

**SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE  
LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE**

**SMOKING, HEALTH AND SOCIAL CARE (SCOTLAND) BILL**

**PURPOSE**

1. This supplementary memorandum has been prepared by the Scottish Executive in accordance with Rule 9.7.10 of the Parliament's Standing Orders to assist consideration by the Subordinate Legislation Committee in accordance with Rule 9.7.9. It addresses changes to provisions of the Smoking, Health and Social Care (Scotland) Bill conferring power to make subordinate legislation and the inclusion of new powers as a result of amendments at Stage 2 of the Bill. It describes the purpose of each additional provision and explains why the matter is to be left to subordinate legislation.

**SECTION 4 - MEANING OF "SMOKE" AND "NO-SMOKING PREMISES"**

**Relevant provisions: Subsections (2) and (7)**

**Power conferred on: The Scottish Ministers.**

**Power exercisable by: Regulations made by Statutory Instrument.**

**Parliamentary procedure: Affirmative resolution procedure of the Scottish Parliament.**

2. Section 4 has subordinate legislation making powers in relation to the prohibition of smoking in certain wholly or substantially enclosed places. Subsection (2) of section 4 enables Scottish Ministers to prescribe by means of regulations certain kinds of premises or classes of premises as "no-smoking premises" for the purposes of Part 1 of the Bill. Subsection (7) enables Scottish Ministers to modify, by means of regulations, section 4(4) so as to add or remove a kind of premises from the kinds of premises which can be prescribed as "no-smoking premises" under section 4(2). The Bill has been amended to require the consultation to be on a draft of the regulations. That will apply therefore also to any changes to regulations made under these powers. The consultation requirements in relation to regulations made under not only section 4(2) and (7) but also section 3(3) are currently contained in section 34(4) of the Bill. As a consequence of these amendments, section 34(4) is redundant and the Executive will move a further technical amendment at Stage 3 to omit it from the Bill.

3. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily. Affirmative procedure is used where the order or regulation making powers allow for the modification of any enactment or where there is significant public interest. In view of the public interest in the subject matter, the regulations under this provision will be subject to affirmative resolution procedure.

## **SECTION 7A – SALE OF TOBACCO TO UNDER-AGE PERSONS: VARIATION OF AGE LIMIT**

**Relevant provision: Section 7A.**

**Power conferred on: The Scottish Ministers.**

**Power exercisable by: Order made by Statutory Instrument.**

**Parliamentary procedure: Negative Resolution of the Scottish Parliament (Note – The Executive intends to bring forward an amendment at Stage 3 to require affirmative resolution procedure).**

4. Under section 18 of the Children and Young Persons (Scotland) Act 1937 (c.37) (“the 1937 Act”) (offence of selling tobacco etc. to under-age persons and other preventative measures), subsection (1) makes it an offence to sell tobacco to persons under 16; subsection (2) allows the court to order the person in charge of premises to take precautions to stop those under 16 from using a cigarette machine – and/or to order its removal; and subsection (3) places a duty on constables and park-keepers to seize any tobacco or cigarette papers from those under 16 if found in their possession whilst smoking in the street/public place.

5. The provisions in section 7A would enable Scottish Ministers, by order, to modify section 18 of the 1937 Act so as to substitute for the age specified in any of its provisions such other age or ages as they consider appropriate. Scottish Ministers believe that where there is evidence that varying the minimum age in section 18 of the 1937 Act would contribute to reducing smoking rates in Scotland then this power may be exercised. At present there is insufficient evidence that raising the age limit would have this effect. However, a delegated power would allow Scottish Ministers to vary the age limit based on any evidence forthcoming in the future.

6. The Scottish Ministers may make an order under this section only after consulting such persons as they consider appropriate on a draft of the order. As the powers will enable Scottish Ministers to amend primary legislation it is felt that affirmative resolution is the appropriate procedure and the Scottish Executive will bring forward an amendment to section 34 at Stage 3 to address this. Section 34 currently provides for negative resolution procedure to apply.

