

FROM THE MINISTER OF HEALTH



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Dear *Colm,*

I am writing to you regarding the Health and Social Care Bill (Northern Ireland) 2021.

You may recall that prior to the pre-brief with officials on 4 March, a copy of the Delegated Powers Memorandum was shared with Committee members.

Since then, the Examiner of Rules has contacted my officials and identified that, in her view, there was an omission in the content of the Memorandum. The omission relates solely to the non-inclusion of the powers provided in Clause 6 (1) of the Bill that allows the Department to bring into operation on such day or days as it may appoint by (Commencement) Order the provisions identified in section (1) of Clause 6.

The Delegated Powers Memorandum, therefore, has been updated to reflect the omission identified by the Examiner of Rules and a copy is attached.

The remainder of the Delegated Powers Memorandum remains unchanged

I hope you find this information useful.



Robin Swann MLA
Minister of Health

Health and Social Care Bill

Delegated Powers Memorandum

INTRODUCTION

1. This Memorandum identifies the provisions in the Health and Social Care (Northern Ireland) Bill which confer new powers to make delegated legislation. Its purpose is to explain why the power has been provided for, why the matter should be dealt with by delegated legislation, and the justification for the Assembly control to which they are subject. It should be read in conjunction with the Explanatory and Financial Memorandum accompanying the Bill.

2. The Health and Social Care Bill is particular to Northern Ireland; there is no requirement for similar provisions to be introduced in other parts of the United Kingdom.

BACKGROUND

3. The Health and Social Care Board was established through primary legislation (Health and Social Care (Reform) Act (Northern Ireland) 2009) and requires primary legislation in the form of a Bill progressed and agreed by the Assembly to give effect to its closure and the transfer of its legislative functions.

4. Accordingly, the Health and Social Care Bill has been developed and its purpose is to provide the necessary legislation to both effect and reflect the closure of the Health and Social Care Board, providing a legislative framework for the transfer of responsibility for the functions to the Department.

5. The development of the Bill required the consideration of every reference to the Health and Social Care Board in existing primary legislation and the development of a suitable amendments to reflect its closure and transfer of functions.

6. It has been agreed:
 - The date of closure would be effective from 31 March 2022, dependent on securing successful passage of the Bill and a commencement order being in place.
 - The transfer of responsibility for the Board's functions would be to the Department, with the transfer of staff to the Business Services Organisation (BSO).

MAIN PROVISIONS

7. The Health and Social Care Bill contains 7 Clauses and 3 Schedules. Its purpose is to provide the necessary legislation to effect the dissolution of the Health and Social Care Board and provide a legislative framework for the transfer of responsibility for the functions to the Department.
8. In total **six** new regulation making powers are included in the draft Bill and in addition a power is provided for the Department to bring specific provisions into operation on such day or days as it may by order appoint. Each of the new powers are described below.

Clause 4 Transitional Provision

9. Clause 4 (1) introduces Schedule 3 which contains two parts:
 - the first setting out the provisions that require the Department to make arrangements for the preparation of the final accounts and report of the Regional Board; and
 - the second which provides General Provision and Specific Provision to ensure continuity in terms of previous directions issued and how references to the Regional Board in statutory documents or statutory provisions are to be read.

Its aim is to mitigate potential risks arising from the closure of the Board.

10. The power contained in Clause 4 (2) allows the Department, via regulations, to make further transitional, transitory or saving provision, as

needed, including provision that amends or modifies any statutory provision.

11. This power provides for regulations to be made (if necessary) to address any non-alignment of existing statutory instruments not already identified as a consequence of the closure of the Health and Social Care Board and commencement of new arrangements.
12. Clause 4 (3) confirms that regulations under subsection (2) are subject to negative resolution as the Department would anticipate that any regulations made under these powers would be routine and not controversial.
13. Similar provisions are evident in the Health and Social Care (Reform) Act (NI) 2009 which provided for the dissolution of a number of health bodies, establishment of bodies (including the Health and Social Care Board) and transfer of legislative functions from dissolved bodies to new bodies.

Clause 6 Commencement

14. Clause 6 describes when the provisions of the Act (assuming the Bill receives necessary approvals) will come into operation. Clause 6 details two distinct groups of provisions in terms of when they may come into operation.
15. Clause 6 (1) provides the Department with a power (by order) to appoint when the following provisions come into operation:
 - Section 1 – The Health and Social Care Board is dissolved;
 - Section 2 and Schedule 1 – The transfer of functions of the Health and Social Care Board and consequential amendments on the transfer of those functions;
 - Section 4(1)(b) and Part 2 of Schedule 3 – Other transitional provision connected with the coming into operation of the Act.

16. The aim remains to commence these provisions to facilitate the closure of the Health and Social Care Board and provide for the move to new arrangements on the 1 April 2022.

17. Bringing these provisions into operation will be achieved by the progression of a Commencement Order. A Commencement Order does not require scrutiny by the Assembly. The Health Committee would be notified of a Commencement Order.

18. The remaining provisions will come into operation upon Royal Assent.

Schedule 1

Health and Personal Social Services (NI) Order 1991, article 8(9B)

19. Article 8 describes the organisations and bodies that can enter into Health and Social Care contracts (arrangements for the provision of goods and services). The Department is already referenced here while the reference to Health and Social Care Board will be omitted.

20. With any contract / commercial arrangement there exists the risk of a dispute arising. With the dissolution of the Board the requirement for the Department to be involved in these arrangements has the potential to be increased. At present the Department is key to facilitating impartial determinations in terms of dispute resolution and will be unable to undertake this role in future where it becomes a named party in any contract / arrangement. The Department's objective is to therefore ensure future dispute resolution mechanisms are clearly independent and transparent.

