

NATIONAL CARE SERVICE (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the National Care Service (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill, and direction-issuing powers, 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.

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

OUTLINE OF BILL PROVISIONS

3. The Bill is divided into Parts as follows:

- Part 1, and its associated schedules, provide for the establishment and operation of the National Care Service, Part 1 contains 9 regulation-making powers (in sections 4, 13, 15, 17, 27, 28, 29, 31 and 32) and 3 direction-issuing powers (in sections 16, 18 and 19), schedule 1 contains 2 regulation-making powers (in paragraphs 11 and 15),
- Part 2 makes provision about the management and use of health and social care information, it contains 1 regulation-making power (in section 36),
- Part 3 modifies other enactments, it inserts 2 regulation-making powers into other enactments (the insertions are effected by sections 38 and 41),
- Part 4 contains the formal provisions usually found at the end of an Act of the Scottish Parliament, it includes 2 regulation-making powers (in sections 45 and 47) as well as regulation 46 which elaborates on regulation-making powers conferred elsewhere in the Bill including by specifying the parliamentary scrutiny procedures to which they are subject.

RATIONALE FOR SUBORDINATE LEGISLATION

4. The Scottish Government has, in considering the matters that should be dealt with by subordinate legislation and the appropriate level of parliamentary scrutiny for subordinate legislation, had regard to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances,
- the need to make appropriate use of valuable parliamentary time, and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of provisions passed by the Parliament.

DELEGATED POWERS

Section 4 – Establishment, and abolition, of care boards

Power conferred on: **the Scottish Ministers**
Power exercisable by: **regulations made by Scottish Statutory Instrument**
Parliamentary procedure: **affirmative**

Provision

5. Section 4 allows the Scottish Ministers to make regulations to establish bodies known as care boards. It also allows them to make regulations abolishing care boards.
6. Care boards will be National Care Service institutions responsible for delivering services to people in exercise of functions conferred on them by virtue of regulations under Chapter 6 of Part 1 of the Bill.
7. There are to be broadly 2 types of care board: local care boards and special care boards. A local care board will be responsible for exercising its functions in relation to a part of Scotland. A special care board may also be responsible for exercising functions in relation to a particular part of Scotland, but might instead have functions exercisable in relation to the whole of Scotland.
8. Regulations under section 4 establishing a care board will also:
 - give the board a name,
 - identify it as a local or a special care board,
 - if it is a local care board, identify the area for which it is responsible,
 - specify the minimum and maximum number of members the board can have (not counting its chair).
9. The power that section 4 confers is analogous to the power conferred by section 2 of the National Health Service (Scotland) Act 1978, which allows the Scottish Ministers to make regulations establishing health boards (which are to have a territorial focus) and special health boards (which need not have a particular territorial focus).

Reason for taking power

10. It is appropriate for the Scottish Ministers to have flexibility to determine the number and areas of local care boards, as views on the best arrangements may vary between areas and may change over time. Decisions on how they should be arranged in the first instance is to be the subject of ongoing discussion with people to ensure that there is a strong voice that allows service users, carers, the social services workforce and service providers to meaningfully participate and contribute to discussions and decisions about the services which affect them. The Scottish Ministers will use the power to set and amend the number of local care boards, and their geographical areas, in secondary legislation once those discussion have concluded. The need for special care boards may also arise and may change over time, depending on decisions to be made

on whether any support to individuals is to be provided on a national basis, or whether central services should be provided to support local care boards.

Choice of procedure

11. Regulations under section 4 will be subject to the affirmative procedure. The Government recognises that there is likely to be significant interest in the geographical structure of the National Care Service, both when it is established and in any later changes that may be made, and therefore considers it is appropriate for the affirmative procedure to be used.

12. Section 2 of the National Health Service (Scotland) Act 1978, which is analogous to the Bill's section 4, allows health boards and special health boards to be established subject to no parliamentary procedure beyond the requirement to lay regulations made under it before the Scottish Parliament. The Government decided not to follow that model in relation to section 4 of the Bill. The Government thinks it is appropriate that the Parliament should be asked to agree to the proposed creation, or abolition, of a care board. In the Government's view there are no strongly countervailing considerations.

