

HEALTH BOARD ELECTIONS (MEMBERSHIP AND ELECTIONS) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

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 Health Boards (Membership and Elections) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes, Policy Memorandum and Financial Memorandum for the Bill.

OUTLINE AND SCOPE OF THE BILL PROVISIONS

2. The Bill makes provision regarding the constitution of Health Boards and amends the National Health Service (Scotland) Act 1978 ("the 1978 Act") to provide for Health Board elections. Such elections will be piloted in Health Board areas specified in the pilot order to be made under section 4. Following the pilots, the Scottish Ministers must publish a report, which must contain an evaluation of the pilots, and lay a copy of it before the Scottish Parliament. Following this, the Scottish Ministers may by order roll-out Health Board elections across Scotland. The Bill makes provision to extend the functions of the Local Government Boundary Commission should wards be required in Health Board areas. It also provides that individuals aged 16 and over are entitled to vote at a Health Board election and makes some minor and consequential amendments.

3. The scope of the Bill is restricted to the constitution of Health Boards. The Bill is not concerned with the functions of Health Boards.

SECTIONS OF THE BILL

4. The Bill is divided into twelve sections and a schedule which deal with the following proposed measures—

- Section 1 (constitution of Health Boards) amends Schedule 1 to the 1978 Act (which makes provision about the constitution of Health Boards). This provides that a Health Board is to consist of appointed members (including an appointed chairman), councillor members and elected members, but the total number of councillor

members and elected members must amount to more than half the total number of members. Further amendments are made as a consequence of this, including the insertion of new paragraph 10A which provides for the period an elected member holds office and confers a power on the Scottish Ministers to make regulations about the tenure of office of elected members.

- Sections 2 and 3 (elected members of Health Boards) amend the 1978 Act to provide for Health Board elections and the Scottish Ministers' powers in relation to elected members. Section 2 inserts into section 2 of 1978 Act a new subsection (10A), which introducing new Schedule 1A which makes provision for the election of individuals to be members of Health Boards, and it also inserts new Schedule 1A. New Schedule 1A includes a number of regulation making powers regarding the timing of Health Board elections, electoral wards, conduct of elections, candidates, franchise, election expenses and vacancies. The provision on franchise provides that individuals aged 16 and over are entitled to vote at a Health Board election. Section 3 amends section 77(2) of the 1978 Act to provide that the Scottish Ministers may hold an election following an order declaring a Health Board to be in default.
- Section 4 (pilot scheme) provides that the Scottish Ministers may by the pilot order appoint a day on which sections 1 to 3 are to come into force in respect of the Health Board areas specified in the pilot order. It also provides that the Scottish Ministers may make one order only and that the order may make such modifications to sections 1 to 3 as the Scottish Ministers consider appropriate.
- Section 5 (report on pilot scheme) provides that no later than 5 years after the earliest Health Board election to be held in a Health Board area specified in the pilot order, the Scottish Ministers must publish a report, which must contain various matters, including an evaluation of the pilot, and lay a copy of it before the Scottish Parliament.
- Section 6 (termination of pilot scheme) provides that the pilot order is revoked on the day falling 7 years after the earliest Health Board election to be held in a Health Board area specified in the pilot order. If the pilot order is revoked before a roll-out order is made, then, on the day the pilot order is revoked, sections 1 to 7 and paragraph 2 of the schedule are repealed. In other words, the pilot scheme is terminated and it no longer becomes possible to hold elections in any Health Board area.
- Section 7 (roll-out) provides that the Scottish Ministers may by roll-out order appoint a day on which sections 1 to 3 are to come into force in respect of Health Board areas not specified in the pilot order. When a roll-out order is made it has the effect of repealing section 6 (thus ensuring the Health Boards running the pilot scheme can continue to hold elections on a permanent basis). The roll-out order may make provision adding to, replacing or omitting any part of the text of, or otherwise modifying, any enactment as the Scottish Ministers consider appropriate.
- Sections 8 to 12 (final provisions) provide for minor and consequential amendments, key terms, orders, commencement and short title.
- The schedule (minor and consequential amendments) provides for minor and consequential amendments to the 1978 Act and the Public Appointments and Public Bodies etc. (Scotland) Act 2003.

