



The Scottish Parliament
Pàrlamaid na h-Alba

Liam McArthur MSP

Stuart McMillan MSP
Convener
Delegated Powers and Law Reform
Committee
c/o Clerk to the Committee

27 June 2024

Dear Stuart

Re: Assisted Dying for Terminally Ill Adults (Scotland) Bill – Delegated Powers Memorandum

Thank you for your letter of 4 June 2024 seeking further explanation of certain provisions relating to the delegated powers in the Assisted Dying for Terminally Ill Adults (Scotland) Bill. This letter responds to each of the Committee’s questions set out in the letter.

Section 4(5)(a) - Request for assistance: first declaration, and Section 6(6)(a): Medical practitioners’ assessments

The Committee asked why these sections do not require specific persons or bodies, such as the General Medical Council and/or the Chief Medical Officer for Scotland, to be consulted.

The roles of “coordinating registered medical practitioner” and “independent registered medical practitioner” under the Bill can only be fulfilled by registered medical practitioners, a term defined in the Interpretation and Legislative Reform (Scotland) Act 2010 as, “a fully registered person within the meaning of the Medical Act 1983 (c.54) who holds a licence to practise under that Act”. The 1983 Act also established a mandate for the General Medical Council to maintain a register of doctors in the UK.

As the Committee noted, the powers in section 4(5)(a) and section 6(6)(a) enable the Scottish Ministers to make regulations specifying what qualifications and experience a registered medical practitioner must have (in addition to those already required as set out above) in order to fulfil the role of “coordinating registered medical practitioner” or “independent registered medical practitioner” under the Bill. These powers were added as the member is conscious that a certain level of experience (that might be for example that a doctor should have completed foundation year 2 or that one of the doctors should be a specialist in the person’s terminal illness) might be required in addition to the experience already required by the 1983 Act in order to ensure the public and anyone wishing to access assistance can have the fullest confidence that the assisted dying process is carried out in the safest way possible.

The powers in section 4(5)(a) and 6(6)(a) are subject to a requirement that Scottish Ministers must consult such persons as they consider appropriate. This requirement is included to ensure that appropriate consultation with those best placed to advise the Scottish Ministers takes place before any regulations are laid. I believe it is appropriate for Scottish Ministers to determine who to consult and I believe it very likely that this may include both the General Medical Council and the Chief Medical Officer, along with any other bodies and/or individuals the Scottish Ministers best determined, without need to require statutory consultation with any specific bodies and/or persons. As such, I am content to leave this as drafted and to reflect further if further comment is made on this during stage 1.

Section 4(5)(a) - Request for assistance: first declaration, and Section 6(6)(a): Medical practitioners’ assessments

The Committee asked why the Member does not consider it appropriate to make every use of these powers subject to the affirmative procedure, given the significance of the roles of coordinating registered medical practitioners and independent registered medical practitioners within the assisted dying process provided for by the Bill.

I carefully considered the most appropriate level of scrutiny and use of Parliamentary time for considering regulations laid under these provisions. I was particularly mindful of the likelihood that first regulations made under both these provisions would be significantly more substantial than any subsequent regulations and would therefore be most appropriately subject to a higher level of scrutiny afforded by the affirmative procedure. Consequentially, given the likelihood that any subsequent regulations would make minor adjustments to the parent regulations, and with the aim of striking a proportionate balance, I considered it appropriate for any such regulations to be subject to the negative procedure, to ensure best use of Parliamentary time. The reasons are explained fully in the Delegated Powers Memorandum, which states:

“It is expected that Scottish Ministers, when first deciding on the level of qualifications and experience for the coordinating registered medical practitioner, which is a key role in the assisted dying process provided for by the Bill as

outlined above, will cover all aspects of it comprehensively. This is underpinned by the above mentioned requirement to consult with relevant stakeholders, thus further ensuring that qualifications and other requirements on the level of experience that doctors performing this important role in the process should have are considered exhaustively and set appropriately. However, some adjustments may need to be made over time as the assisted dying scheme develops and evolves. Any such later adjustments would require the making of further regulations. The Member considers that the negative procedure is the appropriate level of scrutiny for such modifying regulations that ensures the best use of Parliament's time. Finally, it is worth noting that the Scottish Ministers are required to consult appropriate stakeholders prior to the making of any regulation under this provision of the Bill, even those subject to the negative procedure."

However, although content with this approach, I note and appreciate the Committee highlighting this issue and will carefully consider any further comment made on this during the consideration of the Bill at stage 1. I will then reflect further, should the Bill proceed to amending stages, mindful of the possibility of bringing forward amendments to adjust if considered appropriate.

Section 15(8) - Provision of assistance

The Committee asked why this power has not been made subject to a statutory requirement to consult the Chief Medical Officer for Scotland.

As the Committee noted, 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. The power is subject to the affirmative procedure therefore ensuring a higher level of Parliamentary scrutiny. I fully expect that the Scottish Ministers would seek advice from appropriate persons (which I expect may include the Chief Medical Officer (CMO)) on which substance, or substances, should be approved by regulation for use in the assisted dying scheme provided by the Bill. However, I don't consider it necessary to mandate a requirement to consult with any specific bodies and/or persons and, that being the case, I am content to leave this as drafted and to reflect further if further comment is made on this during stage 1.

Section 31(1) - Ancillary provision

The Committee asked why the Member does not consider that every use of this power should 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.

The power conferred under section 31(1) enables Scottish Ministers to regulate to make any incidental, transitional, transitory or savings provision they consider appropriate to give full effect to the Bill or any provision made under it and ensures that appropriate matters can be addressed without the need to amend the Bill. It is expected that this power may mostly be used to address minor, technical changes that may be required. However, to address the possibility of the power being used to add to, modify, replace or omit any part of this, or any other Act, any such regulations are subject to the affirmative procedure. Again, with the aim of achieving an appropriate balance between the potential use of the power and the best use of parliamentary resource, and given that, although the Bill deals with a highly sensitive issue and process, not all ancillary provisions will be of a significant and/or sensitive nature, I therefore consider it appropriate and reasonable that any other uses of this power (i.e. regulations other than those which add to, replace or omit any part of an Act) be subject to the negative procedure. As the Delegated Powers Memorandum sets out, "That approach is typical for ancillary powers of this type and reflects the fact that the Parliament should be able to carefully scrutinise any amendments to primary legislation, while ancillary changes to subordinate legislation are likely to be of a more technical nature and so merit a lesser degree of parliamentary scrutiny."

I remain content with this approach, however, I appreciate the Committee highlighting this issue and will carefully consider any further comment made on this during the consideration of the Bill at stage 1. I will then reflect further, should the Bill proceed to amending stages, mindful of the possibility of bringing forward amendments to adjust if considered appropriate.

Section 32(2) – Commencement

The Committee expressed concern about the commencement of the substantive sections of the Bill in circumstances where there is no "approved substance" available to bring about assisted death. Specifically, the Committee was concerned 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 some other contingency has occurred. The Committee asked what consideration the Member has given to legal transparency in this regard, and the public perception regarding the practical consequences of commencing the Act.

I have considered this issue carefully. As set out in the Bill, and detailed in the Delegated Powers Memorandum, section 32(1) of the Bill commences the sections of the Bill relating to commencement, regulation-making powers, interpretation, ancillary provision and the short title the day after Royal Assent. Section 32(2) provides that all other provisions of the Bill are to come into force on such a day as the Scottish Ministers may by regulations appoint. Commencement is provided for in this way to take account of the fact that time will be required to prepare for the introduction of assisted dying in Scotland as provided by the Bill and therefore it is most appropriate for the

Scottish Ministers to best determine when to regulate for the commencement of the substantive provisions of the Bill.

This is intended to ensure that the substantive provisions of the Bill do not commence before Ministers are confident that the process can operate fully, which includes being able to regulate to provide for an approved substance. Ministers' ability to co-ordinate commencement of the Bill's substantive provisions, laying the necessary regulations, and raising awareness of the availability of assisted dying in Scotland, should ensure full transparency and that any lack of clarity or confusion, both within the medical professions, and amongst the wider public in Scotland, is avoided.

Section 18(1) - conscientious objection

Issues relating to the making of regulations and implementation of the Act: the Committee can envisage a situation in which either the relevant Scottish Minister or another prominent individual, such as the Chief Medical Officer for Scotland, might conscientiously object to assisted dying. The Committee would welcome the Member's thoughts on the potential problems which might arise in such a situation and how they might be addressed.

Section 18(1) of the Bill states that no-one should be under any duty... "to participate in anything authorised by this Act to which that individual has a conscientious objection". The Policy Memorandum accompanying the Bill sets out the policy intent behind the provision, stating, "no-one ... should therefore be required to play a hands-on part in providing assisted dying if they have a conscientious objection to doing so". The policy intent of the provision is therefore that particularly no registered medical practitioner, nurse or pharmacist (as made clear in the Bill's Explanatory Notes) is compelled by the Bill to play a hands-on role in providing a terminally ill adult who has requested, and been assessed as being eligible, with assistance for them to take to end their own life. This approach mirrors the approach taken to abortion for example, where health professionals can opt out of participating in the process if they have a conscientious objection to doing so.

I do not envisage any prohibitive barriers to the making of regulations or implementation of the Act, as a result of section 18(1).

I hope this response is helpful in informing the Committee's further deliberations on the Delegated Powers Memorandum and any report to the lead committee at Stage 1.

Yours,

Liam McArthur