

Population Health Improvement Directorate

Care, Support and Rights

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Clerk to the Delegated Powers and Law Reform Committee
Room T1.01
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Carers (Scotland) Bill at Stage 1

1. I am writing in response to your note of 31 March 2015 which sets out the Delegated Powers and Law Reform Committee's request for further information regarding sections 1 and 4 of the Carers (Scotland) Bill.

Section 1(3)

2. In relation to section 1(1)-(3), the Committee asked for **“further justification as to the choice of the negative procedure for the exercise of the power in section 1(3)”** and **“why the affirmative procedure is not considered to be more appropriate for this power, having regard to the effect that its exercise may have on the applicability of the Bill to particular groups of carers”**.

3. The power at section 1(3) and the regulations made under it are intended to give effect to the policy that kinship care agreements under The Looked After Children (Scotland) Regulations 2009 (S.S.I. 2009/210)¹ are *not* to be regarded as “contracts” under this Bill and to put beyond doubt that similar agreements that exist between foster carers and local authorities *are* to be regarded as contracts for the purposes of the Bill.

4. Section 1(3)(b) is also intended to make provision for those people who in policy terms we refer to as “mixed carers”. The terminology, “mixed carers” is not used in law. “Mixed carers” are carers who undertake both unpaid care for a family member and paid care as a personal assistant (being in receipt of a direct payment from the cared for person) for the same family member. Under the Self-directed Support (Direct Payments) (Scotland) Regulations 2014², the local authority can agree to a supported person employing a close relative or family member where appropriate.

¹ http://www.legislation.gov.uk/ssi/2009/210/pdfs/ssi_20090210_en.pdf

² <http://www.legislation.gov.uk/ssi/2014/25/part/3/made>

5. Implementation of the Social Care (Self-directed Support) (Scotland) Act 2013 (“the SDS Act”) is still in its early stages. It is anticipated that over time, as more local authorities introduce and use the provisions in the SDS Act to make direct payments, the numbers of people in the “mixed carer” group might increase. It is also possible that further types of “mixed carer” will emerge. It is anticipated that the Scottish Government will therefore wish to make regulations setting a framework governing the treatment of new generic types of “mixed carers”, including specifying whether or not such types of “mixed carer” fall within the definition of “carer”. The regulations might also provide some flexibility for local authorities to exercise discretion in the determination of individual cases.

6. The negative procedure had been considered appropriate here as the power is intended to be used to further define how the principles already established in the Bill should operate, rather than to establish such principles. The main principle we have in mind is that the duties and powers in the Bill should be exercised by local authorities and other bodies as set out in the Bill in relation to carers who are “unpaid.” Moreover, the amendments envisaged in regulations were not considered to be sensitive. Indeed it was anticipated that local authorities would both need and welcome the additional clarity on the treatment of kinship and foster carers and “mixed carers” to be set out in the regulations, coupled with the flexibility to deal pragmatically with individual cases of “mixed carers”. This flexibility would, for example, enable carers who care for someone on an unpaid basis for some of the time and on a paid basis for the remainder of the time to benefit from, for example, training on moving and handling as set out in the adult carer support plan.

7. Despite the Scottish Government’s views about the appropriateness of the negative procedure, we have considered the Committee’s concern that the power in section 1(3) could considerably expand or restrict the reach of the Bill’s provisions depending on the manner in which it is exercised. It is certainly the case that “unpaid” caring is a challenging concept which could become more challenging in the future. In light of the Committee’s concerns, and our further consideration, the Scottish Government intends to bring forward a Stage 2 amendment to make the section 1(3) power subject to affirmative procedure.

Section 4

8. The Committee has asked:

- **whether the drafting of the power in section 4(2) is considered to be sufficiently clear, on the basis that it appears to contemplate both the Scottish Ministers and relevant authorities determining which outcomes may be personal outcomes; and for**
- **“further explanation as to the relationship between sections 4(2)(a) and 4(2)(b) and for clarification as to the respective roles of the Scottish Ministers and relevant authorities in relation to the exercise of this power”.**

9. The policy intention of section 4(1) is to provide as much scope as possible within the definition, for carers to determine their own personal outcomes and to be pragmatic and yet creative in doing so. This section makes the link in the Bill

between the personal outcomes being set and the caring role. It might be the case however that in the light of experience over time, it becomes necessary to further refine this definition. It is not the intention however of the Scottish Government to restrain carers' ability to establish their own personal outcomes in agreement with the person preparing the adult carer support plan/young carer statement, but to provide further explanation as appropriate.

10. A further consideration is that those involved in preparing adult carer support plans or young carer statements may find it helpful, for example, for Scottish Government to specify in regulations that "personal outcomes" should be set with reference to a broader framework of outcomes.

11. There already exists both in legislation and in policy broader frameworks of outcomes. For example, the national health and wellbeing outcome 6, that "people who provide unpaid care are supported to look after their own health and wellbeing, including to reduce any negative impact of their caring role on their own health and well-being" is part of a suite of nine outcomes set out in The Public Bodies (Joint Working) (National Health and Wellbeing Outcomes) (Scotland) Regulations 2014³ Outcome 6 is carer-specific but the other outcomes apply to carers as citizens or as users of health and social care. There are also high-level outcomes for carers set out in the Carers Strategy.⁴ Therefore, it might not be necessary to set further high-level outcomes or broader frameworks but the regulation-making power at section 4(2)(a) provides the option to do so, or to ensure that the personal outcomes are contextualised by reference to a broader framework.

12. Section 4(2)(b) is intended to help relevant authorities interpret what is meant by "personal outcomes" through regulations which specify the sort of outcomes that are envisaged. Consequently relevant authorities will be able to help carers to identify their "personal outcomes" more effectively. It is also envisaged that such regulations would protect the rights of carers by minimising any risk that "personal outcomes" could be so narrowly defined as to render support to the carer unnecessary.

13. Both the Scottish Government and relevant authorities are therefore intended to have a role in relation to determining "personal outcomes". The Scottish Government's primary role is in specifying the regulatory framework within which personal outcomes should be set and the role of relevant authorities is in interpreting those regulations and working with an individual carer to help identify the carer's personal outcomes for articulation in the adult carer support plan or young carer statement.

11. I hope this is helpful to the Committee.

Yours sincerely

Lynn Lavery

³ <http://www.legislation.gov.uk/sdsi/2014/9780111024522>

⁴ <http://www.gov.scot/Publications/2010/07/23153304/0>