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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Supplementary Delegated Powers in the Care Reform (Scotland) Bill (as amended at Stage 2)



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Katy Clark
Scottish Labour



Roz McCall
Scottish Conservative
and Unionist Party

Introduction

1. This report considers the delegated powers in the Care Reform (Scotland) Bill (“the Bill”) as amended at Stage 2.
2. This is a Scottish Government Bill which was introduced on 20 June 2022. The lead committee was the Health, Social Care and Sport Committee.
3. On introduction, the Bill was titled the National Care Service (Scotland) Bill and the Scottish Government stated that the Bill seeks to establish a National Care Service which will operate in a similar way to the National Health Service. Following Stage 2 amendments, the scope of the Bill has reduced because Part 1, which established the National Care Service, was removed. In summary, the Bill now sets out:
 - (a) information sharing requirements for health and social care services;
 - (b) reforms to the delivery of care and regulation of carers;
 - (c) new rights for care home residents; and
 - (d) reforms to procurement and social services.
4. The lead committee was the Health, Social Care and Sport Committee.

Delegated Powers

5. On introduction, the Bill conferred 16 powers to make subordinate legislation, and 2 powers to make directions, on the Scottish Ministers.
6. The Committee previously considered the delegated powers in the Bill at Stage 1 on 1 and 29 November 2022 and held an evidence session with the Minister for Mental Wellbeing and Social Care, Kevin Stewart MSP, on 10 January 2023. [The Committee published a report on 3 February 2023](#). It recommended that the Bill should not progress in its current form and said that there was insufficient detail on the face of the Bill to allow for meaningful parliamentary scrutiny.
7. The Bill completed Stage 2 on 4 March 2025. The Scottish Government produced a [Supplementary Delegated Powers Memorandum](#) (“SDPM”) covering the delegated powers as amended at Stage 2.
8. 8 delegated powers have been removed, 2 delegated powers have been revised, and 8 delegated powers have been included at Stage 2. Commentary on those powers is below.

Review of powers

Section 36(1): Power to provide for an information sharing scheme for public health and social care services

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by the Scottish Ministers

Parliamentary procedure: Affirmative

New or revised power: revised

Provision

9. Section 36 provides the Scottish Ministers with a power to make regulations to establish a scheme for sharing information between public health and social care services. Section 36(2) clarifies that those regulations may: (a) require one person to supply information to another person and (b) create civil and criminal sanctions for those who fail to comply with its requirements.
10. This provision has been amended during Stage 2. The definitions for the services relating to this scheme no longer specifies the National Health Service and the National Care Service. Instead, subsection (3) provides that the scheme may apply to any service which is provided under a list of prescribed functions.
11. A new subsection (4) has been inserted, which clarifies that regulations made under this section may provide for the sharing of information for more than just the performance of the functions specified in subsection (3), but for the performance of *any* function that supports the efficient and effective provision of public health and social care services.
12. This power is subject to the affirmative procedure.

Committee consideration

13. The Committee asked whether the Scottish Government had any further comment to provide in relation to the amendments made to this delegated power during the course of Stage 2 of the Bill, as it had not included it in its SDPM. The Scottish Government responded that, with the removal of the proposed structures of a National Care Service from the legislation, it became necessary to redefine the means of achieving the intended scope of the power. It states that the intent of the amendment is to match the initial scope as set out in the Bill as introduced, rather than to introduce any new scope.
14. The Committee accepts this explanation.
15. The Committee also asked, in relation to this power, whether the Scottish Government had considered establishing the information sharing scheme on the face of the Bill.
16. The Scottish Government responded that it recognised the merits of being able to scrutinise proposals in primary legislation, but that it is important to recognise that

Scotland's health and social care landscape will evolve and change significantly. It stated that it is imperative that such a scheme remains flexible to address such challenges as and when they arise. The Scottish Government also stated that the affirmative procedure offers an appropriate opportunity for scrutiny.