5. Further information about the Bill's provisions are contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 13–EN, and in the Policy Memorandum published separately as SP Bill 13–PM.

RATIONALE FOR SUBORDINATE LEGISLATION

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. The Government has had regard when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill to—

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time;
- the need to ensure that other areas of regulation can be developed in a coherent and consistent way by other authorities;
- the likely frequency of amendment;
- the possible need to change provisions in a co-ordinated way, for example to react to changes in approach when considering roll-out;
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament.

7. Where subordinate legislation is required to implement Government policy some form of parliamentary procedure may be appropriate. A balance must be struck between the different levels of scrutiny involved in the procedures. In the Bill the balance reflects the view of the Government on the importance of the matter delegated by Parliament.

DELEGATED POWERS

8. This Memorandum describes the provisions of the Bill which confer power to make subordinate legislation. It sets out—

- the persons upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision;
- the Parliamentary procedure, if any, to which the exercise of the power to make subordinate legislation is to be subject.

Section 1(2) (constitution of Health Boards) – Power to specify the total number of members of the Health Board and the number of each type of member

New paragraph 2(2) of Schedule 1 to the 1978 Act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

Provision

9. Section 1(2) of the Bill inserts a new paragraph 2(2) into Schedule 1 to the 1978 Act to give the Scottish Ministers powers to make regulations that must specify the total number of members of each Health Board and the number of each type of member on those Boards.

Reason for taking this power

10. It is considered appropriate to delegate the power to subordinate legislation because specifying the numbers of members and indeed the types of members for each Health Board may need amendment from time to time; for example to react to changes in approach required when considering roll-out or because the overall boundaries of Health Boards have been changed.

Choice of procedure

11. Statutory instruments made by virtue of Schedule 1 to the 1978 Act are subject to negative procedure in accordance with section 105(2) of the 1978 Act. Given that this is a power to be added to that Schedule, the Government considers that there should be no amendment to section 105 of the Act to make the election regulations subject to affirmative resolution procedure. The key point of interest as regards the number of each type of member on Health Boards is to do with which types of members will form the majority. That is specifically provided for in the Bill (see new paragraph 2(3)(a)). Beyond that, there is no significant public interest, so affirmative procedure is not considered appropriate. The regulations will therefore be subject to negative resolution procedure.

Section 1(5) (constitution of Health Boards) – Power to specify the circumstances in which an elected member must vacate office

New paragraph 10A(2) of Schedule 1 to the 1978 Act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

Provision

12. Section 1(5) of the Bill inserts a new paragraph 10A(2) into Schedule 1 to the 1978 Act to give the Scottish Ministers powers to make regulations that may specify the circumstances in which (a) an elected member must vacate office before the end of the period that a member normally holds office for, and (b) the Scottish Ministers may determine that an elected member is to vacate office before the end of that period.

Reason for taking this power

13. It is considered appropriate to delegate the power to subordinate legislation because specifying the circumstances in which an elected member must vacate office may need amendment from time to time, for example to react to changes in other areas of the law dealing with circumstances which might indicate that a person is not fit to be a Health Board member (such as insolvency or an area of criminal law). This is also consistent with the approach already

taken in paragraph 11 of Schedule 1 to the 1978 Act in respect of existing Health Board members (who are all currently appointed by the Scottish Ministers).

Choice of procedure

14. Statutory instruments made by virtue of Schedule 1 to the 1978 Act are subject to negative procedure in accordance with section 105(2) of the 1978 Act. Given that this is a power to be added to that Schedule, the Government consider that there should be no amendment to section 105 of the Act to make these regulations subject to affirmative resolution procedure. Further, there is no significant public interest, so affirmative procedure is not considered appropriate. The regulations will be subject to negative resolution procedure as are the current regulations dealing with the tenure and vacation of office of existing members (note that section 1(6) of the Bill makes a small amendment to the existing power in paragraph 11(a) of Schedule 1 to ensure that the powers relating to elected members and those relating to appointed members and councillor members are analogous).

