill essentially as they see fit, if they disapply either section 4(2) or 7(2). It accordingly asked the Scottish Government to explain the basis upon which the supplementary power in section 21(2)(b) is intended to be exercised.

62. The Scottish Government suggested that the power might be used to disapply section 8, which relates to the provision of information by local authorities. The Scottish Government's legal adviser said:

"It would be sensible to disapply local authorities' duty to provide information on choices if somebody did not have a choice."¹⁸

63. The Committee agrees that that would be a sensible approach. However, it observes that, in terms of section 8(1), section 8 only applies where "a local authority gives a person an opportunity to choose one of the options for self-directed support." It appears to the Committee that no such opportunity will be given if section 4(2) or 7(2) has been disapplied, and so section 8 will not apply. Making provision to disapply section 8 in regulations would accordingly seem to be otiose.

64. As sections 9 to 11 of the Bill will similarly apply only where a local authority has given a person an opportunity to choose one of the options, the Committee suggests that the Scottish Government give further consideration to whether the power in section 21(2)(b) is in fact necessary, particularly given that it enables the modification or disapplication of any provision of the Bill and is accordingly of a particularly significant nature.

65. As an example of the breadth of potential provision which might be made under section 21(2)(b), the Scottish Government was asked whether it might be used to disapply section 6(2), notwithstanding the previously-stated intention that section 6(2) be protected from the principal power to disapply contained in section 21(1). The Scottish Government's legal adviser replied:

"It certainly has not crossed my mind that that would be the intention. It would be for Parliament to decide, but that would clearly be a strange use of the power."¹⁹

66. Whether or not it might represent an unusual exercise of the section 21(2)(b) power, the Scottish Government appears to accept that the power could be used to controvert its intention to prevent the disapplication of the right of carers to make a choice. The Committee accordingly suggests that, if the Scottish Government remains of the view that the power is necessary, the Government should consider whether it is necessary to take a power to modify *any* provision of the Bill, or if it could feasibly identify provisions which should be protected from modification using this power.

¹⁸ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 423.

¹⁹ Scottish Parliament Subordinate Legislation Committee. *Official Report, 15 May 2012*, Col 423.

Parliamentary procedure

67. As with section 12, this power appeared to the Committee to be a particularly significant one. It therefore explored again with the Scottish Government why it considered the affirmative procedure to provide a sufficient level of parliamentary scrutiny, and whether super-affirmative procedure had been considered. The Scottish Government took the view that there was nothing to distinguish this power from section 12. It confirmed its earlier position, i.e. that the reasoning given in relation to the Local Government Finance (Unoccupied Properties etc) (Scotland) Bill applied similarly in relation to this power.

68. As reported at paragraph 23 above, the Committee does not consider this to be an accurate comparison. Again, there is no statutory consultation requirement in section 21. It considers the section 21 power to be equally as significant as the section 12 power, if not more so. Accordingly, while it welcomes voluntary consultation, it is of the view that a statutory obligation to consult would constitute a greater safeguard when proposing to exercise a power which would preclude any element of choice.

69. The Committee accepts that the power in section 21(1) to disapply section 4(2) or 7(2) of the Bill is, in principle, appropriate.

70. However, the Committee recommends that the Scottish Government explain whether it considers it necessary to remove the element of choice entirely using section 21(1) if Option 2 is considered not to be appropriate in any given situation. If this is not the case, then it is asked to explain how this may be reconciled with its stated position that section 21 should only be used to remove choice entirely, and not to interfere with the available options.

71. The Committee also recommends that the Scottish Government consider whether it is sufficient to rely on the disapplication of section 4(2) or 7(2) impliedly to disapply the remainder of those sections, given that it is arguable that subsection (4) could sensibly continue to operate despite such a disapplication.

72. The Committee does not accept that the supplementary power in section 21(2)(b) to modify or disapply any other section of the Bill in consequence of a disapplication of section 4(2) or 7(2) – as presently drafted – is appropriate.

73. The Committee calls on the Scottish Government to identify the sections of the Bill to which section 21(2)(b) might apply, given that a number of sections are expressed to apply only where a local authority has given a person the opportunity to choose one of the options.

74. Given that it appears to be intended that certain sections of the Bill, such as section 6(2), should not be modified, the Committee invites the Scottish Government to consider whether it is necessary that the power in section 21(2)(b) permit the modification of any other section of the Bill, or if it could feasibly identify the provisions which should be protected from modification using this power.

75. **The Committee also considers that the section 21 power ought to be subject to a statutory requirement to consult with interested bodies on any draft regulations. Were it subject to such a requirement, the Committee would be content that the regulations are subject to the affirmative procedure.**

Section 24 – Ancillary provision

Power conferred on:	the Scottish Ministers
Power exercisable by:	order
Parliamentary procedure:	affirmative procedure where making textual amendments to primary legislation, and otherwise negative procedure

Background

76. Section 24(1) allows the Scottish Ministers to make such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision of the Act. Section 24(2) provides that this power may be used to modify any enactment. Section 24(3) provides that where the power is exercised so as to amend any part of the text of an Act, then the affirmative procedure applies. Otherwise, negative procedure applies.

Comment

77. The Committee accepts that circumstances may arise which would necessitate adjustments of the nature permitted by this power. It does not think it would be an effective use of parliamentary time to require matters of a technical or minor nature, and which are bound up with giving effect to the provisions in this Bill (as distinct with being used for some wider purpose), to be dealt with by means of further primary legislation.

78. Nevertheless, to the extent that this power enables textual changes to be made to primary legislation, the Committee considers that it is important that an appropriate level of parliamentary control is applied to that process. It therefore agrees that the affirmative procedure should apply in such circumstances. Similarly, the Committee considers that in other circumstances it is reasonable that the negative procedure should apply.