17. The Committee notes the Scottish Government's response and highlights its correspondence to the Parliament.

18. The Committee also asked whether the regulations made under this power would include a requirement that the individual to which the information relates consents to the sharing of such information, and whether the Scottish Government could give examples of similar information sharing protocols.
19. The Scottish Government responded that it is already the case that a broad range of information is communicated between public bodies without requiring the consent of the individual. It states that in most cases, the sharing of health and care information relies on lawful basis other than consent, primarily the vital interests or public task basis. It states that any scheme established will operate within devolved competence and be compatible with the Data Protection Act 2018 and the UK GDPR. The Scottish Government highlighted the Social Security Information-sharing (Scotland) Regulations 2021 as an example, which it stated has a smaller scope, but is broadly similar to the proposal in section 36.

20. The Committee notes the Scottish Government's response and highlights its correspondence to the Parliament.

Section 37B(2): Power to modify the persons to whom information standards apply

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

New or revised power: New

Provision

21. Information standards are to be produced by the Scottish Ministers and made available online, setting out requirements in relation to the processing of Scottish health or social care information. Section 37B(1) lists the persons to whom the information standards may be applied to. It includes local authorities, and persons providing health, care and social work services. Listed persons are subject to a binding legal obligation to comply with any information standard relevant to them.
22. Section 37B(2) confers a power on the Scottish Ministers to make regulations to change or clarify the list of persons to whom information standards may be applied to.
23. The power is subject to the affirmative procedure.

Committee consideration

24. This is a new power conferred on the Scottish Ministers which the SDPM states is necessary to accommodate for the evolving landscape of actors in the sector, and to address any grey areas that may arise from operational experience. For these reasons, there may be a need to periodically refine the list of persons in section 37B(1).
25. This power is capable of being used to apply legally binding requirements on categories of persons and as such, the Scottish Government considers that affirmative procedure is the appropriate scrutiny procedure for regulations made under section 37B(2).
26. The Committee agrees that a regulation-making power in this section may be appropriate, as it is foreseeable that the list of prescribed persons may need updated in the future in light of developments in relation to the various bodies who may be responsible for providing care.

27. The Committee accepts the proposed power in principle and is content that the exercise of the power will be subject to the affirmative procedure.

Section 37C(2): Power to provide civil sanctions for breach of compliance with information standards

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

New or revised power: New

Provision

28. As set out above, persons listed in section 37B(1) may be required to comply with information standards for the processing of health and social care information in Scotland. Section 37C(1) provides that it is a legal duty for a person to whom an information standard applies, to comply with it.
29. Section 37C(2) provides a power for the Scottish Ministers to make regulations setting out a civil sanction for persons who breach their section 37C(1) duty to comply with the information standards.
30. Regulations made under this power would be subject to the affirmative procedure.

Committee consideration

31. The Committee asked in relation to this power why the Scottish Government did not consider it appropriate to set out the civil sanctions on the face of the Bill.
32. The Scottish Government responded that it considered it important to take time to ensure the sanctions are appropriate, proportionate and targeted. It highlighted the Network and Information Systems Regulations 2018 as a starting point for any

regulations made under this power. It stated that, given that penalties may specify sums and their limits, it is necessary that these are changeable over time to account for inflation. It stated that the flexibility offered by regulations is appropriate and allows for setting out the detail that is required.

33. The Committee notes the Scottish Government’s response and highlights its correspondence to the Parliament.

Section 37E(3): Power to amend the definition of “information-standards website” to specify an internet domain name

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: laid, no procedure

New or revised power: new

Provision

34. The information standards mentioned above are required to be published by the Scottish Ministers on the “information-standards website”. Section 37E(1) sets out a definition for this term as “the website maintained by, or on behalf of, the Scottish Ministers with an internet domain name specified by the Scottish Ministers by regulations”.
35. Section 37E(3) then obliges the Scottish Ministers to make regulations to amend this definition to specify an internet domain name. It also creates a discretionary regulation making power on the Scottish Ministers to subsequently amend the domain name.
36. Regulations made under this power would be laid in the Parliament but would not be subject to further procedure.