Section 2(2) (Health Board elections) – Powers to make “election regulations”

Paragraph 13 of new Schedule 1A to the 1978 Act

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

Provision

15. Section 2(2) of the Bill inserts new Schedule 1A into the 1978 Act. This Schedule provides for Health Board elections. Paragraph 13 of Schedule 1A gives the Scottish Ministers powers to make regulations to be known as “election regulations” which can cover a range of things to do with Health Board elections. In particular, the preceding paragraphs of Schedule 1A specify that the power can be used to make the following provision—

- Paragraph 2(1) - Specify the day for the first election in a Health Board area;
- Paragraph 2(2) – Specify different days for different Health Board areas;
- Paragraph 3(1) - Specify that a Health Board area is to be divided into more than one ward (where the Scottish Ministers decide that a Health Board area is not to be comprised of a single ward);
- Paragraph 3(2)(a) - Specify the number of electoral wards in a Health Board area (if the area is to be divided);
- Paragraph 3(2)(b) - Specify the boundaries of those wards (again, only where the Scottish Ministers decide that a Health Board area is not to be comprised of a single ward);
- Paragraph 4(2)(a) - Make provision about the tenure and vacation of office of a returning officer;
- Paragraph 4(2)(b) - Make provision about the functions of the returning officer;

- Paragraph 4(2)(c) - Make provision about the payment of the returning officer's fees and expenses;
- Paragraph 4(2)(d) - Make provision about any other matters relating to returning officers that the Scottish Ministers consider appropriate;
- Paragraph 5(1) - Specify the "nomination period" and other requirements regarding the nomination of candidates;
- Paragraph 6 - Specify the number of elected members to be elected in each electoral ward;
- Paragraph 8(3)(a) - Make provision about the manner in which and period during which votes may be cast;
- Paragraph 8(3)(b) - Make provision about the form and content of ballot papers;
- Paragraph 8(3)(c) - Make provision about the manner in which the number of votes which will secure the return of a candidate as an elected member is to be calculated;
- Paragraph 8(3)(d) - Make provision about the procedure for counting votes;
- Paragraph 8(3)(e) - Make provision about the declaration of the results of the poll;
- Paragraph 9(a) - Make provision about who is qualified to be a candidate in a Health Board election;
- Paragraph 9(b) - Make provision about the circumstances in which an individual may be disqualified from being a candidate;
- Paragraph 10(1)(b) - Specify criteria regarding entitlement to vote;
- Paragraph 10(2) - Determine, or set out criteria for determining, the electoral ward in which an individual is entitled to vote;
- Paragraph 11 - Make provision about expenses which may be incurred by a person in connection with a Health Board election;
- Paragraph 12(2)(b) - Make provision about appointing an individual to fill a vacancy;
- Paragraph 12(5) - Specify criteria for identifying an "unelected candidate".

16. As mentioned above, paragraph 13 of Schedule 1A confers on the Scottish Ministers the power to make election regulations. Sub-paragraph (1) provides that the Scottish Ministers may make election regulations in relation to any matter specified in the Schedule (set out above). Sub-paragraph (2) provides that election regulations may make further provision about Health Board elections. Sub-paragraphs (3) and (4) provide that in particular, election regulations may provide that an enactment (including an Act of the Scottish Parliament and any instruments made under such an Act) applies (with or without modifications specified in the regulations) or does not apply to Health Board elections.

Reason for taking this power

17. It is considered appropriate to delegate the power to provide for the detail of election regulations to subordinate legislation because these technical details may need amendment from time to time, for example to react to changes in established best practice in administering

elections or to cater for technological developments in the manner in which votes may be cast. The view is taken that this strikes the right balance between the importance of the issue and providing flexibility to respond to challenging circumstances.

18. Regulations made under this power will be mostly technical in nature. They will deal with the complex mechanics of conducting elections. It is not thought appropriate to include such bulky and technical provisions within the body of a piece of primary legislation. The approach of setting out the framework of the electoral system in primary legislation and the detailed provisions in secondary legislation is commonplace. See, for example The Loch Lomond and the Trossachs National Park Elections (Scotland) Order 2002 (SSI 2002/202), The Cairngorms National Park Elections (Scotland) Order 2003 (SSI 2003/2), and The Scottish Local Government Elections Order 2007 (SSI 2007/42).

