



The Scottish Parliament
Pàrlamaid na h-Alba

Published 20 December 2023
SP Paper 501
77th Report, 2023 (Session 6)

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

Delegated powers in the Abortion Services (Safe Access Zones) (Scotland) Bill at Stage 1



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Textphone: 0800 092 7100
Email: sp.info@parliament.scot

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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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Oliver Mundell
Scottish Conservative
and Unionist Party



Colin Smyth
Scottish Labour

Introduction

1. At its meeting on 12 December 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Abortion Services \(Safe Access Zones\) \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

Overview of the Bill

3. This is a Member's Bill which was introduced by Gillian Mackay MSP ("the Member-in-charge") on 5 October 2023. The Lead Committee is the Health, Social Care and Sport Committee.
4. The stated aim of the Bill is to create safe access zones around "protected premises" that provide abortion services. The Bill sets out that a building that is a hospital or forms part of a hospital at which abortion services are provided, or a place that is approved under section 1(3) of the Abortion Act 1967 ("the 1967 Act") for the purposes of that section will be defined as "protected premises". The Bill establishes a "safe access zone" for each protected premises as described above, which includes the public area of the grounds of the protected premises and each public area of land within 200 metres of the edge of the protected premises. In those zones, behaviour which amounts to influencing, preventing access, or causing harassment to those accessing services is an offence.

Delegated powers

5. The Bill confers three powers to make subordinate legislation on the Scottish Ministers and one power to issue guidance.
6. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) on behalf of the Member-in-charge, which sets out the reasons for taking the delegated powers in the Bill and for the procedure chosen.

Review of relevant powers

Section 10: Power to modify meaning of “protected premises”

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

7. Section 1 of the Bill defines what is meant by “protected premises”. Section 1 provides that “protected premises” means a building that is or forms part of an NHS hospital at which abortion services are provided, or a place that is approved under section 1(3) of the Abortion Act 1967 for the purposes of that section. However, it does not include a place forming part of a “class of place” that is so approved under that section (at present, an example of an approved “class of place” under that section not covered by the Bill is a “pregnant woman’s home”). Section 1(3A)(a) of the 1967 Act provides that the power in section 1(3) of that Act includes the power to approve a class of place.
8. The delegated power in the Bill of interest to the Committee, section 10(1), enables the Scottish Ministers to amend the definition of “protected premises”. Section 10(1)(a) provides that Scottish Ministers may in the future, by regulations, include a class of place that is approved under section 1(3) of the 1967 Act in the definition of “protected premises”. As outlined above, classes of places approved under section 1(3) of the 1967 Act are currently excluded from the definition in the Bill.
9. Section 10(1)(b) also enables the Scottish Ministers to, by regulations, include a building or place at which treatment or services relating to abortion services are provided, in the definition of “protected premises”.
10. Scottish Ministers may only exercise the power in section 10(1)(b) if they consider that it is necessary to establish a safe access zone in relation to that building or place to protect persons who are accessing, providing or facilitating the provision of treatments or services relating to abortion services at the building or place against the acts which the Bill deems an offence.
11. Before laying draft regulations under section 10(1)(b), the Scottish Ministers must consult the provider of the treatments or services at the building or place, or the operator of the building or place. If Scottish Ministers consider it appropriate, they must also consult the Health Board and local authority in whose area the building or place is situated, and any other person they consider has an interest in the building or place becoming protected premises.
12. Any regulations made under section 10(1) would be subject to the affirmative procedure.
13. Any regulations made under section 10(1) may make incidental, supplementary, consequential, transitional, transitory or saving provision and may make different provision for different purposes. Regulations made under section 10(1)(b) may also

modify the Act flowing from this Bill where such modification is consequential to the modification of the definition of “protected premises”.

Committee consideration

14. Section 1(3) of the 1967 Act enables the Scottish Ministers to approve a place, other than an NHS hospital, for the treatment for the termination of pregnancy. This could be used, for example, to approve a private hospital for this purpose. This has already been done in respect of Rosshall Hospital in Glasgow. This hospital therefore already falls within the definition of “protected premises”. The 1967 Act also enables the Scottish Ministers to approve a class of place. This power was used during the pandemic to approve a “pregnant woman’s home” as a class of place, as a temporary measure. The temporary measure has remained in place with revisions which enable early medical abortions to be carried out at a pregnant woman’s home without reference to the threat of coronavirus. That “class of place” is therefore outwith the definition currently provided for in the Bill.
15. The regulation making power would allow the Scottish Ministers to include a class of place which is approved in the future in the definition. The DPM explains that the approval power has not yet been used in respect of clinical settings. The Committee considers that it is foreseeable that a class of place could be approved in respect of a clinical setting in the future, and it may therefore be appropriate that regulations could be made to include those settings in the definition currently provided in the Bill.
16. The power would also allow the Scottish Ministers to include in the definition a building or a place where that building or place provides treatments or services relating to abortion. The DPM explains that this would not be buildings or places that provide treatment for the termination or pregnancy, instead it could be associated services or treatment such as counselling.
17. Regulations made by the Scottish Ministers must be compatible with the European Convention on Human Rights (“Convention Rights”). The Committee acknowledges that designating safe access zones around certain premises could raise compatibility questions around the balancing of protestors’ freedom of expression and freedom of assembly and association rights under Articles 10 and 11 with a person’s right to private life under Article 8. This Committee would consider such matters if and when this power is exercised.
18. The Committee considers that the delegation of this power is appropriate. It is clear why the power is required and is reasonably foreseeable that it will be used. If a class of place is approved under the 1967 Act to provide treatment for the termination of pregnancy, it would seem appropriate that those places are included in the definition of “protected premises” given the stated purpose of the Bill. The power is also limited in that the Scottish Ministers may only make regulations in respect of a building or place at which treatment or services relating to abortion services are provided if they consider it is necessary to establish a safe access zone in relation to that building to protect persons who are accessing, providing or facilitating the provision of treatments or services relating to abortion services at the building or place against an act which this Bill deems an offence. Again, it appears to the Committee that this would be in line with the stated purpose of the Bill, and therefore it is not considered that it would be a good use of parliamentary time to use primary legislation to update these matters if it became necessary.