Section 13 – Independent Advocacy

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

Provision

13. Section 13 gives the Scottish Ministers a power to make regulations about independent advocacy to support people accessing services provided by the National Care Service.

Reason for taking power

14. Section 13 enables the Scottish Ministers to make regulations, which may where necessary amend primary legislation, to create a coherent framework of independent advocacy to support people accessing NCS services. Consistent with the Scottish Government's human rights-based approach to the development of the NCS, determining what independent advocacy and how it should be delivered will be done through co-design with people with lived or living experience of accessing health and social care services. Section 13 will enable the Scottish Ministers to make further provision on independent advocacy to deliver on the outcomes of the co-design process.

15. There are a number of provisions in statute that confer duties on care providers to make people aware of advocacy services, provide advocacy services or provide a right to advocacy services. These provisions, however, are restricted to limited services, situations and groups of people, and do not extend independent advocacy as far as will be required to support the range of services, situations and people accessing NCS services. Section 13 therefore enables the Scottish Ministers to amend these provisions for the development of a comprehensive approach to providing independent advocacy in relation to NCS services.

Choice of procedure

16. The power conferred by section 13 is a broad one. The affirmative procedure is generally considered the most appropriate for regulations modifying primary legislation, especially where the nature of the modifications that may be made under the enabling powers is left relatively open ended.

Section 15 – Dealing with complaints

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

Provision

17. Section 15 gives the Scottish Ministers a power to make regulations about the handing of complaints concerning services provided by the National Care Service and social services provided by others.

Reason for taking power

18. Section 14 provides for a single point of access for any complaints about NCS services, with complaints to be allocated to the appropriate body to address them. This will benefit those who wish to make complaints, but are unsure of how to make a complaint or which body should deal with the complaint.

19. Section 15 enables the Scottish Ministers to establish a comprehensive complaints process by secondary legislation, following discussion with stakeholders. This may include the NCS at national level and local care boards playing a role in assessing and dealing with complaints about services which fall under the wider NCS scope, but may not necessarily be undertaken solely or directly by the NCS. Regulations under section 15 may also provide for other public sector bodies to have a role in any NCS complaints structure, reflecting that the remit and scope of NCS services may develop and evolve over time.

20. The Scottish Ministers intend to ensure that service users, carers, social services staff and service providers can meaningfully participate and contribute to discussions and decisions about the complaints system. The Scottish Ministers will use the power to make arrangements for the creation or adjustment of a complaints system following appropriate discussions.

Choice of procedure

21. The power conferred by section 15 is a broad one. Aspects of complaints handling in areas that may be affected by the power are already addressed by primary legislation. Regulations under section 15 may therefore need to modify that extant legislation. The affirmative procedure is generally considered the most appropriate for regulations modifying primary legislation, especially where the nature of the modifications that may be made under the enabling powers is left relatively open ended. The power conferred by section 15 also allows requirements to be imposed on any person with civil or criminal sanctions attached to defaults. The creation of new

sanctions that can be imposed on citizens is also considered to be a matter of such seriousness that the affirmative procedure is appropriate.

Section 16 – Directions to care boards

Power conferred on: the Scottish Ministers
Power exercisable by: direction
Parliamentary procedure: none

Provision

22. Section 16 of the Bill requires care boards to comply with directions issued by the Scottish Ministers.

Reason for taking power

23. It is normal for public bodies, particularly those directly funded by the Scottish Ministers, to be required to comply with directions issued by the Ministers. It is an essential mechanism for the Scottish Ministers to exercise control over bodies for whose performance the Scottish Minister are ultimately accountable.

