

CARERS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7 of the Parliament’s Standing Orders and aims to assist the Delegated Powers and Law Reform Committee in its consideration of the Carers (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of the memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

3. The amended or new delegated powers in the Bill 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.

Section 1 – Meaning of “carer”

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

Provision

4. 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.

5. 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

6. 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’.

7. 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 the 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

8. The choice of procedure was amended at Stage 2 so that the regulation making power at subsection (3) is now subject to the affirmative procedure. The change in choice of procedure follows further consideration at the request of the Delegated Powers and Law Reform Committee.

9. On reflection, the Scottish Government agreed with the Delegated Powers and Law Reform Committee that the power at subsection (3) was significant in that it could potentially be used to expand or restrict the reach of the Bill’s provisions on providing support to carers, depending on the manner in which it is exercised. The Scottish Government acknowledged that it is certainly the case that “unpaid” caring is a challenging concept which could become more challenging in the future. The power at section 1(3)(b), for example, is intended to make provision for those people who in policy terms are referred to as “mixed carers”. Mixed carers are carers who undertake both unpaid care and paid care for the same family member. The 2013 Act is still in the early stages of implementation and it is possible, for example, that as it becomes more prevalent, further types of mixed carer may emerge.

10. The provisions at section 1(3) will therefore be subject to the affirmative procedure so as to give regulations made under these provisions a higher level of parliamentary scrutiny.

Section 6A – Adult carers of terminally-ill cared-for persons

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

Provision

11. Section 6 places a duty on the responsible local authority to prepare an adult carer support plan (ACSP). The ACSP replaces the current carer's assessment. Section 6 provides that an adult carer support plan sets out an adult carer's identified personal outcomes, an adult carer's identified needs (if any) and the support (if any) to be provided by the responsible local authority to an adult carer to meet those needs. Equivalent provision is made for young carers in the form of the Young Carer Statement.

12. Section 6A(1) provides that the Scottish Ministers may by regulations prescribe timescales for the preparation of adult carer support plans in relation to adult carers of terminally ill cared-for persons.

13. Subsection (2) provides that, for the purposes of this section and section 11A, a cared-for person is terminally ill at any time if at that time the person suffers from a progressive disease and death in consequence of that disease can reasonably be expected within 6 months.

Reason for taking power

14. The Scottish Government has introduced provisions at Stage 2 to confer a new regulation-making power so that Scottish Ministers may prescribe timescales for preparation of an adult carer support plan where the adult is caring for a cared-for person who is terminally ill. A definition of 'terminally ill' is provided for by subsection (2) of section 6A. This definition is the same as that used in section 66(2)(a) of the Social Security Contributions and Benefits Act 1992 (attendance allowance for the terminally ill).

15. Taking into account views from a range of stakeholders, including Marie Curie, the Scottish Government recognises that there could be some circumstances in which the preparation of the adult carer support plan may need to be done quickly, such as for those who have caring responsibilities for people who are terminally ill. The Health and Sport Committee agreed with this position in its Stage One report.

16. The regulation making power set out at 6A is deliberately narrowly drawn. This is because the Scottish Government does not envisage a need to set timescales for the preparation of the ACSP for any other group of carer.

17. Regulations made under this power will set out the actual timescales to be complied with for the preparation of the ACSP. The detail about how such cases will be recognised and processed will be set out in guidance. This is expected to include how such carers are to be

identified, what forms of evidence are required so that local authorities may establish that the cared for person has a terminal illness within the definition in section 6A(2) and how prioritisation procedures are to be triggered.

Choice of procedure

18. The power in section 6A is subject to the affirmative procedure. This is considered appropriate as it will be important to ensure that an appropriate timescale is set, and that in reaching a decision about what timescale should be set, that there is extensive debate and consultation with a wide range of stakeholders. It is considered that the Parliament itself will have a significant degree of interest in this issue and selection of the affirmative procedure provides the Parliament with the appropriate degree of scrutiny over the measures proposed.

Section 11A – Young carers of terminally-ill cared-for persons

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

Provision

19. This section provides that the Scottish Ministers may by regulations prescribe timescales for the preparation of young carer statements in relation to young carers of terminally ill cared-for persons.

Reason for taking power

20. This new power introduces an equivalent power to that introduced by section 6A but in respect of the preparation of the young carer statement for young carers of terminally ill cared-for persons. Adult carer support plans and young carer statements are provided for in separate provisions in the Bill because they address slightly different issues and the authority responsible for preparing the young carer statement may vary depending on the young carer's circumstances. It is therefore also necessary to make separate provision about the timescales for the preparation of young carer statements in relation to young carers of terminally ill cared-for persons. The reasons for taking this power are the same as that set out for section 6A.

