

MENTAL HEALTH (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Mental Health (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.
2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

BACKGROUND

3. The Mental Health (Scotland) Bill “(the Bill)” is part of the Scottish Government's programme to streamline, simplify and clarify the systems for efficient and effective treatment for people with a mental disorder. The Bill seeks to improve the operation of the Mental Health (Care and Treatment) Scotland Act 2003 (“the 2003 Act”) and some related provisions in the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Additionally the Bill makes provision through amendments to the Criminal Justice (Scotland) Act 2003, as to the rights of victims of crime in the context of mental health disposals.

OUTLINE OF BILL PROVISIONS

4. The Bill is structured in the following parts
 - **Part 1** amends the 2003 Act in respect of a number of issues relating to compulsory treatment for patients including procedures for compulsory treatment, suspension of detention, removal of patients and timescales for referrals and disposals. Part 1 also amends provisions relating to representation by named persons and advance statements.
 - **Part 2** amends the 1995 Act in respect of treatment for mentally disordered offenders. It amends timescales for assessment and treatment orders for such patients and provides for variation of certain orders.
 - **Part 3** creates a new notification scheme for victims of mentally disordered offenders.
 - **Part 4** sets out general provisions on coming into force and modification of enactments.

APPROACH TO USE OF DELEGATED POWERS

5. The Bill contains a number of delegated powers. The Government has had regard, when deciding where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances without the need for primary legislation;
- anticipate the unexpected, which might otherwise impact on the purpose of the legislation;
- the need to make proper use of valuable Parliamentary time; and
- allow detailed administrative arrangements to be kept up to date within the basic structure and principles set out in the primary legislation.

6. The delegated powers provisions 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 has been considered appropriate.

DELEGATED POWERS

Section 11(2)(f): Orders relating to non-state hospitals

7. Chapter 3 of Part 17 of the 2003 Act allows certain persons to make an application to the Mental Health Tribunal for Scotland (the Tribunal) for an order declaring that a patient is being held in conditions of excessive security. Sections 264 to 267 apply to patients detained in a state hospital, whilst sections 268 to 270 apply to ‘qualifying patients’ detained in other ‘qualifying hospitals’.

8. Section 11(2)(f) of the Bill repeals the existing powers in section 268 of the 2003 Act to (i) specify a description of “qualifying patient” in regulations for the purposes of sections 268 to 271 of that Act; (ii) specify a description of “qualifying hospital” in regulations for the purposes of sections 268 to 271; and (iii) make provision in regulations as to when for the purposes of sections 268 to 271 a patient's detention in a hospital is to be taken as involving the patient being subject to a level of security that is excessive in the patient's case.

9. No regulations have been made under section 268 of the 2003 Act.

10. The regulation making powers repealed in section 11(2)(f) of the Bill appear in a revised form in section 12(3). Repealing and re-enacting the regulation making power in a new section (section 272A) is intended to improve the readability of sections 268 to 271 as a whole by dealing with the meaning of ‘qualifying hospital’, ‘hospital’ and ‘hospital unit’ in the one place. The vires of the power has also been adjusted to make it clear that the meaning ascribed to ‘qualifying hospital’ in regulations can refer to a particular hospital unit or to particular measures of security or containment; this will allow, for example, hospitals adopting particular security measures to be specified as ‘qualifying hospitals’ for the purpose of sections 268 to 271.

Section 12(3): Qualifying non-state hospitals and units

Power conferred on: The Scottish Ministers
Power exercised by: Regulation made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

11. This provision inserts a new section 272A into the 2003 Act which enables the Scottish Ministers to (i) further define the expression “qualifying hospital” for the purposes of sections 268 to 271(subsection (1)); (ii) make provision for the purposes of those sections to assist in the determination of whether the patient’s detention in hospital involves the patient being subject to a level of security which is excessive in a patient’s case; and (iii) make further provision regarding the operation of those sections in particular circumstances. It is noted that subsection (4) of the new section 272A provides that regulations made under that section may make provision by reference to a specified hospital or hospital unit (or a type or description of hospital or hospital unit) or to measures of security or containment under which a patient is detained.

Reason for taking power

12. The power in subsection (1) of section 272A is taken to allow the Scottish Ministers to specify the patients, or groups of patients, to whom the right in section 268 will apply by reference to the hospital, or hospital unit in which those patients are detained. This is a reformulation of the existing power in section 268(12) to define “qualifying hospital”.

13. The power in subsection (2) of section 272A is a reformulation of the existing power in section 268(14) and is retained to ensure that the circumstances in which a patient will be regarded as being subject to a level of security that is excessive can be specified in order to assist the Tribunal in the determination of an application under section 268.