Choice of procedure

24. As is usual for direction-issuing powers of this kind, the Bill does not provide for directions under section 16 to be subject to any procedure in the Parliament. Those directions are a device by which the Scottish Ministers can manage the National Care Service and ensure consistency across NCS national and local bodies. It would be inappropriate for the directions to be subject to parliamentary procedure in much the same way as it would be inappropriate for the Scottish Ministers' instructions to their civil servants to be subject to parliamentary procedure. The Scottish Ministers will of course be answerable to the Parliament for the results of their management of the National Care Service.

Section 17 – Removal of care board members

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: laid, no procedure

Provision

25. Section 17 allows the Scottish Ministers to remove all of the members of a care board by regulations. This function is exercisable where, following an inquiry, the board is found to have failed to carry out any of its functions.

Reason for taking power

26. Care boards will have responsibility for delivering certain services as National Care Service institutions, but ultimate responsibility for the National Care Service will rest with the Scottish Ministers. The power to remove a failing board will be one of the levers available to the Scottish

Ministers for managing the National Care Service. Section 17 is akin to section 77 of the National Health Service (Scotland) Act 1978 which, amongst other things, allows the Scottish Ministers to remove the members of a failing health board by subordinate legislation.

Choice of procedure

27. Regulations that do no more than remove the members of a failing care board will be subject to no procedure beyond the requirement to lay them before the Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The decision to remove a board after it has been found to have failed by an inquiry is a managerial decision rather than one with a political or legislative character.

28. Indeed the only reason that the Bill provides for a decision to remove the members of a board to be effected by subordinate legislation, rather than providing for it to be dealt with as an administrative matter as decisions to remove individual board members are, is that supplementary provision may be needed where all of the members of a board are removed at once. It may, for example, be necessary to allow the appointment of an interim board through a process that departs from that which will be normally followed when appointing board members. Having the power to remove a board be exercisable by regulations means that the power in section 45 to make ancillary provision can be exercised in connection with the removal of a board. As discussed below, regulations under section 45 will be subject to the negative or the affirmative procedure depending on whether they amend primary legislation. If the section 45 power to make ancillary provision is exercised in the same instrument as the power to remove a board, the whole instrument will, by virtue of section 33 of the Interpretation and Legislative Reform (Scotland) Act 2010, be subject to the scrutiny procedure applicable to the provisions in it made under section 45.

Section 18 – Transfer of care board’s functions in an emergency

Power conferred on: the Scottish Ministers
Power exercisable by: direction
Parliamentary procedure: none

Provision

29. Section 18 would allow the Scottish Ministers to temporarily transfer a function of a care board to another person where, due to an emergency, it is felt that it would be better to have the other person perform the function. This temporary transfer of responsibility for discharging a function would be effected by direction.

Reason for taking power

30. As Scottish Ministers are ultimately responsible for the services provided by the National Care Service, they need to be able to ensure continuity of service for people accessing care and support. This power enables Ministers to ask another care board to take on the functions of a care board that became unable to discharge its functions in the case of an emergency. This power is modelled on similar provisions in place for Health Boards.

Choice of procedure

31. As is usual for direction-making powers, the power conferred by section 18 would not be subject to parliamentary procedure.

Section 19 – Transfer of care board’s functions due to service failure

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

32. Section 19 would allow the Scottish Ministers to temporarily transfer a function of a care board to another care board, or to themselves where there is a concern that the care board is failing, or is at risk of failing, to discharge the function satisfactorily. The temporary transfer of responsibility for discharging the function would be effected by direction.

Reason for taking power

33. Similarly to section 18, the Scottish Ministers are ultimately responsible for the services provided by the National Care Service and they need to be able to ensure continuity of service for people accessing care and support. In the unlikely event of a care board failing or being at risk of failing to discharge its functions, this power enables Ministers to ask another care board to take on its functions. This power is modelled on similar provisions in place for Health Boards

Choice of procedure

34. As is usual for direction-making powers, the power conferred by section 19 would not be subject to parliamentary procedure.

