ADOPTION AND CHILDREN (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This supplementary Memorandum has been prepared by the Scottish Executive in accordance with Rule 9.7.10 of the Parliament’s Standing Orders to assist consideration by the Subordinate Legislation Committee in accordance with Rule 9.7.9. It explains changes or modifications to the powers to make subordinate legislation under the Adoption and Children (Scotland) Bill made as a consequence of amendments at Stage 2. It describes the purpose of each amended provision conferring powers to make subordinate legislation. This supplementary Memorandum should be read in conjunction with the original Delegated Powers Memorandum lodged in relation to the Bill as introduced.

2. In deciding whether to adopt negative or affirmative resolution procedure, careful consideration has been given to the degree of parliamentary scrutiny that is felt to be required for the regulations, balancing the need for the appropriate level of scrutiny with the need to avoid using up parliamentary time unnecessarily.

Amendments to delegated powers

3. During the Stage 2 proceedings, the Bill was structurally altered which resulted in some powers being moved or replaced by new provisions. The power to make regulations has been modified in some cases as a result of amendments to provisions in relation to which those powers relate. The procedure applicable to two powers has been altered from negative resolution procedure to affirmative resolution procedure. Outlined below are descriptions of the relevant powers which have been amended or modified and explanations of and as to why the additions, removals, amendments or alterations have been made and are considered appropriate.

PART 1 - ADOPTION

Section 2 – Local Authority Plans

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

4. Section 2 has been altered to make provision in relation to the preparation and publication by local authorities of plans for the provision of adoption support services. This reflects other changes throughout the Bill which remove references to “pre-adoption”, “adoption” and “post-
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adoption” services and replace them with a single reference to “adoption support services”. This change reflects current practice and clarifies the structure of support. The power in this section is itself not altered though the power to make regulations and to give directions does now relate to the services under their new style, “adoption support services”.

Section 5 – Adoption Agencies: regulations about carrying out of functions

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

5. Section 5 has been altered so that regulations may specify circumstances in which a local authority that is proposing to make arrangements for a child to be adopted must apply not merely for a permanence order but for a permanence order with authority for the child to be adopted. The amendment does not alter the nature of the exercise of the power but ensures that it is absolutely clear that the power conferred by this section only applies to such a permanence order.

Section 6 – Adoption Support Services

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

6. This section as originally introduced set out who was eligible to receive pre-adoption services and what such services included. This section has been amended in line with other changes to the Bill, consolidating references to “pre-adoption”, “adoption” and “post-adoption” services within this section under the heading “adoption support services”. The section now sets out eligibility for and constitution of adoption support services. The list of eligible persons in subsection (1) has been expanded to take into account the often complex nature of family arrangements and ensure that it is clear who is eligible to receive adoption support services.

7. Subsection (2) indicating what adoption support services include has also been altered to ensure that it comprehensively reflects current practice. A new paragraph (da) has been inserted to ensure that the appropriate persons, as reflected in the new list in subsection (1), are eligible to receive the provision of information about adoption and the provision of guidance about adoption under this section.

8. The power in this section to amend subsection (2) by adding to or modifying the list is not itself changed but the power to make further provision about services is subject to a technical amendment so that it refers to “adoption support services” in line with the rest of the Bill.

Section 7 – Adoption Support Services

9. In line with the consolidation measures taken throughout the Bill, this section has been removed and the provisions merged with those in section 6. The power to make regulations is
now contained solely in section 6(4) which is unchanged, save for a technical amendment outlined above.

Section 7A – Assessment of needs for adoption support services

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

10. Section 7A(3)(a) provides that the Scottish Ministers may make regulations making provision for the manner in which local authorities should conduct assessments of the needs of a person for adoption support services. It is a direct replacement for section 48(4) of the Bill which has been deleted following the restructuring of the support provisions in the Bill.

