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

Delegated powers provisions in the National Care Service (Scotland) Bill at Stage 1



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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.



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Membership changes

1. The following changes to Committee membership occurred during the course of the Committee's scrutiny of the delegated powers provisions in the National Care Service (Scotland) Bill:
 - on 19 January 2023, Carol Mochan MSP replaced Paul Sweeney MSP.

Introduction

2. At its meetings on [1 November 2022](#), [29 November 2022](#) and [10 January 2023](#) the Delegated Powers and Law Reform Committee considered the delegated powers in the [National Care Service \(Scotland\) Bill](#). The Committee also considered its draft report at meetings on [24](#) and [31 January 2023](#).ⁱ
3. The Committee considered the delegated powers in the Bill under its remit in Rule 6.11 of Standing Orders.
4. The lead Committee for consideration of the Bill is the [Health, Social Care and Sport Committee](#), to which this Committee directs its report.
5. Bill Kidd MSP and Jenni Minto MSP dissented from this report. Their alternative view can be found in the Minority Statement in Annexe B.

ⁱ Jenni Minto MSP substituted for Stuart McMillan MSP at the meetings on 10, 24 and 31 January 2023

Overview of the Bill

6. This Scottish Government Bill was introduced on 20 June 2022 by the Cabinet Secretary for Health & Social Care, Humza Yousaf MSP.
7. The Bill seeks to establish a National Care Service which will operate in a similar way to the National Health Service. It gives the Scottish Ministers the power, by regulations, to establish “care boards” which will have responsibility for particular geographical areas. Currently, social care and social work services are the responsibility of local authorities working together with health boards, known as Integration Joint Boards or Health and Social Care Partnerships. In 2020, the Scottish Government commissioned the Independent Review of Adult Social Care which identified challenges such as: inconsistency of user experience (postcode lottery), complex and inconsistent governance arrangements, lack of national oversight and collaboration, lack of collaborative and strategic leadership and non-integrated budgetary and financial planning.
8. A consultation exercise was carried out in 2021 and an independent analysis was published which found broad agreement with the Scottish Government’s proposals to bring together social care and community health services for all ages under a National Care Service accountable to Scottish Ministers.

Delegated Powers

9. The Bill confers sixteen powers to make subordinate legislation, and two powers to make directions, on the Scottish Ministers. Each power is described in more detail from paragraph 20 below.
10. The Scottish Government has produced a [Delegated Powers Memorandum](#) (“DPM”) which sets out its reasons for taking the delegated powers in the Bill and for the procedure chosen.

Committee consideration

11. The Committee [wrote](#) to the Scottish Government on 7 November 2022 to ask questions and request more information about the delegated powers in the Bill.
12. The Committee received a [response](#) from the Scottish Government on 16 November 2022.
13. On its consideration of the response from the Scottish Government referenced above, the Committee decided that it required to take further evidence on the delegated powers in this Bill. The Committee held an evidence session with the Minister for Mental Wellbeing and Social Care, Kevin Stewart MSP, at its meeting on 10 January 2023ⁱⁱ. The Official Report can be found [here](#).
14. Following the evidence session, the Committee received a [letter](#) from the Minister.
15. A summary of the evidence considered by the Committee (in addition to the information provided in the DPM) can be found in Annexe A.

ⁱⁱ Jenni Minto MSP substituted for Stuart McMillan MSP at the meeting on 10 January 2023

Committee conclusions and recommendations

16. The Committee does not believe the Bill should progress in its current form. This follows our consideration of the evidence received and of the Bill and Bill documents as introduced.

17. The Committee is concerned there is insufficient detail on the face of the Bill and within the Bill documents to allow for meaningful parliamentary scrutiny. Given the far-reaching nature of the proposed reforms the Committee is mindful there is a real risk of letting down those the Bill is intended to help by allowing Scottish Government ministers to use delegated powers instead of primary legislation to introduce core and as yet unknown provisions. The Committee believes the current approach significantly reduces the threshold for parliamentary approval and prevents MSPs from bringing forward detailed amendments.

18. The Committee believes this is unacceptable and risks setting a dangerous precedent, undermining the role of the parliament.

19. In this context, the Committee is unable meaningfully to report on the provisions and delegated powers of the Bill as it stands. The Committee therefore recommends that the Scottish Government revisit its approach to this legislation and strongly refutes the suggestion that full parliamentary scrutiny presents a barrier to collaborative working.ⁱⁱⁱ

ⁱⁱⁱ As noted above, Bill Kidd MSP and Jenni Minto MSP dissented from the report and its conclusions and recommendations.