Sections 27 to 29 – Powers to transfer functions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative

Provisions

35. Sections 27 to 29 allow regulations to be made allocating functions under existing enactments to the institutions of the National Care Service (namely, care boards and the Scottish Ministers). Section 27 allows functions that currently belong to a local authority to be transferred (wholly or partly) to a National Care Service institution. Section 28 performs a similar function in relation to functions that currently belong to health boards and special health boards. Section 28 also allows the Scottish Ministers to designate a function they have under the National Health Service (Scotland) Act 1978 as a National Care Service function so that certain provisions of the Bill will apply in relation to it. Section 29 allows regulations to be made transferring functions from one National Care Service institution to another.

36. Section 30 provides that before making regulations under section 27 to transfer the function of providing a children's service or a justice service, the Scottish Ministers must consult publicly about that function transfer. When laying those regulations, the Scottish Ministers must lay before the Parliament a summary of the consultation process and responses

Reason for taking powers

37. The transfer of functions to the Scottish Ministers or to care boards that are answerable to them is a core part of creating a National Care Service and enabling the Ministers to discharge their duty under section 2. This transfer will be complex. First, discussion is required with people accessing support, carers, the social services workforce and providers to consider which functions are to be transferred. Then it will require careful examination of the services provided under each enactment and co-ordination with the current holders of the functions and providers of the services, to ensure there is no gap or reduction in support during the transfer. Functions may be transferred wholly, so that the previous holder of the function has no further responsibility for it, or partly, so that responsibility may be shared between different bodies for different purposes. Engagement with those accessing support, carers and the social services workforce will also take place to ensure readiness and that everyone is comfortable with the transfer arrangements. Transfers of functions are therefore likely to take place gradually, applying to different provisions of an enactment, or for different purposes or in different areas, at different times.

38. One option for implementing this gradual transfer of functions could have been to provide for the transfer of functions under the listed enactments on the face of the Bill, and then to make the individual arrangements by commencement regulations. However, this would give the Parliament no opportunity to scrutinise those proposals. Instead, the Bill gives the Scottish Ministers powers to make these transfers by regulations, so that the detailed proposals can be set out for the Parliament's examination. The power in section 29 also allows for reorganisation of functions within the National Care Service if that should become necessary in future.

39. Children's services and justice social work services were not assessed in the Independent Review of Adult Social Care. It is therefore important that the risks and opportunities, costs and benefits are fully assessed before a decision is made to implement the transfer. Before any transfer of functions in these areas is proposed the preferred model of delivery will be co-designed with stakeholders, backed by relevant assessment of evidence, and will be subject to consultation, parliamentary scrutiny and approval before any transfer takes place.

Choice of procedure

40. Regulations under sections 27 to 29 are to be subject to the affirmative procedure. Sections 27 and 28 allow functions that will in many cases have been conferred by primary legislation on one person to be transferred to another. Changing the allocation of functions laid down by the Scottish Parliament or the UK Parliament in primary legislation is a serious matter. If the Parliament has, after deliberation, decided that a particular function should fall to a local authority and has enacted legislation to that effect, it is appropriate for the affirmative procedure to apply to any regulations which would transfer that function to a different person.

41. There are, in the Government's view, particular sensitivities about transferring children's services and justice services from local authorities to the National Care Service. As noted above,

section 30 therefore provides that before making regulations under section 27 which would have that effect the Scottish Ministers must carry out a public consultation. It further requires them to put an account of that consultation before the Parliament at the same time as the draft Regulations that would give effect to the transfer. This is so that the Parliament is aware of the consultation's outcomes, and any limitations it may have had, when making its own decision about whether to approve the draft Regulations. Where an additional requirement is added to the affirmative procedure in this way, it is sometimes colloquially referred to as a super-affirmative procedure.

42. In the Government's view, the same arguments that warrant regulations under sections 27 and 28 being subject to the affirmative procedure hold good in relation to regulations under section 29. Whereas regulations under sections 27 and 28 will, in many cases, be operating directly on text passed by the Scottish Parliament or the UK Parliament, regulations under section 29 will be operating on text that has already been modified by regulations under section 27 or 28. Nevertheless, if the Parliament considered the original modification to that text under the affirmative procedure, it seems appropriate that subsequent changes to it should be scrutinised in the same way.

