ADOPTION AND CHILDREN (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This Memorandum has been prepared by the Scottish Executive in accordance with Rule 9.4A.1 of the Parliament’s Standing Orders. Its purpose is to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Standing Orders, of provisions in the Adoption and Children (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each such provision and explains why the matter is to be left to subordinate legislation. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF THE BILL

2. The Adoption and Children (Scotland) Bill will improve, modernise and extend adoption in Scotland and makes provision in relation to the care of children which provides greater stability for children who cannot live with their birth families. The Bill will repeal the Adoption (Scotland) Act 1978 (“the 1978 Act”), save for Part IV of that Act, and restate its provisions subject to amendment.

PART 1

3. Part 1 makes provision in relation to matters concerning adoption. It makes provision in relation to local authorities’ duties regarding adoption services and care plans, placement for adoption, adoption applications and orders (including their effect), registration of adoptions and in relation to adoptions with a foreign element. It introduces a range of provisions which will extend the existing provisions contained in the Adoption (Scotland) Act 1978.

4. Part 1 introduces a statutory range of adoption services for people affected by adoption and gives Scottish Ministers power to make regulations for the implementation and administration of such a service.

5. Part 1 extends other existing provisions contained in the 1978 Act; these include extending the range of people who are eligible to adopt, simplifying the grounds for dispensing with parental agreement to adopt, giving unmarried fathers new rights, amending section 11 of the Children (Scotland) Act 1995 to allow the possibility of parental responsibilities and rights (such as contact) being granted to individuals who have previously lost such rights, increases
safeguards for overseas adoption and widens the range of issues that local authorities should have regard to when placing a child for adoption.

6. Part 1 gives regulation making powers relating to the provision for adoption services, local authority plans for adoption services, care plans and restrictions on removing children from, or bringing children into, the United Kingdom in connection with adoption.

PART 2

7. Part 2 introduces a new court order for children who cannot live with their birth families, called a permanence order. The Permanence Order will provide increased stability for children who cannot live with their birth family and will be flexible enough to cater for individual needs of such children. There are no subordinate legislation powers contained in this Part of the Bill.

PART 3

8. Part 3 of the Bill provides for miscellaneous provisions regarding notification of applications for orders, referral of certain cases to the Principal Reporter, removing the bar to making a contact order in relation to an adopted child and his or her former parents, rules of court for the appointment of curators ad litem and reporting officers, regulations about fostering allowances, evidence of consent and notices.

PART 4

9. Part 4 provides for rules of court, offences by bodies corporate and partnerships, interpretation, ancillary provisions, minor amendments and repeals and the short title and commencement. It also creates regulation making powers relating to court procedure for an adoption order or permanence order.

SUBORDINATE LEGISLATIVE POWERS – OUTLINE

10. The Bill contains a number of delegated powers provisions which are explained in detail below. Some of these powers are new while others replace or update existing powers in the 1978 Act.

11. This memorandum sets out—
   • the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
   • why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
   • the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

12. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Executive has considered the importance of each matter against the need to—
This document relates to the Adoption and Children (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 27 March 2006

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation; and
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

13. In addition to the powers outlined below the Bill also contains certain direction making powers. It is considered that these are of an executive nature rather than a legislative nature and as such they are not detailed in this memorandum.

SUBORDINATE LEGISLATIVE POWERS – DETAIL

Section 2 Local authority plans

14. Section 2 makes provision in relation to the preparation and publication by local authorities of plans for the provision of adoption services in their areas. Subsection (3) specifies who must be consulted by local authorities in drawing up plans for the provision of the adoption service which list includes such other persons as may be prescribed by Scottish Ministers by regulations.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

15. The list at subsection (3) is currently considered to be comprehensive. The power to make regulations specifying additional persons has been taken so that Scottish Ministers can add to this list should the need arise. As practice and experience develops it is probable that there will be a need to revise the list to take account of working practices to include others who may have an important role in relation to adoption and adopted children and the development by local authorities of their plans for adoption services.

16. The regulations will be subject to negative resolution procedure. Given that the regulations will be uncontroversial and administrative in nature it is considered that negative resolution procedure is appropriate.

Section 3 Assistance in carrying out functions in sections 1 and 2

17. Section 3 provides power for a local authority to require assistance from certain persons in relation to its functions of providing services and preparing and publishing plans for adoption services. The persons who may be called upon to assist are set out in subsection (3), being other local authorities and health boards. Subsection (3)(c) provides for Scottish Ministers to add to the defined list of those who can assist a local authority in carrying out functions in sections 1 and 2.
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Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

18. A regulation-making power has been taken to allow Scottish Ministers to add to the list in subsection (3). The list at subsection (3) is currently considered to be appropriate. The power to make regulations specifying additional persons has been taken so that Scottish Ministers can add to the specified list should the need arise. As practice and experience develops it is probable that there will be a need to revise the list to take account of working practices to include others who may have an important role in relation to adoption and adopted children and the development by local authorities of their plans for adoption services.

