Delegated Powers and Law Reform Committee

48th Report, 2013 (Session 4)

Public Bodies (Joint Working) (Scotland) Bill

Published by the Scottish Parliament on 24 September 2013
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (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.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Christian Allard
Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
John Scott
Stewart Stevenson (Deputy Convener)
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Delegated Powers and Law Reform Committee

48th Report, 2013 (Session 4)

Public Bodies (Joint Working) (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 3 and 24 September 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Public Bodies (Joint Working) (Scotland) Bill at stage 1 (“the Bill”)

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 28 May 2013. The Health and Sport Committee is the lead Committee. The Bill is also being considered by the Local Government and Regeneration Committee.

4. In broad outline, the Bill provides a framework with a view to the improvement of the quality and consistency of health and social care services, through the integration of health and social care services in Scotland. The functions of local authorities and Health Boards which may be integrated are not however limited by the Bill to health and social care functions. Four “models of integration” between local authority and Health Board functions may be used, by agreement subject to the approval of the Scottish Ministers. On default if an integration plan is not submitted to Ministers, they may specify functions to be delegated to an integration joint board (Part 1).

5. The Bill also provides for the Common Services Agency (also known as NHS National Services Scotland) to provide goods and services to public bodies

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1 Public Bodies (Joint Working) (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Public%20Bodies%20(Joint%20Working)%20(Scotland)%20Bill/b32s4-introd.pdf

2 Public Bodies (Joint Working) (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/PB_-_DPM.pdf
including local authorities (Part 2, section 44). It also provides for the Scottish Ministers to form a wider range of joint venture structures in relation to persons providing functions and services under the National Health Service (Scotland) Act 1978, to seek to make the most effective use of resources (Part 3, section 46). There is new provision that a Health Board may, with the agreement of another Health Board and the Scottish Ministers, carry out on behalf of that other Board any function of the other Board (Part 3, section 47).

6. The Bill also extends the scheme for meeting losses and liabilities of health service bodies which is run by NHS Scotland on behalf of the Scottish Ministers, to local authorities and “integration joint boards” established under Part 1 (Part 2, section 45).

7. The Policy Memorandum outlines that the Bill is designed to establish “a framework for integration between Health Boards and local authorities of, as a minimum, adult health and social care based on the principles of a person-centred approach to service planning” (paragraph 32). The Scottish Government published its consultation on proposals for such integration in May 2012.

8. At its meeting of 3 September the Committee agreed to write to Scottish Government officials to raise various questions on the delegated powers. This correspondence is reproduced at the Annex.

DELEGATED POWERS PROVISIONS

9. As noted above the Committee considered each of the delegated powers in the Bill.

10. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

Section 5 – Power to prescribe national outcomes
Section 6(2) – Consultation
Section 7(1) – Approval of integration plan
Section 9(2) – Functions delegated to integration joint board
Section 9(3) – Functions delegated to integration joint board- prescribed day
Section 10(5) – Chief officer of integration joint board
Section 11 – Other staff of integration joint board
Section 14 – Functions delegated to local authority or Health Board- prescribed day
Section 21(5) – Effect on delegation of functions
Section 22(8) – Further powers of persons to whom functions are delegated- order by the Scottish Ministers
Section 23(4) – Requirement to prepare strategic plans

Section 26(2) – Establishment of consultation group

Section 27(5) – Steps following establishment of consultation group

Section 32(4) – Carrying out of integration functions: localities

Section 33(3) – Integration authority: performance report

Section 36(2) – Winding-up of an integration joint board

Section 38(2) – Grants to local authorities

Section 41 – Guidance

Section 45(3) – Extension of schemes for meeting losses and liabilities of health service bodies

Section 48(1) – Interpretation

Section 50 – Ancillary provision

11. Subsequently, in light of the written responses received by the Committee, it agreed that it did not need to draw the Parliament’s attention to the following delegated powers:

Section 12(3) – Integration joint boards: further provision- schemes for transfer of staff, etc.

Section 22(1) to (7) – Further powers of persons to whom functions are delegated

Section 39(2)(b) – Default power of Scottish Ministers (establishment of an integration joint board)

Section 39(2)(c) – Default power of Scottish Ministers (prescribed day)

Section 40 (Directions)

Section 52(2) and (3) (Commencement)

12. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.
Section 1(3)(e) – Integration plans: same local authority and Health Board area- prescribed information about other prescribed matters

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<td>Power exercisable by:</td>
<td>Regulations</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative procedure</td>
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</tbody>
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Provision

13. Section 1(3)(e) provides for the power to prescribe by regulations, information about such matters as may be prescribed, for inclusion in an integration plan.

Comments

14. The Committee initially asked the Scottish Government to provide some examples of the information and matters that could be prescribed for inclusion in an integration plan. The response annexed sets out in paragraph 2 the range of such matters which it is intended could be prescribed in the regulations.

15. The Scottish Government provided further explanation to the Committee (paragraphs 3 to 6 of Annex B), as to why this power is needed in principle, and why it is intended that the matters which may be prescribed under section 1(3)(e) would go beyond those set out in section 1(3)(a).

16. Given the underlying policy proposals on what integration plans may contain, the Committee accepted the explanation for the need for this delegated power in principle (as opposed to seeking to set out the additional information in the Bill).

17. The Committee notes however that while this power is to prescribe further information for inclusion in integration plans, the range of matters which could be prescribed as set out in paragraph 2 of the response concern matters which could be of significance, such as the further arrangements for an integration joint board or joint monitoring committee to be implemented in the plan beyond the “model of integration”, arrangements for financial management of an integrated budget, or any arrangements for transfer of staff. The range of further matters that could be prescribed is also not limited to those arrangements.

18. The Committee therefore asks the Scottish Government, in relation to the power in section 1(3)(e), to consider in advance of Stage 2 of the Bill whether the significance of the matters which could be prescribed in regulations under this power is such that the affirmative procedure could be a more suitable level of Parliamentary scrutiny of the exercise of this power, rather than the negative procedure.

19. The Committee asks for further comment on this in the Scottish Government’s response to this report.
Delegated Powers and Law Reform Committee, 48th Report, 2013 (Session 4)

Section 1(6) – Integration plans: same local authority and Health Board area-prescription of functions

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative procedure

Provision

20. The regulations under section 1(6)(a) and (b) are intended to prescribe the range of functions of local authorities and Health Boards which either must, may, or may not be, delegated under an integration plan.

Comments

21. The Committee asked the Scottish Government to explain why it is appropriate that section 1(6) provides that the Scottish Ministers have a discretion, rather than a requirement, to make the regulations.

22. It is confirmed in response that the Scottish Ministers intend to use this power to prescribe the minimum set of functions that must be delegated to the integration authority, and also to specify those functions which may or may not be delegated. In line with the policy memorandum, the regulations will set out adult health and adult social care functions which must be delegated.

