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

Delegated powers in the Assisted Dying for Terminally Ill Adults (Scotland) Bill at Stage 1



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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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Membership changes

1. The following changes to Committee membership occurred during the course of the Committee's scrutiny of the delegated powers in the Assisted Dying for Terminally Ill Adults (Scotland) Bill:
 - on 29 May 2024, Jeremy Balfour MSP replaced Oliver Mundell MSP,
 - on 4 September 2024, Daniel Johnson MSP replaced Foysol Choudhury MSP.

Introduction

2. At its meetings on 28 May and 10 September 2024, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Assisted Dying for Terminally Ill Adults (Scotland) Bill ("the Bill") at Stage 1.
3. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
4. This Members' Bill was introduced by Liam McArthur MSP on 27 March 2024. The lead committee is the Health, Social Care and Sport Committee.
5. The Bill consists of 33 sections and 5 schedules. The Policy Note states that the aim of the Bill is "to allow mentally competent terminally ill eligible adults in Scotland to voluntarily choose to be provided with assistance by health professionals to end their lives".
6. The Bill proposes to achieve this by: -
 - providing a lawful basis for the provision of assistance to a terminally ill eligible adult to end their own life,
 - setting out the criteria which must be met and the procedural steps which must be taken before such assistance can be provided; and
 - setting out the process for the provision of end-of-life assistance,
7. In addition, the Bill: -
 - makes clear that no one will be compelled to participate in the assisted dying process if they have a conscientious objection to doing so;
 - provides that it is not a crime to provide an eligible person with assistance where the requirements of the Bill have been met, and that there is also no equivalent civil liability;
 - sets out the process which must be followed after death has been brought about with assistance;
 - provides that it will be an offence to coerce or pressure a terminally ill adult into requesting an assisted death, and
 - makes provision regarding the collection and reporting of data, the publication of an annual report, and a requirement to review the Act after five years of operation.

Delegated Powers

8. The Bill confers ten powers to make subordinate legislation on the Scottish Ministers.
9. The Member-in-charge has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.
10. At its meeting on Tuesday 28 May, the Committee agreed to write to the Member-in-charge to raise queries in relation to five of the delegated powers in the Bill. The Committee [wrote](#) to the Member on 4 June and received a [response](#) on 27 June.

Review of relevant powers

Section 4(5)(a): Request for assistance: first declaration

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: First regulations affirmative, any subsequent regulations negative

Provision

11. Section 4 sets out the first step in the process which a person must follow before they can be provided with assistance to end their own life under the Bill.
12. The person must make a “first declaration” which must be signed by them (or by a proxy, if the requester is unable to sign the form themselves) and must be witnessed by the “co-ordinating registered medical practitioner” and another witness.
13. The coordinating registered medical practitioner is the doctor who will oversee the assisted dying process for a particular person. They will be the first of two doctors who will assess whether a person can be provided with assistance to end their life.
14. The Bill provides that the coordinating registered medical practitioner must witness the signing of the first and second declaration forms, attend on the day of the planned death, provide an approved substance to the terminally ill adult with which they can end their own life, complete a final statement after an assisted death, and record all relevant forms on the person’s medical records.
15. Section 4(5) defines a “coordinating registered medical practitioner” as “a registered medical practitioner who has such qualifications and experience as the Scottish Ministers may by regulations specify” and who has confirmed with the terminally ill adult that they are willing to act as the coordinating registered medical practitioner.
16. The power being delegated is the power to specify what qualifications and experience a registered medical practitioner must have in order to act as a “co-ordinating registered medical practitioner”.

Committee consideration

17. The Committee asked the Member-in-charge:
 1. why there is no statutory requirement to consult certain specific persons/bodies (such as the General Medical Council or the Chief Medical Officer for Scotland); and
 2. why it is considered appropriate that only the first exercise of these powers will be subject to the affirmative procedure.
18. In his response, the Member-in-charge explains that:

