

CARERS (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 Carers (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 the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by Parliament.

OUTLINE OF BILL PROVISIONS

3. The Carers (Scotland) Bill was announced by the First Minister in the Programme for Government in November 2014 and is an important part of the Scottish Government's wider programme of Health and Social Care reform. The primary purpose of the Bill is to ensure better and more consistent support for both adult and young carers so that they can continue to care, if they so wish, in better health and to have a life alongside caring. This is to be achieved by building on existing legislative rights for carers and young carers. There will also be better linkages with the assessment processes for cared-for persons and with the services for cared-for persons (both adults and disabled children). Implementation of the Bill's provisions will complement and enhance the actions in the Scottish Government's and COSLA's national Carers and Young Carers Strategy, *Caring Together* and *Getting it Right for Young Carers*, 2010-2015.¹

4. The Bill is structured into eight parts:

- **Part 1** contains provisions which define key terms used within the Bill;
- **Part 2** makes provision to replace the current carer's assessment with a new adult carer support plan (ACSP) and provides for a specific young carer statement (YCS) for all young carers; to identify the personal outcomes of the carer/young carer and their needs for support; to state what an ACSP/YCS must contain and when it should be reviewed; and to set out the information within the ACSP/YCS which should be provided to the carer/young carer and any other person the carer/young carer requests;

¹ *Caring Together: The Carers Strategy for Scotland 2010 – 2015; Getting it Right for Young Carers: The Young Carers Strategy for Scotland 2010-2015* - <http://www.scotland.gov.uk/Publications/2010/07/23153304/0>

- **Part 2** also allows Scottish Ministers to provide for the assessment of adult and young carers' needs for support for the purpose of preparing an ACSP/YCS, and for the review of such documents, by regulations;
- **Part 3** introduces a duty for local authorities to support carers whose identified needs cannot be met by the authority's general provision of the services, including the information and advice service established by this Bill; nor by services in the community; nor by the provision of services to the cared-for person. The carer's identified needs must then meet local eligibility criteria, which the local authority must set out, publish and review on a regular basis. Provision is made to enable the Scottish Ministers to set national eligibility criteria within Scotland by regulations. Part 3 also requires local authorities, in determining what support to provide to a carer, to consider in particular whether the support should take the form of, or include, a break from caring;
- **Part 4** requires local authorities and health boards to involve carers in the design, development and delivery of carer services. For the purposes of the Bill, this means services provided by the local authority or health board to carers and cared-for persons;
- **Part 5** requires local authorities to prepare a local carer strategy which will set out the authority's plans for identifying carers/young carers in its area, obtaining information about the care they provide or intend to provide, and how they will use their resources to provide carer/young carer services. Provision is made to ensure that the local authority consults with relevant bodies and persons and has regard to other plans plus any outcomes as laid out in other enactments, in preparing a local carer strategy. The local authority must publish and review its local carer strategy over a period as stated in the Bill;
- **Part 6** provides for the establishment of an information and advice service for carers in each local authority area, which must include a short breaks services statement;
- **Part 7** provides for general provision in relation to guidance and directions, and financial and other assistance to and by voluntary organisations; and
- **Part 8** and the schedule set out various supplementary and final provisions, and make consequential amendments to other enactments.

RATIONALE FOR SUBORDINATE LEGISLATION

5. 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;
- make proper use of valuable Parliamentary time;

- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- 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.

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate. Powers that are referred to here as being exercisable by regulations are to be made by Scottish statutory instrument.

DELEGATED POWERS

PART 1 – KEY DEFINITIONS

Section 1 – Meaning of “carer”

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

7. Subsection (1) provides that in this Act, “carer” means an individual who provides or intends to provide care for another individual (the “cared-for person”). Subsection (2) provides that subsection (1) does not apply: (a) in the case of a cared-for person under 18 years old, to the extent that the care is or would be provided by virtue of the person’s age, or (b) in any case, to the extent that the care is or would be provided (i) under or by virtue of a contract, or (ii) as voluntary work.

