ADULT SUPPORT AND PROTECTION (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Supplementary Memorandum has been prepared by the Scottish Executive to accompany the Adult Support and Protection (Scotland) Bill following Stage 2 consideration of that Bill, which concluded on 19th December 2006. It has been produced in accordance with Rule 9.7.10 of the Parliament’s Standing Orders to assist consideration by the Subordinate Legislation Committee in accordance with Rule 9.7.9.

2. It details further provisions in the Adult Support and Protection (Scotland) Bill, introduced by amendment at Stage 2, that confer powers to make subordinate legislation and a power which has been removed from the Bill. This supplementary Memorandum should be read in conjunction with the original Memorandum. It does not form part of the Bill and has not been endorsed by the Parliament.

PART 1 – PROTECTION OF ADULTS AT RISK FROM HARM

Delegated power removed from the Bill

Section 3(2) – Power to amend the ‘adult at risk’ definition

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

3. Section 3(2) of the Bill as introduced conferred a power on Scottish Ministers to amend the definition of an adult at risk by Statutory Instrument, subject to affirmative procedure.

Justification for removing this power

4. By virtue of an amendment at Stage 2, the ability of Scottish Ministers to amend the definition of an adult at risk was removed. This was done in response to a comment made by the Health Committee and ensures that if the definition requires to be amended in the future it will have to be achieved through changes to primary legislation. This is felt to be appropriate for a provision so fundamental to the purpose of the legislation.
Section 23A(2) - Power to prescribe other classes of person who are obliged to notify an adult at risk of the granting, variation or recall of a banning or temporary banning order.

Power conferred on: Lord President of Court of Session
Power exercisable by: Act of Sederunt
Parliamentary procedure: None

Justification for taking this power

5. Section 23A was introduced by amendment at Stage 2. It requires the applicant for a banning order or temporary banning order, (where he or she is not the adult at risk), or such other person as may be prescribed in Rules of Court, to deliver the documents set out at subsection (3) to the adult at risk, and to any other person with an interest in the adult’s well-being or property. This is to ensure that the adult at risk, and persons interested in the adult’s well-being and property, are notified of the granting of an order following an application by a third party and that they have possession of all the documents that are relevant for the purposes of enforcement. As it is important to avoid mistakes being made in the proper service of documents, it is considered that flexibility is necessary to enable a different person, e.g. a sheriff officer, to deliver the required documents. Proceeding in this way avoids the need for primary legislation to effect procedural changes in ensuring that the necessary persons are informed.

6. It is therefore submitted that it is appropriate for Rules of Court to determine whether delivery of the documents, as set out in subsection (3), to the adult at risk (or other person as may be specified by the sheriff) can be carried out by a person other than the applicant for the order.

7. The Rules of Court will be made by Act of Sederunt and, therefore, attract no parliamentary procedure.

PART 2 –ADULTS WITH INCAPACITY

Section 53(7) - inserts new subsection 22A(2)(b) in the 2000 Act.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

8. Section 22A provides for the revocation of powers of attorney. Section 22A(2)(b) provides that revocation of a power of attorney must incorporate a certificate in the prescribed form by a practising solicitor or by a member of another prescribed class that he has interviewed the granter immediately before the granter subscribed the document; he is satisfied that at the time the revocation is made the granter understands its effect and he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the revocation. These two new regulation making powers link to the existing scheme for the registration of powers of attorney under the 2000 Act where Scottish Ministers may prescribe the form of the certificate and also the classes of those who can sign certificates for the registration of powers of attorney. It is anticipated that the prescribed classes of those who can sign this certificate will be the same as the prescribed classes under sections 15(3)(c) and section 16(3)(c) which are practising
members of the Faculty of Advocates and registered medical practitioners. The prescribed certificate will be slightly different as it will relate to a revocation of a power of attorney.