23. The Scottish Government recognises that given the intention to require the delegation of certain functions, it would be more appropriate to require the Scottish Ministers to make such regulations. The Scottish Government will, therefore, bring forward an amendment at stage 2 to this effect.

24. The Committee also noted that section 56 of the Local Government (Scotland) Act 1973 is not expressly amended by, or referred to in, the Bill. Subsections (6) and (6A) of that section provide that a local authority’s functions with respect to setting amounts of council tax, borrowing money, approving annual investment strategies or reports, and determining applications for planning permission for a certain class of property, shall be discharged only by the authority. By subsection (7), a local authority shall not make arrangements for the discharge for any of their functions under the Animal Health Act 1981 by any other local authority.

25. Section 1 does not provide for any exclusion of those significant functions in the 1973 Act, from the powers to prescribe the functions which may be delegated in terms of an integration plan, and agreed to be set out in a plan.

26. The Committee therefore asked the Scottish Government whether there is any intention to affect the operation of section 56(6), (6A) and (7) of the 1973 Act. If not, it asked whether amendment of the Bill at Stage 2 would be proposed, so that “integration functions” could never extend to those functions. The Government has undertaken to consider this further in advance of Stage 2.
The scrutiny procedure applied to the powers in section 1(6)

27. The Committee considered that the Delegated Powers Memorandum for the Bill has not explained satisfactorily why the negative procedure was the appropriate level of scrutiny of the powers in section 1(6). The powers are very significant within the Bill, as the regulations will provide for the range of functions which must, may, or may not be, delegated under an integration plan.

28. The Scottish Government, in recognition of the significance of these powers, has considered it more appropriate that the exercise of them should be subject to scrutiny by Parliament by the affirmative procedure. It undertakes to bring forward an amendment at stage 2 to this effect.

29. The Committee notes that, in relation to the power in section 1(6), the Scottish Government has undertaken to bring forward an amendment at Stage 2, to require the Scottish Ministers to make the regulations under this power, rather than having a discretion to do so. The Committee will consider the proposed amendment after Stage 2.

30. The Committee also notes that the Scottish Government has undertaken to consider whether any amendments at Stage 2 need to be made to address the operation of the provisions in section 56(6), (6A) and (7) of the Local Government (Scotland) Act 1973, as they relate to the powers in section 1 of the Bill. The Committee asks for further comment on this in the Scottish Government’s response to this report.

31. The Committee also notes that the Scottish Government has undertaken to bring forward an amendment at Stage 2 which would provide that the exercise of the powers in section 1(6) would be subject to Parliamentary scrutiny by the affirmative procedure.

Section 12(1) and (2) – Integration joint boards: further provision

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

Provision

32. Section 12(1) provides that the Scottish Ministers may by order make provision about various aspects of joint integration boards, including their membership and proceedings. Such boards may be established under section 9. An order may make different provision in relation to different integration joint boards.

33. Any integration joint boards which are established under the Bill will be public authorities which will either undertake or direct the carrying out of functions delegated by the constituent local authorities and health boards.
Comments

34. The Committee asked the Scottish Government why this power needs to be drawn widely, to permit any provisions by order about (and so to determine) the membership of integration joint boards. It also asked why it could not be drawn to contain provision for the permissible number of members of an integration joint board (for instance by stating a minimum or maximum number of members, within which parameters an order could specify the number of members of a particular board); and contain provision for who may be a member.

35. It is indicated in response to the Committee (Annex B, paragraphs 10 and 11) that there are policy reasons for seeking a flexible approach as to the number of members, and who may be a member. It has been considered important that this provision strikes an appropriate balance between establishing a common framework for integration, while at the same time ensuring that it is not prescriptive at such a level of detail as to stymy local innovation. It is considered important that the powers should allow provision as to the membership, proceedings etc. of integration joint boards to be modified, as integration develops.

36. The Committee accepts the Scottish Government’s explanation of the perceived need for proposing a wide power in relation to the membership of joint boards, in principle. It considers it appropriate however to draw the proposed scope of the power in section 12(1)(a) to the attention of the Health and Sport Committee as the lead committee for the Bill.

37. The Committee accordingly draws the attention of the lead committee to the power in section 12(1)(a). This power proposes to enable the Scottish Ministers by order to make provision about the membership of integration joint boards, without any limitations as to the number of members of a particular board that may be prescribed, or as to who may be prescribed as members.

Section 15 – Transfer of staff where functions delegated to local authority or Health Board

Power conferred on: the Scottish Ministers
Power exercisable by: Scheme
Parliamentary procedure: None (and not in the form of an SSI)

Comments

38. Section 15 provides for a power of the Scottish Ministers to make a scheme for the transfer of staff from a person who is to delegate functions under the possible “integration models” between local authorities and Health Boards described in section 1(4), except for the “corporate body” model.

39. In summary, as in relation to section 12(3), the Committee asked the Scottish Government to explain the reasons for taking this power, the circumstances in which the power might be used to transfer staff between a local authority and a
Health Board, and why it is appropriate that any scheme is not subject to Parliamentary procedure.

40. The Government's response (Annex B, paragraphs 17 to 20) is to similar effect as for section 12(3), in relation to the proposed contractual and administrative nature of any scheme for transfer of staff, and why it has been considered not appropriate to provide that a scheme should be subject to Parliamentary scrutiny, nor published.

41. However, the response also explains that this power is similar to the current power in the Community Care and Health (Scotland) Act 2002 (“the 2002 Act”), which is repealed by the Bill. It is explained that Highland Partnership has transferred staff under that power.

42. The Committee understands that section 15 of the 2002 Act currently confers powers on local authorities and NHS bodies in accordance with regulations made by Ministers to enter into arrangements for the delegation of certain functions. Specifically in terms of section 15(4)(c) of the 2002 Act, regulations may make provision as respects the provision of staff in connection with any such arrangements, including the transfer and secondment and terms and conditions of staff. (The regulations are subject to the negative procedure in terms of section 23 of the Act).

43. The Committee understands therefore that while there is a current power in the 2002 Act to enable transfer of staff arrangements, the form of exercise of that power is by regulations which are published as a Scottish statutory instrument, not an unpublished scheme. It appears therefore that the Bill proposes a downgrading of the level of Parliamentary scrutiny of the power to transfer staff, where functions are delegated under an integration plan between a local authority and Health Board (by one of the integration models under section 1(4)(b), (c), or (d)).

44. The Committee therefore accepts the power in section 15 to make a scheme for the transfer of staff where functions may be delegated to a local authority or Health Board, in principle.

45. However it draws to the attention of the lead committee that the exercise of this power would not be subject to Parliamentary scrutiny. The Committee understands that the current power to make provision for any transfer or secondment of staff contained in the Community Care and Health (Scotland) Act 2002, where arrangements may be entered between local authorities and NHS bodies for the delegation of functions, is exercisable by Regulations which are subject to Parliamentary scrutiny by the negative procedure (sections 15(4)(c) and 23 of that Act).