8. Subsection (3) provides that the Scottish Ministers may by regulations: (a) provide that “contract” in subsection (2)(b)(i) does or, as the case may be, does not include agreements of a kind specified in regulations; (b) permit a relevant authority to disregard subsection (2)(b) where the authority considers that the relationship between the carer and the cared-for person is such that it would be appropriate to do so.

Reason for taking power

9. There may be situations where it would be appropriate to ensure that certain people fall within the definition of ‘carer’ for the purposes of the Bill, notwithstanding that they provide care under agreements which may be viewed as contracts. Alternatively, there may be groups who should be excluded from the definition of carer because of the agreements under which they provide the care, where it would be helpful to put beyond doubt that the agreements in question are to be treated as ‘contracts’ for the purposes of subsection (2)(b). For example, regulations could provide that the agreements which certain types of kinship carers have with local authorities are not to be considered to be ‘contracts’. The effect of such regulations would be to ensure that those kinship carers fall within the Bill’s definition of a carer (providing no other exception applies) and as a

result can be offered an adult carer support plan and, if eligible, subsequent support. This power will provide flexibility in adding or removing particular types of contracts or other agreement from the exception to the definition of ‘carer’.

10. The Scottish Government would like to retain flexibility so that a local authority may be able to support an individual who does not fall within the definition of a carer. Subsection (3) allows for regulations that would see local authorities being able to disregard subsection (2) (b) and consider carers who provide care by way of a contract or through a voluntary organisation to be classed as ‘carers’ as defined by subsection (1). This flexibility will allow for amendments to be made to include certain types of carers. This is especially likely to be relevant in the case of carers who provide some care on a paid and some care on an unpaid basis to same family member. As the Social Care (Self-directed Support) (Scotland) Act 2013 (“the 2013 Act”) becomes more widely used, it is likely that direct payments under the 2013 Act will mean that the number of carers who provide both paid care, by way of a contract with the person they care for, and unpaid care are likely to rise. This power will allow for amendments to be made to take account of the possible rise in the different types of these caring situations.

Choice of procedure

11. These provisions are subject to negative procedure which is considered appropriate as the definitions are a matter of detail rather than of broad principle. This power is for defining purposes only to allow further clarification regarding the term “contract” and “carer”. It is considered that a higher level of Parliamentary scrutiny would be inappropriate for provisions of this nature.

12. – There is general agreement amongst the statutory and third sector organisations about what a carer is. These provisions may be used to refine the definition of carer for the purposes of this Bill, ensuring that certain persons fall within that definition. For example, provision could be made to ensure that kinship care agreements under the Looked After Children (Scotland) Regulations (S.S.I. 2009/210) are not regarded as a ‘contract’ under this Bill. Since this power would not be used to fundamentally alter the basic meaning of “carer” but only to refine it, any use of this would not warrant affirmative procedure.

Section 4 – Meaning of “personal outcomes”

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

13. Subsection (1) provides that in this Act, “personal outcomes”, in relation to carers, includes outcomes which would, if achieved, enable carers to provide or continue to provide care for cared-for persons. It is likely that personal outcomes will also be linked to maintaining and improving the health and wellbeing of the carer.

14. Subsection (2) provides that the Scottish Ministers may by regulations make further provision about personal outcomes, including provision about: (a) which outcomes may be personal

outcomes; (b) the matters to which a relevant authority is to have regard in considering which outcomes may be personal outcomes.

Reason for taking power

15. The Scottish Ministers are likely to provide further definition of exactly what a personal outcome is with reference to a relevant framework. Subsection (2)(a) will give Ministers the ability to define the matters that a relevant authority must consider when agreeing personal outcomes with a carer. It is envisaged that the power under subsection (2)(b) will be used to set out the matters that responsible authorities should take account of when considering and agreeing a carer or young carer's own personal outcomes. The matters that are prescribed are likely to focus on outcomes that are linked to maintaining and improving the health and wellbeing of the carer. There is likely to be an emphasis on preventative support that will allow the carer to continue, if they so wish, in the caring role and lead a life alongside caring. By using regulations, Scottish Ministers will be afforded more flexibility with which to keep pace with developing practice.

