

THE LAW COMMISSION
and
The SCOTTISH LAW COMMISSION
(Law Com No 213)
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Health Service Commissioners Bill

Report on the Consolidation of the Legislation Relating to the Health Service Commissioners

Presented to Parliament by the Lord High Chancellor and the Lord Advocate by Command
of Her Majesty

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The Secretary of the Scottish Law Commission is Mr K F Barclay and its offices are at 140 Causewayside, Edinburgh, EH9 1PR.

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Health Service Commissioners**

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain,
and the Right Honourable the Lord Rodger of Earlsferry, QC,
Her Majesty's Advocate.*

The Health Service Commissioners Bill which is the subject of this Report consolidates the legislation relating to the Health Service Commissioners for England, for Wales and for Scotland. In order to produce a satisfactory consolidation it is necessary to make the following recommendations.

The Treasury, the Department of Health, the Scottish Office, the Welsh Office and the Health Service Commissioners have been consulted in connection with the consolidation and do not object to any of the recommendations.

(Signed) HENRY BROOKE, *Chairman, Law Commission*
C K DAVIDSON, *Chairman, Scottish Law Commission*

3rd June 1993

Recommendations

1. *Bodies subject to investigation: the Dental Practice Board and the Scottish Dental Practice Board*

Section 109(dd) of the National Health Service Act 1977, which was inserted by section 12(4) of the Health and Medicines Act 1988, added the Dental Practice Board to the list of bodies subject to investigation by the Health Service Commissioner for England and the Health Service Commissioner for Wales. Section 93(1)(bb) of the National Health Service (Scotland) Act 1978, inserted by section 12(5) of the 1988 Act, added the Scottish Dental Practice Board to the list of bodies subject to investigation by the Health Service Commissioner for Scotland.

The other bodies in the lists of bodies subject to investigation by the Health Service Commissioners are expressly excluded from the jurisdiction of the Parliamentary Commissioner for Administration by paragraph 8 of Schedule 3 to the Parliamentary Commissioner Act 1967. It appears to have been an oversight that an amendment was not made in the 1988 Act adding the two Dental Practice Boards to paragraph 8 in order to remove this overlap in the jurisdiction of the Health Service Commissioners and the Parliamentary Commissioner, and we recommend that the appropriate amendment to the 1967 Act be now made.

This recommendation is given effect to in *paragraph 2 of Schedule 2* to the Bill.

2. *Matters subject to investigation: the Mental Welfare Commission for Scotland*

Paragraph 7 of Schedule 14 to the 1978 Act prevents the investigation by the Commissioner for Scotland of matters "in relation to which the protective functions of the Mental Welfare Commission have been, are being or may be exercised..." The Commission referred to is the Mental Welfare Commission for Scotland, continued in being by the Mental Health (Scotland) Act 1984. Schedule 13 to the 1977 Act contains no similar provision.

It is unjustifiable for such a matter to be investigable by the Commissioner for England or for Wales but not by the Commissioner for Scotland. We recommend that the correct practical result be produced by limiting the powers of the English and Welsh Commissioners similarly so that, on the unlikely assumption that a matter in relation to which the protective functions of the Mental Welfare Commission for Scotland are being exercised falls within the jurisdiction of the Commissioner for England or for Wales, he will be prevented from conducting an investigation.

This recommendation is given effect to in *clause 4(3)* of the Bill.

3. *Reports by the Health Service Commissioner for Scotland*

Section 96 of the 1978 Act sets out the circumstances in which the Health Service Commissioner for Scotland must or may make a report, and the persons and bodies to whom the report is to be made. Subsection (5) requires him to make an annual report to the Secretary of State and empowers him to make such other reports as he thinks fit to the

Secretary of State. The Secretary of State is required to lay a copy of each report before each House of Parliament. Similar provision is contained in section 119 of the 1977 Act.

Section 119(4)(a) of the 1977 Act originally provided in relation to the Commissioners for England and for Wales that:

- "(4) Each of the Commissioners shall-
- (a) annually lay before each House of Parliament a general report on the performance of his functions under this Part in respect of the Health Services Board and the Welsh Committee, and may from time to time lay before each House of Parliament such other reports with respect to those functions as he thinks fit;"

Paragraph (a) was repealed by Schedule 2 to the Health Services Act 1980 consequential on the abolition of the Health Services Board and the Welsh Committee.

As respects Scotland, the amendments made to section 96(6) of the 1978 Act by Schedule 2 to the 1980 Act produce a very different result. That subsection as originally enacted provided:

- "(6) The Commissioner shall annually lay before each House of Parliament a general report on the performance of his functions under this Part in respect of the Scottish Committee and may from time to time lay before each House of Parliament such other reports with respect to his said functions under this Part as he thinks fit."

By amendments in Schedule 2 to the Health Services Act 1980, purportedly consequential on the abolition of the Health Services Board and the Scottish Committee, the provision was not repealed (like its English equivalent) but modified to read as follows:

- "(6) The Commissioner... may from time to time lay before each House of Parliament such... reports with respect to his... functions under this Part as he thinks fit."

This had the effect of creating a new power for the Scottish Commissioner to lay directly before Parliament reports relating to his functions generally; it was a far more significant change than was justified in 1980 as a consequence of the abolition of the Health Service Board, no similar power was given to the Commissioner for England or for Wales, and it appears to have been misconceived and probably unintentional. We recommend that section 96(6) should now be repealed without re-enactment.

This recommendation is given effect to in *Schedule 3* to the Bill.

4. *Requirement to consult other Commissioners*

Where the Commissioner for England or for Wales considers that a complaint relates to a matter within the jurisdiction of a Local Commissioner in England and Wales, the Parliamentary Commissioner or another Health Service Commissioner, section 118(1) to (1B) of the 1977 Act requires him to consult the Commissioner in question. Section 95A of the 1978 Act, inserted by the Parliamentary and Health Service Commissioners Act 1987, requires the Commissioner for Scotland to consult the Parliamentary Commissioner or the other Health Service Commissioners where he so considers. Section 31 of the Local

Government (Scotland) Act 1975 requires him to consult the Commissioner for Local Administration in Scotland.

The obligation to consult other Commissioners is limited as it only arises where a Commissioner is of the opinion that the complaint relates to a matter within the jurisdiction of another Commissioner. However, if the Commissioner for Scotland, for example, considers that a matter he is investigating falls within the jurisdiction of a Local Commissioner in England, we recommend that he should be obliged to consult him. And similarly with the other Commissioners, although in practice it is unlikely that the Bill will cause extra "cross-border" consultation except in the rarest cases.

This recommendation is given effect to in *clause 18(1)* of the Bill.