



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

11th Report, 2015 (Session 4)

Assisted Suicide (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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John Mason (Deputy Convener)
Margaret McCulloch
John Scott
Stewart Stevenson

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Delegated Powers and Law Reform Committee

11th Report, 2015 (Session 4)

Assisted Suicide (Scotland) Bill at stage 1

The Committee reports to the Parliament as follows—

1. At its meetings on 9 December 2014, 20 January and 3 February 2015, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Assisted Suicide (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 member in charge of the Bill provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”)².

OVERVIEW OF BILL

3. This Member's Bill was introduced by the late Margo MacDonald MSP on 13 November 2013. The designated “member in charge” of the Bill is Patrick Harvie MSP (under Rule 9.2A of the Parliament's Standing Orders).
4. The lead Committee is Health and Sport, and the Bill is also considered by the Justice Committee.
5. The Bill makes provision for a procedure to be followed by persons suffering from terminal or life-shortening illnesses/conditions and who wish for assistance in ending their own lives. Where this procedure is followed, the Bill operates to remove criminal and civil liability from those providing such assistance.
6. Broadly, a 3-stage procedure must be followed. The person who is to be assisted must make a preliminary declaration and a first and second request for assistance, which must be endorsed by medical practitioners and recorded on the person's medical notes. The person must be suffering from a terminal or life-shortening illness, or a progressive condition which is terminal or life-shortening,

¹ Assisted Suicide (Scotland) Bill [as introduced] available here:

http://www.scottish.parliament.uk/S4_Bills/Assisted%20Suicide/b40s4-introd.pdf

² Assisted Suicide (Scotland) Bill Delegated Powers Memorandum available here:

http://www.scottish.parliament.uk/S4_Bills/Assisted_Suicide_DPM_final.pdf

with no prospect of any improvement in quality of life and must have concluded that the quality of their life is unacceptable. The person must be over 16 years of age, registered with a medical practice in Scotland, and capable of making such a decision.

7. The Bill specifically does not authorize anyone to do anything which would itself cause another person's death (i.e. euthanasia). The cause of death must be the person's own deliberate act.

8. The Bill also creates the role of "licensed facilitator". The facilitator may provide the assistance itself, or may simply attend to give support and act as an additional safeguard. The facilitator's function is described as providing practical assistance, comfort and reassurance before, during and after the act of suicide. The facilitator also has a role in taking possession of any unused drugs and in reporting a suicide/ attempted suicide to the police.

9. Licensed facilitators are to be appointed by one or more licensing authorities, which are in turn to be appointed by the Scottish Ministers. The Scottish Ministers may make regulations governing the procedure for granting licences to facilitators, for the suspension and revocation of licences, for the suspension and revocation of the appointment of licensing authorities, for training and supervision of facilitators, and for appeals. The Scottish Ministers may also issue directions and guidance for facilitators and licensing authorities.

DELEGATED POWERS PROVISIONS

10. 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 delegated powers in the following provisions:

- Section 22(1) – Appointment of licensing authority
- Section 22(2) – Licensing of facilitators

11. At its meeting of 9 December, the Committee agreed to write to the member in charge to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the **Annex**.

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

Section 23 – Directions and guidance for facilitators and licensing authorities

Power conferred on:	Scottish Ministers
Power exercisable by:	Directions
Parliamentary procedure:	None, but published

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance

Parliamentary procedure: None, but published

Provision

13. Section 23(1) provides that the Scottish Ministers may issue directions about how licensed facilitators are to act, and section 23(2) provides that a licensing authority must use its best endeavours to ensure that those directions are complied with by the facilitators to whom it has granted licences. Section 23(3) provides that a licensing authority must have regard to any guidance issued by the Scottish Ministers, and section 23(4) provides that any such directions or guidance must be published.

Comment

Matters to be covered by directions and guidance

14. As the Committee did not have the benefit of explanation in the DPM, it sought general explanation as to how these powers of direction and guidance could be used. The Committee also sought explanation as to what matters the directions and guidance could cover, and why this would be appropriate rather than these matters being contained in regulations made under section 22 of the Bill.

15. The response to the Committee has explained that the powers to make directions and guidance in section 23 are envisaged as complementary to, and separate from, the main powers given in section 22.

16. The response discussed that the powers in section 22 allow the Scottish Ministers to appoint licensing authorities by statute, and to set statutory parameters on key elements of the licensing regime which are intended to have general application. By contrast, the powers to make directions and guidance in section 23 are intended to be used by Ministers to provide more detailed oversight; by either imposing detailed requirements on facilitators as to how they are to act in particular circumstances (in the case of directions) or by providing factual/technical guidance.