21. Article 8 (9A) provides that the Department can refer such disputes to a prescribed body for determination. Article 8 (9B) provides the Department with the power to make regulations to establish a body for these purposes. Providing for a transparent independent dispute resolution process is not controversial or novel. These regulations are subject to negative resolution.

Health and Personal Social Services (NI) Order 1991, article 10A (2)

22. Article 10A lists the Social Care and Children legislative functions that are to be conferred directly on Health and Social Care Trusts (HSC trusts) following the closure of the Health and Social Care Board. Legislative provision will continue to evolve and it is therefore necessary to allow the list of functions to be amended when considered appropriate.

23. Article 10A (2) provides a power for the Department to make regulations to amend the list of Social Care and Children functions conferred directly on the HSC trusts. These regulations are subject to negative resolution as the Department would anticipate that any regulations made under these powers would be routine and uncontroversial.

Health and Personal Social Services (NI) Order 1991, article 10B (8)

24. Article 10B provides that certain functions of the Department may be exercisable on its behalf by HSC trusts through the application by the Department of a delegation direction. The article further describes what should be included in a delegation direction.

25. Article 10B (8) provides the Department with a power to make regulations to amend any statutory provisions as may appear to the Department necessary to facilitate the exercise of functions conferred on HSC trusts through a delegation direction.

26. Regulations for this provision, that amend only statutory instruments, are subject to negative resolution as the Department would anticipate that any regulations made under these powers would be routine and uncontroversial. No other regulations may be made under these provisions unless a draft has been laid before and approved by a resolution of the Assembly.

Health and Personal Social Services (NI) Order 1991, Schedule 3, Part 3A, 22A (7) and (8).

27. Paragraph 22A provides that the Department may, by direction, cease the exercise of specific Social Care and Children functions by HSC trusts and for them to be exercisable by a substituted body or person. Further detail in 22(A) provides for the making of transitional provisions to ensure continued delivery of services in any situation in which another body or person takes over responsibility for Social Care and Children functions.
28. Paragraph 22A (7) provides a power to the Department to make regulations so that the power of the Department to give directions and guidance, etc. outlined in paragraph 6(2) to paragraph 8 of Schedule 3 may apply to a substituted body or person to whom the Department has directed to exercise Social Care and Children functions. These regulations are subject to negative resolution as the Department would anticipate that any regulations made under these powers would be routine and uncontroversial.
29. Paragraph 22A (8) provides the Department with a power to make regulations to amend any statutory provisions as may appear to the Department as necessary. The Department would seek to use this power to facilitate and safeguard the exercise of Social Care and Children functions conferred on a substituted body or person HSC trusts through a direction made under paragraph 22A (1), should that be necessary.
30. Regulations for this provision that amend only statutory instruments are subject to negative resolution as the Department would anticipate that any regulations made under these powers would be routine and uncontroversial. No other regulations may be made under these provisions unless a draft has been laid before and approved by a resolution of the Assembly.

AMENDMENTS TO EXISTING POWERS

31. Upon the closure of the Health and Social Care Board the Department will have responsibility for the lists of providers for Primary Medical care (GPs, Dentists, Pharmaceutical and Ophthalmic) and the contracts with those

providers.

32. Regulations already provide appeal rights for GPs, Dentists, etc. that have been refused entry to or have been removed from providers' lists. In addition Regulations also provide appeal rights in terms of the arrangements, contract content and contract disputes for providers. In most cases current legislation points to the Department as responsible for making determinations in the dispute resolution process.
33. The Department does not seek new regulation making powers but seeks to ensure dispute resolution mechanisms are clearly independent and transparent.
34. In each of the articles noted below, the Department seeks to include in existing regulations the duty to provide for a prescribed body rather than the Department to make determinations in the dispute resolution process. The Department's objective is to ensure future dispute resolution mechanisms are clearly independent and transparent.

Health and Personal Social Services (NI) Order 1972

- Primary Medical Services/Dental Services – Article 15D (3D and 3DA)
- General Medical Services Contracts, disputes and Enforcement – Article 57F(2 and 2A)
- Persons performing primary medical services – Article 57G (3j and 3C)
- Arrangements for general dental services – Article 61 (2AB)
- Arrangements for general ophthalmic services – Article 62 (2c and 2A)
- Arrangements for pharmaceutical services – Article 63AA (3AA)

Health (Miscellaneous Provisions) Act (NI) 2008

- General dental services contracts: disputes and enforcement – inserts Article 61E into the 1972 Order – Article 61E (2 and 2A) – This

provision remains prospective, it has not been commenced.

35. The Department doesn't seek to amend the existing level of Assembly scrutiny in relation to any of the above.

Health and Personal Social Services (NI) Order 1972, Schedule 9

36. Schedule 9 outlines the Department's existing legislative power (by Order) for provision to make loans to General Medical Practitioners. The purposes loans may be made for are in respect of enabling GPs to:

- To provide or to acquire a share in premises;
- To alter, enlarge, improve or repair such premises;
- To acquire land required for the erection of or in connection with the use of such premises;
- To acquire equipment or furniture needed by them in the provision of those services; and
- To repay any loan raised by them for such purposes.

37. The amendment omits the existing reference "by order" and seeks to update the legislative reference by substituting the existing reference with a reference to regulations. Loans to GPs are to be made in accordance with a scheme provided for in regulations.

38. The provision retains the requirement to secure the approval of the Department of Finance, previously it would have been for the Order being made; this has been revised to any regulations being made. The amendment also provides that no regulations may be made unless a draft of the regulations has been laid before and approved by resolution of the Assembly.

