Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (a) any—
   (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   (ii) [deleted]
   (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
   (c) general questions relating to powers to make subordinate legislation;
   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
   (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
   (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
   (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
   (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Christian Allard
Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
John Scott
Stewart Stevenson (Deputy Convener)

Committee Clerking Team:
Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Delegated Powers and Law Reform Committee

50th Report, 2013 (Session 4)

Children and Young People (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 10 September and 1 October 2013 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Children and Young People (Scotland) Bill at stage 1 (the Bill)\(^1\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (the DPM)\(^2\).

OVERVIEW OF BILL

3. This Bill was introduced by the Scottish Government on 17 April 2013. The Education and Culture Committee is the lead Committee.

4. In broad outline, the Bill concerns the rights and wellbeing of children and young people, and the duties of public authorities to support children, young people and their families. It places duties on the Scottish Ministers and other public authorities in line with the requirements of the United Nations Convention on the Rights of the Child, and amends the powers of the Children’s Commissioner to enable investigations to be conducted in relation to individual children and young people.

5. The Bill also makes provision about the way public services work to support children and young people, by providing for a single planning approach for children who need additional support from services (“child’s plans”) and creating a single point of contact around every child or young person (the “named person service”).

\(^1\) Children and Young People (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27s4-introd.pdf

\(^2\) Children and Young People (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/CYPB_-_Delegated_Powers_Memorandum_2.pdf
It also requires authorities which provide children’s services to have a coordinated approach to planning and delivery of those services, and makes provision about the approach to assessing the wellbeing of children and young people.

6. The Bill also extends the duties of local authorities to provide early learning and childcare for pre-school age children and extends the support available to looked after children and young people leaving care. It makes provision for counselling services and other forms of assistance to be made available to parents and kinship carers, and creates a statutory adoption register for Scotland.

7. Finally, the Bill amends existing legislation which affects children and young people by creating a new right to appeal a local authority decision to place a child in secure accommodation, and by making procedural and technical arrangements in the areas of children’s hearings support arrangements and school closures.

DELEGATED POWERS PROVISIONS

8. The Committee considered each of the delegated powers in the Bill.

9. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers

   Section 3(2) – Authorities to which section 2 (duties in relation to the UNCRC) applies

   Section 4(4) – Interpretation of Part 1

   Section 7(3) – Children’s services planning: power to specify services which are to be included in or excluded from the definition of “children’s service” or “related service”

   Section 7(5) – Children’s services planning: power to modify the definition of “other service provider”

   Section 8(2) – Requirement to prepare children’s services plan

   Section 10(1)(b) – Children’s services plan: process

   Section 15(1) – Guidance in relation to children’s services planning

   Section 16(1) – Directions in relation to children’s services planning

   Section 17(2)(b) – Children’s services planning: default powers of Scottish Ministers

   Section 19(3)(b) – Named person service

   Section 32(2)(b) – Content of a child’s plan

   Section 33(8) – Preparation of a child’s plan

   Section 35(5) – Responsible authority: special cases
Section 44(2) – Mandatory amount of early learning and childcare

Section 46(2) – Duty to consult and plan on delivery of early learning and childcare

Section 47(2) – Method of delivery of early learning and childcare

Section 50(2) – Corporate parents

Section 57(1) – Guidance on corporate parenting

Section 58(1) – Directions to corporate parents

Section 60(2)(e) – Provision of aftercare to young people

Section 60 – Consequential amendment to regulation-making power in the Regulation of Care (Scotland) Act 2001

Section 61(1) – Provision of counselling services to parents and others

Section 62(1) – Counselling services: further provision

Section 64(2) – Assistance in relation to kinship care orders

Section 65(2)(c) – Orders which are kinship care orders

Section 66(3) – Kinship care assistance: further provision

Section 68 – Scotland’s Adoption Register
Inserting section 13B(2) into the Adoption and Children (Scotland) Act 2007 – Power of direction

Section 68 – Scotland’s Adoption Register
Inserting section 13E(2) into the Adoption and Children (Scotland) Act 2007 – Power of direction

Section 71 – Appeal against detention of child in secure accommodation
Inserting section 44A(3) into the Criminal Procedure (Scotland) Act 1995

Section 74(6) – Assessment of wellbeing

Section 77(1)(b) – Subordinate legislation

Section 78(a) – Ancillary provision

10. At its meeting of 10 September the Committee agreed to write to Scottish Government officials to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at Annexes A and B.
11. In light of the written responses received by the Committee, it agreed that it did not need to draw the Parliament’s attention to the following delegated powers:

   Section 13(1)(b)(ii) – Reporting on children’s services plan

   Section 17(6) – Children’s services planning: default powers of Scottish Ministers

   Section 30(2) – Interpretation of Part 4 (provision of named persons)

   Section 32(2) – Content of a child’s plan

   Section 37(5) – Child’s plan: management

   Section 68 – Scotland’s Adoption Register
   Inserting section 13E(1) into the Adoption and Children (Scotland) Act 2007 – Power to make regulations