Delegated Powers in the Bill

Section 4 – Establishment, and abolition, of care boards

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative

20. Section 4 provides the Scottish Ministers with a power to establish and abolish care boards by regulations. The power must be exercised so that there are care boards for distinct geographical areas which together cover the whole of Scotland, but do not coincide or overlap. The power may also be exercised in order to establish special care boards, which do not require to have a geographical remit.
21. Regulations made under section 4 must specify the name by which the board is to be known and whether it is to be known as a local or special care board. Where the power is exercised to establish a local health board, those regulations must identify the geographical area for which the board is responsible. They must also specify the minimum and maximum number of ordinary members of the board.
22. Regulations made under section 4 are subject to the affirmative procedure.

Section 13 – Independent Advocacy

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative

23. Section 13 provides the Scottish Ministers with a power to make regulations about the provision of independent advocacy services in connection with the services that the National Care Service provides.
24. Regulations made under section 13 will be subject to the affirmative procedure. Such regulations may modify any enactment other than the Act that flows from the Bill itself.

Section 15 – Dealing with complaints

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative

25. Section 15 provides that the Scottish Ministers may make regulations which make provision about the handling of relevant complaints, including the remedies that are to be available. A relevant complaint is a complaint about a service provided by the National Care Service or any other social service. Such regulations may impose requirements and create sanctions for those who fail to comply with the regulations'

requirements. The regulations may confer functions on a person listed in schedule 6 of the Public Service Reform (Scotland) Act 2010 or modify or remove one of those persons' existing functions.

26. Regulations made under this power are subject to the affirmative procedure. Such regulations may modify any enactment other than the Act that flows from the Bill. Where regulations confer, modify or remove functions as described above, regulations may only be laid by Scottish Ministers with the consent of the Scottish Parliamentary Corporate Body.

Section 16 – Directions to care boards

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

27. Section 16 requires care boards to comply with directions issued by the Scottish Ministers.
28. The direction making power is not subject to any parliamentary procedure.

Section 17 – Removal of care board members

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: laid, no procedure

29. Section 17 provides that the Scottish Ministers may remove all of the members of a care board by regulations. The power may only be exercised where, following an inquiry, the board is found to have failed to carry out any of its functions.
30. Such regulations will be laid before the Parliament but will not be subject to any further parliamentary procedure.

Section 18 - Transfer of care board's functions in an emergency

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

31. Section 18 allows the Scottish Minister to temporarily transfer a function of a care board to another person where, due to an emergency, it is felt that it would be better to have the other person perform the function.

Section 19 – Transfer of care board's functions due to service failure

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

32. Section 19 allows Scottish Ministers to temporarily transfer a function of a care board to another person where there is a concern that the care board is failing, or is at risk of failing, to discharge the function satisfactorily.

Sections 27 to 29 – Powers to transfer functions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: affirmative

33. Sections 27 to 29 provide that the Scottish Ministers may make regulations to transfer functions of local authorities and health boards to care boards and themselves.
34. Regulations made under this power are subject to the affirmative procedure. If regulations are made that would transfer the function of providing a children's service or a justice service, the Scottish Ministers must first consult publicly on the proposal. They must thereafter lay a summary of the consultation process before the Parliament when laying such regulations.

Sections 31 and 32 – transfers of staff, property, liabilities etc

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: negative

35. Sections 31 and 32 provide the Scottish Ministers with a power to transfer staff, property and liabilities in connection with the transfer of a function from one person to another as described above.
36. Regulations made under sections 31 and 32 will be subject to the negative procedure.

Section 36 – Care records

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: affirmative

37. Section 36 provides the Scottish Ministers with a power to establish a scheme for sharing information to enhance the efficiency and effectiveness of services provided by and on behalf of the National Care Service and the National Health Service. The Scottish Government gives in its DPM the example of information about an individual's prescription to be shared with relevant social care and health professionals involved in their care.
38. Regulations made under section 36 will be subject to the affirmative procedure.

Section 38(9)(b) – Support for carers to take sufficient breaks: further provision**Power conferred on: the Scottish Ministers****Power exercisable by: regulations made by the Scottish Ministers****Parliamentary procedure: affirmative**

39. Section 38 amends the Carers (Scotland) Act 2016 in order to require local authorities to provide support and enable the carer to take sufficient breaks. Section 38(9)(b) provides the Scottish Ministers with a regulation making power to make further provision in connection with the support to be provided.
40. Regulations made under this section will be subject to the affirmative procedure.