Choice of procedure

16. These provisions are subject to negative procedure which is considered appropriate as the definitions are a matter of detail rather than of broad principle. This power is for defining purposes only to allow further clarification regarding the term "personal outcomes". It will not fundamentally change the meaning of "personal outcome" which is generally understood in policy and practice with regard to supporting carers, but it is likely to be used to provide examples of what a personal outcome may be. Therefore, it is considered that a higher level of Parliamentary scrutiny would be inappropriate for provisions of this nature.

PART 2 – ADULT CARER SUPPORT PLANS AND YOUNG CARER STATEMENTS

Section 7 – Adult carers: identification of outcomes and needs for support

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

17. Section 7 provides that the Scottish Ministers may by regulations make provision about the identification of adult carers' personal outcomes and their needs for support, including: (a) how personal outcomes and needs for support are to be identified; (b) the process for doing so (including arrangements for the involvement of carers and cared-for persons); (c) who may carry out identification; (d) the sharing of information about carers and cared-for persons for the purpose of identifying personal outcomes and needs for support; (e) the factors to be taken into account in identifying carers' personal outcomes and needs for support; (f) the circumstances in which carers' personal outcomes and needs for support should be reviewed.

Reason for taking power

18. This power will give Scottish Ministers the ability to further define the process for identifying adult carers' personal outcomes and their needs for support. It is envisaged for example

that regulations may prescribe whether the adult carer support plan must be prepared face to face, or in what circumstances it will be appropriate to prepare the adult carer support plan by alternative means; how cared-for persons' views are to be sought and to set parameters around who can share information about the carer and the cared-for person, for what purpose and in what circumstances, as part of the carer support plan process. By using regulations to do this, Ministers will have the flexibility to amend the process as evidence from local practice emerges.

Choice of procedure

19. The power in section 7 is subject to affirmative procedure (by virtue of section 37(2)(b)). This is considered appropriate as it will provide a higher level of Parliamentary scrutiny for regulations which would directly affect what the primary legislation requires in terms of the extent of the duty to support. Section 7 is significant in determining how personal outcomes are identified and agreed. This is a fundamental element in establishing a carer's needs and therefore what the duty to provide support means in a particular instance.

20. Whilst this level of scrutiny involves more parliamentary time, it is considered that the type of provision which will be made under this provision is sufficiently important to justify this, and it is not anticipated that they will be regularly amended.

Section 8 – Content of adult carer support plan

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

21. Subsection (1) provides for what an adult carer support plan must contain as specified in subparagraphs (a)-(i). Subsection (2) requires that each second and subsequent adult carer support plan must also contain information about the extent to which support provided under a previous plan has assisted in the achievement of the carer's identified personal outcomes.

22. Subsection (3) provides that the Scottish Ministers may by regulations make provision about: (a) other information which an adult carer support plan must (or must not) contain; (b) the form of adult carer support plans.

Reason for taking power

23. As the Bill is implemented and becomes embedded in practice there may be evidence to suggest that the list of matters or form of adult carer support plans requires amendment. The powers contained in subsection (3) provides Ministers with the ability to add matters which must be included in an adult carer support plan if required, without having to amend primary legislation.

Choice of procedure

24. This delegated power allows the Scottish Ministers to set out matters of details regarding the content of an adult carer support plan, so it is proposed these regulations are subject to negative

procedure. It is not considered that a higher level of Parliamentary scrutiny would be appropriate for a provision of this nature.

Section 9 – Review of adult carer support plans

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

25. Section 9 provides that the Scottish Ministers may by regulations make provision about the review of adult carer support plans, including: (a) the circumstances in which plans are to be reviewed; (b) the frequency of review; (c) the procedure for review; (d) arrangements for obtaining the views of adult carers and cared-for persons.