46. In contrast, the power in section 15 of the Bill to make provision about the transfer of staff, where functions are delegated to a local authority or Health Board, is proposed to be exercisable by a scheme which would not be published as a Scottish statutory instrument, nor subject to Parliamentary scrutiny.
47. The Committee understands therefore that section 15 proposes to remove scrutiny by the Parliament, in comparison with the similar power in the 2002 Act which would be repealed by the Bill.

Section 16 – Integration joint monitoring committees: further provision

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

Provision

48. Section 16(1) provides that the Scottish Ministers may by order make provision about the establishment of, membership of, and the proceedings of, integration joint monitoring committees, and any other matter relating to the operation of integration joint monitoring committees that the Scottish Ministers think fit.

49. Any such committees will be public authorities which would monitor the carrying out of “integration functions” for the area of a local authority.

Comments

50. Similarly to the power in section 12 to prescribe the membership of integration joint boards, the Committee asked the Scottish Government for explanation why this power requires to be drawn widely, to permit any provisions by order about (and so to determine) the membership of integration joint monitoring committees.

51. The Scottish Government considers that, as for the power in section 12, flexibility as to the membership of integration joint monitoring committees will enable Ministers to put in place a framework to allow integration authorities to develop governance arrangements that suit local circumstances (Annex B, paragraph 21).

52. The Committee accepts the Scottish Government’s explanation of the perceived need for proposing a wide power in relation to the membership of joint boards, in principle. As for the power in section 12(1)(a) however, it considers it appropriate to draw the proposed scope of this power to the attention of the Health and Sport Committee as the lead committee for the Bill.

53. The Committee accordingly draws the attention of the lead committee to the power in section 16(1)(b). This power proposes to enable the Scottish Ministers by order to make provision about the membership of integration joint monitoring committees, without any limitations as to the number of members of a particular committee that may be prescribed, or as to who may be prescribed as members.
Section 36(3) – Power to make provision in consequence of new integration plan—scheme about transfer of staff, etc.

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<td>Power exercisable by:</td>
<td>Scheme</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None (and not in the form of an SSI)</td>
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</tbody>
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Provision

54. Section 36(3) provides that in consequence of the replacement of an integration plan by a new plan, the Scottish Ministers may, by scheme, make such provision about the transfer of staff, property, rights, liabilities or obligations of an integration joint board, a local authority or a Health Board as they consider necessary.

Comments

55. In summary, the Committee asked the Scottish Government to explain the reasons for taking this power, and to explain the circumstances in which the power might be used to transfer staff, property, etc., upon a new integration plan being substituted under section 35. It also asked why it has been considered appropriate that the exercise of the power should not be subject to Parliamentary scrutiny.

56. The Government’s written response (Annex B, paragraphs 26 to 29) has provided an explanation to the Committee why this further power to make a scheme is considered to be required.

57. Similarly to the power in section 15, this power in consequence of the substitution of a new integration plan (upon a change of the local authority which prepared the plan, or the integration model), would enable Ministers to make schemes for transfer of staff, property, rights, liabilities or obligations between a local authority and a Health Board (as well as to or from an integration joint board).

58. The Committee accepts the explanation why these powers are required in principle. However it considers it appropriate to draw to the attention of the lead committee the difference between the level of Parliamentary scrutiny which is proposed to be applied to these powers, in comparison with the powers currently available to transfer staff between a local authority and a Health Board in the Community Care and Health (Scotland) Act 2002. As for section 15, it is proposed that a scheme under this provision would not be subject to Parliamentary scrutiny, nor be published as a Scottish statutory instrument.

59. The Committee also asked the Scottish Government why section 19 applies where (by virtue of section 12(3) or 15(1)) a scheme is made for staff transfer, to set out the effects on contracts of employment, but section 19 does not provide that it applies when this power in section 36(3) is exercised.

60. The Scottish Government has considered this further, and concluded that section 19 should indeed apply when this power is exercised. It will consider whether an amendment at stage 2 is necessary to give that effect.
61. The Committee therefore accepts the power in section 36(3) to make a scheme in consequence of the replacement of an integration plan by a new plan, in principle.

62. However it also draws the attention of the lead committee to the same matter as for the powers to make a scheme in section 15, as regards the scrutiny of the exercise of this power. Section 36 similarly proposes to remove scrutiny by the Parliament, in comparison with the analogous power in the Community Care and Health (Scotland) Act 2002 to set out arrangements for the transfer of staff which would be repealed by the Bill.

63. The Committee notes that the Scottish Government will consider in advance of Stage 2 whether an amendment is required, to give effect to the intention that section 19 should apply, when the power in section 36(3) is exercised to make a scheme for the transfer of staff.

Section 39(2) – Default power of Scottish Ministers

64. Section 39(2)(a) to (e) lists five default powers which the Scottish Ministers may exercise, where a local authority and a Health Board fail before the day prescribed under section 7 to submit an integration plan for approval by them.

65. The functions of a local authority and a Health Board which may be specified under section 39(2)(a) on default to be delegated to an integration joint board are not limited by the prescription of functions by regulations under section 1(6). Section 1(6) relates to the prescription of functions which must, may, or may not be, delegated under an integration plan. Section 39(2) applies where such a plan has not been submitted for approval.

Comment

66. The Scottish Government has confirmed that it does not intend for the functions that may be specified under section 39(2)(a) to go beyond those that would be prescribed by regulations under section 1(6). It undertakes to consider whether a Stage 2 amendment is necessary to effect this.

67. The Committee also sought explanation why there is a difference of approach between the powers contained in section 1(6) and section 39(2). The exercise of the powers under section 1(6) are proposed to be subject to the negative procedure, but the exercise of the powers under section 39(2)(a), (d) and (e) to specify the functions to be delegated to an integration joint board and other matters are not proposed to be subject to scrutiny by the Parliament.

68. The Scottish Government has explained (Annex B, paragraph 31) that the policy intention is in that respect to take a consistent approach with the powers to prescribe by regulation the functions which may be delegated between local authorities and Health Boards in terms of the Community Care and Health (Scotland) Act 2002. The entering of arrangements for the actual selection of
individual functions or parts of a function for delegation by a particular health board or local authority is not subject to further scrutiny by the Parliament under the 2002 Act.

69. The Committee accepted that explanation in principle, given the policy intentions underlying section 39.

70. The Committee notes that the Scottish Government will consider in advance of Stage 2 whether an amendment is required, to give effect to the intention that the functions which may be specified under section 39(2)(a) on default to be delegated to an integration joint board would not go beyond those that would be prescribed by regulations under section 1(6).
ANNEX A

Correspondence with the Scottish Government

On 3 September, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 1(3)(e) – Integration plans: same local authority and Health Board area- prescribed information about other prescribed matters

Power conferred on:  the Scottish Ministers  
Power exercisable by: Regulations  
Parliamentary procedure: Negative procedure

1. Section 1(3)(e) provides for the power to prescribe by Regulations, information about such matters as may be prescribed, for inclusion in an integration plan.