Section 41 – Reserving the right to participate in procurement by type of organisation (inserted regulation 76A(6) of SSI 2015/446)**Power conferred on: the Scottish Ministers****Power exercisable by: regulations made by the Scottish Ministers****Parliamentary procedure: negative**

41. Section 41 amends the Public Contracts (Scotland) Regulations 2015 and includes a regulation making power to amend the regulations. New regulation 76A, inserted by the Bill, will allow bidders for certain types of contract to be restricted to certain types of organisation.
42. Regulations made under this power will be subject to the negative procedure.

Section 45 – Ancillary provision**Power conferred on: the Scottish Ministers****Power exercisable by: Regulations made by Scottish Statutory Instrument****Parliamentary procedure: affirmative if amending primary legislation, otherwise negative**

43. Section 45 of the Bill makes standard ancillary provision, giving the Scottish Ministers the power to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to the Act flowing from this Bill.
44. Regulations made under section 45 may modify any enactment, including the Act that flows from this Bill. As is standard, section 46(2)(b) provides that the affirmative procedure applies where regulations made under section 45 amend primary legislation and that otherwise the negative procedure will apply.

Section 47 – Commencement**Power conferred on: the Scottish Ministers**

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: laid, no procedure

45. Section 47 of the Bill provides the Scottish Ministers with a regulation making power to bring sections of the Bill into force. Part 4 of the Bill, final provisions, comes into force the day after Royal Assent. All other provisions will require to be brought into force by commencement regulations made by the Scottish Ministers.
46. Commencement regulations will be laid before the Parliament but are not subject to any further parliamentary procedure.

Schedule 1, paragraph 11(2) – Appointment of care board members

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: affirmative on the first use, thereafter negative

47. Paragraph 11 of schedule 1 provides that the Scottish Ministers may make regulations specifying how appointments of members to care boards are to be made.
48. Such regulations will be subject to the affirmative procedure on the first use, and thereafter negative procedure.

Schedule 1, paragraph 15(2) – Disqualification from membership

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: negative

49. Paragraph 15 of schedule 1 sets out the grounds that will disqualify a person from being a member of a care board. Those grounds are statutory grounds for disqualification from being a member of a public body or a director of a company. The power may be exercised in order to reflect any changes to the statutory grounds, or for new grounds to be added.

Annexe A: Evidence considered by the Committee

50. The Scottish Government is taking a new approach to the construction of this legislation, which it is terming “co-design”. The Scottish Government has explained in its Policy Memorandum, its written response to the Committee's questions and during the public evidence session what it considers co-design to entail. It stated in its written response to the Committee that-
- ” *the Bill creates a framework for the National Care Service (NCS), but leaves space for the detail to be worked through during co-design with those who have lived experience of the social care system, and flexibility for the service to develop and evolve over time.*^{iv}
51. In general, it is expected that the inclusion of a delegated power in a Bill is accompanied with a detailed explanation in the Delegated Powers Memorandum as to why the power is considered necessary and how it is anticipated such a power will be exercised. This enables the Committee to assess whether it is appropriate that such a power is delegated, whether the level of scrutiny applied is appropriate and whether the power has been clearly drafted and goes no further than necessary to deliver the intended policy, and report back to the Parliament in those terms.
52. The Committee, and therefore the Parliament, is asked in this case to make such assessments without the usual level of explanation or detail. It is being asked to accept the Scottish Government's explanation that such detail will be established following further consultation between the Scottish Government and stakeholders. In most cases, the Parliament will not have any oversight of that consultation process. The Parliament will have the opportunity to scrutinise the resulting regulations when they are laid before the Parliament. At that point, such scrutiny is limited to the acceptance or rejection of the proposal as there is no mechanism for amending subordinate legislation.
53. In its written response to the Committee, the Scottish Government explained that it considered it important to obtain parliamentary agreement to the principle of the creation of a National Care Service at this point. During the evidence session, the Committee probed why it is considered necessary to obtain such agreement at this point, and why a Bill has been chosen as the appropriate mechanism to obtain that agreement.
54. The Minister responded explaining that-
- ” *we need people to be involved in the co-design of the service in my opening remarks, I talked about the implementation gap that exists...To fill that gap, we need co-design, to ensure that folks who are in receipt of care, folks who work in care and folks who are carers are at the heart of helping us to design the future national care service. To ensure that there is effective co-design, we have to ensure that the principles of the bill are in place, so that the folks who co-design with us know that their work will lead to actions*^v.

