



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

61st Report, 2014 (Session 4)

Mental Health (Scotland) Bill at stage 1

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Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
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Delegated Powers and Law Reform Committee

61st Report, 2014 (Session 4)

Mental Health (Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 5 August and 7 and 28 October the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Mental Health (Scotland) Bill at stage 1 (“the Bill”)¹. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².
3. In this report the following expressions bear the following meanings:
 - “the Bill” means the Mental Health (Scotland) Bill;
 - “DPM” means the Scottish Government’s Delegated Powers Memorandum;
 - “the Tribunal” means the Mental Health Tribunal for Scotland;
 - “the 1995 Act” means the Criminal Justice (Scotland) Act 1995;
 - “the 2003 Act” means the Mental Health (Care and Treatment) (Scotland) Act 2003; and
 - “the CJ Act 2003” means the Criminal Justice (Scotland) Act 2003.

OVERVIEW OF BILL

4. The Bill was introduced by the Scottish Government on 19 June 2014. The lead Committee is the Health and Sport Committee.

¹ Mental Health (Scotland) Bill [as introduced] available here:
[http://www.scottish.parliament.uk/S4_Bills/Mental%20Health%20\(Scotland\)%20Bill/b53s4-introd-bookmarked.pdf](http://www.scottish.parliament.uk/S4_Bills/Mental%20Health%20(Scotland)%20Bill/b53s4-introd-bookmarked.pdf)

² Mental Health (Scotland) Bill Delegated Powers Memorandum available here:
http://www.scottish.parliament.uk/S4_Bills/Mental_Health_DPM.pdf

5. The Bill makes provision in relation to mental health. In particular, the Bill makes a large number of technical amendments to the 1995 Act, the 2003 Act and the CJ Act 2003.

6. Part 1 of the Bill amends various aspects of the 2003 Act including the provisions of that Act concerning compulsory treatment of patients, emergency and short-term detention, suspension of detention, removal of patients and levels of security. Part 1 also makes provision in relation to the cross-border transfer of patients within the mental health system and for absconding patients. The principal changes in that regard are to the powers of the Scottish Ministers to make regulations in respect of transferring patients.

7. Part 1 of the Bill also makes a number of amendments to the 2003 Act to enable references to a hospital to be read as references to a particular unit within a hospital (similar changes are made to the 1995 Act by Part 2 of the Bill). These changes are designed to reflect experience in practice whereby it may be appropriate to transfer a patient to a different part of the hospital in which he or she is already being treated, as opposed to transferring the patient to another hospital altogether.

8. Part 2 of the Bill makes amendments to the 1995 Act. The majority of these amendments are technical in nature and are designed to give greater clarity of meaning to, and to improve the operational efficiency of, the mental health provisions in that Act. Many of the changes made by Part 2 amend provisions in the 1995 Act concerning the timescales for assessment and treatment orders for mentally disordered offenders. The amendments are intended to align the provisions on timescales with the practice of the criminal courts more generally.

9. Part 3 of the Bill creates a notification scheme for the victims of mentally disordered offenders. The CJ Act 2003 as amended by the Victims and Witnesses (Scotland) Act 2014 already provides a notification scheme for victims of offenders who do not have a mental disorder. The scheme allows victims to receive specific information from the Scottish Ministers about the offender, such as information about the offender's release from prison, unless there are exceptional reasons why the disclosure of such information would be inappropriate.

10. The Bill extends the notification scheme to victims of mentally disordered offenders. It creates new categories of information that may be disclosed in respect of offenders subject to detention in hospital by virtue of a hospital direction or a transfer for treatment direction. In particular, it entitles the victims of mentally disordered offenders to be informed when a certificate suspending the offender's detention without supervision has been granted; of the fact that such a certificate has been revoked; and when an offender is unlawfully at large.

DELEGATED POWERS PROVISIONS

11. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

- Section 19(2) – Consent to being a named person
- Section 24 – Cross-border transfer of patients
- Section 25(3) – Dealing with absconding patients
- Section 25(4) – Dealing with absconding patients
- Section 50 – Commencement

12. At its meeting of 5 August, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

13. In light of the written responses received, the Committee agreed that it was content with the following delegated powers and did not need to comment on them further:

- Section 12(3) – Qualifying non-state hospitals and units
- Section 12(3) – Power to make further provision about the operation of sections 268-271
- Section 43(3)(b) – Right to information: offender imprisoned
- Section 48 – Power to make modifications

Recommendations

14. The Committee's comments, and where appropriate, recommendations on the remaining delegated powers in the Bill are detailed below.

