

PUBLIC BODIES (JOINT WORKING) (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Public Bodies (Joint Working) (Scotland) Bill. This Memorandum describes the provisions in the Bill conferring power to make subordinate legislation which are either introduced or amended at Stage 2. This Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

PART 1 – FUNCTIONS OF LOCAL AUTHORITIES AND HEALTH BOARDS

Integration schemes

Section 1(4B)-(4D), (4F) and (4G) – Integration schemes: same local authority and Health Board area

Power conferred on:	the Scottish Ministers
Power exercisable by :	regulations made by statutory instrument
Parliamentary procedure:	negative
Amended or new power:	new powers and amended powers

Provision

2. Subsection (3) provides that an integration scheme is a scheme setting out certain matters including, in accordance with subsection (3)(b), the functions that are to be delegated in accordance with a model provided for in subsection (4).

3. Subsection (4B) provides for the Scottish Ministers to prescribe by regulations the functions that a Health Board may delegate by virtue of an integration scheme. Subsection (4C) provides for the Scottish Ministers to prescribe by regulations the functions conferred by enactments listed in the schedule to the Bill that local authorities must delegate but only in so far as they are exercised in relation to persons aged at least 18 years where the local authority (and Health Board) are delegating functions to an integration joint board or the local authority is delegating functions to a Health Board. Subsection (4D) provides for the Scottish Ministers to

prescribe the functions of a Health Board that must be delegated but only in so far as they are exercisable in relation to persons aged at least 18 years where the Health Board (and local authority) are delegating functions to an integration joint board or the Health Board is delegating functions to a local authority. Subsection (4F) provides for the Scottish Ministers to prescribe the functions of a Health Board that: (a) must be delegated other than in prescribed circumstances or (b) may not be delegated in certain prescribed circumstances. Subsection (4G) provides for the Scottish Ministers to prescribe the functions of a local authority, being functions conferred by an enactment listed in the schedule, which may not be delegated in certain prescribed circumstances.

4. By virtue of section 48(1), “prescribed” means prescribed by the Scottish Ministers by regulations.

Reason for taking the power

5. The powers provide appropriate flexibility for the Scottish Ministers in setting out the functions of a local authority and a Health Board that may, must and may not be delegated under an integration scheme. It also allows the Scottish Ministers to make provision as to the delegation of functions in certain circumstances.

Stage 2 amendment

6. The Bill as introduced contained no limits on the functions that were to be available for delegation, but permitted the Scottish Ministers to make regulations under section 1(6) setting out the functions of health boards or local authorities that must, may or may not be delegated.

7. It was noted in evidence to the Health and Sport Committee by Local Government stakeholders and the Convention of Scottish Local Authorities (COSLA) that the Bill provided for a broader range of local authority functions to be available for delegation than the policy intention set out in the Policy Memorandum.

8. The Bill has been amended at Stage 2 to restrict the range of functions available for delegation to meet the policy intention of integrating adult health and social care services. Section 1(6) as introduced has been replaced with new, more restricted powers. Under section 1(4B), the Scottish Ministers may, by regulations, prescribe functions of Health Boards which are to be delegated. No functions of Health Boards which are not so prescribed will be able to be delegated under an integration scheme. Under section 1(4C), regulations may be made to require the delegation of local authority functions only if the function is conferred by an enactment listed in the schedule to the Bill and only in so far as the function is exercisable in relation to persons at least 18 years of age. Under section 1(4D), regulations may be made to require the delegation of functions of Health Boards only in so far as the functions are exercisable in relation to persons at least 18 years of age.

9. These amendments, along with the schedule, therefore provide for the functions conferred on Health Boards and local authorities that may be delegated under integration schemes and provide appropriate Ministerial control on the delegation of functions. The powers allow the Scottish Ministers to set the framework within which Health Boards and local authorities will determine the functions to be delegated when implementing an integration scheme.

