

HEALTH BOARDS (MEMBERSHIP AND ELECTIONS) (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

1. This supplementary Memorandum has been prepared by the Scottish Government 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 explains changes to the powers to make subordinate legislation under the Health Boards (Membership and Elections)(Scotland) Bill resulting from amendments at Stage 2. This supplementary Memorandum should be read in conjunction with the original Delegated Powers Memorandum for the Bill.

AMENDMENTS TO DELEGATED POWERS

2. During the Stage 2 proceedings, Scottish Ministers modified some of the delegated powers that were introduced by the Bill. These changes are designed to give Parliament a greater role in scrutinising subordinate legislation made under the Bill and respond positively to the comments made in both the Subordinate Legislation Committee and Health and Sport Committee. This includes the provision for "Super Affirmative" procedure to apply to any future roll out order for Health Board elections.

3. There follows a description of the relevant changes to the sections of the Bill

Section 1(5) (constitution of Health Boards) – Power to specify further 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

4. New paragraph 10A(1A) of Schedule 1 to the 1978 Act, as inserted at Stage 2 by section 1(5) of the Bill, already excludes the holders of specified public office from holding office as elected Health Board members. Section 1(5) of the Bill also 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 further circumstances in which an elected member must vacate office before the end of the period that a member normally holds office for. As a result of a Stage 2 amendment, the

regulations may now, in particular, specify that an elected member is to vacate office on becoming the holder of a post set out in a list of restricted posts maintained by the Health Board concerned for that purpose. This was always the policy intention and the amendment simply ensures that regulations can make such provision.

Reason for taking this power

5. 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).

6. Paragraph 10A(2)(b) of the Bill as drafted provided that Scottish Ministers could specify circumstances in which they determined that an elected member should vacate office. However this power was removed from the Bill at Stage 2 so Ministers can no longer make regulations which give themselves discretion to remove an elected member from office.

Choice of procedure

7. The regulations will continue to be subject to negative resolution procedure. Statutory instruments made by virtue of Schedule 1 to the 1978 Act are normally 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.

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: Affirmative resolution procedure

Provision

8. 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.

9. As outlined in the original Delegated Powers Memorandum, this power can be used to make provision as specified in Schedule 1A. The substantive changes made to Schedule 1A at Stage 2 are as follows.

10. Paragraph 3(2)(c) of Schedule 1A now provides that if election regulations specify that a Health Board area is to be divided into more than one ward then the regulations must also specify the number of elected members to be elected in each ward. The Bill as drafted

(paragraph 6 of Schedule 1A) provided that the election regulations had to specify the number of elected members to be elected in each electoral ward. Separate regulations also had to specify the total number of members of each Health Board and the number of each type of member (new paragraph 2(2) of Schedule 1 to the 1978 Act). The default position in the Bill is that Health Board areas will normally comprise a single ward. Therefore this had the effect of obliging 2 sets of regulations to specify the same figure. New paragraph 3(2)(c) of Schedule 1A avoids this duplication. There is no substantive effect on the proposals of the Bill.

11. Paragraph 4(1) of Schedule 1A now provides that election regulations may specify who is to be appointed as returning officer for each ward. The Bill as drafted provided that each Health Board would appoint an individual as the returning officer. The policy intention is that the returning officer responsible for conducting a Health Board election is to be the returning officer responsible for elections of councillors for the most populous local government area in the Health Board area. This is reflected in the draft election regulations that were circulated to the Committees before Stage 1. It is not therefore the intention that the Health Board determine who should be appointed as a returning officer; rather a specific person is to be appointed as set out in election regulations.

12. Following a Stage 2 amendment, Paragraph 8(4) of Schedule 1A now provides that if election regulations provide for votes in a Health Board election to be cast only by post, the regulations must also provide for a system of personal identifiers to be used. If a traditional ballot is used (e.g. a mixture of ballot box and postal ballot) then personal identifiers are not required.

13. Paragraph 9(2) provides that election regulations may make provision about who is qualified to be candidate in a Health Board election and about the circumstances in which an individual may be disqualified from being a candidate. This power was amended at Stage 2 to ensure that regulations may, in particular, disqualify from being a candidate an individual holding a restricted post set out in a list maintained by the Health Board concerned for that purpose. It has always been the policy intention to make the Health Boards responsible for establishing and maintaining their own list of restricted posts. This is reflected in the draft election regulations that were circulated to the Committees before Stage 1. The amendment therefore is of no substantive effect but ensures that election regulations can make such provision.

Choice of procedure

14. Statutory instruments made by virtue of Schedule 1 to the 1978 Act are normally subject to negative procedure in accordance with section 105(2) of the 1978 Act. However given that the election regulations concern matters of substance, the Government consider that the election regulations should be subject to affirmative resolution procedure. This is provided for by new section 105(2A) of the 1978 Act as inserted by section 2(1A) of the Bill at Stage 2.

Section 4 (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; unless the pilot order (or order amending the pilot order) adds to, replaces or omits any part of the text of sections 1 to 3, or an order revokes the pilot order, in which case Affirmative Resolution Procedure

Provision

15. Section 4 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). Subsection (3) provides that the pilot order may bring sections 1 to 3 into force with such modifications as Ministers consider appropriate. These provisions were in the Bill as drafted; the only change at Stage 2 is in relation to the choice of procedure described below.

Choice of procedure

16. 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.

17. However the Government recognises that the power to modify goes further than a normal commencement order so if the pilot order contains any textual amendment to sections 1 to 3 of the Bill, it will be subject to affirmative procedure. The Government also agrees that any decision to revoke the pilot order should be subject to affirmative procedure since it would be a significant step to reverse the implementation of the election arrangements.

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: “Super affirmative” resolution procedure

Provision

18. 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 a draft of the roll-out order has been laid before, and approved by a resolution of, the Scottish Parliament.

19. It should be noted that, following Stage 2 amendment, if a question of whether to resolve to approve a draft roll-out order is put to a meeting of the Scottish Parliament but is not agreed by the Parliament then on the day after the question is put, sections 1 to 7 and paragraph 2 of the schedule (ie the substantive provisions of the Bill relating to Health Board elections) are repealed (new section 6(2)(b) of the Bill inserted at Stage 2).

20. A Stage 2 amendment inserted section 7(3A) into the Bill. It provides that, before the draft roll-out order can be laid, Ministers must lay before Parliament a copy of the proposed draft roll-out order and their reasons for making it (section 7(3A)(a)). Ministers must also publicise the proposed draft roll-out order (section 7(3A)(b)) and consider and respond to any representations or Parliamentary report or resolution when laying the draft roll-out order before Parliament for affirmative approval (sections 7(3A)(c) and (3B)(a)). Where the draft roll-out order includes material changes to the proposed draft roll-out order, Ministers must also lay a statement giving details of the proposed revisions and reasons for making the changes (section 7(3B)(b)).

Reason for taking this power

21. 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

22. 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 of the clear intention to pilot and evaluate Health Board elections before deciding to adopt them across Scotland and because a roll-out order may do more than merely commence provisions of the Bill.

23. 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.

24. 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 these unique

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issues, the Government considers it appropriate for such an order to attract an exceptional parliamentary procedure. So despite roll-out orders being primarily about commencement they will be subject to additional procedures to ensure that anything done in such an order is brought to the attention of the Parliament and so should allow thorough scrutiny of policies and proposals in moving to any roll-out of elections.

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