Justification for taking this power

9. It is appropriate that the provision to determine the classes of persons who can sign certificates be made by subordinate legislation. This will allow for flexibility to ensure that should any new appropriate classes emerge, it will be possible to expand the classes if consultees agree. This is in line with the policy objective of improving access to the 2000 Act.

10. It is appropriate for operational matters such as the provision of forms to be dealt with by subordinate legislation which will be the subject of consultation. Both reflect the current procedures in the 2000 Act relating to registration of powers of attorneys.

11. Any secondary legislation made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. The negative resolution procedure is considered appropriate as these are operational details and this reflects the procedure set out in the 2000 Act relating to the registration of powers of attorney. As a matter of practice any secondary legislation will be made after consultation with stakeholders.


12. The following supersedes paragraphs 25, 26 (as it relates to Part 3 of the 2000 Act) and 28 of the Delegated Powers Memorandum.

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

13. These sections replace the existing Part 3 of the 2000 Act, which allows an individual to apply to the Public Guardian for the authority to access funds for an adult’s day to day living expenses. There were a significant number of changes already in the Bill which are incorporated in the revised Part 3 of the 2000 Act. The revised Part 3 also includes further amendments to allow for the opening of bank accounts, the authorisation of a wider range of one-off transfers and withdrawals, a key change to how organisations may apply and how their fitness is to be judged and the possibility of using a third account as part of the scheme. A number of provisions relate to the power of Scottish Ministers to prescribe the form and content of registers maintained by the Public Guardian.

14. We will be consulting on the details of what is to be prescribed and the following provides an indication of what these might be. Sections 24A(2)(d), 24D(7), 25(3)(b) and 4(a), 26B(4)(a), 26D(4), 26E(3)(a), 26F(3)(a), 26G(4)(a), 27B and 27E(2) contain delegated powers.

Justification for taking this power

15. All of the delegated powers relate to operational and procedural matters for the Public Guardian and include the details which require to be registered when she grants an application under this Part, the form which a medical certificate should take and the period within which
objections must be lodged when the Public Guardian proposes to refuse an application under Part 3. Subordinate legislation is appropriate for this level of detail. It also allows the Department to consult on this detail before making the regulations. All of the delegated powers reflect the provisions in the original Part 3 of the 2000 Act dealing with an application to intromit with funds but extended to cover the wider range of applications which will be possible under new Part 3.

16. Any subordinate legislation made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This procedure is considered appropriate as subordinate legislation will set out the operational detail of the scheme rather than the scheme itself and any secondary legislation will be made after consultation with stakeholders. This also reflects the procedures set out in the original Part 3 of the 2000 Act.

17. Section 24A sets out the general purpose of intromissions with funds and the type of expenditure which may be authorised. Under section 24A(2)(d), these include any prescribed fees charged by the Public Guardian. This is not a new delegated power and is a repeat of section 28(1)(d) of the old Part 3.

18. Section 24D provides that the Public Guardian may on application authorise the opening of an account in the adult’s name if the adult has no account or does not have a suitable account for the purposes of intromitting with funds. Under section 24D(7) the applicant is required to notify prescribed details of the account to the Public Guardian once it has been opened. This is a new delegated power. It is intended to prescribe details such as name of account, fundholder, type of account, sort code and account number.

19. Section 25 provides for an application to be made to the Public Guardian for a withdrawal certificate authorising the applicant to intromit with an adult’s funds and sets out who may apply. Applications can now be made by organisations and by individuals jointly. Section 25(3)(b) provides that an application to intromit can only be granted if prescribed particulars of an account authorised to be opened under section 24D are notified to the Public Guardian. Section 25(4)(a) provides that when the Public Guardian grants an application she must enter prescribed particulars in the register. Section 25(3)(b) contains a new delegated power. The prescribed details will be the same as those required under section 24D(7) above. Section 25(4)(a) is a repeat of section 26(4)(a) of the old Part 3.