79. The Committee did not consider it to be entirely clear whether an order under section 24 may modify the Bill itself, despite the provision in section 24(2) that an order may modify “any enactment”. It has recently scrutinised delegated powers where the matter has been put beyond doubt in the Bill, for example in section 121(2) of the Police and Fire Reform (Scotland) Bill. The Committee accordingly asked the Scottish Government to explain whether it was intended that this Bill could itself be modified by order under section 24.

80. The Scottish Government did not offer a view on whether it would be possible to modify the Bill using the power in section 24, but it did clarify that it is not its intention to do so. The Committee considers that the present administration’s intentions cannot be determinative of the matter when the power will appear on the

statute book until it is repealed, and so will be available to any future administration. The Scottish Government went on to make it quite clear that it considers the wording used in the Police and Fire Reform (Scotland) Bill to achieve clarity to be unnecessary, as it has no intention to use the power in that way.

81. The Committee respects the Scottish Government's intentions in relation to this power. However, if there is no intention that the power should be used in that way, then the Committee considers that it could be revised so as to state expressly that the power does not extend to modification of the Bill itself. In that respect, it would represent the mirror image of the Police and Fire Reform (Scotland) Bill's wording, which contains express provision to put it beyond doubt that the equivalent provision *did* extend to modification of that Bill. The Committee suggests that the Scottish Government reconsider this matter in the interests of clarity.

82. Subject to the following recommendation, the Committee is satisfied in principle with the power in section 24, and that it is subject to the affirmative procedure when making textual amendments to primary legislation, and otherwise to the negative procedure.

83. The Committee recommends that the Scottish Government, in light of its stated intention not to use the power in section 24 to modify the Bill itself, consider whether section 24(2) might be revised so as to put the matter beyond doubt in order to make it clear that it may not be used to modify the Bill itself.

Section 25 – Transitional provision etc.

Power conferred on:	the Scottish Ministers
Power exercisable by:	order
Parliamentary procedure:	negative procedure

Background

84. Section 25 confers power on the Scottish Ministers to make such provision as they consider necessary or expedient for transitory, transitional or saving purposes in connection with the coming into force of the Act. Section 25(2) provides that an order made under this section may modify any enactment, and orders under this section are subject to the negative procedure in all cases.

Comment

85. Again, the Committee accepts that circumstances may arise which necessitate adjustments of the nature permitted by this power, and it does not think it would be an effective use of parliamentary time for matters of a technical or minor nature, which are bound up with giving effect to the provisions in this Bill (as distinct with being used for some wider purpose), to be dealt with by means of further primary legislation.

86. However, this power, although subject to the negative procedure, may be used to modify any enactment. Unlike the power in section 24, there is no requirement that the affirmative procedure will apply when making textual

amendments to primary legislation. As the Scottish Government's Delegated Powers Memorandum did not provide any explanation as to why negative procedure is considered appropriate in these circumstances beyond a bare reference to "similar ancillary powers in other Bills", the Committee explored the matter further with Scottish Government officials. The Scottish Government's legal adviser stated:

"I had thought that it was general practice that such revisions would be subject only to negative procedure, because I cannot think of ways in which transitional or transitory provisions would modify the text of primary legislation."²⁰

87. The Committee accepts that this may well be the case. However, section 25(2) expressly provides that an order under section 25(1) "may modify any *enactment*." Regardless of whether the circumstances can be presently envisaged, section 25 as it stands would confer the power to make transitional or transitory provisions which modify the text of primary legislation. It accordingly appears to the Committee that section 25(2) is either unnecessary, insofar as it relates to primary legislation, or it should be subject to the affirmative procedure in the same way as the section 24 power is when it is used to textually amend primary legislation.

88. The Committee observes that the powers in section 25 are very similar to those in section 122 of the Police and Fire Reform (Scotland) Bill. In the Committee's report on the delegated powers in that Bill, it recommended that, as the power *might* be used to amend primary legislation, it ought to be subject to the affirmative procedure when used to do so. In the Cabinet Secretary's letter to the Convener dated 30 April 2012, the Scottish Government acknowledges the merits of a consistent approach when textual modifications are being made to primary legislation. It has accordingly undertaken to lodge a Stage 2 amendment to make section 122 subject to the affirmative procedure when textually amending primary legislation.

89. The Committee reaffirms its view that a delegated power which permits the textual amendment of primary legislation is a significant matter, no matter how unlikely it is that it will be exercised for that purpose. It accordingly has a particular interest in ensuring that the Parliament has an appropriate level of scrutiny in relation to its exercise. Indeed, if the exercise of the power textually to amend primary legislation is considered to be unusual or rare then the Committee considers that this could be said to strengthen the appropriateness of the affirmative procedure being applied to ensure that the Parliament is adequately alerted to those unusual events.

90. Separately, and as with section 24, the Committee did not consider it to be entirely clear whether an order under section 25 might modify the Bill itself, despite the provision in section 25(2) that an order may modify "any enactment". As section 24(2) and 25(2) are identical, the Committee adopts its reasoning in relation to section 24 in respect of section 25.

²⁰ Scottish Parliament Subordinate Legislation Committee. *Official Report*, 15 May 2012, Col 427.

91. Subject to the following recommendation, the Committee is satisfied in principle with the power in section 25.

92. The Committee recommends that the Scottish Government consider whether section 25(2) might be revised so as to put it beyond doubt that the power in section 25 may not be used to modify the Bill itself.

93. The Committee recommends that, as is the case with the power under section 24, the power in section 25 should be subject to the affirmative procedure where it is used to make textual amendments to primary legislation, and to the negative procedure otherwise.

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Published in Edinburgh by APS Group Scotland

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Printed in Scotland by APS Group Scotland

ISBN 978-1-4061-8980-3