17. The response to the Committee has pointed also to the flexibility of the power to make directions and guidance, which will allow Ministers to vary their approach over time and to respond rapidly to changing events.

18. The Committee notes the anticipated significant role of licensed facilitators and their potential impact on individuals (who may be vulnerable) and their families when an assisted suicide is contemplated. In light of this, the Committee is concerned that the rules governing the conduct of facilitators should be clearly prescribed in legislation, to give greater clarity as to what is expected of facilitators, and in order to provide protection both for facilitators and for the public.

19. The Committee accepts, in principle, that there may be information of a more technical, factual nature in relation to which it might be appropriate for the Scottish Ministers to issue guidance. However, in respect of specific requirements imposed on facilitators, the Committee considers that these should be contained in regulations (rather than directions) and should be subject to Parliamentary

scrutiny, for the reasons set out above. As such, careful consideration should be given as to what matters should be included in regulations and what is appropriate to cover by way of directions.

20. The Committee also notes with concern the response from the member in charge, which discusses the flexibility of directions and guidance and the ease with which they may be issued or amended, in the absence of any Parliamentary process. While the Committee accepts in principle that this may be appropriate in the case of guidance on purely technical/ factual matters, the Committee considers that rules relating to the conduct of facilitators should more appropriately be subject to Parliamentary scrutiny.

Requirement to use “best endeavours”

21. In light of the unusual wording in section 23(2) of the Bill, which requires a licensing authority to use its “*best endeavours*” to ensure that directions are complied with by the facilitators to whom it has granted licences, the Committee sought explanation as to why this requirement to use “*best endeavours*” is appropriate.

22. The response to the Committee has explained that the wording used is a reflection of the context. The response explains that once facilitators have completed their initial training and been licensed, they will be expected to act independently, without direct supervision by the licensing authority; as such, the authority will not be in a position to guarantee that every facilitator will comply with directions. The response notes that the authority can be expected to inform facilitators of any changes and do what it can to ensure compliance.

23. As noted, it is unusual for a power to issue directions to be framed as requiring the authority to use “*best endeavours*” to ensure compliance by those individuals to whom it has issued licences. More usually, directions would simply be binding on an authority.

24. The Committee notes that, while the legal meaning of the phrase “*best endeavours*” has been discussed in case law³, the level of compliance it implies remains fundamentally uncertain and will remain a question of construction. The Bill gives no definition of the phrase, nor any further indication as to how compliance with the obligation is to be measured or achieved.

25. The Committee considers that the use of the phrase “*best endeavours*” in section 23(2), without any further indication as to what this phrase means in the context of the provision nor what process is to be followed in order for compliance to be achieved, makes the obligation on licensing authorities effectively meaningless.

³ *IBM United Kingdom Limited v Rockware Glass Limited* [1980] FSR 335 and *Jet2.Com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529, discussing the meaning of the phrase “best endeavours” in the context of commercial contracts. The cases cited came before the English courts and the approach taken would not necessarily be followed in Scotland.
<http://www.bailii.org/ew/cases/EWHC/Comm/2011/1529.html>

26. The Committee is concerned that the nature of the obligation imposed on licensing authorities, and the level of compliance required to be shown, should be clear and transparent. For this reason the Committee draws the drafting of section 23(2) and the use of the phrase “*best endeavours*” to the attention of the Health and Sport Committee.

Parliamentary scrutiny of directions and guidance

27. Given the significant role of licensing authorities and licensed facilitators, and their potential impact on individuals who may be vulnerable, the Committee sought explanation as to why the Bill makes no provision for any Parliamentary procedure to apply to either the directions or the guidance, nor any requirement for them to be laid before Parliament.

28. The response to the Committee has explained that it is not considered necessary or appropriate to require either directions or guidance to be subject to the same sort of Parliamentary scrutiny process as regulations. The response points again to the matters which it is anticipated will be covered by directions and guidance (discussed above); and argues that both directions and guidance would require to be issued or updated more easily and quickly than the formal process for legislative approval allows.

29. The response notes, however, that the member in charge is receptive to adding a requirement (in addition to that of publication) for either or both types of document to be laid before the Parliament (with the possible caveat that this should only apply to guidance when it is first made or significantly amended, so as not to inhibit the process of making small scale continuous improvements as the need arises).

30. As discussed above, it is the opinion of the Committee that rules governing the conduct of facilitators would be of such potential significance that they should more properly be contained in regulations rather than directions. The Committee has also considered whether directions, which as the Bill is currently drafted will cover the conduct of facilitators, should be subject to the same level of Parliamentary scrutiny as that applied to regulations. As a minimum the Committee considers that both directions and guidance should require to be laid before the Parliament on issue, as well as being published in accordance with the requirements of the Bill.

31. The Committee again notes with concern the response from the member in charge that directions relating to the conduct of licensed facilitators should be capable of being amended “easily and quickly” and without Parliamentary scrutiny. The Committee does not accept that this is an appropriate level of scrutiny in relation to rules governing the conduct of licensed facilitators.

32. The Committee therefore draws the attention of the Health and Sport Committee to the response from the member in charge, which discusses how the powers to make directions and guidance in section 23(1) and 23(3) of the Bill are intended to be used by Ministers. It is intended that the powers will be used to provide more detailed oversight, by either imposing detailed requirements on facilitators as to how they are to act in

particular circumstances (in the case of directions) or by providing factual/technical guidance.

33. The Committee accepts, in principle, that there may be information of a more technical, factual nature in relation to which it might be appropriate for the Scottish Ministers to issue guidance. However the Committee has a concern that rules as to the conduct of facilitators (in light of the anticipated significance of their role and the potential impact on individuals who may be vulnerable, and their families) should more properly be covered by regulations and should be subject to Parliamentary scrutiny. The Committee is concerned that such rules should be clearly prescribed in legislation, to give greater clarity as to what is expected of facilitators, and in order to provide protection both for facilitators and for the public.

34. Section 23(2) of the Bill requires a licensing authority to use its “*best endeavours*” to ensure that directions are complied with by the facilitators to whom it has granted licences. The Committee notes that it is unusual for a power to issue directions to be framed as requiring the authority to use “*best endeavours*” to ensure compliance by those individuals to whom it has issued licences. More usually, directions would simply be binding on an authority.

35. The Committee notes that the level of compliance implied by the phrase “*best endeavours*” is fundamentally uncertain. The Bill gives no definition of the phrase, nor any indication as to what it may mean in the context of the provision; neither does the Bill set out any process by which compliance may be measured or achieved.

36. The Committee considers therefore that the use of the phrase “*best endeavours*” in section 23(2) renders the obligation on licensing authorities effectively meaningless.

37. The Committee is concerned that the nature of the obligation imposed on licensing authorities, and the level of compliance required to be shown, should be clear and transparent. For this reason the Committee draws the drafting of section 23(2) and the use of the phrase “*best endeavours*” to the attention of the Health and Sport Committee.

38. The Committee notes that the member in charge is receptive to adding a requirement (in addition to that of publication) for either or both directions and guidance to be laid before the Parliament.

39. The Committee considers that, in relation to the powers in section 23(1) and 23(3), an amendment should be brought forward to provide that any directions or guidance issued by the Scottish Ministers must, as well as being published, be laid before the Parliament on issue.

ANNEX

Correspondence with the member in charge of the Bill

On 9 December 2014, the Committee wrote to the member in charge of the Bill as follows:

Section 23 – Directions and guidance for facilitators and licensing authorities

Power conferred on:	Scottish Ministers
Power exercisable by:	Directions
Parliamentary procedure:	None, but published

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None, but published

1. Section 23 provides that the Scottish Ministers may issue directions about how licensed facilitators are to act, and licensing authorities are required to use best endeavours to ensure that those directions are complied with by licensed facilitators. Licensing authorities must have regard to any guidance issued by the Scottish Ministers, and any such directions or guidance must be published.

2. **The Committee asks for an explanation of the following matters in relation to the powers to issue directions and guidance in section 23:**

- **How these powers may be used,**
- **What matters the directions and guidance could cover, and why this would be appropriate rather than these matters being contained in regulations under section 22?**
- **Why it is appropriate that licensing authorities should be required to use “best endeavours” to ensure that directions are complied with by licensed facilitators?**
- **Why there is no provision for any Parliamentary procedure to apply to either the directions or the guidance, nor any requirement for them to be laid before the Parliament?**

On 17 December 2014, the member in charge responded as follows:

I am writing in response to the letter from your Committee’s clerk, dated 9 December, in relation to the provisions in section 23 of the Assisted Suicide (Scotland) Bill which entitle the Scottish Ministers to issue directions, and requiring licensing authorities to have regard to Scottish Ministers’ guidance.

I hope it is helpful if I first set out the context for these provisions, before turning to the four specific points that I am asked to address.

Central to the Bill is the principle that the process for securing an assisted suicide should uphold (as far as possible) the autonomy of the person concerned – while maintaining robust safeguards against abuse of the vulnerable.

Licensed facilitators play a vital role – both in providing practical assistance to the person, while also acting as a safeguard and guarantor of the process. The nature and extent of that assistance may vary considerably, depending on the circumstances – including, for example, the extent of the person’s own physical capabilities and the extent to which the person wants family members or friends also to be involved. But that flexibility must not compromise the facilitator’s role in upholding the integrity of the process, and ensuring that the fixed parameters of the legislation are respected. As a result, being a facilitator is likely to be a demanding role that requires compassion, sensitivity and integrity. It is for this reason that the Bill requires any facilitator to have been trained by a licensing authority (appointed by Ministers), and to be subject to that authority’s ongoing supervision.

Section 22 requires the appointment of a licensing authority to be done by subordinate legislation (subsection (1)), and also requires there to be a statutory framework (in regulations under subsection (2)) for any subsequent suspension or revocation of such an appointment. It also gives Scottish Ministers the power (in subsection (2)(d)) to set statutory parameters on key elements of the licensing authority’s role – i.e. on how the authority checks that applicants are suitable to become facilitators, trains the applicants to take on that role, and then ensures that (once licensed) they continue to be subject to ongoing training, supervision and inspection. These are suitable matters for subordinate legislation because they can operate at a high degree of generality – i.e. with standard provision that will apply whoever the licensing authority is and in relation to any licensed facilitators.

Section 23 is a complementary provision that enables Ministers to provide more detailed oversight. Both directions (which would impose specific requirements on facilitators) and guidance (which would be more general and advisory) are provided for, to give Ministers flexibility. It will be for Ministers to decide whether, and to what extent, to use these powers. On the one hand, they may feel that it is primarily the role of the licensing authority to ensure that facilitators have the information and support they need to carry out their role sensitively and appropriately, and so may keep these powers largely in reserve. On the other hand, they may prefer to take a more pro-active approach and impose more detailed requirements on facilitators (in how they are to act in particular circumstances). The choice is for them, and they would have the flexibility to vary that approach over time, and to respond rapidly to events. Thus, for example, if a particular case arose in which a facilitator was criticised for acting in a particular way, then Ministers would have the power to address this rapidly by issuing directions forbidding facilitators from so acting (which licensing authorities would then be expected to bring to the attention of those facilitators they had already licensed).

I hope this explanation serves to address the first bullet point in the clerk’s letter, concerning how these powers may be used.

It is difficult to give any general answer to the second bullet point, as it will be for Ministers rather than me to decide what matters are best dealt with in either directions or guidance. The underlying point is that Ministers' powers to make regulations or issue directions or guidance are complementary, and would be used differently, for different purposes. For example, there are many things that it could be helpful to include in guidance that would not be appropriate for regulations (or directions), such as background (factual) information about some of the illnesses and conditions that people seeking an assisted suicide may have. Guidance could also be amplified by examples, checklists and diagrams – material that would not normally be considered appropriate in a legislative context. The other advantage of guidance is that it can more quickly and easily be developed over time, or rapidly updated as circumstances change – without needing to go through a formal process of making (and securing Parliamentary approval for) amending regulations.

In relation to the third bullet point, the “best endeavours” wording is a reflection of the context. Once facilitators have completed their initial training and been licensed, they will be expected to act independently, without direct supervision by the licensing authority. The authority will not, therefore, be in a position to guarantee that every facilitator it has trained will immediately comply with any new directions – but it can be expected to inform facilitators of any changes to what is expected of them, and to do what it can to ensure they comply. (And Ministers have the power, under section 22, to give themselves the power to suspend or revoke the appointment of the authority if, for example it fails to act appropriately to ensure compliance by its facilitators with Ministers' directions.)

On the final bullet point, I do not think it would be necessary or appropriate to require either directions or guidance to be subject to the same sort of Parliamentary scrutiny process (whether affirmative or negative) as regulations, for the reasons already outlined – namely, that directions are meant to serve as a specific response to particular circumstances, while guidance is meant to be non-legislative in character, and both should be capable of being issued or updated more easily and quickly than the formal process for legislative approval allows. The Bill already requires any directions or guidance to be published (see section 23(4)), and I would be receptive to adding to this a requirement for either or both types of document to be laid before the Parliament (with the possible caveat that the laying requirement should only apply to guidance when it is first made or significantly amended, so as not to inhibit the process of making small-scale continuous improvements as the need arises).

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