

MENTAL HEALTH (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 (DPLRC) in its consideration of the Mental Health (Scotland) Bill. This Memorandum describes a new provision in the Bill conferring power to make subordinate legislation which was added at Stage 2. It also describes provisions in the Bill conferring power to make subordinate legislation which were amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

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

2. The delegated powers provisions in the Bill which were inserted or amended at Stage 2 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 is considered appropriate.

Section 11(4A) – Orders relating to non-state hospitals (Inserting section 271A - Process for Orders: further provision)

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

3. Section 11(4A) was inserted in the Bill at Stage 2. Section 12(3) which contained alternative regulation making powers was removed from the Bill at the same time. Section 11(4A) inserts new section 271A into the Mental Health (Care and Treatment) (Scotland) Act 2003. It provides that the Scottish Ministers may make regulations to (i) further define the expression “qualifying hospital” for the purpose of sections 268 – 271 of the 2003 Act; (ii) specify the test that the Mental Health Tribunal for Scotland will be required to apply for the purpose of determining an appeal against conditions of excessive security (the test for the purposes of sections 268(2), 269(3) and 271(2)(a) of the 2003 Act); (iii) make further specific provision about the test specified in (ii) above, requiring that a requirement for the test to be met is that the Tribunal is satisfied that a patient’s detention in a hospital involves the patient being subject to a level of security that is excessive in the patient’s case; (iv) make provision about when a patient’s detention in a hospital is taken to involve the patient being subject to a level of security that is excessive in the patient’s case; and (v) set out the criteria that a person preparing a supportive report for an appeal must meet, besides being a medical practitioner.

Reason for taking power

4. The regulation making power at subsection (1) reformulates the current power to make regulations at section 268(12) of the 2003 Act and allow Ministers to define this in terms of the hospital or unit of the hospital in which patients are detained. The nature of the secure estate in Scotland means that the levels of security at an individual unit or hospital could change. Framing the power in this way will allow Ministers to ensure that the legislative framework can adapt to changes in the secure estate. A power to make regulations defining “qualifying hospital” was provided by section 268(12) of the 2003 Act. While section 268(12) could have been left in place, because it is necessary to have other new regulation-making powers relating to excessive-security appeals and it is neater to keep all of the enabling powers in one place, new section 271A(1) replicates section 268(12) and the latter will be repealed.

5. The regulation making power at subsection (2) is a reformulation of the power to make regulations currently contained in section 268(14) to set out the test which should be applied by the Tribunal in addition to that already in existence on the face of the 2003 Act. This will allow the test to be specified and then also reformulated through regulations should experience of the Tribunal’s operation of the test indicate a need for it to be refined. The effect of the new power is that the Tribunal will be required to apply the test set out in the regulations made under section 271A(2) to decide whether to uphold a patient’s excessive security appeal (or, in the case of section 271, whether to reverse its earlier decision to uphold a patient’s appeal).

6. The regulation making power at subsection (3) also reformulates the powers at section 268(14) and will allow the Scottish Ministers to clarify the concept of excessive security. This provision elaborates on the test to be set by regulations under subsection (2). In particular, subsection (3) requires that whatever other factors may form part of the test, the regulations must provide that the test can only be met, in any given case, if the Tribunal is satisfied that the patient’s detention in the hospital in question involves the patient being subject to a level of security that is excessive in the patient’s case. That is the test presently specified on the face of the relevant provisions of the 2003 Act. The purpose of the power in this respect is to ensure that the core element of the test remains unaltered, while allowing flexibility for the test to be refined through subsequent regulations (by the addition of extra limbs to the test) should experience of the Tribunal’s operation of the test indicate a need for it to be refined.

7. When exercised, the test set out in regulations made using this power must include as a requirement, for the test to be met, that the Tribunal be satisfied that detention of the patient in the hospital in which the patient is detained involves the patient being subject to a level of security that is excessive in the patient’s case.

8. The regulation making power at subsection (4) of the new section 271A confers a power on the Scottish Ministers to make regulations making further provision about when a patient’s detention in a hospital is to be taken to involve the patient being subject to a level of security that is excessive in the patient’s case. The purpose of the power is to allow regulations to clarify the concept of excessive security, for example by saying relative to what purpose the excessiveness of security is to be judged. New section 271A(4) replicates section 268(14) of the 2003 Act; the existing power will be repealed so that it can be restated more neatly in a single regulation-making section.

9. The regulation making power at subsection (5) is not solely about excessive-security appeals from patients in hospitals other than a state hospital. The Act will give rise to a requirement for a patient making an excessive-security appeal from the state hospital (under section 264 of the 2003 Act) or another hospital (under section 268 of the 2003 Act) to have a report from a medical practitioner supporting the patient's appeal. New section 271A(5) confers a power on the Scottish Ministers to make provision requiring that a person meet criteria besides being a medical practitioner in order to prepare a report in support of a patient's excessive-security appeal.

