



Delegated Powers and Law Reform Committee

Duncan McNeil MSP
Convener, Health and Sport Committee

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26 March 2015

Dear Duncan

The Delegated Powers and Law Reform Committee considered the member in charge's response to the Committee's stage 1 report on the Assisted Suicide (Scotland) Bill at its meeting on 24 March.

For your information, as an annex to this letter I attach a copy of the member in charge's letter.

Having considered the response to the report, the Committee's position remains as stated in its stage 1 report on the Bill.

That being the case, as regards section 23 of the Bill, the Committee is still of the view that rules governing the conduct of licensed facilitators should be set out in regulations rather than directions.

Notwithstanding, the Committee agreed to write to the Health and Sport Committee to note the member in charge's willingness to reflect on the use of the term "best endeavours at section 23(2).

Section 23(2) of the Bill requires a licensing authority to use its "*best endeavours*" to ensure that directions are complied with by the facilitators to whom it has granted licences.

In its report, the Committee reflected that the use of the words 'best endeavours' in a power such as this is unusual, noting that it would be more usual for directions to simply be binding on the licensing authority. The Committee further noted that no definition or explanation of the term was provided for in the Bill.

Whilst the member was of the view that the use of the term 'best endeavours' in the context of section 23(2) was sufficiently clear, he indicated his willingness to take the Committee's concerns into account. He suggested that it may be possible to adjust section 23(2) in order to require licensing authorities to make facilitators aware of any directions issued, and also to require facilitators to comply with any such directions.

The Committee would welcome such an adjustment to section 23(2). However, the Committee would welcome a further step in the process, requiring the licensed facilitators to acknowledge that they are aware of the directions. Given the significance of the matters that may be covered in the directions, the Committee considers that the addition of this step would provide for a more robust process.

I hope you find this helpful.

A handwritten signature in black ink, appearing to read 'Nigel Don'.

Nigel Don MSP
Convener



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17 December 2014

Dear Nigel,

Assisted Suicide (Scotland) Bill – delegated powers

I am writing in response to the letter from your Committee's clerk, dated 9 December, in relation to the provisions in section 23 of the Assisted Suicide (Scotland) Bill which entitle the Scottish Ministers to issue directions, and requiring licensing authorities to have regard to Scottish Ministers' guidance.

I hope it is helpful if I first set out the context for these provisions, before turning to the four specific points that I am asked to address.

Central to the Bill is the principle that the process for securing an assisted suicide should uphold (as far as possible) the autonomy of the person concerned – while maintaining robust safeguards against abuse of the vulnerable.

Licensed facilitators play a vital role – both in providing practical assistance to the person, while also acting as a safeguard and guarantor of the process. The nature and extent of that assistance may vary considerably, depending on the circumstances – including, for example, the extent of the person's own physical capabilities and the extent to which the person wants family members or friends also to be involved. But that flexibility must not compromise the facilitator's role in upholding the integrity of the process, and ensuring that the fixed parameters of the legislation are respected. As a result, being a facilitator is likely to be a demanding role that requires compassion, sensitivity and integrity. It is for this reason that the Bill requires any facilitator to have been trained by a licensing authority (appointed by Ministers), and to be subject to that authority's ongoing supervision.

Section 22 requires the appointment of a licensing authority to be done by subordinate legislation (subsection (1)), and also requires there to be a statutory framework (in regulations under subsection (2)) for any subsequent suspension or revocation of such an appointment. It also gives Scottish Ministers the power (in subsection (2)(d)) to set statutory parameters on key elements of the licensing authority's role – i.e. on how the authority checks that applicants are suitable to become facilitators, trains the applicants to take on that role, and then ensures that (once licensed) they continue to be subject to ongoing training, supervision and inspection. These are suitable matters for subordinate legislation because they can operate at a high degree of generality – i.e. with standard provision that will apply whoever the licensing authority is and in relation to any licensed facilitators.

Section 23 is a complementary provision that enables Ministers to provide more detailed oversight. Both directions (which would impose specific requirements on facilitators) and guidance (which would be more general and advisory) are provided for, to give Ministers flexibility. It will be for Ministers to decide whether, and to what extent, to use these powers. On the one hand, they may feel that it is primarily the role of the licensing authority to ensure that facilitators have the information and support they need to carry out their role sensitively and appropriately, and so may keep these powers largely in reserve. On the other hand, they may prefer to take a more pro-active approach and impose more detailed requirements on facilitators (in how they are to act in particular circumstances). The choice is for them, and they would have the flexibility to vary that approach over time, and to respond rapidly to events. Thus, for example, if a particular case arose in which a facilitator was criticised for acting in a particular way, then Ministers would have the power to address this rapidly by issuing directions forbidding facilitators from so acting (which licensing authorities would then be expected to bring to the attention of those facilitators they had already licensed).

I hope this explanation serves to address the first bullet point in the clerk's letter, concerning how these powers may be used.

It is difficult to give any general answer to the second bullet point, as it will be for Ministers rather than me to decide what matters are best dealt with in either directions or guidance. The underlying point is that Ministers' powers to make regulations or issue directions or guidance are complementary, and would be used differently, for different purposes. For example, there are many things that it could be helpful to include in guidance that would not be appropriate for regulations (or directions), such as background (factual) information about some of the illnesses and conditions that people seeking an assisted suicide may have. Guidance could also be amplified by examples, checklists and diagrams – material that would not normally be considered appropriate in a legislative context. The other advantage of guidance is that it can more quickly and easily be developed over time, or rapidly updated as circumstances change – without needing to go through a formal process of making (and securing Parliamentary approval for) amending regulations.

In relation to the third bullet point, the “best endeavours” wording is a reflection of the context. Once facilitators have completed their initial training and been licensed, they will be expected to act independently, without direct supervision by the licensing authority. The authority will not, therefore, be in a position to guarantee that every

facilitator it has trained will immediately comply with any new directions – but it can be expected to inform facilitators of any changes to what is expected of them, and to do what it can to ensure they comply. (And Ministers have the power, under section 22, to give themselves the power to suspend or revoke the appointment of the authority if, for example it fails to act appropriately to ensure compliance by its facilitators with Ministers' directions.)

On the final bullet point, I do not think it would be necessary or appropriate to require either directions or guidance to be subject to the same sort of Parliamentary scrutiny process (whether affirmative or negative) as regulations, for the reasons already outlined – namely, that directions are meant to serve as a specific response to particular circumstances, while guidance is meant to be non-legislative in character, and both should be capable of being issued or updated more easily and quickly than the formal process for legislative approval allows. The Bill already requires any directions or guidance to be published (see section 23(4)), and I would be receptive to adding to this a requirement for either or both types of document to be laid before the Parliament (with the possible caveat that the laying requirement should only apply to guidance when it is first made or significantly amended, so as not to inhibit the process of making small-scale continuous improvements as the need arises).

I hope the above comments are helpful to your Committee.

A copy of this letter goes to Duncan McNeil, Convener of the Health & Sport Committee, for information.

Yours sincerely,

Patrick Harvie MSP