19. The affirmative procedure appears appropriate given the potential significance of the measures such regulations could introduce. The affirmative procedure will give the Parliament an opportunity to ensure it is content that such regulations strike the right balance between Convention Rights.
20. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 11 – Ministerial guidance

Power conferred on: Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

21. Section 11 provides that an operator of protected premises (or proposed protected premises) must have regard to any guidance given by the Scottish Ministers in relation to protected premises (or proposed protected premises) and the establishment, extension, reduction or cessation of safe access zones for protected premises.
22. Section 11(2) provides that the Scottish Ministers must publish any such guidance, and may revise or revoke that guidance.
23. Guidance issued by the Scottish Ministers would not be subject to any parliamentary procedure.

Committee consideration

24. The DPM states that guidance issued by the Scottish Ministers is intended to provide support to operators of protected premises, or proposed protected premises, and will highlight matters in greater detail than is considered appropriate for legislation. It states that such guidance may include information for operators on how to apply for an extension of a safe access zone, examples of when an application for extension may be appropriate and the information that an application for extension would be expected to contain.
25. The Committee has recently been considering carefully powers to publish guidance, especially where there is a requirement to “have regard” to such guidance, and whether those powers should be subject to some form of parliamentary procedure. In this instance, it appears to the Committee that the power to issue guidance will be used to provide information on how to make applications under the Bill, and where that may be appropriate, rather than to place any substantive obligations on the operator. Given the detail on the face of the Bill, it is also not considered that it is likely that guidance could be issued to make substantive provision in relation to the operation of protected premises. The Committee therefore considers it disproportionate to make such guidance subject to any parliamentary procedure.

26. **In light of the above, the Committee is content with the power to issue guidance in section 11, and that such guidance would not be subject to parliamentary procedure.**

Section 12: Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if adding to, replacing or omitting any part of the text of an Act; otherwise negative

Provision

27. Section 12 makes standard ancillary provision, giving the Scottish Ministers the power to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Act flowing from the Bill.
28. By virtue of section (2), regulations made under section 12 may modify any enactment, including the Act flowing from this Bill.
29. Section 12(3) provides that the affirmative procedure will apply where regulations amend primary legislation, and that otherwise the negative procedure will apply.

Committee consideration

30. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it.
31. The power allows issues of an ancillary nature which may arise to be dealt with effectively by the Scottish Ministers. Without such a power, any changes would require to be made by primary legislation, which would not be an effective use of either the Parliament's or the Scottish Government's resources.
32. For these reasons, the Committee is content that the power is appropriate in principle.
33. The Committee is also content that the affirmative procedure applies to any provision made which modifies primary legislation and that otherwise the negative procedure applies. This is standard for ancillary provision.

34. **The Committee finds the power acceptable in principle and is content with the specified parliamentary procedures which are dependent on whether or not the power is exercised to amend primary legislation.**

Section 15: Commencement

Power conferred on: Scottish Ministers**Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Laid, no further procedure***Provision*

35. Section 15 makes commencement provision. The following provisions of the Bill come into force the day after Royal Assent: sections 12, 13, 14, 15 and 16.
36. The delegated power is contained in section 15(2), which provides that the Scottish Ministers can, by regulations, appoint when the other provisions of the Bill are to come into force.
37. Such regulations are to be laid before the Parliament but are not subject to any parliamentary procedure.

Committee consideration

38. It is standard to take a power at the end of a Bill to commence those sections of the bill where provision has not been made in the Bill for commencement. This allows the Scottish Ministers to appoint the day on which those sections are to be commenced. The Committee is therefore content with the power in principle.
39. It is also standard that commencement regulations are laid before the Parliament but not subject to further parliamentary procedure.

40. **The Committee finds the power acceptable in principle and is content that it is not subject to any parliamentary procedure.**