Sections 31 and 32 – Transfers of staff, property, liabilities, etc.

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

Provisions

43. Where, by virtue of regulations under section 27, 28 or 29, a function is transferred from one person to another it may be appropriate for the staff responsible for performing the function and associated assets and liabilities to transfer alongside the function. Sections 31 and 32 allow those transfers to be effected by regulations.

Reason for taking powers

44. The transfer of staff, assets and liabilities will be dependent on the transfer of functions by regulations under section 27, 28 or 29. It will require a significant level of detail that will not be available until decisions are made on transfers of functions, and it is therefore appropriate for regulations to be used.

Choice of procedure

45. Regulations under sections 31 and 32 will be subject to the negative procedure. They are concerned with the allocation of resources amongst public-sector bodies, which is an administrative matter rather than one of high legal or political significance. Necessarily regulations under sections 31 and 32 will be parasitic on decisions about which body should exercise which functions, and regulations reflecting those decisions (i.e. regulations under section 27, 28 or 29) will be subject to the affirmative procedure. Regulations under section 31 or 32 will largely be made for the purpose of giving effect to those decisions that the Parliament has expressly approved.

Section 36 – Care records

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

Provision

46. Section 36 confers on the Scottish Ministers power by regulations to establish a scheme for sharing information to enhance the efficiency and effectiveness of services that are provided by and on behalf of the National Care Service and the National Health Service. For example, this could allow for information about an individual’s prescription (medicine) to be shared with relevant social care and health professionals involved in their care – this might include a care worker responsible for ensuring medicine is taken at the right time of day, or an allied health care professional who needs this information to discharge their caring duties.

Reason for taking power

47. The Scottish Ministers intend to engage with service users, carers, the social services workforce and service providers when determining how and when data (including personal data) should be shared by and on behalf of the National Care Service and the National Health Service to facilitate a nationally-consistent, integrated and accessible electronic social care and health record. The scheme which will be established will be the subject of ongoing engagement with those affected to ensure they can meaningfully participate and contribute to discussions and decisions. The Scottish Ministers will exercise the power once those discussion have concluded. The power is considered appropriate in light of the importance of the issue and the need for flexibility to respond to changing circumstances and stakeholder engagement.

Choice of procedure

48. The power conferred by section 36 is broad. It deals with the sharing of individuals’ most sensitive personal information. And it allows for the creation of new requirements to be imposed on any person with civil or criminal sanctions attached to defaults. The seriousness of these matters are such that the Government considers that the affirmative procedure is most appropriate. The Government foresees no circumstances in which it would be necessary to make regulations under section 34 so quickly that having them be subject to the affirmative procedure would be a problem.

Section 38(9)(b) – Support for carers to take sufficient breaks: further provision

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

Provision

49. Where a carer is unable to take sufficient breaks from providing care, new section 24(4A) of the Carers (Scotland) Act 2016 (inserted by section 38(8)(e) of the Bill) requires the responsible local authority to provide support to enable the carer to take sufficient breaks.

50. The new text inserted by section 38(9)(b) of the Bill will confer on the Scottish Ministers power by regulations to make further provision in connection with the support to be provided under that new section. The new power replaces an existing power in section 25(2) of the Carers Act which enables the Scottish Ministers to make regulations about breaks from caring. Under the new power the Scottish Ministers may, for example, make provision about the meaning of the expression “sufficient breaks” in the Carers Act, about standards or criteria in relation to the sufficiency of such breaks, or about the forms of support that may enable a carer to take such breaks. In addition, where the support to be provided under new section 24(4A) of the Carers Act is the provision of care for the cared-for person, the new power may be used to make provision about the role of the cared-for person in relation to how the care is provided. New section 25(2A)(c) and (d) of the Carers Act (inserted by section 38(9)(b) of the Bill) broadly replicates the existing provision in section 25(2)(a) and (b) of that Act.