Reason for taking power

26. To assist with the delivery of adult carer support plans, the Scottish Government will define, in consultation with relevant stakeholders, the process for reviewing plans. By using regulations to do this, Scottish Ministers will be afforded the flexibility to review and amend the process as evidence and local practice suggests, especially in relation to the circumstances for review. Such trigger circumstances could include, for example, when the cared-for person is going to be discharged from hospital. As the Bill is implemented and embedded into practice, evidence may suggest that additional circumstances should be added to the list.

Choice of procedure

27. This is subject to negative procedure which is considered appropriate. A higher level of Parliamentary scrutiny is not considered to be necessary for a provision of this operational nature.

Section 12 – Young carers: identification of outcomes and needs for support

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

28. Section 12 provides that the Scottish Ministers may by regulations make provision about the identification of young carers' personal outcomes and their needs for support, including: (a) how personal outcomes and needs for support are to be identified; (b) the process for doing so (including arrangements for the involvement of carers and cared-for persons); (c) who may carry out the identification; (d) the sharing of information about carers and cared-for persons for the purpose of identifying personal outcomes and needs for support; (e) the factors to be taken into account in identifying carers' personal outcomes and needs for support; (f) the circumstances in which carers' personal outcomes and needs for support should be reviewed.

Reason for taking power

29. This power is equivalent to that described at section 7. It will give the Scottish Ministers the ability to further define the process for identifying young carers' personal outcomes and their needs for support. It is envisaged for example that regulations may prescribe whether the young carer statement must be prepared face to face or in what circumstances it will be appropriate to prepare the young carer statement by alternative means; how cared-for persons' views are to be sought and to set parameters around who can share information about the young carer and the cared-for person, for what purpose and in what circumstances, as part of the young carer statement process. By using regulations to do this, Ministers will have the flexibility to amend the process as evidence from local practice emerges.

Choice of procedure

30. The power in section 12 is subject to affirmative procedure (by virtue of section 37(2)(b)). This is considered appropriate as it will provide a higher level of Parliamentary scrutiny for regulations which would directly affect what the primary legislation requires in terms of the extent of the duty to support. Section 12 is significant in determining how personal outcomes are identified and agreed. This is a fundamental element in establishing a young carer's needs and therefore what the duty to provide support means in a particular instance.

31. Whilst this level of scrutiny involves more parliamentary time, it is considered that the type of provision which will be made under this provision is sufficiently important to justify this, and it is not anticipated that they will be regularly amended.

Section 13 – Content of young carer statement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

32. Subsection (1) sets out what a young carer statement must contain as specified in subparagraphs (a)-(j). Subsection (2) requires that each second and subsequent young carer statement must also contain information about the extent to which support provided under a previous statement has assisted in the achievement of the carer's identified personal outcomes.

33. Subsection (4) provides that the Scottish Ministers may by regulations make provisions about: (a) other information which a young carer statement must (or must not) contain; (b) the form of young carer statements.

Reason for taking power

34. This power is equivalent to that described under section 8 in relation to adult carer support plans. As the Bill is implemented and becomes embedded in practice there may be evidence to suggest that the list of matters or form of young carer statements requires amendment. The powers

contained in Subsection (4) provide Ministers with the ability to add matters which must be included in a young carer statement if required, without having to amend primary legislation.

Choice of procedure

35. This delegated power allows the Scottish Ministers to set out matters of details regarding the content of a young carer statement, so it is proposed these regulations are subject to negative procedure. It is not considered that a higher level of Parliamentary scrutiny would be appropriate for a provision of this nature.

Section 14 – Review of young carer statements

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

36. Section 14 provides that the Scottish Ministers may by regulations make provision about the review of young carer statements, including: (a) the circumstances in which plans are to be reviewed; (b) the frequency of review; (c) the procedure for review; (d) arrangements for obtaining the views of young carers and cared-for persons.