1. The consultation requirement is intended to ensure that those best placed to provide advice are consulted prior to making regulations under these sections. Whilst it is highly likely that the General Medical Council and Chief Medical Officer for Scotland will be amongst those consulted, the Member does not consider it necessary to make this subject to a statutory requirement.
2. It is anticipated that the first regulations made under these sections will be significantly more substantial than subsequent regulations which will be used to adjust the first (or “parent”) regulations. The use of negative procedure on subsequent use therefore provides an appropriate level of scrutiny.
19. Given that the Member-in-charge considers it “very likely” that the Chief Medical Officer for Scotland and the General Medical Council will be amongst those consulted, the Committee considers that adding a statutory requirement to do so would be appropriate.
20. Regarding the procedure applicable, the Committee was satisfied with the Member’s additional explanation.
21. **Given that it is “very likely” that the Chief Medical Officer for Scotland and the General Medical Council will be consulted in any event, the Committee recommends that the Bill be amended at Stage 2 to include a statutory requirement to do so before regulations are made under these powers. It is content with the choice of procedure.**

Section 5(3): Requirement for proof of identity

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

22. Section 5 requires a terminally ill adult to provide two forms of proof of identity to the coordinating registered medical practitioner and witness when making a first declaration to request assistance to end their life. This is to enable the coordinating registered medical practitioner and witness to establish the requesting person’s identity.
23. Section 5(3) gives Scottish Ministers the power to make regulations to specify what forms of proof of identity are acceptable for this purpose.

Committee consideration

24. The Committee considers that this is a matter of administrative detail, which it is appropriate to specify in secondary legislation.

25. **The Committee finds the power acceptable in principle and is content that it**

is subject to the negative procedure.

Section 6(6)(a): Medical practitioners' assessments

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: First regulations affirmative, any subsequent regulations negative

Provision

26. Section 6 makes provision for two registered medical practitioners to independently assess whether a terminally ill adult who has made a first declaration meets the requirements under the Bill to be provided with assistance to die. The coordinating registered medical practitioner must first assess the person and, if satisfied, refer them to an independent registered medical practitioner for a second assessment. The purpose of the second assessment is to establish whether the person is terminally ill (i.e. that they are suffering from an advanced and progressive disease, illness, or condition from which they are unable to recover and that can reasonably be expected to cause their premature death), has sufficient capacity to make the request, and is acting of their own free will, absent coercion or pressure.
27. Section 6(6)(a) mirrors the provision in section 4(5)(a). It enables the Scottish Ministers to make regulations specifying what qualifications and experience a registered medical practitioner must have in order to fulfil the role of "independent registered medical practitioner" as provided for by the Bill.

Committee consideration

28. The Committee asked the Member-in-charge the same questions and answers as set out at paragraph 17 and 18 above in relation to the mirrored power at section 4(5)(a).
29. Its consideration of that power applies equally to this power.

30. **Given that it is "highly likely" that the Chief Medical Officer for Scotland and the General Medical Council will be consulted in any event, the Committee recommends that the Bill be amended at Stage 2 to include a statutory requirement to do so before regulations are made under these powers. It is content with the choice of procedure.**

Section 15(8): Provision of assistance

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

31. Section 15 of the Bill makes provision to enable a terminally ill person to secure their own clinically assisted death by being provided with “an approved substance”. Section 15(8) defines “approved substance” as “such drug or other substance as is specified by the Scottish Ministers by regulations”. It therefore confers power on the Scottish Ministers to approve a substance which may be used for that purpose.

Committee consideration

32. The Committee queried why this power is not subject to a statutory requirement to consult the Chief Medical Officer for Scotland.
33. The Member explained that whilst he “fully expect[s]” that the Chief Medical Officer would be amongst the persons consulted, he does not consider it necessary to be prescriptive regarding the persons to be consulted.
34. As with the powers in sections 4(5)(a) and 6(6)(a), the Committee considers it would be appropriate to add a statutory consultation requirement for Ministers to consult the Chief Medical Officer for Scotland before using the power delegated by section 15(8).

35. **Given that it is “expected” that the Chief Medical Officer for Scotland will be consulted in any event, the Committee recommends that the Bill be amended at Stage 2 to include a statutory requirement to do so before regulations are made under this power. It is content with the choice of procedure.**

Section 23(1): Guidance

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Provision

36. Section 23(1) enables the Scottish Ministers to prepare and publish guidance regarding the operation of the Act. Section 23 allows the Scottish Ministers to issue guidance regarding the practical operation of the Act. Ministers must consult (under subsection (3)) anyone they consider appropriate when preparing guidance (for example, this could include health professionals, related regulatory and representational bodies and third sector organisations). Subsection (4) provides that a person carrying out any function under the Bill must have regard to any guidance issued by the Scottish Ministers under this section.