11. Section 7A(1)(a) gives an automatic right to a number of persons (those mentioned in section 6(1)(a) to (q)) to request an assessment of needs from a local authority. There is also a right under section 7A(1)(b) for any other affected person to request such an assessment, but the local authority has a discretion in such cases on whether or not to carry an assessment out. The provision of the power in section 7A(3)(a) will ensure that regulations can be made to specify how these assessments are carried out to ensure that all assessments are conducted appropriately, consistently and fairly under the system.

Section 58 – Regulations about adoption services and care plans

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

12. Section 58 has been moved, along with sections 50 and 57, to follow section 8. This has been done to improve the logical structure of the legislation. Technical amendments have been made to the section consequential to the amendments to the Bill to refer to “adoption support services”. In subsection (1)(a)(ii) the cross reference to section 48(1)(a) has been replaced with a reference to section 7A(1)(a) which has replaced that provision.

13. The power to specify the way in which care plans (or adoption support plans) are carried out is now contained in section 56B as outlined below and paragraph (g) of section 58 of the Bill as introduced has therefore been removed.

14. A new provision has been added at subsection (2) to enable the power to be exercised so as to make different provision for different types of adoption support service. This adds necessary flexibility as in practice there may be differences between types of service that require different responses. This provision will allow regulations to be responsive to the particular circumstances of different parts of adoption support services.
Section 23 – Scottish Minister’s power to amend period of time in sections 21 and 22

15. This section, which enabled Scottish Ministers, by order to amend sections 21 and 22 to substitute a different period for the period mentioned in each of these sections, was commented upon by the Subordinate Legislation Committee. Following on from those comments, and in the light of the response of the Scottish Executive given to the Committee, this section has been removed. The section reflected a power conferred in section 28(10) of the Adoption Act 1978 which had never been used. Retention of this power was therefore considered unnecessary.

Section 40 – Disclosure of information kept under relevant enactment

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

16. As introduced, this section contained power to make regulations providing for disclosure of information about adoptions kept by adoption agencies under section 39. The section and therefore the power has been amended not only to refer to section 39 but to any other enactment under which adoption agencies are required to keep information. This will include provisions of previous adoption enactments.

17. A new provision, paragraph (d) of subsection (2) has been added allowing the regulations to make provisions about the review of decisions of adoption agencies relating to disclosure of information, and conditions applicable to such disclosure.

18. Amendment is also made to section 109(5) in order to make these regulations subject to affirmative procedure rather than negative procedure. That amendment follows Executive consideration of comments made by the Subordinate Legislation Committee in relation to procedure and further consideration of the nature of the regulations.

Section 47 – Post adoption services

19. In line with the consolidation measures taken in relation to services provisions in the Bill, this section has been removed and the equivalent provisions now lie in section 6 as explained above.

Section 48 – Assessment of needs

20. In line with the consolidation measures taken throughout the Bill, this section has been removed and is replaced by equivalent provisions in section 7A which is referred to above.
Section 55 – Reassessment of needs for adoption support services

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

21. This section has been amended in line with other changes to the Bill, consolidating references to “pre-adoption”, “adoption” and “post-adoption” services within this section under the heading “adoption support services”. The section confers on the Scottish Ministers the power to prescribe by regulations the matters to which a local authority must have regard when making an reassessment of the needs of a person for adoption support services and the manner in which the reassessment is carried out. No change has been made to the nature of the power itself.

Section 56B – Regulations about reviews of adoption support plans

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

22. Amendments have been made to the Bill replacing references to “care plans” with “adoption support plans” and restructuring the provisions specifying the circumstances in which such plans should be made. Local authorities are under a duty in terms of section 51 of the Bill to prepare an adoption support plan in certain circumstances. There is a further duty on the local authority in section 54 of the Bill to review adoption support plans from time to time.

23. Section 56B confers a power to issue regulations making provision for or in connection with the way in which such reviews are carried out. It is a restatement of the provision contained in section 58(g) of the Bill as introduced. This power to make regulations has been taken so that the Scottish Ministers may make detailed provision as to the manner in which reviews of adoption support plans should be carried out thus providing for a consistency of approach by local authorities.