Reason for taking power

51. The provision replaces an existing power in the Carers Act. The new power will allow the Scottish Ministers to make provision about the type of support to be provided under the new duty to provide support to enable a carer to take sufficient breaks from caring. The Scottish Ministers will monitor how the new duty in section 24(4A) of the Carers Act is operating to ensure that carers are getting the support that they need to take sufficient breaks from providing care to cared-for persons. Breaks from caring are a vital element of social care support for unpaid carers. The Scottish Ministers intend to work with stakeholders to develop an approach to determining what constitutes sufficient breaks before setting out that approach in regulations if necessary. If further provision is needed, the power will be used to help ensure that carers get this support, for example, by defining what is meant by “sufficient breaks” or by setting minimum standards in relation to the sufficiency of such breaks. Taking a power for this is considered appropriate having regard to the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances, and also the need to make appropriate use of valuable parliamentary time.

Choice of procedure

52. Section 42(2) of the Carers Act provides that regulations under section 25(2) in its existing form are subject to the affirmative procedure. The nature of the new regulation-making power that section 38(9)(b) of the Bill introduces is not so fundamentally different as to warrant a change to the parliamentary scrutiny procedure that applies. The new power may be used to make provision which informs the support to be provided by local authorities to enable carers to take sufficient breaks from providing care. The significance of any such provision on the support provided to carers is such that a higher level of parliamentary scrutiny under the affirmative procedure is considered appropriate.

Section 41 – Reserving right to participate in procurement by type of organisation (inserted regulation 76A(6) of S.S.I. 2015/446)

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

Provision

53. Section 41 of the Bill will insert a new regulation 76A into the Public Contracts (Scotland) Regulations 2015, which includes a regulation-making power to amend some of its own terms. It is unusual for Regulations to themselves confer a regulation-making power, but the Public Contracts Regulations were made to implement an EU directive and therefore have some features that would be considered unusual in purely domestic subordinate legislation. Regulations 19(4A) and (4B), 23A and 57(2A) and (2B) of the Public Contracts Regulations already confer regulation-making powers.

54. New regulation 76A would allow bidders for certain types of contract to be restricted to certain types of organisation. Regulations under paragraph (6) of the new regulation could be used to change the types of contract for which the list of bidders could be restricted, and the types of organisation to which the bidding could be restricted.

Reason for taking power

55. The definition of a qualifying organisation under regulation 76A(5) represents a mutual organisation, as reflected in Article 77 of the procurement Directive, in which management or ownership is based on employee ownership or active participation. This is not a common structure amongst providers of social care support in Scotland. It may be that in future, and only following discussion with service providers and other stakeholders, the Scottish Ministers may wish to amend the definition to include other types of non-profit or third sector organisations. It may also be necessary to update the CPV codes (types of contract) this provision applies to, in order to reflect the services within scope of the NCS.

Choice of procedure

56. By virtue of regulation 83A of the Public Contracts Regulations, regulations made under the existing regulation-making powers conferred by those Regulations are subject to the negative procedure. The changes to technical procurement rules that could be effected by the power that new regulation 76A(4) would confer are not, in the Scottish Government's view, more significant than the changes that could be effected by those existing powers. Therefore the Scottish Government considers it appropriate for regulations under the proposed new power to be subject to scrutiny on the same basis as regulations under any of the existing powers.

Section 45 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

57. Section 45 provides that the Government can use regulations to make changes to the law connected to the changes made by the Bill and regulations made under powers conferred by the Bill.

Reason for taking power

58. Any new law may give rise to the need for a range of ancillary provisions. Without the power to make supplementary, incidental, consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters which require to be dealt with in order to give full effect to the original Bill. That would not be an effective use of either the Parliament's or of the Scottish Government's resources. For example, minor consequential amendments to legislation which deal with other aspects of community or local authority service planning may be required to properly give effect to the Bill. The power itself is restricted by being ancillary to the provisions of the Bill and any such provision must clearly be for the purposes of the Bill, or in consequence of it, or for giving full effect to it. It is appropriate for significant transitional, transitory or saving provision (as opposed to routine provision regarding commencement) to be subject to Parliamentary procedure.