2. The Committee asks the Scottish Government:
   
   - To provide some examples of the information and matters that could be prescribed for inclusion in an integration plan?
   
   - Why the power is drawn to permit any matters to be prescribed (about which prescribed information would need to be included in a plan), without provision that such matters should relate to the matters which the plan will set out in accordance with section 1(3)(a) to (d)?

Section 1(6) – Integration plans: same local authority and Health Board area - prescription of functions

Power conferred on:  the Scottish Ministers  
Power exercisable by: Regulations  
Parliamentary procedure: Negative procedure

3. The regulations under section 1(6)(a) and (b) are intended to prescribe the range of functions of local authorities and Health Boards which either must, may, or may not be, delegated under an integration plan.

4. The Committee asks the Scottish Government:
   
   - To explain, therefore, why it is appropriate that section 1(6) provides that the Scottish Ministers have a discretion, rather than a requirement, to make the regulations?

5. Section 56 of the Local Government (Scotland) Act 1973 is not expressly amended by, or referred to in, the Bill. Subsections (6) and (6A) of that section provide that a local authority’s functions with respect to setting amounts of council
tax, borrowing money, approving annual investment strategies or reports, and determining applications for planning permission for a certain class of property, shall be discharged only by the authority. By subsection (7), a local authority shall not make arrangements for the discharge for any of their functions under the Animal Health Act 1981 by any other local authority.

6. Section 1 does not provide for any exclusion of those significant functions in the 1973 Act, from the powers to prescribe the functions which may be delegated in terms of an integration plan, and agreed to be set out in a plan.

7. The Committee asks the Scottish Government:

- To confirm, in relation to the scope of the powers therefore, whether there is any intention to affect the operation of section 56(6), (6A) and (7) of the 1973 Act.

- If not, would amendment of the Bill at Stage 2 be proposed so that “integration functions” could never extend to those functions?

8. The Committee considers that paragraph 12 of the Delegated Powers Memorandum has not explained satisfactorily why the negative procedure rather than the affirmative procedure (or super-affirmative procedure) is a more appropriate level of scrutiny of the powers in section 1(6). The powers are very significant, as the regulations will provide for the range of functions which must, may, or may not be, delegated under an integration plan.

9. The Committee asks the Scottish Government to explain this further.

Section 12(1) and (2) – Integration joint boards: further provision

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

10. Section 12(1) provides that the Scottish Ministers may by order make provision about various aspects of joint integration boards.

11. The Committee asks the Scottish Government:

- Why this power needs to be drawn widely, to permit any provisions by order about (and so to determine) the membership of integration joint boards?

- Why could this power not be drawn more narrowly, to-

  (a) contain provision for the permissible number of members of a joint board (for instance by stating a minimum or maximum number of members, within which parameters an order could specify the number of members of a particular board), and
Section 12(3) — Integration joint boards: schemes for transfer of staff

Power conferred on: the Scottish Ministers  
Power exercisable by: Scheme  
Parliamentary procedure: None (provided by section 49), and not in the form of a Scottish statutory instrument

12. Section 12(3) provides that the Scottish Ministers may by scheme make provision about the transfer to an integration joint board of staff, property, rights, liabilities or obligations of a local authority or a Health Board.

13. The Delegated Powers Memorandum explains that (as a matter of policy) it is envisaged that any integration joint board established under the Bill will not necessarily require to employ staff, the delivery of functions is likely to be carried out by the constituent local authorities and health board, and the option of direct employment of staff by a joint board is included as a safeguard, if locally agreed arrangements fail to work.

14. The Committee asks the Scottish Government:

- To explain the reasons for taking this power, and explain the circumstances in which the power might be used to transfer staff, property etc. to an integration joint board?

- To explain why it is necessary for this power to include the transfer of property, rights liabilities or obligations as well as staff, when the similar power proposed in Section 15 in relation to the other “integration models” between a local authority and Health Board is restricted to the transfer of staff?

- To explain why it has been considered appropriate that the exercise of this power should not be subject to Parliamentary scrutiny, nor provision made for publication of a scheme, nor that it should be made in the form of a Scottish statutory instrument?

Section 15 – Transfer of staff where functions delegated to local authority or Health Board

Power conferred on: the Scottish Ministers  
Power exercisable by: Scheme  
Parliamentary procedure: None (and not in the form of an SSI)

15. Section 15 provides for a power of Ministers to make a scheme for the transfer of staff from a person who is to delegate functions under the possible
“integration models” between local authorities and Health Boards except for the “corporate body” model.

16. The Committee asks the Scottish Government:

- To explain the reasons for taking this power, and explain the circumstances in which the power might be used to transfer staff between a local authority and a Health Board?

- To explain why it has been considered appropriate that the exercise of this power should not be subject to Parliamentary scrutiny, nor provision made for publication of a scheme, nor that it should be made in the form of a Scottish statutory instrument?

Section 16 – Integration joint monitoring committees: further provision

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

17. Section 16(1) provides that the Scottish Ministers may by order make provision about the establishment of, membership of, and the proceedings of, integration joint monitoring committees, and any other matter relating to the operation of integration joint monitoring committees that the Scottish Ministers think fit.

18. The Committee asks the Scottish Government:

- Why this power need to be drawn widely, to permit any provisions by order about (and so to determine) the membership of integration joint monitoring committees?

- Why could this power not be drawn more narrowly, to—
  
  o (a) contain provision for the permissible number of members of such a committee (for instance by stating a minimum or maximum number of members, within which parameters an order could specify the number of members of a particular committee), and

  o (b) contain provision for who may be a member (given that any such committees will be public authorities which will monitor the carrying out of “integration functions” for the area of a local authority)?
Section 22(1) to (7) – Further powers of persons to whom functions are delegated- directions

Power conferred on: An integration joint board, local authority or Health Board (as the case may be)
Power exercisable by: Directions
Parliamentary procedure: None

19. Section 22(1)(a) enables integration joint boards to direct the local authorities or the Health Board that have delegated functions to it in accordance with an integration plan, to carry out a function on its behalf. Section 22(1)(b) enables a local authority or Health Board which has had functions delegated to it in accordance with an integration plan to direct the local authority or Health Board which delegated the function to it to carry out the functions on its behalf.

20. The Committee asks the Scottish Government:

- To explain the reasons for taking the powers, and the circumstances in which directions could be used?

- To explain why it has been considered that the powers are appropriate to be exercised in the form of written directions, rather than a form of subordinate legislation such as an order.

- Whether it is intended that the directions would be published on being made, and if so, should this be provided for?

Section 36(3)– Power to make provision in consequence of new integration plan- scheme about transfer of staff, etc.