19. The regulations will be subject to negative resolution procedure. Given that the regulations will be uncontroversial and administrative in nature it is considered that negative resolution procedure is appropriate.

Section 5 Adoption Agencies: regulations about carrying out of functions

20. This section contains a power to make regulations relating to the carrying out of functions by a registered adoption service and the carrying out by a local authority of its functions in relation to adoption.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

21. This provision restates section 9 of the 1978 Act by virtue of which the Adoption Agencies (Scotland) Regulations 1996 (S.I. 1996/3266) were made. These regulations set out detailed provision in relation to the regulation of adoption agencies, including provision concerning the establishment and functions of adoption panels which consider the assessment of potential adopters and duties of adoption agencies in the adoption process. These are detailed provisions the nature of which are suitable for subordinate legislation rather than primary legislation.

22. These regulations were subject to negative resolution procedure and this is considered appropriate for the new regulations which will replace them as they will be uncontroversial in nature and relate substantially to administrative and technical details.

Section 6 Pre-adoption services

23. Section 6 sets out who is eligible to receive pre-adoption services and what such services include. A person listed at subsection (1) is entitled to receive such services. Subsection (4) contains power to add and otherwise modify by regulations the list of pre-adoption services set out at section 6(2) and to make further provision about pre-adoption services.
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Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by Statutory Instrument  
Parliamentary procedure: Affirmative resolution procedure (where amendment to section 6(2) is made) or negative resolution procedure

24. The intention is that Scottish Ministers will have the power to make regulations by which these services can be added to or modified. The list at subsection (2) currently is comprehensive. Defining services in this way is new and it is likely that as services are implemented under the Bill, and as these services develop, new and innovative services designed to meet the needs of those persons mentioned in subsection (1) will be developed. In order therefore to provide the necessary flexibility to respond to any changes which may arise in the provision of such services or the need for other services of this type to be specified it is considered that a power to amend is required.

25. The regulations will also give Scottish Ministers the power to make further provisions about pre-adoption services. In practice this is likely to include amending the list of people who are eligible to receive pre-adoption services should the existing list be considered to be too narrow as practice and experience of the new scheme develops.

26. Such regulations will be subject to affirmative resolution procedure where they amend section 6(2). This is considered appropriate as they permit modification of a provision of a Bill. Otherwise, any regulations will be subject to negative resolution procedure as they will be administrative and uncontroversial in nature.

Section 7  Adoption support services

27. Section 7 sets out who is eligible to receive adoption support services and what such services include. The services are similar to pre-adoption services but an assessment of needs is required before such services may be provided and, under section 8, the provision of the service is within the discretion of the local authority. Subsection (4) contains power to add and otherwise modify by regulations the list of adoption support services set out at section 7(3) and to make further provision about such services.

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by Statutory Instrument  
Parliamentary procedure: Affirmative resolution procedure (where amendment to section 7(2) is made) or negative resolution procedure

28. The intention is that Scottish Ministers will have the power to make regulations by which these services can be added to or modified. The list at subsection (3) is currently comprehensive. Defining services in this way is new and it is likely that as services are implemented under the Bill, and as these services develop, new and innovative services designed to meet the needs of persons other than those mentioned in section 6(1) will be developed. In order therefore to provide the necessary flexibility to respond to any changes which may arise in the provision of such services or the need for other services of this type to be specified it is considered that a power to amend is required.
29. Such regulations will be subject to affirmative resolution procedure where they amend section 7(2) as they permit modification of a provision of a Bill. Otherwise, any regulations will be subject to negative resolution procedure as they will be administrative and uncontroversial in nature.

Section 20 Restrictions on removal: child placed for adoption with consent

30. This section makes it an offence for a person to remove a child from prospective adopters with whom the child has been placed for adoption by an adoption agency. It applies where each parent or guardian of a child has given consent to the placement in accordance with regulations made by the Scottish Ministers.

Power conferred on: Scottish Ministers  
Power exercisable by: Regulations made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

31. The regulations will be subject to negative resolution procedure. This is considered appropriate as they will relate to detailed procedural issues of a substantially uncontroversial nature.

Section 23 Scottish Ministers’ power to amend period of time in sections 21 and 22

32. This section contains a power to amend by order the period of 5 years mentioned in sections 21(1)(b) and 22(1)(b) of the Bill. It also allows any period so substituted to be further amended.

Power conferred on: Scottish Ministers  
Power exercisable by: Order made by Statutory Instrument  
Parliamentary procedure: Affirmative resolution procedure

33. Sections 21(1)(b) and 22(1)(b) impose restrictions on removal of the child from the care and possession of the prospective adopters where, respectively, a notice of intention to adopt has been given under section 18(2) or an application for an adoption order is pending. The restrictions on removal apply where the child’s home has been with the prospective adopters for a period of five years preceding the giving of the notice or the making of the application, as the case may be. In order to allow the period of five years to be amended without the need for primary legislation it is considered that a power to amend by way of subordinate legislation is required.