14. The power in subsection (3) of section 272A is included to provide the Scottish Ministers with sufficient flexibility to make additional provision in order to ensure that sections 268 to 271 operate effectively in relation to particular circumstances. A wide power is required to ensure that the Scottish Ministers are able to react quickly to ensure the legislative framework supports the ever changing nature of the secure estate for mental health patients and ensure that as this develops to meet the changing needs of patients, so the legislation can be amended to reflect these developments.

15. The nature of the secure estate in Scotland is such that resources need to adapt to the changing needs of patients quickly. The flexibility of regulations rather than primary legislation is needed to ensure the legislative framework can adapt to the changes in the secure estate.

Choice of procedure

16. Section 12(4) of the Bill amends section 326(4) of the 2003 Act so that regulations made under the new section 272A will be subject to affirmative procedure. Affirmative procedure is considered appropriate here given that the exercise of the powers will determine which patients outwith a state hospital are eligible to make an application under section 268 (or to have an application made which relates to them by their named person, etc.). This is

consistent with the existing regulation making powers under section 268 and will ensure that the appropriate level of scrutiny is given to the exercise of the power.

Section 19(2) Consent to being named person

Power conferred on: The Scottish Ministers
Power exercised by: Regulation made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

17. Chapter 1 of Part 17 of the 2003 Act makes provision for patients to have a “named person”. Section 250 makes provision for the nomination of a named person. Section 19(2) of the Bill provides that a nomination made under section 250(1) of the 2003 Act will only be valid if a docket to the nomination states that the person nominated has consented to the nomination and the docket has been signed by the nominated person and witnessed by a ‘prescribed person’. This is achieved by the amendments made to section 250(1) in section 19(2) of the Bill.

18 Subsection (7) of section 250 confirms that references to ‘prescribed person’ in that section means a person of a class prescribed by regulations. Accordingly, the power conferred by section 19(2) of the Bill enables the Scottish Ministers to prescribe the class of person who can witness a nominated person’s signature, on a docket, consenting to act as an individual’s named person. Regulations made under section 250 of the 2003 Act are subject to negative resolution procedure (see section 326(1) and (3) of the 2003 Act).

Reason for taking power

19. The reason for taking this regulation making power is to provide the Scottish Ministers with the flexibility to change the prescribed class of person. It would not be an effective use of either the Parliament’s or the Government’s resources for this detailed administrative matter to have to be dealt with through subsequent primary legislation. This is consistent with the approach adopted in the existing section 250(2) and (7) for prescribing persons for the purpose of witnessing the signing of a nomination of a named person under that section.

Choice of procedure

20. Negative procedure is considered appropriate for an administrative matter and is in line with the procedure in place for other situations, including in the existing section 250(2) itself, where the Scottish Ministers are required to “prescribe the class of person” (negative procedure applies to the existing power in section 250(2) to prescribe persons to witness a nomination made under that section by virtue of section 326(3) of the 2003 Act).

Section 24 Cross border transfer of patients

Power conferred on: The Scottish Ministers
Power exercised by: Regulation made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

21. Section 24 of the Bill makes a number of small changes to provisions relating to cross border transfer of patients. Section 24(2) amends section 289 of the 2003 Act by extending the power to make regulations in respect of the cross border transfer of patients subject to requirement other than detention, to include persons subject to equivalent requirements in a member state of the European Union. Section 24(3) amends section 290 in the same way in respect of cross border transfer for patients subject to detention requirements or otherwise in hospital and section 23(4) amends section 309A in a similar fashion as regards the power to make regulations in relation patients who are in Scotland on an escorted leave of absence from another jurisdiction with the UK.

Reason for taking power

22. The current powers to make regulations under sections 289 and 290 of the 2003 Act do not allow Scottish Ministers to make regulations to authorise the reception of patients from outwith the United Kingdom – i.e. from other member States of the European into Scotland to provide treatment for mental disorder. The changes to these provisions in section 24(2) and (3) will allow such regulations to be made (or rather, amendments to be made to the existing regulations made under these sections) which will enable patients from other Member States to be transferred to Scotland to receive treatment for mental disorder.

23. Similarly, the power in section 309A to make provision by way of regulations allowing patients from another jurisdiction, but who are in Scotland on an escorted leave of absence, to be kept in charge of an authorised person does not apply to patients from other Member States of the EU. The amendment to section 309A will allow such regulations to be made (or rather, amendments to be made to the existing regulations made under this section, including provision applying sections 301 to 303 of the 2003 Act (provisions relating to absconds) to such patients. These changes are being made by way of the delegated powers, rather than on the face of the Bill, because it is consistent with the approach adopted in the existing provisions of the 2003 Act.