Section 45(2) – Right to make representations

Power conferred on:	the Scottish Ministers
Power exercisable by:	guidance
Parliamentary procedure:	none

Provision

15. Section 45(2) of the Bill inserts new sections 17B-D into the CJ Act 2003. The new section 17B affords a person who is to be given information by virtue of the new victim notification scheme a right to make representations before certain decisions are taken in respect of the offender. Those representations must be about how the decision in question might affect the victim or the victim's family.

16. The new section 17C(2) of the CJ Act 2003 obliges the Scottish Ministers to issue guidance as to how written representations made under the new section 17B are to be framed and how oral representations are to be made.

17. The Committee considered at its meeting on 5 August that the power to issue guidance under the new section 17C(2) of the CJ Act 2003 was acceptable in principle. The Committee was also content that the guidance was not to be subject to any parliamentary procedure. The Committee agreed, however, to ask the Scottish Government whether it considered it necessary to include a requirement on the face of the Bill that the guidance issued in exercise of this power be published.

18. In response to the Committee's question, the Scottish Government explained that guidance issued under the new section 17C of the CJ Act 2003 will be published. The Scottish Government does not consider it necessary, however, to include a requirement that the guidance be published on the face of the Bill. In that regard, the Government draws a parallel between this provision and the existing provision in section 17(4) of the CJ Act 2003. Section 17(4) provides that the Scottish Ministers are to issue guidance as to the manner in which representations made under section 17(1) (release on licence) are to be framed. There is no requirement on the face of section 17 that such guidance be published.

19. The Committee notes the Scottish Government's response to its written question and absence of a requirement to publish guidance issued under the parallel power that exists at section 17(4) of the CJ Act 2003. The Committee considers, however, that the absence of a requirement to publish the guidance issued under section 17(4) is not in and of itself a reason not to include such a requirement in respect of the new section 17C(2) of that Act as inserted by section 45(2) of the Bill.

20. The Committee considers that, as a matter of general principle, where guidance is to be issued, it should be published, and a requirement to publish the guidance should be included on the face of the legislation conferring the power. The guidance to be issued under the new section 17C of the CJ Act 2003 will be used by members of the public in order to assist them in framing representations that they wish to make in respect of decisions that may affect them. The Committee considers it to be important that such guidance is made publicly available in order that it can serve that purpose and that, as such, there should be a requirement on the face of the Bill that the guidance be published.

21. The Committee draws the power in section 45(2) of the Bill to the attention of the Parliament. The Committee recommends that section 45(2) be amended at Stage 2 so as to include a requirement that guidance issued under the new section 17C(2) of the Criminal Justice (Scotland) Act 2003 be published.

ANNEX

Correspondence with the Scottish Government—

On 5 August 2014, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

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

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative procedure

1. Section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) provides a right of appeal against detention in conditions of excessive security to patients held in hospitals other than a state hospital. Such a right is available to “qualifying patients” in a “qualifying hospital”, however the meaning of each of those terms is left to be defined in regulations made by Scottish Ministers under sections 268(11) and (12).

2. Section 11 of the Bill makes a number of amendments to section 268 of the 2003 Act. Together with section 12, the Bill reformulates the right of appeal against detention in conditions of excessive security for patients other than those held in a state hospital. The 2003 Act continues to provide that the right of appeal is available to patients in a “qualifying hospital”, but section 12(3) of the Bill inserts a new section 272A into the 2003 Act which provides that a “qualifying hospital” is a hospital other than a state hospital which falls within such further meaning (if any) as is given to that expression by regulations. The right of appeal therefore appears to be conferred upon patients in all hospitals other than a state hospital, with the possibility that regulations could be made which restrict that right by further defining the expression “qualifying hospital”.