Choice of procedure

59. As is usual for an ancillary power of this kind, regulations made under it which textually modify primary legislation will be subject to the affirmative procedure. Otherwise, regulations made under section 45 will be subject to the negative procedure. This is the approach to scrutiny that the Parliament typically endorses in relation to regulations under this kind of enabling power.

Section 47 – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: laid, no procedure

Provision

60. Section 47 allows the Government to bring into force on a date, or dates, specified by regulations the substantive provisions of the Act that the Bill will become (if passed by the Parliament and given Royal Assent).

Reason for taking power

61. Taking a power to bring provisions into force by regulations is usual practice. It allows the Government to judge the appropriate moment for changes to the law to take effect, ensuring that

those who will be affected by the changes have time to prepare and can input into the plans for implementation. For this bill in particular, it is intended that the detail of implementation will be discussed with those who access support, carers, the social services workforce and providers, and therefore the timing of commencement will need to allow for those discussions to take place.

Choice of procedure

62. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 will apply. Commencement regulations merely determine when provisions that the Parliament has considered and passed will take effect.

Schedule 1, paragraph 11(2) – Appointment of care board members

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative on the first use, thereafter negative

Provision

63. The Scottish Ministers will be responsible for appointing the members of care boards. Paragraph 11 of schedule 1 provides for appointments to be made in accordance with regulations made by the Scottish Ministers.

Reason for taking power

64. It is important that care boards include members who represent the local population, including people with lived and living experience of accessing and providing the services to be provided by the NCS, and carers, as well as local elected members. It may also be appropriate to require some members to have particular professional qualifications or experience. The detail of the number of members and what groups should be represented is to be the subject of ongoing discussion with people to ensure that there is a strong voice that allows service users, carers and service providers to meaningfully participate and contribute to decisions about the care board membership. The Scottish Ministers will use the power to make regulations about care board membership once those discussion have concluded. The power will also allow the Scottish Ministers to respond to practical experience and changing circumstances to amend the membership requirements without recourse to primary legislation.

Choice of procedure

65. The first set of regulations to be introduced will be subject to the affirmative procedure, reflecting the likely breadth of interest in the establishment of the Care Boards, including who can be appointed to them. As subsequent changes are likely to reflect amendments to the process, rather than fundamental change, it is considered more suitable for subsequent regulations to be subject to the negative procedure, which strikes the right balance in ensuring transparency and accountability while making appropriate use of valuable parliamentary time.

Schedule 1, paragraph 15(2) – Disqualification from membership

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

Provision

66. Paragraph 15 of schedule 1 sets out the grounds that will disqualify a person from being a member of a care board. A person disqualified from membership cannot be appointed to a care board, and a person who becomes disqualified after being appointed ceases to be a member. Sub-paragraph (2) allows the Scottish Ministers to adjust the list of disqualification grounds by regulations.

Reason for taking power

67. The grounds set out for disqualification from membership of a care board are statutory grounds for disqualification from being a member of a public body or a director of a company. A power to modify these grounds is provided to allow for any changes to these statutory grounds to be reflected, or for any new grounds to be added. For example, following discussion and engagement with stakeholders it might be considered that a person should be disqualified from being a member of a care board if they had been subject to particular levels of enforcement action by a body regulating social services providers or workers. These sanctions may also change over time, therefore flexibility is required.

Choice of procedure

68. Regulations under paragraph 15(2) of schedule 1 are, like regulations under paragraph 11(2), concerned with who can be a member of a care board. In the Government's view it would be illogical for regulations dealing with the criteria for appointment as a member to be subject to parliamentary scrutiny on a different basis from regulations dealing with criteria that disqualify someone from membership.

This document relates to the National Care Service (Scotland) Bill (SP Bill 17) as introduced in the Scottish Parliament on 20 June 2022

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