Power conferred on: the Scottish Ministers
Power exercisable by: Scheme
Parliamentary procedure: None (and not in the form of an SSI)

21. Section 36(3) provides that in consequence of the replacement of an integration plan by a new plan, the Scottish Ministers may, by scheme, make such provision about the transfer of staff, property, rights, liabilities or obligations of an integration joint board, a local authority or a Health Board as they consider necessary.

22. The Committee asks the Scottish Government:

- To explain the reasons for taking this power, and explain the circumstances in which the power might be used to transfer staff, property, etc., upon a new integration plan being substituted under section 35?

- Why it has been considered appropriate that the exercise of this power should not be subject to Parliamentary scrutiny, nor provision made for publication of a scheme, nor that it should be made in the form of a Scottish statutory instrument?
Why does section 19 apply where by virtue of section 12(3) or 15(1), a scheme is made for staff transfer, to set out the effects on contracts of employment, but section 19 does not provide that it applies when this power in section 36(3) is exercised?

To explain why it is considered appropriate that the power in section 15 enables schemes about the transfer of staff (only), where an integration plan sets out one of the 3 integration models apart from the model where an integration joint board is established, and yet this power in section 36(3) extends to making provision about transfer of staff, property, rights, liabilities or obligations, when a new integration plan setting out one of those models is substituted under section 35?

Section 39(2)(a) – Default power of Scottish Ministers

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<th>Power conferred on:</th>
<th>the Scottish Ministers</th>
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<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative</td>
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</table>

23. Section 39(2)(a) to (e) lists 5 default powers which the Ministers may exercise, where a local authority and a Health Board fail before the day prescribed under section 7 to submit an integration plan for approval by them.

24. It appears that the functions of a local authority and a Health Board which may be specified under section 39(2)(a) on default to be delegated to an integration joint board are not limited by the prescription of functions by regulations under section 1(6). Section 1(6) relates to the prescription of functions which must, may, or may not be, delegated under an integration plan. Section 39(2) applies where such a plan has not been submitted for approval.

25. The Committee therefore seeks clarification from the Scottish Government as to whether that is in the intended position?

26. Contrary to the exercise of the powers under section 1(6) (which are proposed to be subject to the negative procedure), the exercise of the powers of the Ministers under section 39(2)(a), (d) and (e) to specify the functions to be delegated to an integration joint board and other matters are not proposed to be subject to scrutiny by the Parliament. The specification of these matters by the Ministers does not require to be made in a Scottish statutory instrument, nor is there provision for publication, nor consultation requirements prior to the specification.

27. The Committee therefore seeks an explanation as to why that difference of approach has been considered appropriate, as between the powers in section 1(6) and section 39(2)?
Section 39(2)(c) – Default power of Scottish Ministers- prescribed day

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Negative

Section 39(2)(c) provides that on the failure of a local authority and Health Board to submit an integration plan for approval, the Ministers may require the authority and Health Board to delegate the specified functions to the joint board before the “prescribed day” which is prescribed by Regulations.

29. The Committee asks the Scottish Government:

- To clarify whether this provision is intended to be a power to prescribe a day, which is separate from the power in section 9(3), or whether it is intended only to refer to that power?

- Whether this could be clearer, given that section 39(1) and section 9(1) state that the sections apply to different circumstances and it appears that “the prescribed day” is not defined in the Bill?

- If section 39(2)(c) is intended to be a separate power, to explain the reasons for taking the power, and why it is considered appropriate that its exercise is subject to the negative procedure.

Section 40 – Directions

Power conferred on: the Scottish Ministers
Power exercisable by: Directions
Parliamentary procedure: None

30. Section 40 enables Ministers to give binding, written directions to a Health Board, local authority or an integration joint board.

31. The Committee asks the Scottish Government:

- To provide full explanation is sought of the reasons for taking these powers (which could be applied generally across a range of functions as well as to specific delegated functions), how the power to direct could be used, and the choice of direction as the appropriate procedure?

- To please explain in what circumstances this could introduce powers of direction by the Scottish Ministers over functions which are presently either not subject to such power, or subject to direction by another authority, and why this would be appropriate?
Section 52 – Commencement

Power conferred on: Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Laid only

32. Section 52(2) provides that the provisions of the Act (other than the general provisions in sections 49, 50, 52 and 53) come into force on such day as the Scottish Ministers may by order appoint.

33. The Committee asks the Scottish Government:

- If it is agreed that the effect of section 49 of the Bill read with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 is that it is proposed that a commencement order under section 52(2) will be laid in Parliament (and would be scrutinised by this Committee)?

34. Section 49 proposes that an order making transitional, transitory or savings provisions for the purposes of or in connection with the coming into force of the Bill is subject to the negative procedure (except where textual amendment of an Act is proposed). However section 49 also proposes that a commencement order made under section 52(2) which contains transitory or transitional provision or savings would be laid, but not subject to further procedure. This appears to be inconsistent, as the Parliamentary procedure will depend on whether the Scottish Government chooses to make a commencement order or a separate order under section 50(1)(b).

35. The Committee asks the Scottish Government asks to consider this further.
ANNEX B

Correspondence with the Scottish Government

On 10 September 2013, the Scottish Government responded as follows:

1. This letter sets out the Scottish Government’s response to the Delegated Powers and Law Reform Committee’s letter of 3 September. The Scottish Government thanks the Committee for their comments and the opportunity to consider these matters. In doing so, this letter seeks to provide an explanation of the following matters:

   **Section 1(3)(e) – Integration plans: same local authority and Health Board area - prescribed information about other prescribed matters**

   *Power conferred on: the Scottish Ministers*
   *Power exercisable by: Regulations*
   *Parliamentary procedure: Negative procedure*

   To provide some examples of the information and matters that could be prescribed for inclusion in an integration plan?

2. The Scottish Government consider that a range of matters additional to those set out in subsections (3)(a) to (d) may require to be prescribed for inclusion in the integration plan. These matters will set out the integration partnership arrangements by which a Health Board and Local Authority agree to implement and deliver the aims of the Bill and which the Scottish Ministers will wish to be assured are in place. These include—

   - The arrangements for the Integration Joint Board or the Joint Monitoring Committee (respectively, depending on which model of integration is used); The arrangements for clinical and care governance;
   - The arrangements for financial management of the integrated budget;
   - The arrangements where any staff are transferring between statutory partners;
   - How the integrated arrangements will interact with such of the health and social care functions and responsibilities of the Health Board and Local Authority as are not delegated to the integrated arrangement.
2. The intention is for the prescribed matters to go beyond those set out in section 1(3)(a) to (d).

3. It is important that the Health Board and local authority, in setting out the matters in section 1(3)(a) to (d), take a collaborative approach to how the integrated arrangements will work, specifically around practical issues such as clinical and care governance, financial governance and staffing resources. Such matters are essential to the success of, and building confidence in, the arrangements entered into by the Health Board and local authority, and to the engagement and confidence of a wide range of key local stakeholders such as clinicians. Experience from integration of health and social care in Highland and evidence from across the UK suggests that whilst a number of the matters set out in the integration plan will relate to the matters which the plan will set out in accordance with section 1(3)(a) to (d), to assure effective joint working arrangements, it may be necessary to require Health Boards and local authorities to set out their agreed arrangements on a broader range of matters which go beyond those specified in section 1(3)(a) to (d).