34. Any such order will be subject to affirmative resolution procedure as it would modify provisions of this Bill.

Section 39 Information to be kept about adoption

35. This section enables Scottish Ministers to make regulations in relation to the information that must be kept by an adoption agency in relation to adoptions and the form in which that information must be kept.
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Section 36 Disclosure of information kept under section 39

36. The regulations will be subject to negative resolution procedure. This is considered appropriate as they will be uncontroversial in nature and relate to detailed administrative issues.

Section 40 Disclosure of information kept under section 39

37. This section enables Scottish Ministers to make regulations providing for disclosure of information about adoptions kept by adoption agencies under section 39. These regulations will set out who is entitled to what information and the extent to which an adoption agency will have discretion in relation to the disclosure of information. These regulations will enable an adopted person to access certain information about his or her adoption including information about his or her parentage. The nature and sensitivity of the information and the age of the adopted person when seeking the information will be relevant factors in determining what right of access will be given and what conditions, if any, will apply in relation to the disclosure of information.

Section 47 Post-adoption services

39. Subsection (5) of this section provides for a power to add further types of service to the list of post-adoption services provided for in subsection (2) of this section, to modify those types of services so provided for, and to make further provision about post-adoption services.

40. This section sets out the categories of person who are eligible to receive post-adoption services and lists the services that will be made available. The intention is that the Scottish Ministers should have the power to add to or modify that list of services, or to make further provision about post-adoption services. This power will provide the necessary flexibility to respond to any changes which may arise in the provision of such services or the need for other services of this type.

41. Where regulations made under section 47(5) contain provision which amends subsection (2), they will be subject to affirmative resolution procedure as they will be amending the provisions of this Bill. Otherwise, any regulations will be subject to negative resolution procedure.
procedure. Given that such regulations would be uncontroversial and administrative in nature, it is considered that negative resolution procedure is appropriate.

Section 48  Assessment of needs

42. Subsection (4) of this section contains a power for the Scottish Ministers to prescribe by regulations the matters to which a local authority must have regard when making an assessment of the needs of a person for post-adoption services and also the manner in which the assessment is to be carried out.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

43. Where a person within any of the classes mentioned in section 47(4) makes a request, this section places a duty on local authorities to carry out an assessment of the needs of that person for post-adoption services and to decide whether such services should be provided. A local authority also has a discretion to carry out an assessment of needs and decide whether such services should be provided in respect of persons other than those listed in section 47(4) upon the request of that person.

44. The regulations will be subject to negative resolution procedure as it is considered that they are administrative in nature and that the parameters of the power are clearly set out in section 48(4).

Section 55  Reassessment of needs for post-adoption services

45. Subsection (6) of this section contains a power for the Scottish Ministers to prescribe by regulations the matters to which a local authority must have regard when making a reassessment of the needs of a person for post-adoption services and also the manner in which the reassessment is to be carried out.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

46. This section applies where a care plan is in force and a “relevant member” within the meaning of section 53 has required the local authority to make a reassessment of the need for post-adoption services. Having regard to the results of the reassessment, the local authority will then decide whether there is a need for the provision of post-adoption services.

47. The regulations will be subject to negative resolution procedure as it is considered that they are administrative in nature and that the parameters of the power are clearly set out in section 55(6).
Section 58  Regulations about adoption services and care plans

48. This section contains a power to make provision by way of regulations for or in connection with various prescribed aspects of the adoption service.

Power conferred on:  Scottish Ministers  
Power exercisable by: Regulations made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

49. This section contains a power to make regulations:

(1) determining the circumstances in which local authority is responsible for the provision of post-adoption services and the making of an assessment of needs under section 48(1)(a),

(2) determining when and under what circumstances a local authority’s duty to provide pre-adoption and post-adoption services ends,

(3) specifying the circumstances in which a local authority can continue to provide post-adoption services once their duty to provide such services has come to an end,

(4) specifying the arrangements which may be made by a local authority when a person to whom it is supplying or has a duty or a discretion to supply an adoption service moves outwith the local authority’s area and the persons with whom such arrangements may be made,

(5) assessing the needs for adoption services of someone who has moved or intends to move from one local authority area to another or to Scotland from outwith Scotland, and

(6) specifying the way in which reviews of care plans should be carried out.

50. Rather than providing for all these matters in the Bill, a power to make regulations has been taken so that the Scottish Ministers can have the flexibility to prescribe specific requirements in relation to adoption services and to amend those requirements should the need arise in future.

51. The regulations will be subject to negative resolution procedure. It is not envisaged that the substance of the regulations will be controversial and accordingly we consider that this will provide the appropriate level of parliamentary scrutiny.