Committee consideration

37. The Scottish Government sets out in the SDPM that it is necessary for the domain name of the website to be identifiable within the legislation, to allow the information standards to be easily located and complied with. This regulation making power is required because the website is not yet established, pending the enactment of the Bill. Once created, the Scottish Ministers will be required to use the section 37E(3)(a) power to insert it into the definition in section 37E(1).
38. The power in section 37E(1)(b) is to subsequently amend, by regulations, the definition to change the domain name, and is intended to accommodate possible changes to the site in future. Since there is no policy content in regulations made under these powers, the Scottish Government has proposed that it is appropriate for them to be laid before Parliament subject to no procedure.
39. The Committee considers that the reasons for the power and the proposed parliamentary procedure are clear and proportionate. It is content with the explanation as to why the power has been taken.

40. **The Committee finds the power acceptable in principle, and that it is not subject to further procedure.**

Section 38A: Power to prescribe timescales for adult carer support plans

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

New or revised power: new

Provision

41. Section 38A adds a new section 6(5A) into the Carers (Scotland) Act 2016 (the “2016 Act”). It obliges the Scottish Ministers to make regulations to prescribe timescales for the preparation of “adult carer support plans”. These are described in section 6(1) as plans prepared by the responsible local authority setting out the adult carer’s identified personal outcomes, needs and support (if required) to be provided by the local authority. The local authority is obliged by subsections (2)-(4) to offer a support plan to persons who they identify as being an adult carer, and if the offer is accepted, they are obliged to create it.
42. Section 38A also repeals the existing section 7 of the 2016 Act. Section 7 obliged the Scottish Ministers to make regulations to prescribe timescales for the preparation of adult carer support plans in relation to adult carers of terminally ill cared-for persons.
43. Regulations made under this power would be subject to the negative procedure.

Committee consideration

44. The Scottish Government explains in the SDPM that a delegated power is being taken here to combat feedback that some carers are experiencing very long delays in having their adult carer support plan prepared. The prescription of timescales is expected to ensure that carers who request a plan can receive one within a reasonable timescale.
45. The Scottish Government considers that the negative procedure is appropriate for this power because the regulations will not create any new legal duties on local authorities, but simply set the timescale for fulfilling an existing one. As such, it considers that the affirmative procedure would be inappropriate, as it would require a disproportionate level of scrutiny on uncontroversial uses of the power. The negative procedure is therefore considered an appropriate balance.
46. The Scottish Government exercised the regulation-making power in section 7 of the 2016 Act in SSI 2021/133 to require local authorities to prepare support plans for adult carers of terminally-ill persons within 10 working days of a substantive conversation with the relevant carer.
47. While the Committee accepts that a regulation-making power may be appropriate here, an alternative may have been to prescribe the timescales on the face of the

Bill, and provide a power to amend them, should that be necessary in the future. Nevertheless, the reasons provided by the Scottish Government for taking a power are considered sufficient, and therefore the Committee is content.

48. The Committee is content with the power in principle, and that it is subject to the negative procedure.

Section 38B: Power to prescribe timescales for young carer statements

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Revised or new: new

Provision

49. Section 38B is equivalent to section 38A above, but in relation to young carers. It adds a new section 12(7) into the 2016 Act which obliges the Scottish Ministers to make regulations to prescribe timescales for the preparation of young carer statements. These are described in section 12(1) as a statement setting out the young carer's identified personal outcomes, needs, and support to be provided by the responsible authority. The relevant authority is the health board, where the carer is a pre-school child, and the local authority, where the carer is older.
50. As with adult carer support plans, the responsible authority is obliged by subsections (2)-(4) of section 12 to offer a statement to persons who they identify as being a young carer, and if the offer is accepted, they are obliged to prepare one.
51. Section 38B also repeals the existing section 13 of the 2016 Act. Section 13 obliged the Scottish Ministers to make regulations to prescribe timescales for the preparation of young carer statements in relation to young carers of terminally ill cared-for persons.
52. Regulations made under this power would be subject to the negative procedure.

Committee consideration

53. The Scottish Government explains in the SDPM that a delegated power is being taken here to combat feedback that some young carers are experiencing delays in having their young carer statement prepared. The prescription of timescales is expected to ensure that carers who request a statement can receive one within a reasonable timescale.
54. The Scottish Government considers that the negative procedure is appropriate for this power because the regulations will not create any new legal duties on local authorities, but simply set the timescale for fulfilling an existing one. As such, it considers that the affirmative procedure would be inappropriate as it would require a disproportionate level of scrutiny on uncontroversial uses of the power. The negative procedure is therefore considered an appropriate balance.