Choice of procedure

10. Regulations made under these provisions are subject to the negative procedure. This is considered appropriate given the restrictions on the exercise of these powers by the Scottish Ministers that are contained within the provisions themselves. Subsection (4B) and (4C) only allow functions to be prescribed in so far as they relate to adults. Subsection (4C) is further limited as it only permits functions to be prescribed which are included in the schedule to the Act. The effect of these restrictions is that these powers cannot be used to permit or require the delegation of functions other than those which relate to adult health and social care services.

Section 1(4H) – Integration schemes: same local authority and Health Board area

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

Provision

11. Section 1(4H) provides for the Scottish Ministers to, by regulations, remove an enactment from the schedule to the Bill. The Schedule provides the list of enactments that confer functions on a local authority that may be delegated. The schedule was added by amendment at stage 2 and sets out the enactments which confer functions which a local authority may delegate under an integration scheme.

Reason for taking the power

12. The power ensures that the Scottish Ministers are able to update the list of enactments in the schedule to remove any function which, in future, may become unsuitable for delegation without requiring primary legislation. Primary legislation would, however, be required to broaden the scope of local authority functions that may be delegated under an integration scheme by adding additional enactments to the list in the schedule. Where a new function is conferred on a local authority by primary legislation, it would be possible for the schedule to be amended by the enactment creating or conferring the new function, to enable the delegation of that function by the local authority.

Choice of procedure

13. Regulations made under this provision are subject to the affirmative procedure. Notwithstanding that the use of the power is limited to the removal of enactments from the schedule, given that this power enables the Scottish Ministers to amend primary legislation by way of regulations it is considered appropriate that the exercise of the power is subject to a higher degree of Parliamentary scrutiny.

Section 9(3) – Functions delegated to an integration joint board

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Amended or new power: new power

Provision

14. Subsection (3) provides that the Scottish Ministers may prescribe the day on which functions are to be delegated if they are not delegated by virtue of section 23(3A).

15. By virtue of section 48(1), “prescribed” means prescribed by the Scottish Ministers by regulations.

Reason for taking this power

16. This provision is required to provide for the Scottish Ministers to set an appropriate date by functions must be delegated. This is to ensure that the policy of integration of adult health and social care functions is achieved within a consistent and clear timescale across Scotland.

Stage 2 amendment

17. As introduced, section 9 provided that, where the integration model in 1(4)(a) was to apply, the Scottish Ministers were to prescribe a single day on which functions were to be delegated. An amendment has been made to section 23(3A) to allow integration authorities to choose to delegate functions on an earlier day, where that day is specified in their strategic plan. The amendment to section 9(3) ensures that where no such date is specified, functions will be delegated, at the latest, on the day prescribed by Ministers. This will provide for clarity as to the final date by which integration of adult health and social care functions must be implemented.

Choice of procedure

18. Regulations under section 9 remain subject to negative procedure for the reasons set out in paragraph 28 of the Delegated Powers Memorandum. The amendments make no change to the choice of procedure in relation to this power.

Section 11 – Other staff of integration joint board

Power conferred on : Scottish Ministers
Power exercisable by: order made by Scottish Statutory Instrument
Parliamentary procedure: negative procedure
Amended or new power: amended power

Provision

19. Subsection (1) provides that the Scottish Ministers may by order make provision enabling integration joint boards to appoint staff other than a chief officer.

Reason for taking this power

20. The reasons for taking this power are set out in paragraph 33 of the Delegated Powers Memorandum.

Stage 2 amendment

21. The Bill was amended at Stage 2 to clarify that the power in 11(1) allows the Scottish Ministers to make provision in relation to only one integration joint board or some integration joint boards. Subsection (4)(a) now provides for flexibility so that an order under 11(1) will be able to take account of local circumstances.

22. Also, stakeholders raised concerns at Stage 1 that the power of the Scottish Ministers to enable, by order, integration joint boards to appoint staff other than a chief officer was broad and far reaching with the potential to significantly change the delivery of health and social functions. Section 11(5) was inserted at Stage 2 and requires that before making an order, the Scottish Ministers must consult with local authorities, Health Boards and integration joint boards where the order relates to integration joint boards generally, or relevant constituent authorities and the relevant integration joint board(s) where the order relates to one or some integration joint boards.