3. The Committee asks the Scottish Government:

- **To clarify the intended use of this power. In particular, the Committee asks the Scottish Government to explain whether it is intended that, in the event that regulations giving further meaning to the expression “qualifying hospital” are *not* made by the Scottish Ministers, the effect of the new section 272A(1) is that the right of appeal will be available to patients detained in all hospitals other than a state hospital?**
- **Why, if the Scottish Government agrees with that interpretation of the power, it is considered appropriate as a matter of principle to qualify the application of the right of appeal provided for in the new section 272A(1) of the 2003 Act in subordinate legislation, as opposed to specifying on the face of the Bill those patients to whom the right will (and will not) apply?**

4. Section 272A(3) provides that regulations may make further provision as to the operation of sections 268 to 271 of the 2003 Act in particular circumstances.

5. The Committee asks the Scottish Government:

- **Whether it can provide examples of the “particular circumstances” in respect of which regulations made in exercise of the power in the new section 272A(3) of the 2003 Act (as inserted by section 12(3) of the Bill) may apply?**

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

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure

Section 48 – Power to make modifications

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure

6. Section 43(3)(b) of the Bill amends section 16 of the Criminal Justice (Scotland) Act 2003. Section 48(2) of the Bill inserts a new section 18B into that Act. Section 16 as amended and the power in the new section 18B(1)(c) both permit the modification of the new section 18A of the Criminal Justice (Scotland) Act 2003 (as inserted by section 47(2) of the Bill).

7. The Committee asks the Scottish Government:

- **Why it is considered necessary to take two separate powers to modify section 18A of the Criminal Justice (Scotland) Act 2003: the power in section 43(3)(b) and the power in the new section 18B(1)(c) as inserted by section 48(2) of the Bill?**
- **Whether the Scottish Government considers that it would be clearer to consolidate these two provisions into a single provision?**

Section 45(2) – Right to make representations

Power conferred on: the Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: none

8. The new section 17B of the Criminal Justice (Scotland) Act 2003 (as inserted by Section 45 of the Bill) affords a victim who is to be given information by virtue of the victim notification scheme a right to make representations before certain decisions are taken in respect of the offender.

9. The new section 17C(2) of the Criminal Justice (Scotland) Act 2003 obliges Scottish Ministers to issue guidance as to how written and oral representations which are made by victims or their families under the new section 17B are to be made. The guidance will be published on the websites of both the Scottish Government and the Scottish Courts and Tribunals Service. However, there is no

requirement for publication of the guidance that is issued on the face of the Bill, but simply a statement to that effect in the Delegated Powers Memorandum.

10. The Committee asks the Scottish Government whether it considers it necessary to include a requirement that the guidance issued in exercise of this power is published on the face of the Bill?

On 19 August 2014, the Scottish Government responded as follows:

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

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: affirmative procedure

Committee question:

To clarify the intended use of this power. In particular, the Committee asks the Scottish Government to explain whether it is intended that, in the event that regulations giving further meaning to the expression “qualifying hospital” are *not* made by the Scottish Ministers, the effect of the new section 272A(1) is that the right of appeal will be available to patients detained in all hospitals other than a state hospital?

Why, if the Scottish Government agrees with that interpretation of the power, it is considered appropriate as a matter of principle to qualify the application of the right of appeal provided for in the new section 272A(1) of the 2003 Act in subordinate legislation, as opposed to specifying on the face of the Bill those patients to whom the right will (and will not) apply?

Scottish Government response:

The Scottish Ministers policy is to make provision for those patients held within a medium secure setting. The power in section 12 (3) is intended to enable regulations to be made by Scottish Ministers which will cover a wide variety of situations and conditions that do not fit easily within a definition referring to a particular level of security. This reflects the position that what constitutes medium security within a particular hospital is not consistent in all locations across the mental health estate in Scotland. The conditions of security in which a patient is held may also alter to reflect the needs of individual patients.

The Scottish Ministers intention is that the regulations will define qualifying hospitals by name (there are currently three units which offer “medium secure” settings). In addition the regulations will define a set of restrictions to which a patient within such a unit may be subject.

In the absence of such regulations it is correct that the section would operate to give a right of appeal to all patients who are not detained within the state hospital, although the Scottish Government is planning to make regulations using this new power, and a draft of these will be made available in early course. It is intended that the right of appeal will be afforded to patients within the medium secure units of “qualifying hospitals” which will be defined in regulations. As discussed in

paragraphs 62 and 63 of the policy memorandum the policy is not intended to extend to patients detained in “low secure” units.

