

SOCIAL CARE (SELF-DIRECTED SUPPORT) (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 Social Care (Self-directed Support) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

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 contains provisions to:

- Give individuals the power to direct the support which they are provided with by a local authority. This applies to services provided under the Social Work (Scotland) Act 1968, the Bill itself (section 2, for carers) and children's services under section 22 of the Children (Scotland) Act 1995;
- Put duties on local authorities to inform individuals about their choices so as to allow them to make an informed choice;
- Consolidate and modernise the provisions on direct payments; and
- Introduce a new power for local authorities to provide support to carers.

4. Further information about the Bill's provisions is contained in the Explanatory Notes and Financial Memorandum published separately as SP Bill 10-FM, and in the Policy Memorandum published separately as SP Bill 10-PM.

Rationale for subordinate legislation

5. The Bill contains a number of delegated powers which are explained in more detail below. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances with the benefit of experience, without the need for primary legislation;
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- make proper use of valuable parliamentary time;
- allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- consider the likely frequency of amendment.

Delegated powers

6. Section 20 contains the general provisions regarding regulations made under the Bill. Subsection (1)(a) allows different provision to be made for different cases. Subsection (1)(b) enables the powers to be used to make incidental, supplementary, consequential, transitional, transitory or saving provisions as the Scottish Ministers think appropriate. As these powers are parasitic on other powers within the Bill they will be subject to the same procedure as the powers which they are being used with.

Section 12 – Power to modify section 3

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations
Parliamentary procedure: Affirmative procedure

Provision

7. Section 12 provides that Scottish Ministers may, by regulations, amend section 3 (which contains the options for self-directed support) and make any consequential changes necessary to sections 4, 6 and 7.

Reason for taking this power

8. One of the key aims of the Bill is to encourage flexibility in the way that support is provided to individuals. At present, four different options for self-directed support are set out but Ministers are keen not to unnecessarily limit any future practice which may not have been foreseen at the time of the Bill. As a result this provision provides flexibility for Ministers to adapt the options (by amendment or by addition/removal) so as to reflect future practice. Obviously there are no current plans to use the powers.

Choice of procedure

9. Ministers recognise that as this power enables amendment of one of the core provisions of the Bill, this provision should, accordingly, be subject to the affirmative procedure.

Section 13 – Power to make further provision about direct payments

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative procedure

Provision

10. Subsection (1) provides a general power for Ministers to make regulations about direct payments.

11. Subsection (2) provides for further specific powers to complement the general power in subsection (1). It provides specific power to:

- specify descriptions of persons who are ineligible to receive direct payments. This will define what ineligibility for direct payments means in terms of section 4(6) of the Bill (subsection (2)(a));
- specify circumstances in which authorities are not required under sections 4, 6 or 7 to give a person a choice of a direct payment (subsection (2)(b)). This might for example mean that direct payments were not available for a particular type of service;
- specify the circumstances in which a local authority may require a person to contribute to a direct payment; (subsection (2)(c))
- enable local authorities to assess or reassess an individual’s ability to contribute (subsection (2)(d));
- specify how direct payments are to be paid and repaid. For example, enabling deduction from direct payments of an individual’s contribution, and enabling payment by instalments (subsection (2)(e))
- specify circumstances in which local authorities must, may or may not terminate a direct payment (subsection (2)(f));
- specify circumstances in which a local authority may pay all, or part, of a direct payment to another person instead of to the person whom the authority is required to make the direct payment to. This would allow so called “third party direct payments” (subsection (2)(g));
- specify persons who may not receive a third party direct payment (subsection (2)(h));
- specify persons who are prohibited from providing services or support under a direct payment other than in prescribed circumstances. This will allow Ministers to limit direct payments to be paid to, for example, family members of the supported person unless certain circumstances apply (subsection (2)(i)); and
- specify conditions which must be satisfied by such a person before they provide services or support (subsection (2)(j)).

Reasons for taking power

12. As with the previous direct payments regime (under section 12B of the 1968 Act and the Community Care (Direct Payments) (Scotland) Regulations 2003 (SSI 2003/243)) it is not considered appropriate for all of the detail regarding direct payments to be within primary legislation. The matters set out above will be technical in nature and Ministers will require flexibility to allow them to adjust to changes in direct payment practice. Importantly it will allow Ministers to adjust the provisions from time to time to ensure that direct payments are available as widely as possible.

13. The power in subsection (1) will provide a general power for Ministers to address any matters regarding direct payments which have not been foreseen in the more specific powers in subsection (2).

14. The powers in section 13 will be used immediately and will provide for a discretion for local authorities to assess a person's means for contributing to the cost of securing the person's support and also give the authority the discretion as to whether or not to recover that contribution (as is the position with charging for other social care services). Furthermore, regulations will set out the circumstances when the payments should be paid net or gross of the individual's contribution.

15. One of the central policy aims of the Bill is to enable direct payments to be made to any individual who wants one. Ministers are keen to avoid creating barriers as to the delivery of direct payments and so they do not plan to use any powers to restrict access readily. It is, however, foreseen that Ministers will use this power to provide for those who are ineligible for direct payments; this is expected, for example, to include those who are subject to certain criminal justice orders (for example a person who is released on licence under section 22 of the Prisons (Scotland) Act 1989 or under section 1 of the Prisoners and Criminal Proceedings (Scotland) Act 1993). There may also be particular services which are not considered appropriate for the use of direct payments; for example, at present direct payments are restricted for securing residential accommodation. If Ministers were to create restrictions of this nature they would propose to consult on such changes with relevant stakeholders to ensure that any restrictions on access to direct payments are appropriate and to ensure that no unnecessary restrictions are placed.