20. Section 26B provides for the making of applications to intromit with funds by joint withdrawers and, under 26B(4)(a), the Public Guardian must enter prescribed particulars in the register when granting the application. This is a new delegated power. It is intended to prescribe details of the adult, all withdrawers, the fact that they are joint withdrawers, and the date of expiry of the authority.

21. Section 26D provides for the appointment of a reserve withdrawer either at the time of the original application or at some later date on application by the main withdrawer and is designed to ensure continuity for the adult. Under 26D(4) when the Public Guardian grants the application she must enter prescribed particulars in the register. This is a new delegated power. It is intended to prescribe details of the adult, all withdrawers, whether or not they are active and the date of expiry of the authority.
22. Section 26E provides for a reserve withdrawer’s authority to act. Under 26E(3)(a) the Public Guardian must enter prescribed particulars in the register when she is notified that a reserve withdrawer requires to be authorised to intromit for a specific period. This is a new delegated power. It is intended to prescribe as with section 26D details of the adult, all withdrawers, whether or not they are active and the date of expiry of the authority.

23. Section 26F covers the variation of a withdrawal certificate. Under 26F(3)(a) when the Public Guardian decides to vary a withdrawal certificate, she must enter prescribed particulars in the register. This is a new delegated power. It is intended to prescribe that there should be recorded the fact that the certificate has been varied. In practice this would be added alongside the original entry in the register.

24. Similarly when the Public Guardian grants an application for authority to transfer funds under section 26G she must enter prescribed particulars in the register in terms of section 26G(4)(a). This is a new delegated power. It is anticipated that this will include the fact that a certificate has been granted but, as with all of the new delegated powers, we will be consulting on the extent to which particulars should be recorded.

25. Section 27B provides that medical certificates which accompany the range of applications under the new Part 3 must be in the prescribed form. This is a new power in relation to sections 24C and 24D. For applications under section 25 it is a repeat of section 26(1)(f). It is anticipated that the form would be the same or similar for all applications.

26. Section 27E(2) provides that where the Public Guardian proposes to refuse an application under Part 3, she must advise the applicant of the prescribed period within which s/he may object. This is a new power in relation to sections 24C, 24D, 26B, 26D, 26F and 26G. For applications under section 25 it is a repeat of section 26(7). It is anticipated that the period will be the same for all sections which would be 21 days.

Section 61(d) - inserts section 57 (6B)(c) in the 2000 Act

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

27. This subsection has been amended to substitute a new section 57(6B)(c) in the 2000 Act (paragraphs 29-30 of the Delegated Powers Memorandum). The purpose behind this amendment is to bring this provision in line with the language used in section 49 of the Bill on recommendation by the Subordinate Legislation Committee. It provides that the Scottish Ministers must consult the Mental Welfare Commission before making regulations under the power in this section and that the “relevant medical practitioners” must be described in the regulations by reference to skills, qualifications, experience or otherwise.

Justification for taking this power

28. It is appropriate to allow for the extension of the classes of ‘relevant medical practitioners’ who can provide a report to support a guardianship application by subordinate
legislation. This ensures flexibility should other categories emerge following the development of training. This accords with the policy objective of ensuring accessibility to the 2000 Act.

29. Any secondary legislation made under this provision will be subject to annulment in pursuance of a resolution of the Scottish Parliament. Its exercise is constrained by the terms of the primary legislation in that there is a requirement to consult the Mental Welfare Commission and because any extension to the categories must be by reference to skills, qualifications, experience or otherwise. This procedure is considered appropriate because of these constraints and the need for flexibility. In addition any secondary legislation will be made after consultation with stakeholders.