Section 64  Restriction on bringing children into the United Kingdom

52. This section contains several powers to make regulations and applies where a person who is habitually resident in the United Kingdom brings a child who is habitually resident elsewhere into the United Kingdom for the purpose of adopting that child. It also applies where such a person brings into the United Kingdom a child whom he or she has adopted under an external adoption which has taken place within the previous twelve months. The section does not apply to children who are to be adopted under a Convention adoption order.
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Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure other than in relation to the first exercise of the power under subsection (8), to which affirmative resolution procedure will apply.

53. The power in subsection (5) permits any regulations made to require the person bringing the child into the United Kingdom to apply to an adoption agency for an assessment of that person’s suitability to adopt the child and to provide the agency with information which it may require. The power in subsection (6) allows provision to be made in respect of conditions which require to be met where this section applies. The power in subsection (7) allows regulations to be made which provide that any provision of Chapter 2 of the Bill may apply with modifications or not apply at all. The power in subsection (8) allows regulations to be made which provide that the provisions of this section will not apply in the circumstances provided for in that subsection.

54. These powers to make regulations have been taken so that Scottish Ministers can make detailed provision as to the procedural requirements that must be met in order to bring a child into the United Kingdom in the circumstances in which this section applies. This allows further procedure to be provided for and safeguards to be added as future issues may come to light with regard to the system of co-operation between countries and the abduction of, the sale of, or traffic in, children. The regulations will also give the flexibility for the conditions not to apply, or to apply with modifications, if a relative, parent, step-parent or guardian is involved.

55. The first exercise of the power will be subject to affirmative resolution procedure, and subsequent exercises of it will be subject to negative resolution procedure. It is considered this degree of parliamentary scrutiny is appropriate. It mirrors the procedure applied to equivalent provisions of the Adoption and Children Act 2002 (section 86). The regulations deal with matters of detail which is of a procedural nature and not otherwise appropriate for primary legislation. It may be that negative procedure would be appropriate for all exercises of the power but it is noted that following comment by the Committee on Delegated Powers and Regulatory Reform in its 28th Report affirmative procedure was applied to the first exercise of the power under the 2002 Act. It is considered that this is appropriate in order to enable a reasonable balance between parliamentary scrutiny and the making of regulations which concern detailed matters of procedure.

Section 65 Preliminary order where child to be adopted abroad

56. This section contains a power in subsection (3) to make regulations prescribing requirements which must be met before an order under this section vesting parental responsibilities and parental rights in prospective adopters may be made. It also contains a power to make regulations providing for any provisions of the Bill which apply to adoption orders to apply to orders made under this section.
Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

57. This section allows a court to make an order vesting parental responsibilities and rights in prospective adopters in relation to a child where it is satisfied that the prospective adopters intend to adopt a child under the law of country or territory outwith the British Islands. Such an order may not be made if the prospective adopters would meet the requirements as to domicile or habitual residence provided for in this Bill in relation to an adoption order. A power to make subordinate legislation has been provided for in order to allow detailed provision to be made in respect of preconditions to be met and which of the provisions applying to adoption orders shall apply to orders made under this section.

58. It is considered that the regulations would be not be controversial and accordingly negative resolution procedure is considered to be appropriate.

Section 66 Restriction on removal of children for adoption outside Great Britain

59. This section contains a power to make regulations to provide for the restrictions on the removal of children for adoption outside Great Britain to apply with modifications, or not to apply at all, if the prospective adopters (or one of them) are parents, relatives or guardians of the child or the prospective adopter is a step-parent of the child.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Affirmative resolution procedure upon the first exercise of the power, and thereafter negative resolution procedure

60. Section 66 makes it an offence to take or send a ‘protected child’ (a British subject or a citizen of the Republic of Ireland) out of Great Britain to any place outwith the British Islands with a view to the adoption of the child, unless under the authority of an appropriate order. It is also an offence to make or take part in any arrangements for transferring the care and possession of a child to any person knowing that the other person intends to take or send the child out of Great Britain.

61. The power to make regulations has been taken so that Scottish Ministers have the flexibility to recognise the special position of relatives, parents, step-parents and guardians with regard to intercountry adoption. It allows for procedural requirements to be waived or altered if criteria to be specified in regulations are met.

62. The first exercise of this power will be subject to affirmative resolution procedure, and subsequent exercises of it will be subject to negative resolution procedure. It is considered this degree of parliamentary scrutiny is appropriate. It mirrors the procedure applied to equivalent provisions of the Adoption and Children Act 2002 (section 86). The regulations are very limited in scope and deal with matters of detail not otherwise appropriate for primary legislation. It may be therefore that negative procedure would be appropriate but it is noted that following comment by the Committee on Delegated Powers and Regulatory Reform in its 28th Report affirmative
procedure was applied to the first exercise of the power. It is considered that this is appropriate in order to enable a reasonable balance between parliamentary scrutiny and the making of regulations which are limited in nature.

Section 67 Regulations under section 64: offences

63. This section makes it an offence for a person to bring, or cause another to bring, a child into the United Kingdom without having complied with the requirements of section 64(5) or meeting conditions under subsection (6) of that section before the child is brought into the United Kingdom or before such later time as may be prescribed by regulations.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

64. As the effect of such regulations will be very limited and uncontroversial in nature negative resolution procedure is considered to be appropriate.