Committee consideration

37. Subsection (2) sets out that such guidance may include provision about various aspects of the Bill, including (but not limited to) the carrying out of assessments under, the making and cancellation of first and second declarations, the provision of assistance in accordance with section 15, the making of final statements, and

information about the lawful provision to terminally ill adults of assistance to end their own lives (including information to be provided to such adults and to the general public).

38. The Explanatory Notes (para 53) state that such guidance is expected to be of a practical nature (for example, guidance for individuals witnessing a first declaration, for doctors around the requirement for proof of identity, how the period for reflection is intended to work and other such requirements under the process set out in the Bill).
39. The Committee accepts the position as stated in the DPM, namely that it would appear prudent to give the Scottish Ministers a power to issue guidance on practical operational matters. Guidance is not normally subject to any form of Parliamentary procedure, as is the case here.

Recommendation

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

Section 24(5): Provision of information by Public Health Scotland to Scottish Ministers

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

41. Section 24 requires Public Health Scotland (PHS) to report specified information annually to the Scottish Government. The information required is set out in section 24(2) and relates to the number of declarations made and the number of assisted deaths that take place. The data is to be broken down by various characteristics set out in section 24(3). The report is also to include, where known, reasons given by terminally ill adults for requesting, or cancelling a request, for being provided with assistance to end their life.
42. Section 24(5) enables the Scottish Ministers to amend (add, vary, or remove) the information that PHS must include in the report, as set out in section 24(2), and/or the characteristics by which the data must be broken down, as set out in section 24(3). The purpose of the PHS report is to inform annual reports, and a five-year review report, which the Bill requires the Scottish Government to publish (see sections 26 and 27). Section 24(4) states that the PHS report to the Scottish Ministers must not contain information that would, or might, disclose the identity of a person. In other words, the information provided to the Scottish Government by PHS must be anonymous. Therefore, any subsequent regulations must not amend the information and/or characteristics to be reported in any way that disclosed the identity of a person.

Committee consideration

43. The Committee considers that the amendment of the information that PHS must include in the report and/or the characteristics by which the data must be broken down are matters of operational detail, which may be appropriately left to regulations.

44. **The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 25(1): Provision of information to Public Health Scotland

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

45. Section 25(1) requires the Scottish Ministers to make regulations for the provision of information to PHS (for example, by medical practices, RMPs and other health professionals, and other parts of the NHS, such as Health Boards) which will inform the report that PHS must make each year to Scottish Ministers (under section 24).

46. Subsection (2) sets out that such regulations may include provision about what information is to be provided, who should provide it, and any circumstances in which information must, or may not, be provided. Subsection (5) requires the Scottish Ministers to consult anyone they consider appropriate (this could, for example, include PHS, Health Boards in Scotland, and professional and other representative bodies) before making the regulations. Section 28 provides that such regulations will be subject to the affirmative procedure in the Scottish Parliament.

47. Subsection (3) enables regulations made under subsection (1) to include provision setting out the circumstances in which disclosing information provided to PHS, or the disclosure of information by PHS, is prohibited, including provision that disclosure of information despite such a prohibition is an offence. Subsection (4) provides that a person committing an offence under regulations made under subsection (1) should be subject to summary cause procedure and liable to a fine to be set out in the regulations (but not exceeding level 5 on the standard scale (currently £5,000)).

Committee consideration

48. This power is connected to the duty in section 24, which requires PHS to report to the Scottish Government on the provision of assistance to terminally ill adults to end their own lives. For PHS to be able to fulfil that duty, there requires to be a duty placed on others involved in the provision of that assistance to supply information to PHS.

49. The Bill requires various data to be gathered during the assisted dying process and added to the terminally ill adult's record. This data is to be captured on the forms set out in the schedules to the Bill. The data to be captured will include sensitive personal data relating to the terminally ill person. Section 25 and the regulations

which may be made under it will create a legal gateway, which will provide a legal basis for the supply of this information to PHS and the subsequent processing of that data. PHS is already responsible for a number of data processing and intelligence functions under various statutory schemes. For example, it currently gathers data necessary for the production of abortion statistics, which are comparable to the functions it is proposed to confer on PHS regarding assisted dying.