Choice of procedure

10. The regulation making power at section 11(4A) will be subject to affirmative procedure. This is consistent with the existing regulation making powers under section 268 of the 2003 Act and the Scottish Government considers that this gives an appropriate level of parliamentary scrutiny to the exercise of the power.

Section 22A – Conflicts of interest to be avoided

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

11. Section 22A was inserted at Stage 2 of the Bill. It provides that the Scottish Ministers may make regulations specifying circumstances when there is taken, or not taken, to be a conflict of interest in relation to medical examinations at sections 36(1), 44(1), 47(1), 57(2), 77(2), 78(2), 139(2), 140(2) or 182(2) of the 2003 Act. The existing regulations under Scottish Ministers' current powers to make regulations about when there is taken, or not taken, to be a conflict of interest in relation to medical examinations at sections 36(1), 44(1), 47(1), or 57(2) of the 2003 Act describe a number of circumstances which are taken to constitute a conflict of interest. This includes for example, in relation to short term detention in hospital, a situation where the approved medical practitioner is related to the patient or is employed by or contracted to provide services in or to an independent health care service in which the patient will be detained if detention is authorised. Section 22A will also allow Scottish Ministers to specify when the general requirement as to conflict of interest set out in subsection (1) will not apply. Section 22A provides that there must not be a conflict of interest in relation to a medical examination carried out for the purpose of any of the listed sections. The section also repeals the existing equivalent regulation making powers at sections 36, 44, 47 and 58 of the 2003 Act.

Reason for taking power

12. Scottish Ministers currently have powers to make regulations about when there is taken, or not taken, to be a conflict of interest in relation to medical examinations at sections 36(1), 44(1), 47(1), or 57(2) of the 2003 Act. Section 22A of the Bill replaces this power and extends it to allow regulations to be made in relation to medical examinations carried out under sections 77(2), 78(2), 139(2), 140(2) or 182(2) of the 2003 Act. It is considered appropriate that the circumstances when there is taken, or not taken, to be a conflict of interest in relation to medical examinations is set out in regulations so as to allow further consultation with stakeholders and

allow flexibility to make changes from time to time in light of experience of the operation of the regulations.

Choice of procedure

13. Section 22A replaces and extends the regulation making powers at sections 36, 44, 47 and 58 of the Act, which were subject to negative procedure. The regulations at section 22A will be subject to negative procedure to be consistent with the powers that this replaces in the 2003 Act. The amendment extends an existing power, it does not alter the nature of the power or what it aims to achieve. It was not considered necessary to alter the parliamentary procedure associated with the power.

Section 25 – Dealing with absconding patients

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

14. Section 25(3) of the Bill provided for Ministers to make regulations to specify how treatment under Part 16 of the 2003 Act is applied to patients who have absconded from jurisdictions outwith Scotland. The Bill has been amended at Stage 2 so that the regulations may specify how treatment under Part 16, other than medical treatment specified under sections 234 or 237 of the 2003 Act, is applied to such patients. (Currently Section 234 of the 2003 Act relates to certain surgical procedures which are for the purpose of destroying brain tissue or the functioning of brain tissue as well as other types of medical treatment specified in regulations for the purposes of the section made by the Ministers. Section 237 relates to electro-convulsive therapy and other such types of medical treatment specified in regulations for the purposes of the section).

Reason for taking power

15. It is considered appropriate for regulations to set out how treatment under Part 16, other than medical treatment specified under sections 234 or 237 of the 2003 Act, is applied to absconding patients to allow further consultation with stakeholders and allow flexibility to make changes from time to time in light of experience of the operation of the regulations.

Choice of procedure

16. Section 25(3) amends the regulation making power in section 309 which already attracts affirmative resolution procedure by virtue of section 326(4)(c). Affirmative procedure is considered appropriate as regulations made under this power will determine the nature of compulsory medical treatment given to patients who have been taken into custody under these provisions. Affirmative procedure is also considered appropriate as this is an extension to an existing regulatory power which attracts affirmative resolution procedures.

Other relevant amendments

17. The amendments described above are amendments which insert or substantially alter provisions conferring powers to make subordinate legislation. In addition, the DPLRC will wish to note that minor changes were made in relation to one other section included in the Bill's delegated powers memorandum.

18. Section 45(2) of the Bill inserts new section 17C into the Criminal Justice (Scotland) Act 2003 and provides Scottish Ministers with a power to issue guidance setting out how representations in relation to certain aspects of the Victim Notification Scheme should be framed. At Stage 2, an amendment was made to one of the circumstances in which representations may be made (the occasion of a first grant of suspension of detention which does not impose a supervision requirement). This amendment did not however alter the power to issue guidance.

*This document relates to the Mental Health (Scotland) Bill as amended at Stage 2
(SP Bill 53A)*

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