Section 68 Declaration of special restrictions on adoptions from abroad

65. This section contains at subsection (3) a power to make an order that declares that special restrictions are to apply to a country with regard to intercountry adoption. The order places a country on “the restricted list”.

Power conferred on: Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

66. Section 70 defines “special restrictions” as the Scottish Ministers being restricted from taking any step that they might otherwise have taken in connection with furthering the bringing of a child into the United Kingdom. Section 68 allows for special restrictions to apply to a country in connection with intercountry adoption, where Scottish Ministers have reason to believe that practices in a country outside the British Islands make it contrary to public policy to further the bringing of children who have been adopted or were the subject of adoption proceedings in that country into the United Kingdom.

67. As the effect of such an order will be administrative in nature and affect the power of Scottish Ministers themselves to act in a certain way, negative resolution procedure is considered to be appropriate.

Section 69 Review

68. Subsection (2) of this section contains power to make an order that revokes an order under section 68 that placed a country on the restricted list with regard to intercountry adoption.
69. Section 69 places a duty on Scottish Ministers to keep the restricted list of countries under review. This order allows a country to be removed from the list if there is no longer reason to believe that practices in that country make it contrary to public policy to further the bringing of children adopted in that country into the United Kingdom.

70. It is considered appropriate that the procedure for revoking an order made under section 68 should be the same as that for making the order in the first instance, hence negative resolution procedure is considered appropriate.

Section 70 The special restrictions

71. Subsection (3) of this section contains power to make regulations that specify the procedure to be followed and the matters to be taken into account by Scottish Ministers in determining whether to take steps that would further the bringing of a child into the United Kingdom despite the existence of special restrictions in relation to a restricted country.

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

72. Section 70 defines special restrictions as mentioned above.

73. The power to make regulations has been taken so that Scottish Ministers have the flexibility to allow children to be brought into the United Kingdom in connection with adoption, from a restricted country under specified exceptional circumstances. This flexibility is required as it allows recognition of the unique circumstances that may emerge with regard to individual cases where each case should be considered on its own merits.

74. Negative resolution procedure is considered appropriate due to the detailed and administrative nature of the regulations.

Section 71 Imposition of extra conditions in certain cases

75. Subsection (1) provides power to make regulations that specify in the restricted list, for any particular restricted country, an additional step that the United Kingdom takes in connection with the bringing in of a child from that country, by virtue of arrangements between the UK and that country and impose one or more conditions specified in the regulations which are to be met in respect of a child brought into the United Kingdom from that country. If a person bringing a child into the UK in connection with adoption does not meet these conditions they will commit a criminal offence.
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Power conferred on: Scottish Ministers
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

76. The power to make regulations has been taken so that Scottish Ministers can respond to the fact that co-operative agreements between the UK and restricted countries may alter over time, given that particular concerns may emerge or the country may attempt to put additional, more robust safeguards in place to facilitate being removed from the restricted list.

77. As the regulations will be detailed and administrative in nature and will be uncontroversial negative resolution procedure is considered appropriate.

Section 73 Meaning of “overseas adoption”

78. Subsection (1) contains power to make regulations that determine what is meant by an overseas adoption effected under the law of any country or territory outside the British Island, but which does not include a Convention adoption. By subsection (2) power is given to prescribe the requirements that should be met by an adoption of any description in order for it to be considered an “overseas adoption” for the purposes of this Act.

Power conferred on: Scottish Ministers
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

79. The power to make regulations has been taken so that Scottish Ministers can alter the criteria to be met in order for an adoption from a particular country to be considered an “overseas adoption”, as the adoption processes within countries are reviewed and new issues may come to light. Whether or not an adoption is considered to be an overseas adoption has relevance in the application of section 74 of the Bill.

80. The regulations will by their nature be very limited in effect and generally uncontroversial as they engage the power of the Court of Session under section 74 rather than have any direct effect themselves. As such negative resolution procedure is considered appropriate.

Section 75 Section 74: supplementary provision

81. Subsection (1) enables Scottish Ministers to make regulations setting out procedural matters in relation to an application to the Court of Session for an order or a decision under section 74 regarding annulment etc of an overseas adoption.
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Power conferred on: Scottish Ministers  
Power exercisable: Regulations made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

82. Regulations under this section will deal with matters of detail, be entirely procedural in nature and be uncontroversial. Negative resolution procedure is therefore considered to be appropriate.

Section 77 Adoption allowances schemes

83. Under this section local authorities are required to prepare adoption allowances schemes. The requirement is to be met within a period following the coming into force of the section as the Scottish Ministers may by order direct under subsection (1).

Power conferred on: Scottish Ministers  
Power exercisable: Order made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

84. Local authorities currently have adoption allowance schemes in place and this provision restates section 51A of the 1978 Act. The power to make an equivalent order under that section is subject to negative resolution procedure. The order will be uncontroversial and it is considered that negative resolution procedure is appropriate.

