

Public Services Reform (Scotland) Act 2010: Extension of Part 2 Order Making Powers Consultation response by Mental Welfare Commission for Scotland

Question

Do you agree that the Scottish Ministers should seek the Parliament's approval to extend the Public Service Reform (Scotland) Act, Part 2 order making powers for a further 5 years from June 2020?

Answer

Unsure.

Reasons for response

We do not have any fundamental objection to the Government seeking this extension, and we agree with the general position that this may be a useful power for 'straightforward' changes to the public bodies landscape, while more significant changes should continue to be made through primary legislation.

However, neither the legislation nor the consultation paper clearly sets out what is seen as straightforward and what is significant, and we believe it is important to provide greater reassurance to Parliament and the public.

Taking the Mental Welfare Commission for Scotland as an example, we can appreciate that some limited extension of our role might be justifiably delivered via secondary legislation. Examples would include:

- an enhanced role in relation to the investigation of deaths of detained patient;
- a clarification of our powers to share information with other public bodies;
- adding a statutory reference to our responsibilities under the Optional Protocol of the Convention for the Prevention of Torture as a designated member of the UK National Preventive Mechanism.

We would also have no difficulty with changes being made in secondary legislation which simplify our accounting and reporting requirements.

However, there are other changes which we believe should only ever be done by primary legislation. Examples include:

- any change that may **compromise the independence of the Commission**, resulting in it being subject to a greater degree of direction by Scottish Ministers;
- any change that would **reduce safeguards** which the Commission operates in respect of individuals with a mental disorder, such as our oversight of medical treatment under Part 16 of the Mental Health (Care and Treatment) (Scotland) Act 2003, or our right to refer a patient's case to the Mental Health Tribunal.

Another helpful example may be the measures which are planned to end the Commission's responsibilities to operate the National Confidential Forum for people who have been in

residential child care. It is right that ending this role should be done via primary legislation, but it may be that following the legislation, some further sweeping up is required, e.g. in relation to how records should be retained in future. Those administrative changes could reasonably be delivered by secondary legislation.

Also, the experience of the NCF was that, once established, some of the legislation setting out how it should operate was over-prescriptive and difficult to operate in practice. It may have been helpful if secondary legislation could have been used to make some of these processes more flexible.

We appreciate the dividing line may be difficult to draw, but it should not be impossible, and we would ask the Government to set out more clearly what matters should be seen as only suitable for primary legislation.