Section 61(2A) - replaces section 60(3) of the 2000 Act

Power conferred on: The Scottish Ministers  
Power exercisable by: Regulations made by Statutory Instrument  
Parliamentary procedure: Negative resolution of the Scottish Parliament

30. This new subsection of the Bill substitutes subsection (3) of section 60 of the 2000 Act to provide a simplified process for renewal of guardianship. At present the renewal process is the same as that for the initial appointment. The aim of introducing a simplified renewal process is to ensure that where the need for guardianship has been established, the renewal process should be as streamlined as possible, while still ensuring that the rights of the adult are protected. It contains delegated powers for Scottish Ministers to prescribe the forms which reports by the medical practitioner, the mental health officer and the Public Guardian must take.

Justification for taking this power

31. All of the delegated powers relate to operational and procedural matters. The level of detail required is best dealt with in subordinate legislation. They reflect the provisions in sections 53 and 57 of the 2000 Act relating to applications for intervention and guardianship orders.

32. Any secondary legislation made under these provisions will be subject to annulment in pursuance of a resolution of the Scottish Parliament. This procedure is considered appropriate as these matters are procedural and reflects what is already set out for guardianship in section 57 of the 2000 Act. As a matter of practice there would be consultation with stakeholders before subordinate legislation is made.
PART 3A: MENTAL HEALTH: MISCELLANEOUS AMENDMENTS AND REPEALS

Section 67B - Compulsory treatment orders and compulsion orders: cross-border transfer of patients etc.

Power conferred on: The Scottish Ministers  
Power exercisable by: Regulations made by Statutory Instrument  
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

33. Section 67B was introduced by an amendment at Stage 2. It amends sections 289 and 309 of the Mental Health (Care and Treatment) (Scotland) Act 2003. Section 289(1) of the 2003 Act, as passed, conferred a power on the Scottish Ministers to make regulations providing for the transfer from Scotland of patients subject to a community-based compulsory treatment order or compulsion order to a place outwith Scotland. The scope of this regulation making power has been extended through the insertion of new subsection (1)(b) of section 289 so that regulations made by the Scottish Ministers under that provision may make corresponding provision for the reception of patients on similar community-based orders into Scotland from other parts of the UK.

34. Section 67B also amends section 289 of the 2003 Act to make clear that regulations made under that provision may, or shall, make provision in relation to certain specific matters, whether relating to the transfer of patients to Scotland, the transfer of patients from Scotland, or both. These matters include allowing regulations to make exceptions to notification requirements (subsection (2XA) and allowing for powers and immunities to be conferred on persons who are escorting patients who are being moved under the regulations, or are pursuing or restraining a patient or taking a patient into custody if they abscond while being so removed (subsection 2ZA). In addition, in relation to the reception of patients in Scotland, there is a requirement for those regulations to provide for such reception to take place only with the consent of hospital managers, who undertake to appoint a responsible medical officer (subsection 2YA). Section 67B also amends section 289 so that regulations may also provide for amendments or modifications to be made to the 2003 Act or any other enactment, for example to provide that patients transferring into Scotland are formally assessed by the responsible medical officer (subsection 2ZA).

35. Consequently, section 67B also amends section 309 of the 2003 Act. Section 309 currently confers a power on Scottish Ministers to make regulations which make provision regarding absconding patients (by applying section 301 to 303 of the Act to such patients) from other jurisdictions who are subject to measures corresponding or similar to detention. Subsection (2) of section 67B extends the scope of that regulation making power so that it now includes absconding patients from other jurisdictions who are subject to compulsory measures other than detention.

Justification for taking this power

36. It is necessary to extend the existing regulation making powers under sections 289 and 309 of the 2003 Act because the Act currently makes no provision to receive on transfer into Scotland patients from other UK territories who are subject to compulsory measures in the community other than detention. This is because at the time the 2003 Act was passed there was
no similar provision relating to compulsory measures in the community applicable in those territories. However, provisions are now being made in other UK territories (for example, in the current Mental Health Bill at Westminster) which authorise community-based measures rather than detention in hospital.

37. It is accordingly necessary to extend the scope of the existing regulation making power in the 2003 Act so that regulations may make provision for possible transfers of such patients to Scotland. As a consequence of this, it is necessary to specify certain matters that the regulations may or shall make provision for.

38. Reciprocal arrangements are currently being made in the Mental Health Bill to enable the transfer of community patients from England and Wales to Scotland and it is expected that similar reciprocal arrangements will also be made in Northern Ireland, the Channel Island and the Isle of Man in due course.

39. All provision in the 2003 Act in relation to cross border matters is made by way of regulations made by the Scottish Ministers. It is considered that subordinate legislation is the most appropriate approach in order to provide flexibility in the exercise of these powers. Statutory provisions in other territories may be subject to change and it is considered appropriate to maintain flexibility and extend the regulation-making powers that already exist in section 289. This is also consistent with the approach taken in relation to cross border transfers involving detained patients by way of regulations made under section 290 of the 2003 Act.

40. By virtue of an amendment made to section 326(4)(c) of the 2003 Act at Stage 2, regulations made under section 289 will now be subject to draft affirmative procedure. It is considered that this provides the appropriate level of security by the Scottish Parliament, given that a power is now included in section 289 for regulations to amend or modify the 2003 Act or another enactment. This is consistent with the level of scrutiny that applies to regulations made under section 290 of the 2003 Act in relation to the cross border transfer of detained patients. Regulations made under section 309 of the 2003 Act will also remain subject to draft affirmative procedure.

Section 67C - Cross-border visits: leave of absence

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

41. Section 67C was introduced as an amendment at Stage 2. It inserts a new provision, section 309A, into the Mental Health (Care and Treatment) (Scotland) Act 2003. This section was introduced to make provision for short term cross-border visits (for example, for a patient to attend a funeral). The cross border transfer provisions already in place under the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Mental Health Act 1983 are designed only for permanent or long term transfer.

42. There is already a power for Scottish Ministers to make regulations under section 309 of the 2003 Act to make provision (by applying section 301 to 303 of the Act) regarding
This document relates to the Adult Support and Protection (Scotland) Bill as amended at Stage 2 (SP Bill 62A)

absconding patients from other jurisdictions who are subject to measures corresponding or similar to detention in hospital.

43. Section 67C will insert a new section 309A into the 2003 Act to provide for a power for Scottish Ministers to make regulations for and in connection with the keeping in charge of a person who is subject to escorted leave of absence authorised under legislation in force in England, Wales, Northern Ireland, the Isle of Man or the Channel Islands. The regulations may make such provision by applying section 301 to 303 of the 2003 Act, with or without modification, to such patients.

Justification for taking this power

44. The additional power for Scottish Ministers to make regulations under section 309A is required to put beyond doubt the powers of the person or persons escorting the patient under the authority in legislation in force in the other territory so that there is clear authority under the 2003 Act for that person or those persons to continue to escort the patient while in Scotland. This will be distinct from the existing powers of escorts to retake the patient should they attempt to abscond, by virtue of regulations made under section 309 of the 2003 Act.

45. All provision in the 2003 Act in relation to cross border matters is made by way of regulations made by the Scottish Ministers. It is considered that subordinate legislation is the most appropriate approach in order to provide flexibility in the exercise of these powers. Statutory provisions in other territories may be subject to change and it is considered appropriate to maintain flexibility. This is also consistent with the approach taken in relation to the application of absconding provisions in the 2003 Act to patients from other jurisdictions by way of regulations made under section 309 of the 2003 Act.

46. By virtue of an amendment made to section 326(4)(c) of the 2003 Act at Stage 2, regulations made under section 309A will be subject to affirmative procedure. It is considered that this provides the appropriate level of security by the Scottish Parliament, given that a power is now included in section 309A for regulations to modify specified provisions in the 2003 Act. This is consistent with the level of scrutiny that applies to regulations made under section 309 of the 2003 Act in relation to the application of absconding provisions to patients from other jurisdictions.
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