Choice of procedure

24. Section 24 amends the regulation making powers in sections 289, 290 and 309A which already attract affirmative resolution procedure by virtue of section 326(4)(c). Affirmative procedure is considered appropriate as this is an extension to an existing regulatory power subject to affirmative procedure and this is the normal procedure for this type of power.

Section 25(3) Dealing with absconding patients

Power conferred on: The Scottish Ministers
Power exercised by: Regulation made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

25. Section 25 of the Bill makes a number of changes to the provisions of the 2003 Act relating to patients who have absconded, or who are treated as having absconded from detention in hospital.

26. Section 25(3)(a) amends section 309 by extending the power to make regulations applying sections 301 to 303 of the 2003 Act to patients from other jurisdictions so as to include patients who have absconded from another member state of the European Union.

27. Section 25(3)(c) amends section 309 of the 2003 Act further by extending the power to make regulations applying sections 301 to 303 to patients from other jurisdictions or, following the amendment in section 25(3)(a), member states, so that some or all of Part 16 of the 2003 Act may also be applied. This will allow persons held in custody by virtue of these provisions to be provided with medical treatment for mental disorder in accordance with Part 16 of the 2003 Act (Part 16 specifies the circumstances in which particular types of treatment, for example, medicine and artificial nutrition, may be given). However, this will not apply to persons who have been taken into custody and who are subject to the equivalent of an emergency detention certificate (which only authorises detention for 72 hours for the purpose of determining what medical treatment requires to be given to the patient); treatment will still be given to such patients if it is necessary as a matter of urgency.

Reason for taking power

28. The current power to make regulations under section 309 of the 2003 Act does not permit Scottish Ministers to make provision allowing patients who have absconded from another member state of the EU to be taken into custody in Scotland. The changes made to section 309 in section 25(3)(a) of the Bill will allow such regulations to be made (or rather, amendments to be made to the existing regulations made under this section).

29. Where a patient absconds from a hospital or other such place in Scotland, the patient will be taken back to the hospital or other address in accordance with section 303 and the order or certificate to which they are subject continues to run. Accordingly, authority to treat the patient continues under the original order or certificate and Part 16 of the 2003 Act will apply to the giving of such treatment. However, there is currently no provision to authorise the giving of treatment to patients who abscond from detention in another jurisdiction and are taken into custody in accordance with section 309 and The Mental Health (Absconding Patients from Other Jurisdictions) Regulations 2008. The power in section 309, and the 2008 Regulations, only authorise the taking into custody of the patient and returning them to the place from which they absconded.

30. Where a patient absconds from another jurisdiction, including from another member state, and is taken into custody in Scotland, their return to the original jurisdiction may not be immediate as it could take a day or so for the hospitals to organise transport. In the interim, the patient may be unwell and require treatment, but the hospital would have no authority to treat the patient other than providing emergency treatment under section 243 of the 2003 Act. The changes made to section 309 in section 25(3)(b) and (c) will allow regulations to be made which will permit treatment to be given to such patients for their mental disorder. These changes are being made by way of the delegated powers, rather than on the face of the Bill, because it is consistent with the approach adopted in the existing provisions of the 2003 Act.

Choice of procedure

31. Section 25 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.

Section 25(4) Dealing with absconding patients

Power conferred on: The Scottish Ministers
Power exercised by: Regulation made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

32. Section 25(4) extends the scope of the regulation making power in section 310(1) to make it clear that the reference to ‘specified persons’ in section 310(1) includes persons authorised by the patient’s responsible medical officer.

Reason for taking power

33. Where a patient absconds from a hospital or other such place in Scotland, the patient will be taken back to the hospital or other address in accordance with section 303 and the order or certificate to which they are subject continues to run. The 2003 Act provides a list of persons who are, or may be, authorised to take patients that have absconded, or failed to comply with a condition in their order, into custody and return them to their place of residence. Section 303(3)(a) sets out the list of people who can take an absconding patient subject to a civil order back into custody. That list includes “any other person authorised for the purposes of that subsection by the patient’s responsible medical officer”. As regards absconding patients who are subject to a mental health order as a result of criminal proceedings, section 310 allows provision to be made by regulations authorising the taking into custody of such patients by ‘specified persons’. Regulations have been made in exercise of this power specifying the persons who can take such patients into custody (see regulation 3 of SSI 2005/463), but it is doubtful whether the power would allow any other person authorised by the patient’s responsible medical officer to be specified. The amendment to section 310 in section 25(4) clarifies that such provision can be made.