Choice of procedure

19. Statutory instruments made by virtue of Schedule 1 to the 1978 Act are subject to negative procedure in accordance with section 105(2) of the 1978 Act. Given that new Schedule 1A is an extension of Schedule 1 (Health Boards), the Government considers that there should be no amendment to section 105 of the Act to make the election regulations subject to affirmative resolution procedure. The regulations will therefore be subject to negative resolution procedure.

Ancillary powers

20. Section 105(7) of the 1978 Act will apply to the effect that the powers conferred on the Scottish Ministers to make regulations may be exercised (a) either in relation to all cases to which the power extends, or in those cases subject to exceptions, or in relation to any specified cases or classes of case, and (b) subject to such other conditions or exceptions as the Scottish Ministers think fit, and shall include power to make such supplementary, incidental, consequential, transitory or saving provision as appears to the Scottish Ministers to be expedient.

Draft regulations

21. Although these regulations will be mostly technical in nature they will nevertheless be of significant size. The Government therefore intends to provide the lead committee with draft election regulations for consideration at Stage 1 of the Bill.

Section 4(1) (elected members: pilot scheme) – Powers to make the “pilot order”

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: None

Provision

22. Section 4(1) of the Bill provides that the Scottish Ministers may by pilot order appoint a day on which sections 1 to 3 are to come into force in respect of the Health Board areas specified in the order. Subsection (2) provides that Ministers may make one pilot order only (but this does not affect the Ministers’ power to modify or revoke the order).

Reason for taking this power

23. This order is essentially a commencement order which will commence the substantive provisions of the Bill in respect of some Health Board areas so that the changes to Health Boards and the system of elections set out in the Bill can be piloted in those areas. By commencing the provisions by order, Ministers are able to be flexible about the starting date for the pilot elections. The order can therefore commence the pilots on a date that is appropriate for the Health Boards concerned, taking account of various factors such as the practical aspects of setting up the new elections. This degree of flexibility is common in respect of commencement powers.

24. Other than stating the commencement date and naming the Health Board areas to which it will relate, the pilot order is not intended to contain any further substantive provision. The order may contain such modifications of sections 1 to 3 as Ministers consider appropriate (subsection (3)). This is necessary to ensure that those provisions work in the context of a pilot scheme which is to be followed by an evaluation process before full roll-out. For example, sections 1 to 3 are quite properly drafted as if the elections system will, once up and running, continue for a number of electoral cycles but in the case of the pilot schemes it may not be appropriate to have the electoral cycle fixed as 4 years.

Choice of procedure

25. The pilot order is therefore nothing more than a commencement order and, as with any other commencement order, it is not considered appropriate to make it subject to any parliamentary procedure. If Parliament passes the Bill, it will have agreed that the changes to Health Boards set out in sections 1 to 3 are to be piloted in certain areas (as it will have agreed to section 4 of the Bill). The decision as to when to commence the pilot scheme is a matter of commencement of the Act passed by the Parliament and is something which is conventionally considered to be a matter for the Government.

Section 7(1) (roll-out) – Powers to make a “roll-out order”

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

Provision

26. Section 7(1) of the Bill gives the Scottish Ministers power to make a roll-out order to appoint a day on which sections 1 to 3 are to come into force in respect of Health Board areas not specified in the pilot order. When a roll-out order is first made it has the effect of repealing section 6 of the Bill (see subsection (2)). Subsection (3) provides that a statutory instrument containing a roll-out order may not be made unless a report has been published under section 5(1) and that statutory instrument is subject to negative resolution procedure. Note that more than one roll-out order may be made. This allows for a staged approach to commencement following evaluation of the pilot schemes.

Reason for taking this power

27. As with the pilot order it is important to have a degree of flexibility in specifying when the provisions of the Bill come into force in respect of each Health Board. Commencement by order delivers that flexibility.