Reason for taking power

37. This power is equivalent to that described under section 9 above in relation to adult carer support plans. To assist with the delivery of young carer statement, the Scottish Government will define, in consultation with relevant stakeholders, the process for reviewing statements. By using regulations to do this, Scottish Ministers will be afforded the flexibility to review and amend the process as evidence and local practice suggests, especially in relation to the circumstances for review. Such trigger circumstances could include, for example, when the cared-for person is going to be discharged from hospital. As the Bill is implemented and embedded into practice, evidence may suggest that additional circumstances should be added to the list.

Choice of procedure

38. This is subject to negative procedure which is considered appropriate. A higher level of Parliamentary scrutiny is not considered to be necessary for a provision of this operational nature.

PART 3 – PROVISION OF SUPPORT TO CARERS

Section 19 – Duty to set local eligibility criteria

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

39. Subsection (1) requires that each local authority must set the local eligibility criteria which it is to apply in its area. Subsection (2) provides that the local eligibility criteria are the criteria by which the local authority must determine whether it is required to provide support to carers' identified needs.

40. Subsection (4) provides that a local authority must, when setting its local eligibility criteria, have regard among other things to such matters as the Scottish Ministers may by regulations specify.

Reason for taking power

41. This power enables the Scottish Ministers to work with relevant stakeholders to set the matters that a local authority must take into account when setting local eligibility criteria. This will ensure a Scotland-wide approach to important national matters when local authorities set their own eligibility criteria. This power will also provide Ministers with the flexibility to amend the regulations if necessary to respond to operational experience. For illustrative purposes only, these matters might include:

- the desirability of taking a preventative approach to avoid carers' needs escalating to a more severe level;
- a requirement for local authorities to consider the resources which exist within the local community which can provide support to carers;
- a requirement for local authorities to take account of the particular needs of carers who have one or more of the protected characteristics under the Equality Act 2010;
- a requirement for local authorities to identify and take account of specific factors that may indicate a carer is particularly likely to have needs for support e.g. carers who are frail; carers who care for more than one person; carers who care for someone with multiple and complex needs;
- a requirement for local authorities to take account of any particular challenges faced by cared-for people in transition and the impact of those challenges on the carers' needs e.g. children in transition to adult services.

Choice of procedure

42. This is subject to affirmative procedure which is considered appropriate. The matters which are to be prescribed will form an overarching context for the local eligibility criteria which local authorities will adopt. These criteria are in turn fundamental to the way that the duty to provide

support to carers, under Chapter 2 of Part 3 of this Bill, will operate in practice. A higher level of Parliamentary scrutiny is therefore considered appropriate. Whilst this level of scrutiny involves more parliamentary time, it is considered that the regulations under this provision will be sufficiently important to justify this, and it is not anticipated that they will be regularly amended.

Section 20 – Publication and review of criteria

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

43. Subsection (1) requires that each local authority must publish its local eligibility criteria.

44. Subsection (2) provides that the first local eligibility criteria must be published before the end of the period of 6 months beginning with the day prescribed by the Scottish Ministers by regulations.

45. Subsection (3) provides that each local authority must carry out a first review of its local eligibility criteria before the end of the period, prescribed by the Scottish Ministers by regulations, beginning with the day on which the criteria are published.

Reason for taking power

46. The power provided by subsection (2) will be used to set the date for publication of the first local eligibility criteria to ensure that such criteria are in place before the date on which it is agreed that the duty in section 22 will be commenced.

47. It is envisaged that subsection (3) will then be used to bring the review of local eligibility criteria into line with the review cycle for local carer strategies under section 30. The timing for the review of local carer strategies may vary between local authority areas (because it is in turn connected to the timing of strategic plans published under the Public Bodies (Joint Working) (Scotland) Act 2014). It was therefore considered that setting the first review date in regulations would be the clearest way to achieve the desired result of enabling each local authority to review its local eligibility criteria in line with its local carer strategy.