16. As noted above, it is expected that regulations using many of these powers will be made immediately on the coming into force of the Bill to provide the administrative framework for direct payments. There may be periodic changes required in the future to deal with changes in practice.

Choice of procedure

17. As with their predecessors, these delegated powers merely allow Ministers to set out matters of detail regarding the framework which is provided for direct payments in the Bill, so it is proposed that these regulations be subject to negative procedure.

Section 18 – Delegation

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations**
Parliamentary procedure: **Negative procedure**

Provision

18. This section amends section 15 of the Community Care and Health (Scotland) Act 2002 to give Ministers extra powers to prohibit the delegation of specified local authority functions unless the local authority also delegates functions under the Bill.

Reasons for taking power

19. This power is taken for the purposes of allowing Ministers to make provision by regulations to prescribe that, where the functions which this Bill are parasitic on are delegated, then the functions of this Bill must also be delegated. It is expected that this power would be used for the purposes of ensuring that where the functions of Part 2 of the Social Work (Scotland) Act 1968, section 22 of the Children (Scotland) Act 1995 or section 2 of this Bill are delegated, the appropriate self-directed support duties are delegated with them. As with the current balance of subordinate and primary legislation in the Community Care and Health (Scotland) Act 2002, it is considered appropriate for these changes to be made by regulations rather than on the face of the Act itself.

Choice of procedure

20. As regulations under the Community Care and Health (Scotland) Act 2002 are under the negative procedure we would propose these changes be subject to negative procedure as well.

Section 21 – Power to modify application of Act

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations**
Parliamentary procedure: **Affirmative procedure**

Provision

21. This section allows Ministers, by regulations, to disapply sections 4(2) and 7(2) in specified circumstances. It also allows provision to be made which deems a person in those specified circumstances to have chosen Option 3 of the options for self-directed support (i.e. selection of the support by the local authority and the making of arrangements for it by the authority). Finally, it allows any other section of the Bill to be disapplied or modified depending on those circumstances.

22. In simple terms this power will allow Ministers to remove the options from either people or services for which self-directed support is not considered appropriate. This is distinct from the related provisions, dealt with in section 13, relating to ineligibility, or the unavailability, of direct payments.

Reasons for taking power

23. This power allows Ministers flexibility to disapply the self-directed support framework for particular persons or for particular services when it is considered necessary. There may be persons or services which do not currently, or may not in future, lend themselves to the self-directed support approach and this power will allow Ministers to make appropriate provision. This power only applies to services for adults and children as Ministers are of the view that no such restriction would be appropriate for the new support for carers available under the Bill.

24. As is stated above, it is Ministers' view that self directed support should be available to all those who want it but there may be some services which are not appropriate for self-directed support. As a result, Ministers would not foresee using these powers readily. Views are currently divergent as to which services this may be, but some suggestions are services for people with substance abuse issues and services for those fleeing domestic abuse. There are also questions around services which are provided to children under the Children (Scotland) Act 1995 which relate to child protection rather than those which are provided for disabled children.

25. If Ministers were to create restrictions of this nature we would propose to consult on such changes with relevant stakeholders to ensure that no unnecessary restrictions are placed on the functioning of the Bill.

Choice of procedure

26. As these regulations would allow Ministers to disapply important aspects of the Bill, these regulations should be subject to the affirmative procedure.

Section 24 – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative/Affirmative

Provision

27. Subsection (1) of this provision allows Ministers to make supplementary, incidental or consequential provision for the purposes of, in consequence of, or for giving full effect to, any provision of this Act.

Reasons for taking power

28. This power will allow Ministers to make a modest number of changes to other enactments which currently refer to section 12B of the 1968 Act (which is repealed by section 23). It also allows the flexibility for Ministers to make any necessary, unforeseen, adjustments to the complex landscape of social care legislation. As the amendments required immediately will be minor and technical in nature it is not considered appropriate for these to be placed on the face of the Bill and, hence, they are more appropriate for subordinate legislation.

This document relates to the Social Care (Self-directed Support) (Scotland) Bill (SP Bill 10) as introduced in the Scottish Parliament on 1 March 2012

Choice of procedure

29. As with similar ancillary powers in other Bills it is considered appropriate for such an order to be subject to the negative procedure unless the order makes textual modifications to primary legislation. In which case, the order should be subject to the affirmative procedure.

Section 25 – Transitional provision etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative

Provision

30. Subsection (1) of this provision allows Ministers to make transitory, transitional or saving provisions in connection with the coming into force of any provision of the Bill.

Reasons for taking power

31. This power will allow Ministers to ensure that there is a smooth transition from current social care provision to social care provision in line with the provisions of this Bill. In particular it will allow Ministers to deal with direct payments which were made under section 12B of the 1968 Act and continue local authorities' ability to pay direct payments and recover any part of such a payment which is misused.

Choice of procedure

32. As with similar ancillary powers in other Bills it is considered appropriate for such an order to be subject to the negative procedure.

Section 26 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

33. Subsection (2) allows Ministers to bring into force the provisions of the Bill which are not brought into force by subsection (1) by order.

Reasons for taking power

34. This will allow Ministers to time the commencement of the Bill to coincide with any necessary subordinate legislation and also allow Ministers to plan commencement appropriately with stakeholders.

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Choice of procedure

35. As is common with simple commencement orders these orders should only be subject to the requirement to lay the instrument as soon as possible after making as laid down in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

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