24. The regulations will be subject to negative resolution procedure as they would have been under section 58. 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 66 – Restriction on removal of children for adoption outwith Great Britain

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

25. References within the Bill to the “possession” of children have been removed. These are technical amendments and do not alter the nature of the power to make regulations contained in subsection (5).
Section 78 – Disclosure of Medical Information about parents of child

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

26. No amendment has been made to this section but having taken into account comments made by the Subordinate Legislation Committee at Stage 1 and having further considered the nature of the regulations that this provision would enable, an amendment has been made to section 109(5) of the Bill to apply affirmative resolution procedure to such regulations.

Section 97 – Permanence orders: rules of procedure

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

27. This section provides for rules of court to be made in respect of the 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.

28. The specification of the power set out in subsection (2) has been amended to refer not just to a permanence order but to one with provision granting authority for the child to be adopted. The persons to whom rules must require notice to be given are set out in subsection (3) which has not been amended. When read in context the permanence order being referred to in subsection (2) is only one with authority for the child to be adopted. This is a technical amendment to specify precisely the permanence order being referred to and does not alter the nature of the power.

Section 103 – Regulations about fostering allowances

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

29. Section 103 as introduced conferred a power on the Scottish Ministers to make regulations providing for payments by local authorities in respect of children who were placed by the authority in terms of section 26(1)(a) of the Children (Scotland) Act 1995. This power has been extended through the insertion of a new subsection (1A) to cover other looked after children. As a result of the amendment, regulations may also be made in relation to payments by a local authority in respect of a child who is required by virtue of a supervision requirement under section 70(3)(a) of the 1995 Act (disposal of referral by children’s hearing: supervision requirements) to reside with a person other than a parent of the child.

30. A new subsection (3) has also been added to this section clarifying that the power in section 103 will apply to situations in which a permanence order has been granted vesting parental responsibilities and parental rights in a person who is a member of the family with
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whom the child was placed. This is a technical change which will enable allowances to continue to be paid to a foster carer even where parental responsibilities or rights are conferred upon that person by a permanence order. It modifies the effect of section 26(1)(a) of the 1995 Act for this purpose which would otherwise mean that as a result of parental responsibilities or rights being conferred upon a member of the family with which the child had been placed that child ceased to be placed in accordance with section 26.

31. No amendment has been made to the procedure applicable to such regulations.

Section 109 – Orders and Regulations

32. In its letter of 3 May 2006 the Subordinate Legislation Committee noted the powers conferred upon the Registrar General for Scotland in paragraphs 1, 6 and 7(4) of schedule 1 to the Bill to make regulations and asked whether it was intended that these should be exercisable by statutory instrument. In the reply of 9 May 2006 the Scottish Executive confirmed that this was indeed the intention. Subsection (1) and (2) of section 109 have been amended to include reference to the Registrar General for Scotland in order to address this point.

33. As a consequence of the deletion of section 23 explained above, paragraph (a) of subsection (5) of section 109 has been deleted.

SCHEDULE 2 – MINOR AND CONSEQUENTIAL AMENDMENTS

The Social Work (Scotland) Act 1968 (c.49)

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

34. The definition of “child” in relation to the power to make regulations contained in sections 5(5) of the Social Work (Scotland) Act 1968 has been amended by paragraph B1(2) of schedule 2 which is a minor technical amendment. No change is made to the fundamental nature of the regulation making power nor to the applicable procedure.

35. The amendment to section 5(5) of the 1968 Act makes clear that a child in subsections (3) and (4) of that section, which concern regulations involving placing of a child by a local authority under section 26 of the 1995 Act, is a child under the age of 18 and is therefore consistent with the definition that applies to section 26 itself, rather than meaning a child under the age of 16 or over the age of 16 but who has not attained 18 and who is subject to a supervision requirement or a child whose case has been referred to a children’s hearing.
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