Choice of procedure

48. This is subject to negative procedure which is considered appropriate. A higher level of Parliamentary scrutiny is not required for a provision of this nature.

Section 21 – National eligibility criteria

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

49. Subsection (1) provides that the Scottish Ministers may make regulations setting out national eligibility criteria.

50. If national eligibility criteria are prescribed under section 21, they will take the place of any local eligibility criteria which have been made.

51. Subsection (4) provides that regulations under this section may modify any enactment (including provisions resulting from this Bill).

Reason for taking power

52. This power will allow the Scottish Ministers to set national eligibility criteria, if they believe this is required, in the light of the effectiveness of the development and implementation of local eligibility criteria and how local eligibility criteria work in practice. In deciding whether it is necessary to introduce national eligibility criteria, the Scottish Ministers would take account of the views of key stakeholders, including COSLA, local authorities, carer organisations and carers and would consult on any relevant regulations. The Scottish Ministers would seriously consider the setting of national eligibility criteria if there is a clear evidence-based rationale for doing so. The Scottish Ministers would need to carefully consider the format and content of national eligibility criteria before consultation to be assured that national eligibility criteria were workable.

53. National criteria would likely be prescribed with consideration to the factors set out in regulations under section 19 of this Bill and the learning and best practice taken from local authorities setting their own local eligibility criteria.

54. The power to modify enactments is taken to ensure that any changes to other legislation – which are necessary in order for the national eligibility criteria to take the place of local eligibility criteria can be made.

Choice of procedure

55. Affirmative procedure applies to these regulations as the Scottish Parliament would be likely to have an interest in the Scottish Ministers replacing local criteria and decision-making with criteria that operate at national level.

Section 23 – Provision of support to carers: breaks from caring

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

56. Subsection (1) provides that a local authority, in determining which support to provide to a carer under section 22(4), must consider in particular whether the support should take the form of or include a break from caring.

57. Subsection (2) provides that the Scottish Ministers may by regulations make provision: (a) about the form of support that may be provided as a break from caring; (b) where the regulations provide for a break from caring to take the form of the provision of replacement care or other services or assistance to the cared-for person, about (i) the role of the cared-for person in relation to how that care or those services or assistance are provided, (ii) whether that care or those services or assistance are to be regarded as support to the carer or to the cared-for person. Subsection (3) provides that support provided under subsection (1) may be provided on a regular basis or on a temporary basis and may be provided for varying periods of time.

Reason for taking power

58. Subsection (2) will provide Scottish Ministers with the power to define what support or types of support should be considered as a break from caring. It will also allow Scottish Ministers to clarify the role of the cared-for person in how that support is provided and whether that support should be regarded as support to the carer or cared-for person. This is especially challenging where it is decided that support for a carer requires services to be delivered to the persons they care for, with regard to obtaining consent from the cared-for persons to receive a service, and how charges, under current charging policies, will be applied. This power will give Ministers the ability to set out detailed procedures to be followed when such an issue arises or is required by changes to policies and practice, including changes to national charging policies covering the cared-for person

Choice of procedure

59. This is subject to negative procedure which is considered appropriate because the provisions will cover procedural issues rather than matters of whether carers are eligible for support. A higher level of Parliamentary scrutiny is not considered appropriate for a provision of this nature.

Section 24 – Charging for support provided to carers

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

60. This section amends section 87 of the Social Work (Scotland) Act 1968 (“the 1968 Act”), which concerns the power of a local authority to charge for services and accommodation provided under certain enactments. Section 87 is amended at subsection (1) and subsection (1A)(a) to allow for charges to be made in respect of services provided under section 22(4) of this Bill. Section 87 also includes a power to make regulations at subsection (5). Under that power, the Scottish Ministers may make regulations modifying or adjusting the rates of such charges, including requiring that they be waived altogether. The amendments to section 87(1) and (1A)(a) made by this section therefore indirectly widen the power at section 87(5).