21. Taking into account views from a range of stakeholders, including Marie Curie, the Scottish Government recognises that there could be some circumstances in which the preparation of the young carer statement may also need to be done quickly, such as for those young carers who have caring responsibilities for people who are terminally ill. The Health and Sport Committee agreed with this position in its Stage One report.

Choice of procedure

22. The power in section 11A is subject to the affirmative procedure for the same reasons as set out in paragraph 18 for the choice of procedure for the power at section 6A.

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: affirmative

Provision

23. 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.

24. Subsection (2) was amended at Stage 2 to provide 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 care for the cared-for person, the role of the cared-for person in relation to how that care is provided. Subsection (3) provides that support provided by virtue of 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

25. 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. Where that break from caring takes the form of support provided to the cared-for person, the power will also allow Scottish Ministers to clarify the role of the cared-for person in how that care is provided.

26. Previously the power at section 23 envisaged that a break from caring might take the form of the provision of replacement care or other services or assistance to the cared-for person. The rationale for taking those powers was so that Scottish Ministers could clarify the role of the cared-for person in how that support was provided and whether that support should be regarded as support to the carer or cared-for person.

27. COSLA and local authorities had reported that this is especially challenging where it is decided that support for a carer requires services to be delivered to the persons they care for. The challenges relate to the question of how any charging policies should be applied and what role the cared-for person should have in agreeing support which is put in place for the purpose of meeting the carer's needs. Both the Health and Sport Committee and the Finance Committee supported the need to clarify the position.

28. The amendments made at Stage 2 seek to clarify the position. Section 22 has been amended to make clear that the only support which may be delivered to the cared-for person in order to meet the carer's needs is care which enables the carer to have a break. Any other form of service or assistance which is delivered to the cared-for person is to be provided under the legislative framework relevant to the cared-for person rather than under section 22. The policy intention is to continue with the position that any support which is provided under section 22 of the Bill in order to meet a carer's identified needs will be provided without charge to the carer. This will be the case even where the support in question is replacement care which is delivered to the cared-for person in order to meet the carer's identified needs.

29. The power at section 23(2) has therefore been amended at Stage 2 to give effect to the intention that the only form of support which is capable of being provided to the cared-for person in order to meet the carer's identified needs, is replacement care. The power which had previously existed in section 23(2)(b)(ii) to make provision about whether care, services or assistance are to be regarded as support to the carer or to the cared-for person has been removed at stage 2. This power is no longer necessary. It is clear that all support provided under section 22(4) is support to the carer.

Choice of procedure

30. The choice of procedure was amended at Stage 2 to ensure these provisions are subject to the affirmative procedure. Regulations made under the power at subsection (2)(b) will likely include measures to provide for the involvement of the cared-for person in decisions about how care is provided to them. The question of a cared-for person's involvement in making decisions about replacement care which is of primary benefit to the carer has become a significant issue in discussion with key stakeholders and there has been a high degree of parliamentary interest. The affirmative procedure would provide additional assurance that the Parliament will have a sufficient degree of scrutiny over the measures proposed.

Section 33A – Guidance and directions to health boards and directing authorities

Power conferred on: the Scottish Ministers
Power exercisable by: directions
Parliamentary procedure: none

Provision

31. Subsection (2) provides that the Scottish Ministers may issue directions to health boards and directing authorities, either individually or collectively, about the exercise of functions conferred by this Act.

32. Subsection (3) provides that each health board must comply with any direction issued to it under this section. Subsection (4) makes the same provision for each directing authority.

Reason for taking power

33. The Bill already makes provision that Scottish Ministers may issue directions to local authorities as to the manner in which they are to exercise their functions under the Act. Local authorities are obliged to comply with such directions. These provisions are delivered by the amendments made to section 5 of the Social Work (Scotland) Act 1968 by section 33 of the Bill.

34. No equivalent provision was made in relation to the functions conferred by the Bill on health boards and directing authorities. The Bill confers functions on health boards in relation to:

- the preparation of young carer statements for pre-school children;
- involvement of carers in relation to carer services; and
- the preparation of local carer strategies.

35. The Bill confers functions on directing authorities (i.e. the managers of a grant-aided school or proprietors of an independent school) in relation to the preparation of young carer statements for pupils at those schools.

36. It was considered appropriate to introduce provisions at Stage 2 so that Scottish Ministers are able to issue directions to health boards and directing authorities in respect of their functions under the Bill as these bodies will be exercising public functions. Directions may be used to provide clarification about how Ministers expect health boards and directing authorities should carry out the functions set out in the Carers (Scotland) Bill. The powers can also be used to provide detail on the matters a health board or directing authority should consider in delivering its functions under this Bill.

Choice of procedure

37. The power to issue directions is 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.

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