

Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by Scottish Parliament officials in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Liability for NHS Charges (Treatment of Industrial Disease) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill amends the Health and Social Care (Community Health and Standards) Act 2003 so as to extend the provision made in Part 3 of that Act for the repayment of NHS charges in personal injury cases. Specifically, the Bill extends the liability of persons who have made compensation payments to an injured party to repay those NHS charges so the liability also applies in cases of industrial disease.

3. Part 3 of the 2003 Act already contains a number of regulation-making powers. Regulations made under these powers, for instance the Personal Injuries (NHS Charges) (Amounts) (Scotland) Regulations 2006, provide the detail which allows calculation of the exact amounts of the NHS charges for which compensators are liable. They also deal with specific issues that may arise, for instance where more than one person is liable to pay compensation for the same injury.

4. The Bill includes one provision that confers a power to make subordinate legislation. It contains no provisions conferring power to issue directions, guidance or codes of practice.

Delegated Power

Section 2(3) (Liability for NHS charges: further provision) – inserted section 153(3C) of the 2003 Act

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative (first regulations made); negative (subsequent regulations)

Provision

5. Section 2 of the Bill inserts four new subsections into section 153 of the 2003 Act, which provides for how the amounts of NHS charges that compensators are to repay are calculated.

6. Taken together, the new subsections provide for the amounts in certificates (i.e. the amounts to be repaid) to be reduced by a proportion reflecting the pre-commencement period of exposure of the injured person to harmful events. This is necessary to ensure that the application of the Bill is non-retrospective – i.e. so that an industrial employer’s liability (to repay NHS charges) only relates to that part of the period during which the employer exposed the worker to harmful events which was after the date on which the core provisions of the Bill came into force.

7. Subsection (3C) provides for the amount of that reduction to be calculated “under regulations”. This is to allow the Scottish Ministers to provide (in regulations) a formula for calculating how the pre-commencement proportion is to be calculated.

Reason for taking power

8. Calculating accurately the extent to which an industrial disease is attributable to harmful events occurring during one period of time (before the commencement date) by comparison with another (after the commencement date) is likely to be complicated. In principle, a wide range

of factors would need to be taken into account – the relative lengths of the two periods, the frequency of exposure during each period to harmful events and the magnitude of those events, changes from one period to the other in working practices, safety equipment or training, and so on.

9. In practice, it is likely that a simpler methodology would be needed if the calculations were to be done reasonably quickly and efficiently. Another relevant factor is that, given the long latency periods associated with some industrial diseases, some of the information that might be needed to make an accurate calculation may no longer be available (e.g. information about the injured person's employment pattern and working conditions years previously). While a simpler methodology might not yield fully accurate results in individual cases, it could – if devised and applied fairly and consistently – yield results that, when aggregated, fairly apportion to compensators an appropriate share of the liability (to repay NHS charges).

10. It is therefore appropriate to give the Scottish Ministers power to specify, in regulations, such a simplified methodology. It is likely that this would have to be devised in consultation with employers, insurers and other interested parties.

Choice of procedure

11. The first regulations made under the new subsection will be essential for allowing the Bill to operate effectively. They will include the methodology outlined above, which needs to be accepted by the relevant parties (including employers and their insurers) as fair and proportionate, and to be capable of being applied relatively quickly and efficiently in a wide range of circumstances.

12. On this basis, it seems appropriate to make those first regulations subject to the affirmative procedure, thus ensuring a higher level of Parliamentary scrutiny.

13. Later exercises of the regulation-making power are likely to be used mostly to fine-tune and adjust the methodology, rather than to replace it wholesale. On that basis, it seems appropriate to make them subject to the negative procedure. This would still allow detailed parliamentary scrutiny should concerns be raised about the content of the regulations, while also allowing technical or uncontentious changes to be made without the need for detailed scrutiny in committee or any plenary consideration.

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