Reason for taking power

61. This power is required to allow Scottish Ministers to create regulations relating to charges for carers. Regulations under this section would be used to define whether any charges should be applied to carers. It is envisaged that this power will be exercised to achieve the result that carers will not be subject to charges for any support that is provided directly to them..

The power to charge is contained within section 87 of the 1968 Act. Charges for cared-for persons are set in regulations, including the National Assistance (Assessment of Resources) Regulations 1992. Even though carers are providers of services, to set charging policy for carers within primary legislation would not be appropriate.

Choice of Procedure

62. Regulations made under section 87(5) in respect of charging for services to carers are subject to negative procedure (in the same way as any regulations in respect of charging for other services would be). A higher level of Parliamentary scrutiny is not considered appropriate for a provision of this nature.

PART 6 – INFORMATION AND ADVICE FOR CARERS

Section 32 – Short breaks services statements

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

63. Subsection (1) requires that each local authority must prepare and publish a short breaks services statement. Subsections (2) and (3) respectively provide for what is meant by a short breaks services statement and that the information and advice contained within such statements must be both accessible, and proportionate to the needs of, the persons to whom it is provided.

64. Subsection (4) provides that the Scottish Ministers may by regulations make further provision about the preparation, publication and review of short breaks services statements.

Reason for taking power

65. The reason for taking this power is to enable the Scottish Ministers to have the flexibility to make further provision about the details of how a short breaks services statement is to be prepared, published and reviewed to reflect any future changes in carer services. The Scottish Ministers will be able to provide further clarity on what is considered a short break together with the type and level of information that short break services statements should contain, as well as how they should be published. This may include where they should be made available and how they are made accessible in formats that take account of, for example, different languages and the specific needs of young carers. The power for the Scottish Ministers to prescribe the review period for short breaks statements is important to ensure that statements are kept relevant and up to date.

Choice of procedure

66. This is subject to negative procedure which is considered appropriate because the regulations will be used to prescribe points of detail which may need to be amended from time to time. A higher level of Parliamentary scrutiny is not considered appropriate for a provision of this nature.

PART 7 – GENERAL PROVISION

Section 33 – Guidance and directions

Power conferred on: the Scottish Ministers
Power exercisable by: directions (no particular format)
Parliamentary procedure: none

Provision

67. This provision amends Section 5 of the 1968 Act (powers of the Scottish Ministers) to provide that the Scottish Ministers may issue directions to local authorities, either individually or

collectively, as to the manner in which they are to exercise any of their functions under this Act. Subsection (3) amends section 5(1B) of the 1968 Act in order to add this Bill to the list of enactments in respect of which the Scottish Ministers may issue directions.

Reason for taking power

68. This amendment to Section 5 of the 1968 Act allows Scottish Ministers to provide guidance and directions to local authorities in respect of their functions under this Bill. A local authority must comply with any direction made under this section, and directions therefore have legislative character. Directions may be used to provide clarification about how Ministers expect local authorities should carry out the functions set out in the Carers (Scotland) Bill. The powers can be used to provide detail on the matters a local authority should consider in delivering its functions under this Bill. Under the previous legislative framework, for example, The Carer's Assessment (Scotland) Directions 2014² that were provided to help local authorities determine whether a person met the 'substantial and regular' test for a carers assessment under the 1968 Act. Those directions will become redundant once this Bill is commenced, as the new adult carer support plan and young carer statement provisions do not require consideration of whether a person provides a substantial amount of care on a regular basis. However, it is envisaged that directions may be used in future to ensure consistency amongst local authorities in relation to similar types of issues.

Choice of procedure

69. The power to issue directions was added to the 1968 Act by the National Health Service and Community Care Act 1990 and has always been exercisable without specific Parliamentary scrutiny. Directions can only be used to deal with the manner in which functions are exercised. They cannot alter the function in any way. Accordingly, they deal with very practical, operational issues and Parliamentary scrutiny is not considered to be appropriate for a provision of this nature.