85. By virtue of subsection (3) Scottish Ministers are given power to make regulations in relation to adoption allowances scheme. The decision as to eligibility for an allowance and the amount of the allowance will be for the local authority but the regulations will set the framework within which such decisions may be made. The regulations may, in terms of subsection (4), make provision specifying the procedure to be followed by an authority in determining to whom an allowance should be paid, the circumstances in which such an allowance is payable and the factors to be taken into account in determining the amount of an allowance. The regulations may also specify the procedure for review, variation and termination of allowances, the procedure to be followed for preparing, modifying or revoking a scheme and may specify the information about allowances that an authority is required to provide to prospective adopters.

Power conferred on: Scottish Ministers  
Power exercisable: Regulations made by Statutory Instrument  
Parliamentary procedure: Negative resolution procedure

86. These provisions restate section 51A(2) of the 1978 Act. The power to make equivalent regulations under that section is subject to negative resolution procedure. The regulations will be uncontroversial and it is considered that negative resolution procedure is appropriate.

Section 78 Disclosure of medical information about parents of child

87. Section 78 enables Scottish Ministers to make regulations requiring the disclosure of medical information about the health of parents of a child who is to be, may be or has been adopted. Such information is a key part of assessment of the suitability of a proposed adoption
placement. An adoption panel considering what is in the best interests of the child is advised by a medical adviser who provides an assessment of relevant information about the child’s health and any medical conditions. Information about the health of the natural parents of the child will inform any assessment of the child’s health and medical condition and thereby enable all relevant information to be taken into account in the best interests of the child.

**Power conferred on:** Scottish Ministers  
**Power exercisable:** Regulations made by Statutory Instrument  
**Parliamentary procedure:** Negative resolution procedure

88. Subsection (1) provides the power for Scottish Ministers to make regulations in relation to the disclosure of the necessary information. Subsection (3) enables such regulations to state to what extent any such information may be disclosed to the child concerned or to adoptive parents or potential adoptive parents. Subsection (4) sets out further details in relation to the regulations specifying to whom information may be disclosed, the circumstances in which information may be disclosed, the type of information that may be disclosed, when consent to disclosure shall not be required and the manner in which the information may be processed by a person to whom the information is disclosed.

89. The regulations will be very detailed in nature and will be limited in effect as provided for by subsection (2) and by the requirements of Article 8 of the European Convention on Human Rights. The particular type of information to be disclosed and the persons to whom disclosure may be required will be limited to such extent as is necessary to enable an assessment of the suitability of a placement to be made in the best interests of the child and the care of the child thereafter.

90. The limited effect and detailed nature of the regulations, together with the safeguards imposed by the section itself, is such that negative resolution procedure is considered to be appropriate.

**Section 97 Permanence orders: rules of procedure**

91. This section provides for rules of court to be made in respect of the court procedure for permanence orders, in particular in relation to applications for orders, variation or revocation of orders and applications for leave to apply for variation or revocation. Such rules will be subject to the normal procedure for the making of court rules and will be made by act of sederunt made under section 32 of the Sheriff Courts (Scotland) Act 1971 (for procedure in the Sheriff Court) or section 5 of the Court of Session Act (for procedure in the Court of Session). Rules made under these provisions will be made by way of statutory instrument, but will not be subject to any form of parliamentary procedure.

**Power conferred on:** Court of Session  
**Power exercisable:** Rules made by Statutory Instrument  
**Parliamentary procedure:** None

92. The Executive considers that these procedural matters should not be dealt with by way of primary legislation and indeed are not matters that the Scottish Ministers should regulate at all.
The power to prescribe procedure should therefore be delegated to the Court of Session, which currently has responsibility for all court rules. The Court of Session is best placed to amend and develop procedural rules as necessary.

93. The rules to be made under this provision will be procedural. Just as there is no need for the Scottish Ministers to make them, there is no need for Parliament to approve or annul them. It is therefore appropriate that they should be made by act of sederunt and not be subject to any form of parliamentary procedure.

Section 98 Notification of proposed application for order

94. This section provides for notification to be given by a local authority to the father of the child, if that father does not have parental responsibilities and parental rights in respect of the child and has never had such responsibilities or rights, of certain information in relation to a proposed application for a permanence order or an application for an adoption order. By virtue of subsections (2)(b) and (5)(b) the information to be given in relation to the processes for applying for an order is such information as may be prescribed by regulations made by Scottish Ministers.

Power conferred on: Scottish Ministers
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

95. The regulations will be subject to negative resolution procedure. This is considered appropriate as the matters to be prescribed are uncontroversial and are procedural in nature.

Section 99 Children subject to supervision requirements: duty to refer to Principal Reporter

96. This section requires the case of a child subject to supervision requirements to be referred to the Principal Reporter in circumstances set out in subsection (1). The referral is to be made within a period of time determined in accordance with subsection (3). That subsection contains power to make regulations that specify by reference to the occurrence of an event described in the regulations, the period of time during which a referral under this section is to be made.