Choice of procedure

23. An order made under section 11 remains subject to negative procedure which is considered appropriate for the reasons set out in paragraph 34 of the Delegated Powers Memorandum. The amendments do not alter the choice of procedure.

Section 12 – Integration joint boards: further provision

Power conferred on : Scottish Ministers
Power exercisable by: order/regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Amended or new power: new and amended power

Provision

24. On introduction, subsection (1) provided that the Scottish Ministers may by order make provision about: (a) the membership of integration joint boards; (b) their proceedings; (c) giving integration joint boards general powers (such as powers to contract, acquire or dispose of property or rights or borrow money or incur other liabilities) in connection with the carrying out of their functions; (d) the supply of services or facilities to integration joint boards by a local authority or Health Board; and (e) about any other matter relating to the establishment or operation of integration joint boards that the Scottish Ministers think fit.

Reason for taking this power

25. The reasons for taking this power are set out in paragraph 36 of the Delegated Powers Memorandum.

Stage 2 amendment

26. On reflection, the Scottish Ministers consider that integration joint boards should have the ability to establish committees should this be required to ensure the effective carrying out of its functions. In particular, integration joint boards may consider this appropriate where a greater number of functions were delegated that relate to different population groups. Given that this would be a significant change to the operation of integration joint boards and the carrying out of their functions, it is considered appropriate that integration joint boards should not be permitted to establish committees or delegate functions to those committees without the Scottish Ministers making an Order to permit this.

27. The Bill was amended at Stage 2 to provide a power for the Scottish Ministers to make an Order enabling an integration joint board to establish committees for any purpose and to permit an integration joint board to delegate any functions delegated to it in pursuance of an integration scheme to its chief officer, any other member of staff or to any such committee.

28. To ensure that there is appropriate flexibility available in the exercise of these powers, the Bill was amended at Stage 2 to insert section 12(2), which provides that the Scottish Ministers may make provision in an Order under 12(1) in relation to only one integration joint board, or some integration joint boards. This will allow the use of these powers to take into account different local circumstance.

29. COSLA raised concerns regarding the breadth of the power of the Scottish Ministers to make an order in relation to integration joint boards, in particular conferring powers to contract, borrow money and supply services. Given that the exercise of this power may result in significant change to the delivery of health and social care services the Scottish Ministers consider it appropriate to amend the Bill to provide for consultation before the exercise of the powers in section 12(1). By virtue of section 12(2A), before making such an Order the Scottish Ministers are required to consult integration joint boards, local authorities and Health Boards where the order relation integration joint boards generally or the relevant constituent authorities where the Order relates to one or some integration joint boards.

30. An amendment at stage 2 inserted a power at 12(5) to provide for the Scottish Ministers to prescribe other groups of persons, in addition to health and social care professionals, who must be consulted before making a scheme in relation to the transfer of staff under 12(4). This amendment was proposed by Rhoda Grant MSP and supported by the Royal College of Nursing. The Scottish Government considered it appropriate that before Ministers make any scheme under 12(4) relevant parties must be consulted. Where a new function is conferred on a local authority by primary legislation, it would be possible for the schedule to be amended by the enactment creating or conferring the new function, to enable the delegation of that function by the local authority.

Choice of procedure

31. An order under section 12(1) remains subject to negative procedure for the reasons set out in paragraph 37 of the Delegated Powers Memorandum. The amendments make no change to the choice of procedure in relation to these powers.

32. Regulations under section 12(5) are subject to negative procedure. This is considered appropriate given the regulations will deal with matters of detail in relation to the persons to be consulted before making any transfer scheme rather than any broad principle.

Section 14 – Functions delegated to local authority or Health Board

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Amended or new power: amended power

Provision

33. Subsection (1A) provides that the Scottish Ministers may prescribe the day on which functions are to be delegated if they are not delegated by virtue of section 23(3A).

By virtue of section 48(1), “prescribed” means prescribed by the Scottish Ministers by regulations.

Reason for taking this power

34. This provision is required to provide for the Scottish Ministers to set an appropriate date by which functions must be delegated. This is to ensure that the policy of integration of adult health and social care functions is achieved within a consistent and clear timescale across Scotland.

