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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 3 October 2023



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(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;

(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.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 3 October, the Committeeⁱ considered the following instrument under its remit and agreed to draw it to the attention of the Parliament:
 - Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)
2. The Committee's recommendations in relation to this instrument are set out in the next section of this report.
3. The Committee also determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments at the end of the report.

ⁱ Rona Mackay MSP substituted for Stuart McMillan MSP

Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the Parliament

Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)

4. The instrument relates to a new “medium secure” mental health hospital which is due to open in January 2024 - the National Secure Adolescent Inpatient Service in Irvine.
5. It will be a hospital for children and young people aged 12 to 17 inclusive who are subject either to compulsory care and treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003, or are subject to a relevant order made by a criminal court (Part VI of the Criminal Procedure (Scotland) Act 1995).
6. In correspondence with the Scottish Government, the Committee asked for more information on whether consideration had been given to the appropriateness of applying to under 18s, without modification, a set of conditions for the right of appeal against being held in excessive security which appeared to have been designed with adults in mind.
7. Having considered the Scottish Government's response, the Committee was satisfied that due consideration had been given to this matter.
8. The Committee also highlighted that the title of the instrument appears unusual, particularly the use of a colon.
9. In its response, the Scottish Government stated that the use of the colon is a suitable choice because it links the two sections of connected text. Nevertheless, the Committee considered that it is unusual to use a colon in the title of the instrument and that this should be discouraged. The Committee considered that consistency in the naming conventions of instruments is desirable, and that it would have been more usual to have brackets around “Miscellaneous Amendments”.
10. A copy of the correspondence can be found in the **Annex**.
11. The lead committee for this instrument is the Health, Social Care and Sport Committee.
12. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground, in that the title of the instrument is not in line with standard drafting practice.**
13. **The Committee also draws its correspondence with the Scottish Government to the attention of the Health, Social Care and Sport Committee, for its information, in relation to the additional material**

provided by the Scottish Government in its response to the Committee's first question.

No points raised

Education, Children and Young People Committee

Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2023 (SSI 2023/267)

Equalities, Human Rights and Civil Justice Committee

Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Amendment Regulations 2023 (SSI 2023/266)

Net Zero, Energy and Transport Committee

Heat Networks (Supply Targets) (Scotland) Regulations 2023 (SSI 2023/Draft)

Annex

Mental Health (National Secure Adolescent Inpatient Service: Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/Draft)

On 22 September 2023, the Committee asked the Scottish Government:

1. Regulation 3 of the instrument designates the NSAIS as a “qualifying hospital” for the purposes of section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Under section 268 there is a statutory right to apply to the Mental Health Tribunal to challenge the level of security under which a patient in a qualifying hospital is being held. It appears that the other qualifying hospitals are for adults, or in any event that NSAIS will be the first qualifying hospital which is exclusively for children and young people (aged 12 to 17 inclusive). Under the instrument, the conditions for an appeal set out in section 268, as they apply to adults, will apply without modification to children and young people. This includes the restriction that only one application may be made per year in respect of the same patient (s. 268(8)). The documents accompanying the instrument do not mention if consideration was given to whether these are the appropriate conditions for an appeal by a child or young person. Could further information be provided in this regard?
2. The title of the instrument appears unusual, particularly the use of the colon. Is this in line with current standard drafting practice?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 26 September 2023, the Scottish Government responded:

1. The proposal to apply section 268 of the Mental Health (Care and Treatment) (Scotland) Act 2003, enabling children and young people held in the new National Secure Adolescent Inpatient Service (“NSAIS”) to apply for a declaration that they are being held in conditions of excessive security, was included in a targeted consultation in Autumn 2022. At present, children and young people detained in conditions of medium security in “qualifying hospitals” may make such applications. The consultation responses were thoroughly reviewed. On the issue of extending the Mental Health (Detention in Conditions of Excessive Security) (Scotland) Regulations 2015 to patients in the NSAIS, stakeholders expressed broad support. DPLRC/S6/23/27/2 14 Careful consideration was given to this and other aspects of the policy proposals and the Scottish Government considers them lawful and appropriate.

Treatment interventions for children and young people who require this level of security will not be brief interventions, with the average length of stay within the NSAIS being 12-18 months. The appeal process is a rigorous and thorough process and the timeframes suggested within current regulations seem appropriate and proportionate and therefore no further amendments would be required for children and adolescents at the NSAIS. If an appeal against excessive security is not upheld then this means all evidence relating to the clinical decision for a child or young person requiring medium secure inpatient care has been acquired and examined and deemed appropriate. Education, psychological interventions and other therapies require longer term interventions. The process of ensuring all care needs are met and risks are reduced with a view to ensuring robust discharge plans or transfer of care arrangements are by themselves involved processes.

This would be in keeping with the Getting It Right For Every Child (GIRFEC) National Practice Model which sets out a shared framework and approach to identification, assessment and analysis of a child or young person's wellbeing needs. Under UNCRC right 25. If you are being looked after away from home. Your situation should be regularly reviewed to make sure you are getting good treatment and care - The NSAIS will be well equipped with a huge focus on education and psychological interventions and ensuring best care, tailored to individual needs and above all safeguarding the child and others from harm. This supports right 23 If you have a mental or physical disability you should get the education, care and support you need to lead a full and independent life to the best of your ability.

Care and treatment of each individual will be managed under the Care Programming Approach which is a legal framework requiring regular review and holds accountability for RMOs, local authorities and all disciplines and agencies to clearly outline the care plan and justification for any restrictive measures with a clearly defined progress plan.

2. The title of the instrument briefly and accurately reflects its content, and incorporates all elements necessary in the title of an instrument. It therefore reflects current drafting practice. The National Secure Adolescent Inpatient Service is a new service, and its name accurately reflects its function. Inclusion of the name of the service in the title of the instrument is considered helpful for the user of the legislation. The use of the colon in the title is also considered appropriate. It is a suitable choice as it links the two sections of connected text. The miscellaneous amendments made to two sets of Regulations are effected as part of the creation of the National Secure Adolescent Inpatient Service.

3. No corrective action is proposed.