## **SECTION 15 - LISTS OF PERSON UNDERTAKING TO PROVIDE OR ASSIST IN THE PROVISION OF GENERAL DENTAL SERVICES**

**Relevant provision: New subsections (2) to (2B) substituted for subsections 25(2) to (2B) of the 1978 Act.**

**Power conferred on: The Scottish Ministers.**

**Powers exercisable by: Regulations made by Statutory Instrument.**

**Parliamentary procedure: Negative Resolution of the Scottish Parliament (section 105(2) of the 1978 Act).**

7. Section 15 of the Bill includes amendments to the provisions in the National Health Service (Scotland) Act 1978 (“the 1978 Act”) for subordinate legislation relating to the listing of relevant healthcare professionals. These amendments have been further amended at Stage 2 to

provide for further subdivision of the lists. Further amendment to subsection (2B) of section 25 of the 1978 Act adds an extra provision to this subsection so that regulations made under the powers may provide that the relevant family health service practitioners may not provide services under arrangements with a Health Board unless they are named in the relevant part of the Health Board's list.

8. There are already regulation-making powers in current section 25(2) of the 1978 Act which are subject to negative resolution to provide a degree of flexibility for responding to changes. The provisions which substitute section 25(2) of the 1978 Act similarly also contain regulation-making powers subject to negative resolution. As an example of the use of flexibility, under subsection (2A)(c) the documents to be supplied on application or the procedure for applications to be made and dealt with may be changed or expanded in light of experience.

## **SECTION 17 - LISTS OF PERSON UNDERTAKING TO PROVIDE OR ASSIST IN THE PROVISION OF GENERAL OPHTHALMIC SERVICES**

**Relevant provision: New subsections (2) to (2B) substituted for section 26(2) of the 1978 Act.**

**Power conferred on: The Scottish Ministers.**

**Powers exercisable by: Regulations made by Statutory Instrument.**

**Parliamentary procedure: Negative Resolution of the Scottish Parliament (section 105(2) of the 1978 Act).**

9. Section 17 of the Bill includes amendments to the provisions of the 1978 Act for subordinate legislation relating to the listing of relevant healthcare professionals. These amendments have been further amended at Stage 2 to provide for further subdivision of the lists. Further amendment to subsection (2B) of section 26 of the 1978 Act adds an extra provision to this subsection so that regulations made under the powers may provide that the relevant family health service practitioners may not provide services under arrangements with a Health Board unless they are named in the relevant part of the Health Board's list.

10. There are already regulation-making powers in current section 26(2) of the 1978 Act which are subject to negative resolution to provide a degree of flexibility for responding to changes. The provisions which substitute section 26(2) of the 1978 Act similarly also contain regulation-making powers subject to negative resolution. As an example of the use of flexibility, under subsection (2A)(c) the documents to be supplied on application or the procedure for applications to be made and dealt with may be changed or expanded in light of experience.

## **SECTION 19 - PHARMACEUTICAL CARE SERVICE CONTRACTS**

**Relevant provisions: Inserting new section 17U(2)(aa).**

**Power conferred on: The Scottish Ministers.**

**Power exercisable by: Regulations made by Statutory Instrument.**

**Parliamentary procedure: Negative Resolution of the Scottish Parliament (section 105(2) of the 1978 Act).**

11. Section 17U(2) sets out examples of the sort of provision regulations under subsection (1) of that section may make, which it is thought demonstrates it is more appropriate for subordinate legislation.

12. The subsection has been further amended at Stage 2 to enable regulations under subsection (1) to confer power on the Scottish Ministers to give directions under them as to the manner in which, and the standards to which, services must be provided.

13. It is clear that regulations made under 17U may contain considerable detail and that it may be necessary to amend the detail of those regulations from time to time. As a result, it is considered that the most appropriate way of dealing with such matters is by means of subordinate legislation and that negative resolution procedure provides the appropriate level of Parliamentary scrutiny.

## **SECTION 19A – DRUG TARIFF**

**Relevant provisions: Section 19A inserts a new section 17VA into the 1978 Act.**

**Power conferred on: The Scottish Ministers.**

**Power exercisable by: Regulations made by Statutory Instrument.**

**Parliamentary procedure: Negative Resolution of the Scottish Parliament (section 105(2) of the 1978 Act).**

14. A new section 19A of the Bill inserts new section 17VA into the 1978 Act. Section 17VA(2)(a) gives the Scottish Ministers power to prescribe the information relating to pharmaceutical care services that must be included in the Drug Tariff. The power is to be exercised by regulations subject to negative resolution procedure (sections 105(2) and 108(1) of the 1978 Act).

15. It is clear that regulations made under 17VA may contain considerable detail and that it may be necessary to amend the detail of those regulations from time to time. As a result, it is considered that the most appropriate way of dealing with such matters is by means of subordinate legislation and that negative resolution procedure provides the appropriate level of Parliamentary scrutiny.