Stage 2 amendment

35. As introduced, section 14 provided that, where the integration model in 1(4)(b)-(d) was chosen, the Scottish Ministers were to prescribe a single day on which functions were to be delegated. An amendment has been made to section 23(3A) to allow integration authorities to choose to delegate functions on an earlier day, where that day is specified in their strategic plan. The amendment inserting section 14(1A) ensures that where no such date is specified, functions will be delegated, at the latest, on the day prescribed by Ministers. This will provide for clarity as to the final date by which integration of adult health and social care functions must be implemented.

Choice of procedure

36. Regulations under section 14 remain subject to negative procedure for the reasons set out in paragraph 40 of the Delegated Powers Memorandum. The amendments make no change to the choice of procedure in relation to this power.

Section 15 – Transfer of staff where functions delegated to local authority or Health Board

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Amended or new power: new power

Provision

37. On introduction subsection (1) provided for the Scottish Ministers to make, by scheme, provision about the transfer of staff. Subsection (1B)(c) provides for the Scottish Ministers to prescribe other groups of persons, in addition to health and social care professionals, who must be consulted before making a scheme in relation to the transfer of staff under subsection (1).

38. By virtue of section 48(1), “prescribed” means prescribed by the Scottish Ministers by regulations.

Reason for taking this power

39. This power is required to ensure that relevant parties, as well as health and social care professionals, are consulted on any scheme the Scottish Ministers may make in relation to the transfer of staff from a local authority to a Health Board.

Stage 2 Amendment

40. This power was inserted at stage 2 and proposed by Rhoda Grant MSP and supported by the Royal College of Nursing. The Scottish Government considered it appropriate that before Ministers make any scheme under 15(1) relevant parties must be consulted.

Choice of procedure

41. Regulations under section 12(5) is subject to negative procedure. This is considered appropriate given the regulations will deal with matters of detail in relation to the persons to be consulted before making any transfer scheme rather than any broad principle.

Section 22A – Section 22: supplementary

Power conferred on: Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Amended or new power: amended power

Provision

42. Subsection (6) allows the Scottish Ministers to provide by order, where the conditions in subsection (7) are met, that an integration authority which is an integration joint board (a) may decide not to give a direction under section 22 in relation to carrying out a function specified in the order or, (b) may give a direction despite the making of that order.

Reason for taking this power

43. The Bill as introduced provided in section 22(8) that the Scottish Ministers could make an order to provide that an integration joint board must or must not make a direction under section 22. The reasons for taking this power are set out at paragraph 48 of the Delegated Powers Memorandum.

Stage 2 amendment

44. The Bill has been amended at Stage 2 so that section 22(1) now provides that an integration joint board must give a direction to one of its constituent authorities in relation to the carrying out of its functions. This reflects the intention that integration joint boards will primarily be responsible for the strategic planning and direction of integration functions, rather than for service delivery. However, the Scottish Government has been clear that, in time, it may be possible for integration joint boards to take on responsibility for delivery of integrated services. The power in subsection 22A(6) allows the Scottish Ministers, on receipt of a written application from the constituent authorities and provided that the Scottish Ministers consider that making an order in relation to some or all of the functions would improve compliance with the national health and wellbeing outcomes, to remove the requirement for an integration joint board to issue directions under section 22(1) and so provide for an integration joint board to deliver the functions delegated by virtue of an integration scheme. This provides for flexibility in the future.

45. The Bill was amended to provide for the policy intention that integration joint boards would not directly deliver integrated functions as the default position, and to require an order under 22A(6) for any integration joint board to be excepted from this default position. Further, COSLA raised concerns regarding the powers of the Scottish Ministers to permit an integration joint board to directly deliver integrated functions and the wide ranging implications for delivery of health and social care services. The provision has therefore been adjusted so that an application from the relevant constituent authorities is a precondition on the exercise of this power by the Scottish Ministers.

Choice of procedure

46. An order made under these provisions is subject to negative procedure, as was the previous version of the power provided in section 22(8) of the Bill as introduced. This remains appropriate given it merely allows the Scottish Ministers to enable a particular delivery mechanism and taking into account the requirements placed on the Scottish Ministers before being able to exercise the power.