Power conferred on: Scottish Ministers
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

97. The power to make regulations has been taken so that Scottish Ministers have a degree of flexibility enabling them to set and alter the relevant period of time if operational issues arise that require some adjustment of the relevant period. Negative resolution procedure is considered appropriate as the regulations will be limited in scope and uncontroversial in nature.
Section 101  Rules: appointment of curators ad litem and reporting officers

98. This section requires rules of court to be made providing for the appointment of curators ad litem and reporting officers for children in respect of whom applications are made for an adoption order, permanence order or order under section 65 of the Bill. The rules will prescribe the cases in which such persons are to be appointed for the child and make provision in respect of the appointment itself.

Power conferred on:    Court of Session
Power exercisable:     Rules made by Statutory Instrument
Parliamentary procedure: None

99. Such rules will be subject to the normal procedure for the making of court rules and will be made by act of sederunt under section 32 of the Sheriff Courts (Scotland) Act 1971 (for procedure in the Sheriff Court) or section 5 of the Court of Session Act (for procedure in the Court of Session). Rules made under these provisions will be made by way of statutory instrument, but will not be subject to any form of parliamentary procedure.

100. The Executive considers that these procedural matters should not be dealt with by way of primary legislation and indeed are not matters that the Scottish Ministers should regulate at all. The power to prescribe procedure should therefore be delegated to the Court of Session, which currently has responsibility for all court rules. The Court of Session is best placed to amend and develop procedural rules as necessary.

101. The rules to be made under this provision will be procedural. Just as there is no need for the Scottish Ministers to make them, there is no need for Parliament to approve or annul them. It is therefore appropriate that they should be made by act of sederunt and not be subject to any form of parliamentary procedure.

Section 103  Regulations about fostering allowances

102. Subsection (1) of this section provides for Scottish Ministers to make regulations for the payment of fostering allowances by a local authority. The regulations will be able to specify persons to whom payment may be made, circumstances in which payment may be made and will enable flexibility for rates of payment to be specified or recommended.

Power conferred on:    Scottish Ministers
Power exercisable:     Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

103. The regulations will be of a detailed administrative nature and will be uncontroversial. Negative resolution procedure is therefore considered to be appropriate.
Section 104  Evidence of consent

104. Subsection (1) provides that a document evidencing any consent required by the Bill is sufficient evidence of the signature of the person bearing to sign it if it is witnessed in accordance with rules of court.

Power conferred on:  Court of Session  
Power exercisable:  Rules made by Statutory Instrument  
Parliamentary procedure:  None

105. The Executive considers that these procedural matters should not be dealt with by way of primary legislation and indeed are not matters that the Scottish Ministers should regulate at all. The power to prescribe procedure should therefore be delegated to the Court of Session, which currently has responsibility for all court rules. The Court of Session is best placed to amend and develop procedural rules as necessary.

106. The rules to be made under this provision will be procedural. Just as there is no need for the Scottish Ministers to make them, there is no need for Parliament to approve or annul them. It is therefore appropriate that they should be made by act of sederunt and not be subject to any form of parliamentary procedure.

Section 106  Rules of Procedure

107. Subsection (1) of this section provides for rules of court to make provision dealing generally with all matters of procedure. Subsections (2) to (6) require rules to provide for certain information to be given to specified persons in relation to specified types of application.

Power conferred on:  Court of Session  
Power exercisable:  Rules made by Statutory Instrument  
Parliamentary procedure:  None

108. Such rules will be subject to the normal procedure for the making of court rules and will be made by act of sederunt under section 32 of the Sheriff Courts (Scotland) Act 1971 (for procedure in the Sheriff Court) or section 5 of the Court of Session Act (for procedure in the Court of Session). Rules made under these provisions will be made by way of statutory instrument, but will not be subject to any form of parliamentary procedure.

109. The Executive considers that these procedural matters should not be dealt with by way of primary legislation and indeed are not matters that the Scottish Ministers should regulate at all. The power to prescribe procedure should therefore be delegated to the Court of Session, which currently has responsibility for all court rules. The Court of Session is best placed to amend and develop procedural rules as necessary.

110. The rules to be made under this provision will be procedural. Just as there is no need for the Scottish Ministers to make them, there is no need for Parliament to approve or annul them. It is therefore appropriate that they should be made by act of sederunt and not be subject to any form of parliamentary procedure.
Section 108 Ancillary provision

111. This section enables Scottish Minister to make orders making ancillary provision, namely such incidental, supplementary, consequential, transitory, transitional or saving provision as they consider necessary for the purposes of or in consequence of provision made by the Bill. Subsection 92) provides that such an order may modify any enactment.

Power conferred on: Scottish Ministers
Power exercisable: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure unless modifying an Act or an Act of the Scottish Parliament in which case affirmative resolution procedure.