55. The Scottish Government exercised the regulation-making power in section 13 of the 2016 Act in SSI 2021/133 to require local authorities to prepare statements for young carers of terminally-ill persons within 10 working days of a substantive conversation with the relevant carer.
56. While the Committee accepts that a regulation-making power may be appropriate here, an alternative may have been to prescribe the timescales on the face of the Bill, and provide a power to amend them, should that be necessary in the future. Nevertheless, the reasons provided by the Scottish Government for taking a power are considered sufficient, and therefore the Committee is content.
57. **The Committee is content with the power in principle, and that it is subject to the negative procedure.**

Section 40: power to prepare a code of practice on new obligations for care home providers

Power conferred on: Scottish Ministers

Power exercisable by: Code of practice

Parliamentary procedure: N/A

Revised or new: new

Provision

58. Section 40 of the Bill adds four new sections into the Public Services Reform (Scotland) Act 2010 (the “2010 Act”). New sections 78A -78D make provision about obligations in relation to care home residents. Section 78C creates a power for the Scottish Ministers to prepare a code of practice providing guidance on fulfilling the duties imposed by sections 78A and 78B.
59. Section 78A provides that care home providers must identify an Essential Care Supporter for every resident. Section 78B requires care home providers to facilitate visits for residents unless there is a serious risk to life, health or wellbeing. This exception can be overcome if the resident is likely to die before suspension of visits are lifted or is suffering from the lack of visits to a degree that the harm to them outweighs the serious risk. Both sections 78A and 78B require that the Scottish Ministers use a pre-existing power to make regulations, under section 78(2) of the 2010 Act, to impose the respective duties. Section 78D is an interpretation section.
60. Providers of care home services are obliged by sections 78A(3) and 78B(7) to have regard to the code of practice. The code must provide that certain considerations are taken as paramount: promoting the resident’s dignity, health, wellbeing and human rights, and the importance of people who are not care home staff in providing care to them. Subsection (5) obliges the Scottish Ministers to consult before publishing any version of the code.
61. The code of practice will not be subject to any parliamentary procedure.

Committee consideration

62. In the SDPM, the Scottish Government considers it appropriate to have this power so that care home services can have a better practical understanding of how the duties are to be fulfilled. It states that this level of detail would not be appropriate for either primary or secondary legislation.
63. The Scottish Government's position is that since the code of practice is not legislative in nature, the power to issue it does not require to be subject to parliamentary scrutiny mechanisms. It considers that the consultation requirement inserts adequate safeguards for those who will be required to follow it.
64. The Committee is satisfied with the reasons provided for establishing this power. It notes that care home providers are bound to have regard to the code, but consider that there is sufficient detail on the face of the Bill to justify setting out more practical matters in a Code of Practice. As such, the Committee agrees that it is appropriate that the code is not subject to parliamentary procedure.
- 65. The Committee is content with the power in principle and that it is not subject to parliamentary procedure.**

Section 41A: Power to modify the monetary threshold for public service contracts

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Revised or new: new

Provision

66. Section 41A inserts a new regulation 5B into the Public Contracts (Scotland) Regulations 2015 (the "2015 Regulations"). The 2015 Regulations impose obligations on public bodies in relation to how they award public contracts for the execution of works, the supply of products, or the provision of services.
67. Regulation 5 of the 2015 Regulations sets out various monetary thresholds that a relevant contract must have, or exceed, in order for the procurement rules to apply to it. New regulation 5B will provide a power to the Scottish Ministers to make regulations to amend these values.
68. This power will be subject to the negative procedure.

Committee consideration

69. The Scottish Government explains in the SDPM that this delegated power is necessary to allow the current fixed monetary threshold to be amended from time to time without requiring primary legislation. This will allow flexibility for the threshold to keep pace with inflation and to ensure compliance with future international law, including trade agreements.
70. The SDPM explains that the Scottish Ministers previously held an implied power to amend these thresholds under section 2(2) of the European Communities Act 1972.