Section 34 – Revised integration scheme

Power conferred on: Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure
Amended or new power: new power

Provision

47. Subsection (3A) provides that, where a local authority and a Health Board are preparing a revised integration scheme, they must jointly consult certain persons before the revised integration scheme is submitted to the Scottish Ministers for approval. Subsection (3A)(a) provides that the persons to be consulted include such persons appearing to the Scottish Ministers to have an interest as may be prescribed.

48. By virtue of section 48(1), “prescribed” means prescribed by the Scottish Ministers by regulations.

Reason for taking this power

49. This power enable the Scottish Ministers to prescribe the relevant parties that must be included in any consultation on a revised integration scheme. It will enable the Scottish Ministers to ensure that the consultation on such a scheme is carried out uniformly between different areas and to a suitable standard given the significant effect on the provision of health and social care services that may result from changes to an integration scheme.

Stage 2 amendment

50. This power was inserted by amendment at stage 2 to provide for the Scottish Ministers to ensure that the relevant parties are consulted where a revised integration scheme is prepared. It ensures that a revised integration scheme will be subject to the same degree of consultation as the initial integration scheme that is prepared under section 1.

Choice of procedure

51. Regulations under section 34(3A)(a) are subject to negative procedure. This is considered appropriate given the regulations will deal with matters of detail relation to consultation requirement rather than broad principle.

PART 2 –SHARED SERVICES

Section 44(4A) – Shared services

Power conferred on:	Scottish Ministers
Power exercisable by:	order made by Scottish statutory instrument
Parliamentary procedure:	affirmative procedure
Amended or new power:	new power

Provision

52. Subsection (4A) provides a power for the Scottish Ministers to amend by order subsection (2) to add or remove a person or a description of a person, for the time being mentioned in or falling within that subsection.

Reason for taking this power

53. Section 44 of the Bill expands certain powers of the Common Services Agency, which are at present set out in section 15(2A) of the National Health Service (Scotland) Act 1978 (as that Act was amended by SSI 2013/220). At present section 15(2A) of that Act provides that the Common Services Agency may carry out certain activities or services for, or on behalf of certain persons. Those persons include the Scottish Ministers, government departments, local authorities and such public bodies or classes of public body as may be determined by the Scottish Ministers. As introduced, section 44(2) contained a list of Scottish public bodies that the Common Services Agency may, with the consent of the Scottish Ministers, enter into arrangements with for the provision of good or services. Those persons are: the Scottish Ministers; any other officer-holder in the Scottish Administration; any Scottish public authority; any Scottish public authority with mixed functions or no reserved functions; any government department; and any cross-border public authority. The new power inserted at stage two allows this list to be amended by the Scottish Ministers by Order. This power is taken to reflect the current provision in section 15(2A) that the Scottish Ministers may determine additional persons to or for whom the Common Services Agency may provide services.

Stage 2 amendment

54. It was considered appropriate to amend section 44 at Stage 2 to enable and provide for future flexibility and changing circumstance should the Scottish Ministers consider it appropriate to amend the list of persons or groups of persons in subsection (2), for example in the event that a new statutory body is created and it is appropriate to include it in section 44(2). The new power in subsection (4A) enables the Scottish Ministers to add or remove persons or groups from that list. This will allow section 44(2) to be kept up to date without requiring further primary legislation, as it can be amended by Order to take into account any changes to the public sector landscape or the powers of the Common Services Agency which may occur in future. It affords a similar level of flexibility as currently provided for in the powers of the Common Services Agency under, for example section 15(2A)(b)-(f).

Choice of procedure

55. An order under this provision is subject to affirmative procedure. Although the exercise of the power is restricted to the addition or removal of persons listed in 44(2), it allows the Scottish Ministers to amend primary legislation by Order. It is therefore appropriate that the use of this power should be subject to the higher degree of Parliamentary scrutiny that affirmative procedure allows.

This document relates to the Public Bodies (Joint Working) (Scotland) Bill as amended at Stage 2 (SP Bill 32A)

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