50. Importantly, the power is limited in that it can only be for the purpose of the preparation of the annual reports by PHS as required under section 24. As the power allows for the creation of criminal offences and provides for the processing of personal and special category data, the Committee considers that the higher degree of parliamentary scrutiny afforded by the affirmative procedure is appropriate.

51. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 30: Modification of declarations and statements

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

52. Section 30 allows the Scottish Ministers to make regulations modifying the forms set out in schedules 1 – 4 of the Bill. They are: the first declaration (where a terminally ill adult makes a first request to be provide with assistance); first medical practitioner’s statement (assessing all aspects of the eligibility of the adult, and the voluntary nature of the request); second medical practitioner’s statement (assessing eligibility regarding state of health and capacity, and the voluntary nature of the request); second declaration (where a terminally ill adult makes a second, final, request to be provided with assistance); and the final statement (which captures various details after taking an approved substance has resulted in death).

Committee consideration

53. The Committee is content that modification of the forms is a matter of administrative detail which may appropriately be left to regulations and that the negative procedure provides an appropriate level of parliamentary scrutiny.

54. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.

Section 31(1): Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

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

Provision

55. Section 31(1) enables the Scottish Ministers by regulations to make any incidental, supplementary, transitional, transitory or savings provision they consider appropriate (including modifying any enactment and making different provision for different purposes) to give full effect to the Bill or any provision made under it.

Committee consideration

56. The Committee queried why only some uses of this power will be subject to the affirmative procedure, given the significance and highly sensitive nature of the issues with which this Bill is concerned, and, by extension, the potential significance and sensitive nature of any ancillary provision which might be made under it.
57. The Member explains that this power is expected to be used to address minor and technical changes which may be required. Where the power is used to amend primary legislation, the affirmative procedure will apply. The Member considers that this approach strikes an appropriate balance between potential use of the power and Parliamentary resources.
58. It is common drafting practice to provide that ancillary powers are to be subject to the affirmative procedure only where adding to, replacing, or omitting any part of the text of an Act. The Member explains that whilst the Bill deals with a highly sensitive issue and process, it does not follow that all ancillary provision made under the Bill once enacted will be of a similarly significant and/or sensitive nature. Accordingly, the Committee considers that the choice of procedure represents a proportionate approach to parliamentary scrutiny and one which is typical for powers of this type.

59. **The Committee accepts the Member's explanation, finds the power acceptable in principle and is content with the choice of procedure.**

Section 32(2): Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

60. Section 28 (regulation-making powers), section 29 (interpretation), section 31 (ancillary provisions), section 32 (commencement) and section 33 (short title) come into force the day after Royal Assent. Section 32 enables the Scottish Ministers, by regulations, to bring the remaining provisions of the Bill into force on such day as the Scottish Ministers may appoint.

Committee consideration

61. In its letter to the Member, the Committee expressed concern that there might be a perception amongst the public that assisted dying would become available upon commencement of the Act when, in fact, it will not be possible unless and until an “approved substance” can be specified. The Committee asked what consideration the Member had given to legal transparency in this regard, and the public perception regarding the practical consequences of commencing the Act.
62. The Member has explained that the intention is to ensure that the substantive provisions of the Bill are not commenced until Ministers are confident that it can operate fully, which includes being able to specify an “approved substance” in regulations.

63. The Committee notes the Member’s response. It finds the power acceptable in principle and is content that it will not be subject to any parliamentary procedure.

Section 18: conscientious objection

Provision

64. Section 18 provides that no one, including any individual health professional, is under any legal duty to play an active, participatory role in anything authorised by the Bill.
65. Section 18 does not contain a delegated power.

Committee consideration

66. In its letter to the Member, the Committee explained that it could envisage a situation in which either the relevant Scottish Minister or another prominent individual, such as the Chief Medical Officer for Scotland (both of whom may have a role in the making for regulations under the Act) might conscientiously object to assisted dying. The Committee invited the Member’s thoughts on the potential problems which might arise in such a situation and how they might be addressed.
67. In his response, the Member reiterates the Bill does not place anyone under a duty to participate in anything to which they conscientiously object and does not envisage any prohibitive barriers to the making of regulations or the implementation of the Act in consequence of section 18.

68. The Committee notes the Member’s response, and highlights the correspondence with the Member-in-charge on this matter to the lead committee.