5. It would be possible to attempt to define these and set them out in the Bill, but this is likely to be futile as (a) it may stifle innovation by requiring that certain matters are addressed in the plan, implying that a particular approach must be adopted to integration at a micro level, and (b) as integration develops, so too are models of integration (within the broad framework established by the Bill). It is difficult to predict what those developments will require in terms of matters which should be addressed in an integration plan in 5 or 10 years’ time.

6. It is for those reasons that there is no restriction that matters prescribed under section 1(3)(e) must relate to the matters which the plan will set out in accordance with section 1(3)(a) to (d).

Section 1(6) – Integration plans: same local authority and Health Board area-prescription of functions

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<td>Regulations</td>
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<td>Negative procedure</td>
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To explain, therefore, why it is appropriate that section 1(6) provides that the Scottish Ministers have a discretion, rather than a requirement, to make the regulations?

7. The Scottish Ministers intend to use this power to prescribe the minimum set of functions that must be delegated to the integration authority, and also to specify those functions which may or may not be delegated. In line with the policy memorandum, the regulations will set out adult health and adult social care functions which must be delegated. The Scottish Government recognise that...
given the intention to require the delegation of certain functions it would be more appropriate to require the Scottish Ministers to make such regulations. The Scottish Government will, therefore, bring forward an amendment at stage 2 to this effect.

To confirm, in relation to the scope of the powers therefore, whether there is any intention to affect the operation of section 56(6), (6A) and (7) of the 1973 Act.

If not, would amendment of the Bill at Stage 2 be proposed so that “integration functions” could never extend to those functions?

8. The Scottish Government are grateful to the Committee for raising this point and will consider whether any amendments at stage 2 need to be made.

_The Committee considers that paragraph 12 of the Delegated Powers Memorandum has not explained satisfactorily why the negative procedure rather than the affirmative procedure (or super-affirmative procedure) is a more appropriate level of scrutiny of the powers in section 1(6). The powers are very significant, as the regulations will provide for the range of functions which must, may, or may not be, delegated under an integration plan._

_The Committee asks the Scottish Government to explain this further._

9. The Scottish Government recognises the significance of the powers in section 1(6). In recognition of this, the Scottish Government consider it more appropriate that these powers be subject to affirmative procedure. The Scottish Government will, therefore, bring forward an amendment at stage 2 to this effect.

Section 12(1) and (2) – Integration joint boards: further provision

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- Why this power needs to be drawn widely, to permit any provisions by order about (and so to determine) the membership of integration joint boards?

- Why could this power not be drawn more narrowly, to:
  
  (a) contain provision for the permissible number of members of a joint board (for instance by stating a minimum or maximum number of members, within which parameters an order could specify the number of members of a particular board), and

  (b) contain provision for who may be a member (given that any joint boards will be public authorities which will either
10. In developing this provision, the Scottish Government had regard to the breadth of responsibility which the integration joint board will have to plan and deliver health and social care, and indeed the substantial resources that will be delegated to it. We also took account of the wide range of matters for which provision would require to be made in relation to an integration joint board to ensure its effective and efficient operation, and the desirability of establishing a consistent approach across Scotland.

11. The Scottish Government consider the breadth of this power necessary in order to give the Scottish Ministers flexibility to respond to the different ways in which Health Boards and local authorities approach integration within the framework set out in the Bill. It is important that the Bill strikes an appropriate balance between establishing a common framework for integration across Scotland, whilst at the same time ensuring that it is not prescriptive at such a level of detail as to stymy local innovation. Section 12(2) specifically recognises that a one size fits all approach may not be appropriate for all aspects of the membership, proceedings, general private law powers, etc., of joint boards. In addition, joint boards will operate in a dynamic environment and it is considered important that the structure of the Bill is such as to allow provision as to the membership, proceedings etc. of integration joint boards to be modified as integration develops. For example, the powers required in circumstances where the integration joint board carries out the delegated functions will be different to those where delivery is undertaken through the Health Board and local authority.

Section 12(3) – Integration joint boards: schemes for transfer of staff

Power conferred on: the Scottish Ministers
Power exercisable by: Scheme
Parliamentary procedure: None (provided by section 49), and not in the form of a Scottish statutory instrument

- To explain the reasons for taking this power, and explain the circumstances in which the power might be used to transfer staff, property etc. to an integration joint board?

- To explain why it is necessary for this power to include the transfer of property, rights liabilities or obligations as well as staff, when the similar power proposed in Section 15 in relation to the other “integration models” between a local authority and Health Board is restricted to the transfer of staff?

- To explain why it has been considered appropriate that the exercise of this power should not be subject to Parliamentary scrutiny, nor provision made for publication of a scheme, nor that it should be made in the form of a Scottish statutory instrument?
12. The Scottish Government have taken this power in order to permit the integration joint board to employ staff, and so that, if services are to be delivered by an integration joint board directly, then the Scottish Ministers can make a scheme to transfer staff, property, rights, liabilities and obligations from the Health Board and local authority to the integration joint board. Whilst, it is not currently intended that the integration joint board delivers services but instead directs the Health Board and local authority to carry out the delegated functions, it is possible that, in the future, due to the success and effectiveness of integration and service redesign and innovation, the integration joint board consider it appropriate to employ staff and deliver services. In such circumstances, the Scottish Government consider that it would be desirable to be able to transfer staff, property, rights, liabilities and obligations. Furthermore, it may be appropriate to transfer staff to the integration joint board to carry out administrative and operational support functions.

13. The Scottish Government considers it necessary for this power to include transfer of property, rights, liabilities or obligations as well as staff so as to enable the integration joint board to fully transact in the possible future circumstances described above – for example, having existing contracts transferred to it. Section 15 is restricted to the transfer of staff between a local authority and Health Board to facilitate effective integration in a ‘lead agency’ arrangement where the Health Board and local authority delegate functions to each other or to one another. In contrast, these provisions of the Bill are specifically directed towards the body corporate model of integration.

14. The Scottish Government does not consider it necessary that the exercise of the power in section 12(3) be subject to Parliamentary scrutiny because it relates to what is essentially an administrative matter.

15. Any scheme will be designed to facilitate delivery of a policy which the Parliament will have already approved through passing of this section and section 19 of the Bill. By its nature, any scheme created under this provision will make detailed provision as to the transfer of individual properties, members of staff, contractual rights and liabilities, etc. As such they are likely to contain personal information and commercially sensitive information. It would be unusual for documents of this nature to be subject to Parliamentary scrutiny.

16. It would be possible for the Health Board and the local authority to transfer staff, property, rights, liabilities and obligations to the integration joint board themselves by agreement. That would of course involve no Parliamentary scrutiny as it is simply a matter of contract between the three parties. The purpose of the section 12(3) power is only to facilitate the making of such a transfer without the need for detailed and complicated contractual arrangements which are likely to be costly to create and administer, and may involve a level of uncertainty.
Section 15 – Transfer of staff where functions delegated to local authority or Health Board

Power conferred on: the Scottish Ministers
Power exercisable by: Scheme
Parliamentary procedure: None (and not in the form of an SSI)

- To explain the reasons for taking this power, and explain the circumstances in which the power might be used to transfer staff between a local authority and a Health Board?

- To explain why it has been considered appropriate that the exercise of this power should not be subject to Parliamentary scrutiny, nor provision made for publication of a scheme, nor that it should be made in the form of a Scottish statutory instrument?

17. The Scottish Ministers currently have a similar power under section 16 of the Community Care and Health (Scotland) Act 2002, under which Highland Partnership have transferred staff. Section 16 of the 2002 Act is repealed by section 51(2). Section 15 will be used in similar circumstances where a Health Board and local authority agree to a transfer of staff.

18. The Scottish Government does not consider it necessary that the exercise of the power in section 15(1) be subject to Parliamentary scrutiny because it relates to what is essentially an administrative matter designed to facilitate delivery of a policy which the Parliament will have already approved through passing of section 19 of the Bill.

19. By its nature, any scheme created under this provision will make detailed provision as to the transfer of individual members of staff, contractual rights and liabilities in relation to them, etc. As such they are likely to contain personal information and may contain commercially sensitive information. It would be unusual for documents of this nature to be subject to Parliamentary scrutiny.

20. It would be possible for the Health Board and the local authority to transfer staff between them by agreement. That would of course involve no Parliamentary scrutiny as it is simply a matter of contract between the two parties. The purpose of the section 15 power is only to facilitate the making of such a transfer without the need for detailed and complicated contractual arrangements which are likely to be costly to create and administer, and may involve a level of uncertainty.

Section 16 – Integration joint monitoring committees: further provision

Power conferred on: the Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative procedure

- Why this power need to be drawn widely, to permit any provisions by order about (and so to determine) the membership of integration joint monitoring committees?
• Why could this power not be drawn more narrowly, to—

  o (a) contain provision for the permissible number of members of such a committee (for instance by stating a minimum or maximum number of members, within which parameters an order could specify the number of members of a particular committee), and

  o (b) contain provision for who may be a member (given that any such committees will be public authorities which will monitor the carrying out of “integration functions” for the area of a local authority)?

21. The Scottish Government considers that the same reasoning applies to this provision as applies to section 12 of the Bill. The Scottish Government considers that this power enables the Scottish Ministers to put in place a framework to allow integration authorities to develop integrated governance arrangements that suit local circumstance and have therefore drawn the provisions widely. This flexibility will include creating sub-committees, paying expenses to members and some of the procedural detail similar to that included within the Community Health Partnership (Scotland) Regulations 2004.

Section 22(1) to (7) – Further powers of persons to whom functions are delegated- directions

Power conferred on:  An integration joint board, local authority or Health Board (as the case may be)
Power exercisable by:  Directions
Parliamentary procedure:  None

• To explain the reasons for taking the powers, and the circumstances in which directions could be used?

• To explain why it has been considered that the powers are appropriate to be exercised in the form of written directions, rather than a form of subordinate legislation such as an order.

• Whether it is intended that the directions would be published on being made, and if so, should this be provided for?

22. It is intended that integration will lead to services being planned and delivered in a seamless joined up way. To enable this, functions will be delegated by the Health Board and local authority to the integration joint board, which will then lead preparation of a strategic plan for the delivery of health and social care. It is likely that this plan will result in services being redesigned and delivered by integrated teams within the Health Board and local authority.

23. However, where functions are delegated to the integration joint board, it is not the intention of the Scottish Ministers that the integration joint board will
necessarily deliver the relevant services. Instead the integration joint board may
direct the Health Board and local authority in line with the arrangements set out in
its strategic plan. Therefore, the Scottish Government considers it necessary for
the integration joint board to be able to direct the Health Board and local authority
in order for it to be able to ensure delivery of the strategic plan.

24. Careful consideration was given to how the integration joint board would
ensure delivery of the strategic plan where this is to be done through the Health
Board and the local authority. Taking account of the fact that these directions
would be directive only upon Health Boards and local authorities (and not any
other person such as a private individual), that the integration joint board would
only have such functions as are delegated to it by the Health Board and the local
authority, that the Health Board and local authority will be involved in preparing
the integration plan which the directions are designed to implement and that the
directions are likely to be of a very detailed administrative nature, the Scottish
Government considers that the exercise of the power is suitable for direction rather
than any form of secondary legislation. A similar approach is taken to the use of
direction making powers in both the Scottish health service (see s2(5) of the
National Health Service (s) Act 1978) and in social care (see s5 of the Social Work
(S) Act 1968).

25. It is not intended that the directions be published, although it is expected that
they would be available to anyone who wished to see them by virtue of the
Freedom of Information (S) Act.

Section 36(3)– Power to make provision in consequence of new integration
plan- scheme about transfer of staff, etc.

Power conferred on: the Scottish Ministers
Power exercisable by: Scheme
Parliamentary procedure: None (and not in the form of an SSI)

- To explain the reasons for taking this power, and explain the
circumstances in which the power might be used to transfer staff,
property, etc., upon a new integration plan being substituted under
section 35?

- Why it has been considered appropriate that the exercise of this
power should not be subject to Parliamentary scrutiny, nor provision
made for publication of a scheme, nor that it should be made in the
form of a Scottish statutory instrument?

- Why does section 19 apply where by virtue of section 12(3) or 15(1), a
scheme is made for staff transfer, to set out the effects on contracts of
employment, but section 19 does not provide that it applies when this
power in section 36(3) is exercised?

- To explain why it is considered appropriate that the power in section
15 enables schemes about the transfer of staff (only), where an
integration plan sets out one of the 3 integration models apart from the model where an integration joint board is established, and yet this power in section 36(3) extends to making provision about transfer of staff, property, rights, liabilities or obligations, when a new integration plan setting out one of those models is substituted under section 35?

26. The Scottish Government have taken this power so that if, for example, a Health Board and two local authorities decide to move from two separate integration plans to a single integration plan with a single integration joint board, then the Scottish Ministers can make a scheme to transfer staff, property, rights, liabilities and obligations from the existing joint boards (and possibly also from the Health Board and local authority) to the new integration joint board. This will facilitate delivery of services by or through the new integration joint board.

27. The Scottish Government considers it necessary for this power to include transfer of property, rights, liabilities or obligations as well as staff so as to enable the integration joint board to fully transact in the circumstances described above – for example, having existing contracts transferred to it.

28. The Scottish Government does not consider it necessary that the exercise of section 36(3) be subject to Parliamentary scrutiny because it relates to what is a detailed administrative matter designed to facilitate delivery of a policy which the Parliament will have already approved through passing the Bill and secondary legislation under it. It would be possible to achieve the same effect as a scheme made by the Scottish Ministers by parties entering into a range of agreements for transfer – reflecting the administrative nature of the scheme.

29. The Scottish Government has considered whether section 19 should apply when the power in section 36(3) is exercised, and concluded that it should, and will consider whether an amendment at stage 2 is necessary to give that effect.

**Section 39(2)(b)– Default power of Scottish Ministers**

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<td>Power exercisable by:</td>
<td>Order</td>
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<td>Parliamentary procedure:</td>
<td>Negative</td>
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It appears that the functions of a local authority and a Health Board which may be specified under section 39(2)(a) on default to be delegated to an integration joint board are not limited by the prescription of functions by regulations under section 1(6). Section 1(6) relates to the prescription of functions which must, may, or may not be, delegated under an integration plan. Section 39(2) applies where such a plan has not been submitted for approval.

The Committee therefore seeks clarification from the Scottish Government as to whether that is in the intended position?

30. The Scottish Government does not intend for the functions that may be specified under section 39(2)(a), to go beyond those that are prescribed by
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regulations under section 1(6). The Scottish Government will, however, consider whether an amendment is necessary.

Contrary to the exercise of the powers under section 1(6) (which are proposed to be subject to the negative procedure), the exercise of the powers of the Ministers under section 39(2)(a), (d) and (e) to specify the functions to be delegated to an integration joint board and other matters are not proposed to be subject to scrutiny by the Parliament. The specification of these matters by the Ministers does not require to be made in a Scottish statutory instrument, nor is there provision for publication, nor consultation requirements prior to the specification.

The Committee therefore seeks an explanation as to why that difference of approach has been considered appropriate, as between the powers in section 1(6) and section 39(2)?

31. The powers to establish the framework within which functions can be selected for delegation is subject to Parliamentary scrutiny - and that is entirely appropriate. However, the actual selection of individual functions or parts of a function in relation to delegation by a particular Health Board or local authority is not – whether that selection is made by the Health Board and local authority under section 1 or by the Scottish Ministers under section 39. In both cases, the selection of individual functions or parts of a function is not subject to Parliamentary scrutiny. This is consistent with the procedure that currently exists under the 2002 Act.

Section 39(2)(c)– Default power of Scottish Ministers- prescribed day

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<tr>
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<td>Regulations</td>
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<td>Parliamentary procedure:</td>
<td>Negative</td>
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- To clarify whether this provision is intended to be a power to prescribe a day, which is separate from the power in section 9(3), or whether it is intended only to refer to that power?

- Whether this could be clearer, given that section 39(1) and section 9(1) state that the sections apply to different circumstances and it appears that “the prescribed day” is not defined in the Bill?

- If section 39(2)(c) is intended to be a separate power, to explain the reasons for taking the power, and why it is considered appropriate that its exercise is subject to the negative procedure.

32. Under section 39(2)(c) the Scottish Ministers can require a local authority and a Health Board to delegate the specified functions to the integration joint board before the “prescribed day”. Subsection (1) of section 39 provides that the section applies only where a local authority and Health Board fail before the day which is prescribed for the purposes of section 7 to submit an integration plan for the approval of the Scottish Ministers under that section. “Prescribed” is defined in
section 48(1) of the Bill as meaning prescribed by the Scottish Ministers by regulations. So the day prescribed under section 39(2)(c) will be different from that prescribed for the purposes of section 7. As to parliamentary procedure, we consider that the negative procedure is appropriate here given that the section comes into play only as a last resort in cases where the Health Board and local authority fail to comply with the requirements of section 7.

Section 40– Directions

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<tr>
<td>Power exercisable by:</td>
<td>Directions</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
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- To provide full explanation is sought of the reasons for taking these powers (which could be applied generally across a range of functions as well as to specific delegated functions), how the power to direct could be used, and the choice of direction as the appropriate procedure?

- To please explain in what circumstances this could introduce powers of direction by the Scottish Ministers over functions which are presently either not subject to such power, or subject to direction by another authority, and why this would be appropriate?

33. The Scottish Ministers already have wide powers of direction in relation to the exercise of their functions by Health Boards (s2(5) of the 1978 Act). The Scottish Ministers also already have wide powers to direct local authorities in relation to the exercise of their functions in the field of social work (including social care) (s5 of the 1968 Act). As such, section 40 only extends their existing direction making powers marginally to take account of the Bill and its effect. That is to say – (1) to confer powers on the Scottish Ministers to direct in relation to new functions arising under the Act and - potentially - a small number of social work functions not covered by section 5 of the 1968 Act and which may be delegated by, or specified in, an integration plan, and (2) to confer powers on the Scottish Ministers to direct integration joint boards, which did not previously exist.

34. Except as regards existing social work functions not covered by section 5 of the 1968 Act. It is appropriate to confer powers as per (1) and (2) as to do otherwise would leave lacuna created by the Bill itself. It is appropriate to extend the range of social work functions in the field of social care to which the Scottish Ministers direction making power extends as that reflects the broad policy which has existed since the 1968 Act was enacted – namely that the Scottish Ministers would have a broad direction making power in relation to the exercise of social work functions by local authorities.

Section 52 – Commencement

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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
</tbody>
</table>
Parliamentary procedure: Laid only

Section 52(2) provides that the provisions of the Act (other than the general provisions in sections 49, 50, 52 and 53) come into force on such day as the Scottish Ministers may by order appoint.

- If it is agreed that the effect of section 49 of the Bill read with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 is that it is proposed that a commencement order under section 52(2) will be laid in Parliament (and would be scrutinised by this Committee)?

35. The Scottish Government agree that this is the effect of section 49 of the Bill, read with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. This is consistent with usual practice whereby commencement orders are laid in Parliament but are not subject to any further Parliamentary procedure.

Section 49 proposes that an order making transitional, transitory or savings provisions for the purposes of or in connection with the coming into force of the Bill is subject to the negative procedure (except where textual amendment of an Act is proposed). However section 49 also proposes that a commencement order made under section 52(2) which contains transitory or transitional provision or savings would be laid, but not subject to further procedure. This appears to be inconsistent, as the Parliamentary procedure will depend on whether the Scottish Government chooses to make a commencement order or a separate order under section 50(1)(b).

*The Committee asks the Scottish Government asks to consider this further.*

36. The Scottish Government consider that it is appropriate that there should be two mechanisms for the making of transitional, transitory or savings provisions for the purposes of, or in connection with, the coming into force of the bill. It is anticipated that the provisions of the bill would in the main, be commenced using an order under section 52(2). However, the separate power under section 50(1)(b) would also allow any complex transitional, transitory or savings provisions to be considered by Parliament.
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