However, since this enactment was repealed as a result of the UK leaving the European Union, there is no longer a power to amend the threshold by subordinate legislation.

71. The choice of negative procedure was elected by the Scottish Ministers to mirror the choice of procedure applicable to other power to modify thresholds in the 2015 Regulations. The Scottish Government suggests that it strikes the right balance in terms of providing an opportunity to Parliament to consider the use of the power, without wasting parliamentary time with adjustments which may be non-controversial.
72. The Committee considers this power is acceptable for the reasons provided, including that it is re-establishing a power held before Brexit, and considers the negative procedure appropriate given the regulations will not form substantive policy changes.

73. The Committee is content with this power in principle, and that it is subject to negative procedure.

Section 43A: Power to modify the types of undertaking that are treated as a “relevant health care service” for information-sharing about adults at risk

Power conferred on: Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: affirmative

Revised or new: new

Provision

74. Section 43A inserts a new subsection 5A into the Adult Support and Protection (Scotland) Act 2007. It allows relevant health care services to share and receive information about adults at risk. Subsections (4) and (5) define a “relevant health care service”, and list professions such as doctors, dentists, nurses and paramedics.
75. Subsection (6) creates a power for the Scottish Ministers to make an order to modify subsections (4) and (5) so as to change or clarify the types of undertaking which are to be treated as a relevant health care service for the purposes of this section.
76. Since an order made under this power would add, replace or omit part of the text of an Act, it is subject to affirmative procedure by virtue of section 46(5)(a) of the Bill.

Committee consideration

77. The Scottish Government explains in the sDPM that this power is necessary given the healthcare landscape is always changing. While the current list is appropriate, changes in the sector may mean that new undertakings will fall into this category. As such, the definition should be updated relatively quickly, without waiting for an opportunity in primary legislation.

78. The Scottish Government considers that the affirmative procedure is appropriate because the power will allow for modification of a list in primary legislation that has been settled by the Parliament through the Bill process. It is therefore appropriate that Parliament should have to consider and agree any change to that list.
79. The Committee notes that the content of the definition has been set out on the face of the Bill, and the Scottish Ministers are taking a limited power to amend it. It is satisfied that there is adequate reason to justify the taking of the power, and that there has been appropriate consideration of the importance of parliamentary scrutiny by making the power subject to affirmative procedure.

80. **The Committee is content with this power and that it is subject to the affirmative procedure.**

Section 13: Power to provide for independent information, advice and advocacy about public social care services

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Revised or new: revised

Provision

81. Section 13 has been revised during Stage 2. On introduction, the provision allowed Scottish Ministers to make regulations to make provision about the provision of independent advocacy services in connection with the National Care Service.
82. Following Stage 2 amendments, the reference to the National Care Service has been replaced with a reference to “public social care services”, which is defined in subsection (2) as a service provided in pursuit of a function listed under the Public Bodies (Joint Working) (Scotland) Act 2014.
83. Furthermore, the provision for which the Scottish Ministers can provide for in regulations has been expanded. Instead of just independent advocacy, the Scottish Ministers can also make provision about independent information and advice.
84. This power is subject to the affirmative procedure and, in accordance with section 46(2)(aa), can be used to modify any enactment other than the Act that flows from the Bill itself.

Committee consideration

85. The Scottish Government has indicated in the SDPM that taking a power to provide also for independent information and advice will allow the Scottish Ministers to implement the results from co-design and engagement with stakeholders. Further, that taking a power will give flexibility to allow the provision to develop in line with people’s needs and the capacities of the sector.
86. The Scottish Government considers that the affirmative procedure is appropriate

because it is a broad open-ended power. As such it is appropriate that Parliament should have close oversight of the policy choices made when exercising the power.

87. The Committee agrees that it is a broad power but that the reasons provided are sufficient to justify taking it. The Committee notes there is a limitation in that provision can only be made in relation to a prescribed list of functions in relation to public social care services. It considers that the affirmative procedure is most appropriate to ensure there is opportunity for adequate parliamentary scrutiny.

- 88. The Committee is content with the power in principle, and that it is subject to the affirmative procedure.**