112. This provision is considered to be necessary to allow flexibility if further changes are found to be necessary as a result of the provisions in the Bill. Whilst some modifications have been identified in preparation for the Bill it may be that there are others which will be required. The provisions of the Bill provide for revocation of the majority of the 1978 Act and the revocation of some provisions of the Children (Scotland) Act 1995 and the Adoption and Children Act 2002. The power, whilst potentially wide is limited in that it can only be used if the Scottish Ministers consider it necessary for the purpose of, or in consequence of, the provisions of the Bill.

113. Where any such order amends primary legislation it will be subject to affirmative resolution procedure. Otherwise it will be subject to negative resolution procedure. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred.

Section 113 Short title and commencement

114. Subsection (2) of this section provides for the provisions of the Bill, save for section 113 itself and sections 108 and 109, to come into force on such days as the Scottish Ministers may be order appoint.

Power conferred on: Scottish Ministers
Power exercisable: Order made by Statutory Instrument
Parliamentary procedure: No procedure

115. As is the usual practice commencement orders under this provision will not be subject to parliamentary procedure.

SCHEDULE 1 REGISTRATION OF ADOPTIONS

116. Paragraph 1 of schedule 1 provides for every adoption order to contain a direction to the Registrar General to make an entry in the Adopted Children Register. The entry is to be in the form prescribed by regulations made by the Registrar General with the approval of Scottish Ministers.
This document relates to the Adoption and Children (Scotland) Bill (SP Bill 61) as introduced in the Scottish Parliament on 27 March 2006

Power conferred on: Registrar General
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: no procedure (but approval by Scottish Ministers required)

117. The regulations will concern how entries are to be made in the Adopted Children Register and, as such, are purely administrative in nature and will govern the internal operations of the Registrar General. It is not considered that any form of parliamentary procedure is necessary or appropriate in relation to such matters.

118. Paragraph 6 of schedule 1 relates to registration of adoptions made under a “registrable foreign adoption”, which is defined to mean an adoption which satisfies prescribed requirements and is either made by virtue of a Convention adoption or an overseas adoption.

119. This paragraph contains a power which allows the Registrar General to prescribe the following matters by way of regulations: paragraph 6(3) provides that an application under this paragraph must be made in the prescribed manner by a prescribed person and must contain the prescribed particulars, and paragraph 6(4) provides that any entry in the Adopted Children Register must be made in the prescribed form. Any such regulations are to be made with the approval of the Scottish Ministers.

Power conferred on: Registrar General
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: no procedure (but approval by Scottish Ministers required)

120. Such regulations will relate to administrative matters concerning applications under paragraph 6 and again it is not considered that any form of parliamentary procedure is necessary or appropriate in relation to such matters.

121. Paragraph 7(4) of schedule 1 allows the Registrar General to prescribe by regulations the manner in which any amendment to an adoption order or revocation of a direction which has been effected under paragraphs 7(1) to (3) of this schedule must be communicated to the Registrar General. Any such regulations are to be made with the approval of the Scottish Ministers.

Power conferred on: Registrar General
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: no procedure (but approval by Scottish Ministers required)

122. The regulations will relate to matters which are purely administrative and internal to the operation of the Registrar General and once again it is not considered that any form of parliamentary procedure is necessary or appropriate in relation to such matters.
SCHEDULE 2- MINOR AND CONSEQUENTIAL AMENDMENTS

The Children (Scotland) Act 1995 (c.36)

123. Paragraph 1(4)(b) of schedule 2 provides for the amendment of the Children (Scotland) Act 1995 by the insertion of a new subsection (4A) in section 73 of that Act. This provides Scottish Ministers with power to make regulations that specify the period of time during which a child who is subject to a supervision requirement should be referred to the Principal Reporter, when it is decided by the local authority that the best interests of the child would be served by their referral for a parental responsibilities order, freeing order or placement for adoption.

Power conferred on: Scottish Ministers
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

124. The power to make regulations has been taken so that Scottish Ministers have a degree of flexibility enabling them to set and alter the relevant period of time if operational issues arise that require some adjustment of the relevant period. Negative resolution procedure is considered appropriate as the regulations will be limited in scope and uncontroversial in nature.

125. Paragraph 1(4)(f) of schedule 2 provides for the amendment of the Children (Scotland) Act 1995 by the insertion of a new subsection (13A) in section 73 of that Act. This provides Scottish Ministers with power to make regulations that prescribe the form of report to be made by a local authority for the purpose of giving advice to the Principal Reporter as to the proposed application for a permanence order in relation to a child who is subject to a supervision requirement.

Power conferred on: Scottish Ministers
Power exercisable: Regulations made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure

126. The power to prescribe the form of report has been taken so that Scottish Ministers have the power to respond to a need to ensure consistency and relevance of reports should operational issues arise that require such prescription. Negative resolution procedure is considered appropriate as the regulations will be limited in scope and uncontroversial in nature.
ADOPTION AND CHILDREN (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM