Introduction

The Mental Health Tribunal for Scotland ("the Tribunal") welcomes the opportunity to submit its view to the Finance Committee on the Public Services Reform (Scotland) Bill ("the Bill") as the Committee considers the principles of the Bill at Stage 1.

The Tribunal restricts this submission to addressing whether the order-making powers proposed in Part 2 of the Bill might appropriately be exercised in respect of the Tribunal in seeking to deliver a “public sector landscape and public sector functions that are proportionate, responsive and efficient”.

Order-making powers in Part 2 of the Bill

Section 10

Section 10(1) would enable the Scottish Ministers to “by order make any provision which they consider would improve the exercise of public functions, having regard to" “efficiency”, “effectiveness” and “economy”.

Section 10(2) defines the term “public functions” as “functions of the persons, bodies and office-holders listed in schedule 3, subject to any limitations specified in that schedule”.

Section 10(3) provides that the provision which Ministers may make by order under section 10(1) “includes” (but is not limited to) provision:

- modifying, conferring, abolishing, transferring, or providing for the delegation of, any function;
- amending the constitution of, or abolishing, a person, body or office-holder listed in schedule 3 (other than the Scottish Ministers; the Forestry Commissioners; a person listed in schedule 3 by virtue of section 11(3)(e); or a company); and
- creating a person, body or office-holder on which functions are conferred or to which functions are transferred or may be delegated.

Schedule 3 specifies 80 bodies and categories of bodies. The Mental Health Tribunal for Scotland is one of the bodies specified. Schedule 3 does not specify any limitation in respect of the Tribunal.

Section 11

Section 11(2) would enable the Scottish Ministers to modify schedule 3 by adding an entry for any person, body or office-holder falling within the categories specified in section 11(3) and to remove any entry from schedule 3.
Section 13

Section 13(1) would enable the Scottish Ministers to “by order make any provision which they consider would remove or reduce any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation”.

Section 13(2) then defines “burden” as meaning “a financial cost”, “an administrative inconvenience”, “an obstacle to efficiency, productivity or profitability” or “a sanction, criminal or otherwise, which affects the carrying out of any lawful activity”.

Section 13(5) provides that the provision which Ministers may make by order under section 13(1) “includes” (but is not limited to) provision:

- abolishing, conferring or transferring, or providing for the delegation of, functions of any description;
- creating or abolishing a body or office.

The Mental Health Tribunal for Scotland

The Tribunal was established by paragraph 21 of, and Schedule 2 to, the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) and came into operation in October 2005. The Tribunal is charged with responsibility for deciding whether people with mental disorder should remain subject to compulsory measures for their detention and for the care and treatment of their mental disorder. The Tribunal’s decisions are subject to appeal to the superior courts.

Power to alter, or abolish, the Tribunal or its public functions

The 2003 Act was scrutinised and amended by Members of the Scottish Parliament and was passed by the Scottish Parliament. In short, the 2003 Act was subject to those parliamentary processes providing for scrutiny and amendment to which all Acts of the Scottish Parliament are subject.

The sheer extent of the powers provided for in section 10(1) (wide enough even to allow for the abolition of any person, body or office-holder listed in schedule 3) and section 13(1) (wide enough even to allow for the abolition of any body or office, apparently not restricted to bodies or offices listed in a schedule) is, in the respectful submission of the Tribunal, worthy of detailed scrutiny.

First, it appears to the Tribunal – being a body created by an Act of the Scottish Parliament and the public functions of which have been provided by an Act of the Scottish Parliament – that any move by the Scottish Ministers to amend the constitution of the Tribunal or to abolish the Tribunal (whether under section 10(1) or section 13(1)) or to modify, abolish or transfer from the Tribunal any of its public functions or to confer upon, transfer to or provide for the delegation of any function to the Tribunal should be subject to the same parliamentary processes for scrutiny and amendment as was the 2003 Act which established the Tribunal and its public functions.

The Tribunal notes that the power to make an order under section 10(1) and section 13(1) is restricted by the onerous affirmative procedure provided for by section 20, which requires consultation in accordance with section 21, and that the order must be laid in draft before the Scottish Parliament and approved by
resolution of the Parliament before it can be made. Nevertheless, the Tribunal notes that even this onerous process does not provide the Parliament with the same degree of flexibility and power as do the processes in respect of primary legislation before the Parliament.

For example, in considering a Bill, it is open to Members of the Scottish Parliament to bring forward amendments (as happened during the passage of the Bill that became the 2003 Act), i.e. Members of the Scottish Parliament can seek to modify what has been placed before the Scottish Parliament by the Scottish Ministers. However, in respect of a draft order under section 10(1) or section 13(1), the Scottish Parliament has power only to accept or reject, in its entirety, what the Scottish Ministers have placed before it: Members of the Scottish Parliament have no power to bring forward amendments to a draft order.

The Tribunal as an independent body impartially exercising judicial functions

Second, the Scottish Ministers are regularly represented before the Tribunal as parties in the cases of restricted patients (i.e. certain mentally disordered patients in respect of whom the Scottish Ministers have certain powers and obligations under the 2003 Act). The Tribunal hears evidence and considers submissions made on behalf of patients, on behalf of Ministers and on behalf of other parties, and reaches a decision on the case before it, such decisions being appealable direct to the Court of Session.

It appears to the Tribunal that the proposed powers under section 10(1) and section 13(1) may potentially raise, in the minds of patients whose cases are being considered by it, and in the minds of others, a perception that the Scottish Ministers have power over the Tribunal which those patients do not. In short, the Tribunal is concerned about the effect which the power under section 10(1) and section 13(1), and its potential use, may have on the perception of the Tribunal as an independent body impartially exercising judicial functions which impact upon the liberty of mentally disordered patients.

Conclusions

For the foregoing reasons, the Tribunal respectfully submits:

(a) that it is inappropriate that the Tribunal – being a body created by an Act of the Scottish Parliament and the public functions of which have been provided for by an Act of the Scottish Parliament – should be listed in schedule 3 to the Bill and so potentially be subject to the alteration or abolition of itself or its public functions, without the requirement for the Scottish Ministers to subject their proposals to those parliamentary processes providing for scrutiny and amendment to which Acts of the Scottish Parliament are subject, but to which a draft section 10(1) order laid before the Parliament is not subject;

(b) that it is inappropriate that the Tribunal – an independent body impartially exercising judicial functions which impact upon the liberty of
mentally disordered patients – being a body in proceedings before which the Scottish Ministers are represented as a party, potentially be subject to the alteration or abolition of itself or its public functions, without the requirement for the Scottish Ministers to subject their proposals to those parliamentary processes providing for scrutiny and amendment to which Acts of the Scottish Parliament are subject, but to which a draft section 10(1) order laid before the Parliament is not subject;

(c) that it is inappropriate that, if the Tribunal was not listed in schedule 3 to the Bill, Ministers would have power under section 11(2) to modify schedule 3 by adding the Tribunal to it, thus making the Tribunal potentially subject to an order under section 10(1) altering or abolishing it or its public functions;
(d) that it is inappropriate, on the grounds given at (a) and (b) above, that the Tribunal potentially be subject to an order under section 13(1) altering or abolishing it or its public functions.

The Tribunal is happy to clarify or elaborate upon any point made in this submission.

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