## **SECTION 26A – FREQUENCY OF INSPECTION OF CARE SERVICES UNDER THE 2001 ACT**

**Relevant provision: Section 26A inserts a new section 25(5A) into the 2001 Act.**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: Order made by Statutory Instrument**

**Parliamentary Procedure: Affirmative Resolution of the Scottish Parliament (section 78(2)(b) of the 2001 Act as amended by the Bill)**

16. At present, the Care Commission is required by section 25 of the 2001 Act to inspect all care services at least once every 12 months (or twice every 12 months, in the case of certain services). In respect of inspections section 25 distinguishes between the first 12 months after registration with the Care Commission and subsequent 12 month periods.

17. The new section 25(5A) gives the Scottish Ministers the power, after consulting the Care Commission and other appropriate persons, to amend by Order the minimum frequency at which care services must be inspected by the Care Commission. More specifically, the power enables the Scottish Ministers to vary the length of the periods specified in sections 25(3) and 25(5) of the 2001 Act (to a frequency below but not above the current statutory levels) and therefore reduce the minimum frequency of mandatory inspections. The power is capable of being exercised in different ways in respect of different care services.

18. As the Care Commission's experience of regulating particular sectors grows, it may be necessary over time to change the frequencies in different ways in respect of different services. Subordinate legislation is considered appropriate for this purpose because it affords the Scottish Ministers flexibility to respond quickly to changes in circumstances, the power to amend is subject to affirmative resolution procedure (in accordance with section 78(2)(b) of the 2001 Act as amended at Stage 2 by new section 26A(3) of the Bill) and, thirdly, the Scottish Ministers will be required to consult first the Care Commission and, thereafter, other appropriate persons before a draft can be laid before the Scottish Parliament.

19. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily. Affirmative procedure is used where the order or regulation making powers allow for the modification of any enactment or where there is significant public interest. In view of the public interest in the subject matter, the regulations under this provision will be subject to affirmative resolution procedure.

## **SECTION 30 – AMENDMENT OF ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000: AUTHORISATION OF MEDICAL TREATMENT**

**Relevant provision: Section 30(2)(b) inserting new section 47(1A) into the 2000 Act;**

**Power conferred on: The Scottish Ministers.**

**Power exercisable by: Regulations made by Statutory Instrument.**

**Parliamentary procedure: Negative Resolution of the Scottish Parliament (section 86 of the 2000 Act).**

20. Section 30(2)(b) as introduced gave powers to allow Scottish Ministers to prescribe the requirements that must be met in order for the prescribed description of persons to certify for incapacity under section 47 of the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”).

21. The Bill, as introduced, did not insert into section 47 a requirement for the specified groups of health professionals (dental practitioners, ophthalmic opticians and registered nurses) to have undergone training on the assessment of incapacity. As amended at Stage 2, section 30(2)(b) of the Bill now enables Scottish Ministers to prescribe by regulations requirements that must be met in relation to all of those health professionals in addition to those who may later be prescribed to be able to certify for incapacity.

22. It is considered that subordinate legislation is the most appropriate approach due to the flexibility of such a power to take account of changing circumstances. Regulations will be by negative resolution in accordance with section 86 of the 2000 Act, which should allow the appropriate degree of Parliamentary scrutiny. It is believed that the negative resolution procedure is still appropriate in respect of the extended powers.

## **SECTION 37: SHORT TITLE AND COMMENCEMENT**

**Relevant provision: Section 37(3)**

**Power conferred on: The Scottish Ministers.**

**Power exercisable by: Order made by Statutory Instrument.**

**Parliamentary procedure: No parliamentary procedure.**

23. Section 37 provides for the short title and commencement arrangements for the Bill.

24. Section 37(2) of the Bill was amended at Stage 2 to omit the references in it to sections 1 to 8 and schedule 1. The result of this is that these provisions will come into force on such day as the Scottish Ministers may appoint by order. In addition section 37(3) was amended to enable an order appointing a day for the commencement of sections 1 to 8 or schedule 1 to specify the time in the day for their commencement (so that they do not need to come into force at the beginning of that day).

25. It is standard procedure for such commencement provisions to be dealt with by subordinate legislation. Whilst the order, in common with the usual practice for such orders, is

not subject to any parliamentary procedure as such, the Subordinate Legislation Committee will have the opportunity to consider the instrument in terms of its remit.