It was thought appropriate to take this power, instead of specifying on the face of the bill those patients to whom the right to appeal will and will not apply because the description of what constitutes a medium level of security within the mental health estate will vary amongst establishments and parts of establishments and determining what constitutes an appropriate level of security is complex and better set out in regulations. In addition taking a power will allow the legislation to adapt as the provision within the hospital estate changes in future.

Paragraph 66 of the policy memorandum also sets out an alternative approach which was considered but rejected on the basis that it would cause delay. The approach taken in the bill allows the creation of an effective appeal within a shorter timescale.

Committee question:

Whether it can provide examples of the “particular circumstances” in respect of which regulations made in exercise of the power in the new section 272A(3) of the 2003 Act (as inserted by section 12(3) of the Bill) may apply?

Scottish Government response:

It is intended that subsections (11) – (14) of section 268 will be repealed by the bill (see section 11(2)(f) of the bill. Inserted section 272A replaces those provisions of section 268 which it was thought not fit for purpose in the context of the mental health estate within Scotland.

This is a complex area and the Scottish Government intend to undertake further discussion with stakeholders to help inform secondary legislation in this area. The consultation on the excessive security provisions undertaken last year made it clear that there is currently no consensus on the way forward, but it was clear that the existing provisions were deemed not to be fit for purpose (see policy memorandum paragraph 65).

Section 272A(3) is designed to ensure that there are no gaps left in the new provisions made under section 272A (2) and (4) and is necessarily wide since its purpose is to ensure that the existing provisions of the Act can be made to work in the wide variety of circumstances within the medium secure estate.

In particular the power is necessary to ensure that any circumstances or arrangements which are not in current contemplation can be provided for as appropriate. It is anticipated that such issues will emerge in greater detail during the development of the draft regulations mentioned above.

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure

Section 48 – Power to make modifications

Power conferred on: the Scottish Ministers
Power exercisable by: order
Parliamentary procedure: affirmative procedure

Committee question:

Why it is considered necessary to take two separate powers to modify section 18A of the Criminal Justice (Scotland) Act 2003: the power in section 43(3)(b) and the power in the new section 18B(1)(c) as inserted by section 48(2) of the Bill?

Whether the Scottish Government considers that it would be clearer to consolidate these two provisions into a single provision?

Scottish Government response:

Legislative propositions can always be expressed in a variety of ways. The Scottish Government takes the view that the drafting approach taken by the bill is the clearest way to present the powers being conferred.

The power to modify section 18A to add or remove definitions is an adjunct to the powers to amend sections 16, 16A, 16C and 17B of the Criminal Justice Act.

Section 18A will be amended either because a clause has been added to one of those sections which uses a word or expression that needs to be defined, or because one of those sections has been amended so that it no longer uses a term defined in section 18A thereby rendering the definition redundant.

The Government takes the view that it would be artificial to present the power to amend section 18A as a single freestanding power in its own section. It would, moreover, mean that anyone amending section 16, 16A, 16C or 17B would have to know to look at two sections (i.e. the section conferring the power to make the principal amendment and the section conferring the power to amend section 18A) rather than one.

Section 45(2) – Right to make representations

Power conferred on: the Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: none

Committee question:

To ask the Scottish Government whether it considers it necessary to include a requirement that the guidance issued in exercise of this power is published on the face of the Bill?

Scottish Government response:

The Government does not consider it necessary to impose a statutory requirement to publish guidance issued in exercise of proposed section 17C(2) of the Criminal Justice Act. The policy aim of issuing guidance would be to encourage people to make their representations in the manner suggested in the guidance and the Scottish Government therefore intends to publish the guidance to enable this to happen.

There is direct parallel in this case with section 17(4) of the Criminal Justice (Scotland) Act 2003, which requires the Government to issue guidance about the way that victims should make representations to the Parole Board. That provision was recently amended by the Parliament through the Victims and Witnesses (Scotland) Act 2014. There is no statutory requirement for guidance issued under section 17(4) to be published. The provision which the Scottish Government has taken in this bill makes is therefore symmetrical with the equivalent provisions in the victims and witnesses provisions.

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