Choice of procedure

28. Again, a roll-out order is essentially a commencement order which will commence the substantive elements of the Bill in respect of the areas where they were not commenced by the pilot order. In accordance with convention it ought to be subject to no parliamentary procedure given that Parliament will, by passing the Bill, have agreed to the concept of the substantive elements of the Bill being rolled-out following an evaluation report being published. However the Government considers an order made under this section to be an exceptional kind of commencement order because a roll-out order may do more than merely commence provisions of the Bill.

29. Firstly, when the first roll-out order is made it will have the effect of repealing section 6 and therefore nullifying the self-repealing provision in that section which ensures that any decision on roll-out has to be taken within a time limit. Clearly Parliament, if it passes the Bill, will also have agreed to that self-repealing time-limit. The Government therefore considers it appropriate to attach Parliamentary procedure to any order which rolls out the substantive provisions of the Bill to more areas whilst also overriding and eradicating the self-repealing time limit.

30. Secondly, a roll-out order may make provision adding to, replacing or omitting any part of the text of, or otherwise modifying, any enactment as Ministers consider appropriate (section 7(4)). This power may be used to make technical adjustments to ensure the smooth transition from the pilot schemes (for example, so as to ensure that all areas are put onto the same electoral cycle it may be necessary to deem the next elections held in the pilot areas to be the first elections in terms of paragraph 2 of new Schedule 1A to the 1978 Act). However it may also be used to make more substantive changes in consequence of findings of the evaluation report. In light of that, the Government considers it appropriate for such an order to attract parliamentary procedure. So despite roll-out orders being primarily about commencement they will be subject to negative resolution procedure. This strikes an appropriate balance between ensuring anything done in such an order which is not a simple commencement provision is brought to the attention of the Parliament and avoiding over-burdening the Parliamentary timetable with technical commencement orders.

Section 10 (Orders)

Provision

31. Section 10 of the Bill contains general subordinate legislation provisions. Subsection (1) provides that the powers in the Bill to make orders are exercisable by statutory instrument. Subsection (2) allows different provisions to be made for different purposes (in particular, for different Health Board areas) and permits the powers to be used to make supplementary, incidental, consequential, transitional, transitory or saving provisions which Ministers consider appropriate.

Section 11(3) (commencement) – Powers to appoint a day on which section 8 and the schedule will come into force

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: None

Provision

32. Section 11(3) of the Bill gives the Scottish Ministers powers to appoint a day on which section 8 and the schedule will come into force.

Reason for taking this power

33. These provisions are intended to come into force following the pilot elections for the pilot areas and, if roll-out is agreed, following the first Health Board elections for the rest of Scotland. Therefore, the Scottish Ministers require flexibility in the appointed day.

Choice of procedure

34. As with any standard commencement order, orders under section 11(3) will be not be subject to any Parliamentary procedure.

The Schedule, paragraph 1 – amendment of paragraph 4 of Schedule 1 to the 1978 Act

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

Provision

35. Paragraph 1 of the Schedule amends paragraph 4 of Schedule 1 to the 1978 Act by extending the categories of persons to whom the Scottish Ministers may pay remuneration to include such members of committees and sub-committees of a Health Board as they may prescribe. This extension recognises the fact that committees and sub-committees of Boards may undertake work for which remuneration would be available if it were undertaken by Health Board members.

Reason for taking this power and choice of procedure

36. This is an extension of the existing power of Scottish Ministers under paragraph 4 of Schedule 1 to the 1978 Act to prescribe the members of a Health Board to whom remuneration can be paid. As with that power, the power to prescribe members of committees and sub-committees of a Health Board to whom remuneration may be paid will be exercised by statutory instrument subject to negative procedure in terms of section 105(2) of the 1978 Act.

This document relates to the Health Board Elections (Membership and Elections) (Scotland) Bill (SP Bill 13) as introduced in the Scottish Parliament on 25 June 2008

Amendment of the Health Boards (Membership and Procedure) (Scotland) Regulations 2001

37. The Government intends to amend the Health Boards (Membership and Procedure) (Scotland) Regulations 2001 (SSI 2001/302) for the Health Boards specified in the pilot order to implement the changes which will be necessary for those Boards as a result of bringing sections 1-3 of the Bill into force.

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