^{iv} [Letter from the Scottish Government](#)

55. In response to the Committee’s question about alternative approaches, the Minister noted that other Committees had also suggested that co-design could have come first, with legislation coming later once the outcomes of the co-design consultation exercise were known. He said that-

” *my response is that that would have impinged on the folk who would have been involved in the co-design. The co-design work might have gone to waste, in people’s eyes, if Parliament then changed far too much of what the folks who helped us with the design wanted in place. Therefore, I think that it is right to have the framework bill and its principles in place before we move it on through collaboration and co-operation with people in order to co-design that extremely important change to our public service delivery.*^{vi}

56. The Committee asked the Minister whether he considered that there should be a role for the Parliament, instead of Ministers, as the ultimate democratic body in the land, to be the arbiter of such matters. The Minister responded that-

” *I do not disagree with that and I am sure that Parliament will make changes to the bill along the way. Stakeholders feel that they have not been listened to enough. By doing the work this way, they feel that they are being listened to. They recognise that the principles of the bill will be in place and that we will then move into the co-design process. As we move forward and come to secondary legislation, they recognise that there will be further consultation and that changes might take place. However, I think that we needed to set out the general framework in order to gain people’s confidence and get them to take part in the co-design process.*^{vii}

57. Further, the Committee asked the Minister whether he had any concerns with the fact that Parliament would be asked to approve or reject the proposals which will come forward as subordinate legislation on the completion of the co-design process, in the context that if such proposals were contained in the Bill itself, Parliament would have an opportunity to make such amendments it considered appropriate. The Minister replied that-

” *using secondary legislation for a number of areas is so that we have the ability to change legislation much more quickly. One thing that we have found over the years in relation to our social care integration journey is that although—as I have said previously—we have put in place good legislation, we have been unable to amend that legislation when we have found out that there are flaws or loopholes that have not been right for service delivery. This approach will give us the ability to be much more flexible in making those amendments when we require to.*^{viii}

v [Official Report, 10 January 2023, col. 3 \(Jenni Minto MSP substituted for Stuart McMillan MSP\)](#)

vi [Official Report, 10 January 2023, col. 3 \(Jenni Minto MSP substituted for Stuart McMillan MSP\)](#)

vii [Official Report, 10 January 2023, col. 4 \(Jenni Minto MSP substituted for Stuart McMillan MSP\)](#)

viii [Official Report, 10 January 2023, col. 5 \(Jenni Minto MSP substituted for Stuart McMillan MSP\)](#)

58. The Committee also asked the Minister whether he considered that the Parliament would be equipped to adequately scrutinise a piece of proposed legislation when there is a lack of detail on the face of the Bill, and what safeguards exist in the bill to ensure adequate parliamentary scrutiny of the Scottish Government's policy proposals. The Minister responded that many individuals-

” *want the answers to all the questions now, but if I start answering all the questions now, it makes a mockery of the co-design process. I recognise that parliamentarians want to know everything in the here and now, as I have asked such questions myself, from the other side of the table. We have to have faith in people and in the co-design process. I know that the approach is different, but it is the right thing to do with this public service reform. It is important that we give people and stakeholders the ability to help us shape the national care service, which has to be fit for the future. We have a future with changing demographics, so we have to take that into account.*^{ix}

59. The Committee asked the Minister whether he had a view on how Parliament's opportunity to engage with the process constructively could be improved. The Minister responded that he-

” *will consider the views of committees on how we can be as open and transparent as we possibly can.*^x

60. As noted above, following the evidence session, the Committee received a [letter](#) from the Minister. The letter explains that if the Parliament rejected regulations brought forward using the co-design process, the regulations would require to be redrafted and reviewed again by the people involved in the co-design process. The Minister also states that he will consider the stages at which it may be helpful to share the progress of co-design with the relevant committees to support their understanding and scrutiny of the final regulations.

^{ix} [Official Report, 10 January 2023, col. 11 \(Jenni Minto MSP substituted for Stuart McMillan MSP\)](#)

^x [Official Report, 10 January 2023, col. 13 \(Jenni Minto MSP substituted for Stuart McMillan MSP\)](#)

Annexe B: Minority Statement by Bill Kidd MSP and Jenni Minto MSP

61. We note that the concept of co-design is a new approach and the reasons that the Scottish Government has set out to justify its use in this instance. We are content with the general approach taken in respect of this Bill and are therefore content with the delegation of the powers in principle.^{xi}

^{xi} Jenni Minto MSP substituted for Stuart McMillan MSP at the meetings on 10, 24 and 31 January 2023