PART 8 – FINAL PROVISIONS

Section 38 – Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure, unless provision is made to add to, replace or omit the text of an Act in which case the affirmative procedure applies

Provision

70. Subsection (1) provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of, or in connection with, any provision made by or under this Bill.

71. Subsection (2) provides that regulations made under subsection (1) may modify any enactment (including this Act).

² *The Carer's Assessment (Scotland) Directions 2014* - <http://www.gov.scot/Resource/0045/00459110.pdf>

Reason for taking power

72. The new procedures introduced by the Bill may give rise to the need for ancillary provisions. The Scottish Ministers may need to make such provision by regulation to support the full implementation of the Bill. This provision empowers the Scottish Ministers to make provisions concerning incidental, supplemental, consequential, transitional, transitory provision or savings where this is thought to be necessary.

73. For example, there may be a need to make further changes to the Bill to reflect the implementation of the Social Care (Self-Directed Support) (Scotland) Act 2013 or the Public Bodies (Joint Working) (Scotland) Act 2014 ('the 2014 Act'), both relatively recent pieces of legislation in the same public policy area as this Bill: for instance if regulations under the 2014 Act amend relevant provisions of the 1968 Act. Equally, it may be necessary to make changes to the 2014 Act or regulations under that Act to ensure that the functions created by this Bill are properly incorporated into integration schemes. The schedule to the Bill makes certain functions capable of delegation, but further amendments will be needed to regulations under the 2014 Act to ensure that they must be delegated. It may also be necessary to make ancillary provision to deal with the way in which integration schemes are revised in order to take new mandatory integration functions into account.

74. Without these powers to make ancillary provision, it might be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill. It would not be an effective use of Parliament's time, or the Scottish Government's resources to deal with such matters through primary legislation. They are best addressed through subordinate legislation.

Choice of procedure

75. If regulations made under this section add to, replace or omit any part of the text of an Act they are subject to the affirmative procedure. This approach is in line with the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 40 – Commencement

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

Provision

76. Subsection (1) provides that this section and sections 36 to 38 and 41 come into force on the day after Royal Assent.

77. Subsection (2) provides that any remaining provisions of this Act come into force on such date as the Scottish Ministers may by regulations appoint. It is usual to allow such provision in conjunction with a power to commence the provisions of a Bill. Subsection (3) clarifies that different days may be appointed for different purposes.

78. Subsection (4) provides that regulations under subsection (2) may include transitional, transitory or saving provision.

Reason for taking power

79. Some formal sections of the Bill are commenced on the day of Royal Assent. The Scottish Ministers may consider it appropriate for the substantive provisions of the Bill to be commenced at such a time as they appear to be suitable. This is to provide flexibility to enable the provisions of the Bill to be brought into force in a coordinated and managed way, so as to give proper effect to the Bill without having to resort to primary legislation. It is usual practice for such commencement provisions to be dealt with by subordinate legislation. It should be noted that any transitional, transitory or saving provision under subsection (4) is separate to and narrower than the power to make equivalent provision under section 38, being dependent on commencement.

80. As an example of the exercise of this power, savings provision is likely to be required as the current carer's assessment process, under sections 12AA and 12AB of the Social Work (Scotland) Act 1968, and sections 24 and 24A of the Children (Scotland) Act 1995, are replaced by the adult carer support plan and young carer statement processes contained within Part 2 of this Bill. This could amongst other things include provisions allowing an existing carer's assessment to be continued and used to provide support to an eligible carer until such time that the assessment is replaced by an adult carer support plan or young carer statement.

Choice of procedure

81. It is normal practice for commencement regulations to be laid before Parliament but not subject to additional procedure. Commencement regulations bring into force provisions whose policy have already been considered by the Parliament during the passage of the Bill. It is thought to be sufficient that any regulations under this section are laid before Parliament as soon as practicable after it is made (and before it comes into force). This is provided for by virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

This document relates to the Carers (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 9 March 2015

CARERS (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM