Delegated Powers and Law Reform Committee

Carers (Scotland) Bill at Stage 1
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Delegated Powers and Law Reform Committee

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.
Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

Margaret McCulloch
Scottish Labour

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meetings on 31 March and 28 April 2015, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Carers (Scotland) Bill ("the Bill"). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Bill was introduced on 9 March 2015 by the Cabinet Secretary for Health, Wellbeing and Sport. It reforms the manner in which the needs of adult carers and young carers are assessed by local and other responsible authorities, as well as the manner in which support is provided to those carers.

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Carers (Scotland) Bill [as introduced] available here: [http://www.scottish.parliament.uk/S4_Bills/Carers%20(Scotland)%20Bill/b61s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Carers%20(Scotland)%20Bill/b61s4-introd.pdf)
Overview of the Bill

3. The Bill was introduced on 9 March 2015 by the Cabinet Secretary for Health, Wellbeing and Sport. The Health and Sport Committee is the lead committee for the Bill.

4. Part 1 of the Bill defines key terms. “Carer” is defined as an individual who provides, or intends to provide, care for another individual (“the cared-for person”). Section 1(2) excludes from this definition care provided to persons under the age of 18 to the extent that the care is provided by virtue of the person’s age, as well as care provided under or by virtue of a contract or as voluntary work. Sections 2 and 3 of the Bill then go on to define the terms “young carer” and “adult carer”.

5. Part 2 of the Bill makes provision in respect of adult carer support plans and young carer statements. Adult carer support plans and young carer statements are to set out the identified personal outcomes and identified needs (if any) of the carer as well as any support that is to be provided to the carer to meet those needs.

6. Part 3 of the Bill relates to the provision of support to carers. It imposes a duty on local authorities to set local eligibility criteria by reference to matters specified by the Scottish Ministers in regulations. The Scottish Ministers retain a power to set Scotland-wide ‘national’ eligibility criteria, which would replace any local eligibility criteria set by local authorities. Section 22(4) of the Bill requires local authorities to provide support to carers within their area to meet their eligible needs.

7. Part 4 of the Bill makes provision for the greater involvement of carers in shaping the services that affect them. Section 25 imposes a duty upon local authorities and health boards to take such steps as they consider appropriate to involve carers and bodies representative of carers in certain carer services. Section 27 of the Bill amends the Social Work (Scotland) Act 1968 so as to require local authorities to take the views of carers into account when exercising specified functions.

8. Part 5 of the Bill relates to local carer strategies. A local carer strategy is a document, prepared by a local authority, setting out various matters relating to the authority’s functions arising under the Bill, including the authority’s plans for identifying carers within its area; the authority’s assessment of the demand for support to carers within its area; and the authority’s plans for supporting carers within its area.

9. Part 6 of the Bill requires local authorities to establish and maintain an information and advice service for carers within its area. The service must provide information and advice about specified matters, including the rights of carers; income maximisation for carers; education and training available to carers; and advocacy for carers. Part 7 of the Bill makes provision regarding the issuing of directions and guidance. Part 8 contains standard provision relating to interpretation, subordinate legislation and commencement.
Delegated Powers Provisions

10. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill. The Committee first considered the Bill at its meeting on 31 March 2015. At that meeting, the Committee agreed that it did not need to draw the attention of the Parliament to the following powers:

- **Sections 7 and 12** - Adult carers and young carers: identification of outcomes and needs for support
- **Sections 8 and 13** - Content of adult carer support plans and young carer statements
- **Sections 9 and 14** - Review of adult carer support plans and young carer statements
- **Section 19** - Duty to set local eligibility criteria
- **Section 20** - Publication and review of criteria
- **Section 21** - National eligibility criteria
- **Section 23** - Provision of support to carers: breaks from caring
- **Section 24** - Charging for support provided to carers
- **Section 32** - Short breaks services statements
- **Section 33** - Guidance and directions
- **Section 38** - Ancillary provision
- **Section 40** - Commencement

11. At the same meeting, the Committee agreed to write to the Scottish Government to raise questions on the following powers:

- **Section 1** - Meaning of “carer”
- **Section 4** - Meaning of “personal outcomes”

12. The correspondence is reproduced at the Annexe. In light of the response received by the Scottish Government, the Committee agreed that it did not need to draw the power in section 4 of the Bill to the attention of the Parliament.

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Carers (Scotland) Bill Delegated Powers Memorandum available here: [http://www.scottish.parliament.uk/S4_Bills/Carers_Bill_DPM.pdf](http://www.scottish.parliament.uk/S4_Bills/Carers_Bill_DPM.pdf)
Recommendation

13. The Committee comments on the remaining power in the Bill as follows:

Section 1 – Meaning of “carer”

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

14. Section 1(1) of the Bill defines the term “carer” for the purposes of the Bill. A carer is defined as an individual who provides or intends to provide care for another individual (“the cared-for person”). Section 1(2)(b) provides that the section 1(1) definition does not apply in circumstances where care is or would be provided under or by virtue of a contract or as voluntary work. The effect of this provision is that where care is provided in those circumstances, the Bill does not apply.

15. Section 1(3) provides that the Scottish Ministers may make regulations which provide that “contract” does or does not include agreements of a kind specified in the regulations. Regulations made in exercise of this power may also permit a relevant authority to disregard section 1(2)(b) where the authority considers that the relationship between the carer and the cared-for person is such that it would be appropriate to do so.

Comment

16. The Committee asked for further justification from the Scottish Government as to the choice of negative procedure for the exercise of the power in section 1(3) of the Bill. The power in section 1(3) appears to the Committee to be one of significance as it permits the Scottish Ministers to make regulations which could considerably expand or restrict the reach of the Bill’s provisions depending upon the manner in which it is exercised. Using the power to determine which agreements are (or are not to be) considered ‘contracts’ for the purposes of the Bill would have a direct impact on the Bill’s scope and application. The Committee accordingly took the view on its first consideration of the power that it may be more appropriately subject to the affirmative procedure.

17. In its response to the Committee’s question, the Scottish Government has provided further information as to how it intends to use this power. It has explained that the power is intended to allow for regulations to make provision as to the effect of the Bill on kinship care arrangements in terms of the Looked After Children (Scotland) Regulations 2009 and in respect of ‘mixed carers’ i.e. carers who undertake a mix of both unpaid and paid care.

18. The Government notes that the number of mixed carers is likely to increase over time as the Social Care (Self-directed Support) (Scotland) Act 2013 is implemented. On that basis, the Government may wish to make regulations which determine whether particular categories or groups of mixed carers are to be treated as ‘carers’ for the purposes of section 1 of the Bill (which will determine whether the Bill applies to such
carers or not). The response indicates that unpaid caring is a challenging concept which could become more challenging in the future.

19. The response states that the Scottish Government had considered the negative procedure to be appropriate to the exercise of this power, on the basis that the power will be used to further define how principles already established by the Bill would operate in the future, rather than to establish any new principles in regulations. The matters to be dealt with in regulations made in exercise of this power were also not considered to be sensitive therefore it was thought that the negative procedure was appropriate.

20. In light of the Committee’s concerns as to the significance of this power, however, the Scottish Government has reflected on the appropriate procedure and concluded that the power should be subject to the affirmative procedure. It therefore intends to bring forward an amendment to this effect at Stage 2.

21. The Committee recommends that the power in section 1(3) of the Bill should be subject to the affirmative procedure and welcomes the Scottish Government’s commitment to bring forward an amendment to this effect at Stage 2.
Annexe

Correspondence with the Scottish Government

On 31 March 2015, the Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 31 March and seeks an explanation of the following matters:

Section 1 – Meaning of “carer”
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

2. Section 1(1) of the Bill defines what is meant by “carer” for the purposes of the Bill. Section 1(2)(b) provides that the section 1(1) definition does not apply in circumstances where care is or would be provided under or by virtue of a contract or as voluntary work. Where care is provided in those circumstances, the Bill does not apply.

3. Section 1(3) provides that the Scottish Ministers may make regulations which provide that “contract” does or does not include agreements of a kind specified in the regulations. Regulations may also permit a relevant authority to disregard section 1(2)(b) where the authority considers that the relationship between the carer and the cared-for person is such that it would be appropriate to do so.

4. The power in section 1(3) appears to be one of significance as it permits the Scottish Ministers to make regulations which could considerably expand or restrict the reach of the Bill’s provisions depending upon the manner in which it is exercised.

5. The Committee therefore asks the Scottish Government:
   - For further justification as to the choice of the negative procedure for the exercise of the power in section 1(3)?
   - Why the affirmative procedure is not considered to be more appropriate for this power, having regard to the effect that its exercise may have on the applicability of the Bill to particular groups of carers?

Section 4 – Meaning of “personal outcomes”
Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

6. Section 4 of the Bill concerns the meaning of the term “personal outcomes”. Section 4(1) provides that “personal outcomes” means outcomes which would, if achieved, enable carers to provide or continue to provide care for cared-for persons. Section 4(2) provides that the Scottish Ministers may by regulations make further provision about personal outcomes, including provision about which outcomes may be
personal outcomes and the matters to which a relevant authority is to have regard in considering which outcomes may be personal outcomes.

7. The Committee asks the Scottish Government:
   - Whether the drafting of the power in section 4(2) is considered to be sufficiently clear, on the basis that it appears to contemplate both the Scottish Ministers and relevant authorities determining which outcomes may be personal outcomes?
   - For further explanation as to the relationship between sections 4(2)(a) and 4(2)(b) and for clarification as to the respective roles of the Scottish Ministers and relevant authorities in relation to this power.

On 14 April 2015, the Scottish Government responded as follows:

1. I am writing in response to your note of 31 March 2015 which sets out the Delegated Powers and Law Reform Committee’s request for further information regarding sections 1 and 4 of the Carers (Scotland) Bill.

Section 1(3)

2. In relation to section 1(1)-(3), the Committee asked for “further justification as to the choice of the negative procedure for the exercise of the power in section 1(3)” and “why the affirmative procedure is not considered to be more appropriate for this power, having regard to the effect that its exercise may have on the applicability of the Bill to particular groups of carers”.

3. The power at section 1(3) and the regulations made under it are intended to give effect to the policy that kinship care agreements under The Looked After Children (Scotland) Regulations 2009 (S.S.I. 2009/210) are not to be regarded as “contracts” under this Bill and to put beyond doubt that similar agreements that exist between foster carers and local authorities are to be regarded as contracts for the purposes of the Bill.

4. Section 1(3)(b) is also intended to make provision for those people who in policy terms we refer to as “mixed carers”. The terminology, “mixed carers” is not used in law. “Mixed carers” are carers who undertake both unpaid care for a family member and paid care as a personal assistant (being in receipt of a direct payment from the cared for person) for the same family member. Under the Self-directed Support (Direct Payments) (Scotland) Regulations 2014, the local authority can agree to a supported person employing a close relative or family member where appropriate.

5. Implementation of the Social Care (Self-directed Support) (Scotland) Act 2013 (“the SDS Act”) is still in its early stages. It is anticipated that over time, as more local authorities introduce and use the provisions in the SDS Act to make direct payments,

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the numbers of people in the “mixed carer” group might increase. It is also possible that further types of “mixed carer” will emerge. It is anticipated that the Scottish Government will therefore wish to make regulations setting a framework governing the treatment of new generic types of “mixed carers”, including specifying whether or not such types of “mixed carer” fall within the definition of “carer”. The regulations might also provide some flexibility for local authorities to exercise discretion in the determination of individual cases.

6. The negative procedure had been considered appropriate here as the power is intended to be used to further define how the principles already established in the Bill should operate, rather than to establish such principles. The main principle we have in mind is that the duties and powers in the Bill should be exercised by local authorities and other bodies as set out in the Bill in relation to carers who are “unpaid.” Moreover, the amendments envisaged in regulations were not considered to be sensitive. Indeed it was anticipated that local authorities would both need and welcome the additional clarity on the treatment of kinship and foster carers and “mixed carers” to be set out in the regulations, coupled with the flexibility to deal pragmatically with individual cases of “mixed carers”. This flexibility would, for example, enable carers who care for someone on an unpaid basis for some of the time and on a paid basis for the remainder of the time to benefit from, for example, training on moving and handling as set out in the adult carer support plan.

7. Despite the Scottish Government’s views about the appropriateness of the negative procedure, we have considered the Committee’s concern that the power in section 1(3) could considerably expand or restrict the reach of the Bill’s provisions depending on the manner in which it is exercised. It is certainly the case that “unpaid” caring is a challenging concept which could become more challenging in the future. In light of the Committee’s concerns, and our further consideration, the Scottish Government intends to bring forward a Stage 2 amendment to make the section 1(3) power subject to affirmative procedure.

Section 4

8. The Committee has asked:

- whether the drafting of the power in section 4(2) is considered to be sufficiently clear, on the basis that it appears to contemplate both the Scottish Ministers and relevant authorities determining which outcomes may be personal outcomes; and for

- “further explanation as to the relationship between sections 4(2)(a) and 4(2)(b) and for clarification as to the respective roles of the Scottish Ministers and relevant authorities in relation to the exercise of this power”.

9. The policy intention of section 4(1) is to provide as much scope as possible within the definition, for carers to determine their own personal outcomes and to be pragmatic and yet creative in doing so. This section makes the link in the Bill between the personal outcomes being set and the caring role. It might be the case however that in the light of experience over time, it becomes necessary to further refine this
definition. It is not the intention however of the Scottish Government to restrain carers’ ability to establish their own personal outcomes in agreement with the person preparing the adult carer support plan/young carer statement, but to provide further explanation as appropriate.

10. A further consideration is that those involved in preparing adult carer support plans or young carer statements may find it helpful, for example, for Scottish Government to specify in regulations that “personal outcomes” should be set with reference to a broader framework of outcomes.

11. There already exists both in legislation and in policy broader frameworks of outcomes. For example, the national health and wellbeing outcome 6, that “people who provide unpaid care are supported to look after their own health and wellbeing, including to reduce any negative impact of their caring role on their own health and well-being” is part of a suite of nine outcomes set out in The Public Bodies (Joint Working) (National Health and Wellbeing Outcomes) (Scotland) Regulations 2014. Outcome 6 is carer-specific but the other outcomes apply to carers as citizens or as users of health and social care. There are also high-level outcomes for carers set out in the Carers Strategy. Therefore, it might not be necessary to set further high-level outcomes or broader frameworks but the regulation-making power at section 4(2)(a) provides the option to do so, or to ensure that the personal outcomes are contextualised by reference to a broader framework.

12. Section 4(2)(b) is intended to help relevant authorities interpret what is meant by “personal outcomes” through regulations which specify the sort of outcomes that are envisaged. Consequently relevant authorities will be able to help carers to identify their “personal outcomes” more effectively. It is also envisaged that such regulations would protect the rights of carers by minimising any risk that “personal outcomes” could be so narrowly defined as to render support to the carer unnecessary.

13. Both the Scottish Government and relevant authorities are therefore intended to have a role in relation to determining “personal outcomes”. The Scottish Government’s primary role is in specifying the regulatory framework within which personal outcomes should be set and the role of relevant authorities is in interpreting those regulations and working with an individual carer to help identify the carer’s personal outcomes for articulation in the adult carer support plan or young carer statement.

14. I hope this is helpful to the Committee.

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v http://www.legislation.gov.uk/sdsi/2014/9780111024522

vi http://www.gov.scot/Publications/2010/07/23153304/0