Choice of procedure

34. Section 25 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 allow certain persons to be taken into custody by persons authorised by a doctor. Affirmative procedure is also considered appropriate as this is an extension to an existing regulatory power which attracts affirmative resolution procedures.

Section 43(3)(b) Right to information: offender imprisoned

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

35. Part 3 of the Bill makes a number of amendments to the Criminal Justice (Scotland) Act 2003 (“the CJ Act 2003”) to create a victim notification and representation scheme for victims of mentally disordered offenders. The current victim notification and representation scheme set out in sections 16 to 18 of the CJ Act 2003 does not apply to victims of offenders

who are made subject to a mental health order. Section 43 amends section 16 of the CJ Act 2003 by adding to the list of information to be provided to victims under the scheme as regards offenders who are made subject to a hospital direction under the 1995 Act or a transfer for treatment direction under the 2003 Act. Section 43(3)(b) amends section 16(4) of the CJ Act 2003 by adding power (in paragraph (c) of that subsection) to modify section 18A (inserted by section 47 of the Bill) by adding, amending or repealing definitions of terms used in the descriptions of information in section 16(3).

Reason for taking power

36. The reason for taking this order making power is to provide the Scottish Ministers with the flexibility to add, amend or repeal definitions of terms used in the descriptions of information in section 16(3). It would not be an effective use of either the Parliament's or the Government's resources for an administrative matter to have to be dealt with through subsequent primary legislation

Choice of procedure

37. Section 43 amends the existing order making power in section 16(4) of the CJ Act 2003 which is already subject to affirmative procedure by virtue of section 88(2) of that Act. Affirmative procedure is considered appropriate as this is an extension to an existing order making power which attracts affirmative resolution procedures.. This is also considered appropriate as this power can be used to modify primary legislation.

Section 45(2) Right to make representations

Power conferred on: The Scottish Ministers
Power exercised by: Guidance
Parliamentary procedure: None

Provision

38. Section 45(2) of the Bill inserts sections 17B to 17D into the CJ Act 2003 to allow victims who are entitled to receive information under the victim notification scheme to also have the opportunity to make written and oral representations in relation to certain decisions about the offender. Subsection (2) of new section 17C (*Making representations under section 17B*) makes provision requiring Scottish Ministers to issue guidance setting out how such representations should be framed.

Reason for taking power

39. Guidance issued in accordance with this provision will be designed to assist victims, or as the case may be their carers or family members, with framing representations and may be revised and updated following feedback from those using the new system.

Choice of procedure

40. The issuing of guidance does not attract any Parliamentary scrutiny; this is considered appropriate here as the guidance will simply explain how representations are to be framed (for example by focusing on the potential impact on the victim encountering the offender when they are conditionally discharged from hospital) and inform victims where to turn if they need assistance to make such representations. The guidance will be published on the Scottish Government and Scottish Tribunals Service websites in due course.

Section 48 Power to make modifications

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

41. Section 48 of the Bill inserts new section 18B (*Power to modify Part*) of the CJ Act 2003. This is a power to modify aspects of the victim notification scheme as it pertains to mentally disordered offenders, for example the power to amend sections 16A and 16B by substituting a different age for the ages specified in those sections.

Reason for taking power

42. The reason for taking this order making power is to provide the Scottish Ministers with the flexibility to change the scheme. It would not be an effective use of either the Parliament's or the Government's resources for this detailed administrative matter to have to be dealt with through subsequent primary legislation.

Choice of procedure

43. Affirmative procedure is considered appropriate as section 48(3) inserts "18B" in section 88(2) of the Criminal Justice (Scotland) Act 2003 which deems this order making power should be subject to the affirmative procedure. This is appropriate given that this power can be used to amend primary legislation and use of the affirmative procedure is normal in such cases.

Section 50 Power to commence Bill

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish statutory instrument
Parliamentary procedure: laid only

Provision

44. This provision enables the Scottish Ministers to commence the Bill by conferring a power on Ministers to bring the provisions of the Bill into force, by order, on such day as the Scottish Ministers appoint. Transitional, transitory or saving provision may be made to ensure the smooth implementation of the amendments (for example by preserving existing rules for on-going pre-commencement cases/proceedings; this may be relevant, for example, as regards the provisions in Part 2 of the Bill relating to the timings of certain remand orders).

Reason for taking power

45. It is standard for Ministers to have control over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider to be suitable.

Choice of procedure

46. As is now usual for commencement orders, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

This document relates to the Mental Health (Scotland) Bill (SP Bill 53) as introduced in the Scottish Parliament on 19 June 2014

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