   Section 78(b) – Ancillary provision

   Section 79(2) - Commencement

12. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

**Section 28(1) – Guidance in relation to named person service**

   **Power conferred on:** The Scottish Ministers
   **Power exercisable by:** Guidance
   **Parliamentary procedure:** None

**Section 29(1) – Directions in relation to named person service**

   **Power conferred on:** The Scottish Ministers
   **Power exercisable by:** Direction
   **Parliamentary procedure:** None

**Provision**

13. Sections 28(1) and 29(1) confer power on the Scottish Ministers to issue guidance and directions to service providers about the exercise of named person service functions under the Bill. Service providers are health boards, local authorities and the directing authorities of independent or grant-aided schools. The principal function of service providers is to make an identified individual (a named person) available in relation to every child or young person. That individual will have responsibilities in relation to the wellbeing of the child or young person.
Comment
14. The Committee asked the Scottish Government whether it considers that it would be appropriate to publish guidance or directions issued under these powers, in light of the potential impact of the named person service on children or young people and their families.

15. The Scottish Government responded that it does consider it appropriate and therefore intends to publish guidance and, if relevant, directions under the powers in sections 28(1) and 29(1) of the Bill.

16. The Committee welcomes the commitment to publication given by the Scottish Government. However, in addition to the intentions of the current administration as regards use of delegated powers, the Committee requires to consider how those powers might be exercised from time to time by future administrations. In that light, the Committee concludes that it would be appropriate for the Bill to impose a duty on the Scottish Ministers to publish guidance and directions under sections 28(1) and 29(1).

17. The Committee therefore asks the Scottish Government to consider bringing forward amendments at Stage 2 to require publication of any guidance or directions issued by the Scottish Ministers under the powers contained in sections 28(1) and 29(1).

18. The Committee asks for further comment on this in the Scottish Government’s response to this report.

Section 39(1) – Guidance on child’s plans

<table>
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<th>Power conferred on:</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Guidance</td>
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<td>Parliamentary procedure:</td>
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Section 40(1) – Directions in relation to child’s plans

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<tr>
<td>Power exercisable by:</td>
<td>Direction</td>
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<td>Parliamentary procedure:</td>
<td>None</td>
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Provisions
19. Section 39(1) enables the Scottish Ministers to issue guidance to any person in connection with that person’s functions under Part 5 of the Bill, while section 40(1) enables Ministers to issue directions to local authorities, health boards and directing authorities.

20. Part 5 of the Bill provides for a child’s plan to be created for every child with a wellbeing need which is considered to require targeted intervention. The child’s plan will set out an overview of the young person’s needs, the actions which require to be provided to meet the assessed needs, who will undertake those
actions, and the desired outcomes. A child’s plan is to be prepared and managed by the responsible authority. Depending on circumstances, that authority will be a local authority, health board or the directing authority of an independent or grant-aided school.

Comments
21. The powers in sections 39(1) and 40(1) raise similar issues to those raised by sections 28(1) and 29(1), discussed above. The Committee accordingly asked the Scottish Government whether it considers that it would be appropriate to publish guidance or directions issued under these powers, in light of the potential impact of the exercise of functions relating to child’s plans on children and their families.

22. The Scottish Government responded that it does consider it appropriate and therefore intends to publish guidance and, if relevant, directions under the powers in sections 39(1) and 40(1) of the Bill.

23. The Committee welcomes the commitment to publication given by the Scottish Government. However, as above, the Committee requires to consider how delegated powers might be exercised from time to time by future administrations. In that light, the Committee concludes that it would be appropriate for the Bill to impose a duty on the Scottish Ministers to publish guidance and directions under sections 39(1) and 40(1).

24. The Committee therefore asks the Scottish Government to consider bringing forward amendments at Stage 2 to require publication of any guidance or directions issued by the Scottish Ministers under the powers contained in sections 39(1) and 40(1).

25. The Committee asks for further comment on this in the Scottish Government’s response to this report.

Section 43(2)(c)(ii) – Duty to secure provision of early learning and childcare

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<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
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<tr>
<td>Parliamentary Procedure:</td>
<td>Negative</td>
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Provision
26. Section 43(2)(c)(ii) enables the Scottish Ministers by order to prescribe additional categories of children who are eligible for the mandatory amount of early learning and childcare. (Section 43 itself specifies one category of child eligible for such childcare, being a child aged 2 or over who is, or has been at any time since their 2nd birthday, looked after or subject to a kinship care order).

27. The Explanatory Notes to the Bill and the DPM state that it is likely that the power will be used to specify that 3 and 4 year olds will be eligible for early learning and childcare from the first term after their 3rd birthday in a similar way in
which the current law does by virtue of the order made under section 1(1A) of the Education (Scotland) Act 1980 (which the Bill amends).

Comment
28. The Committee asked the Scottish Government to explain why it considers it appropriate that an order setting the eligibility criteria for early learning and childcare is subject to the negative procedure.

29. The Scottish Government explained that the power is part of a longer term ambition to increase and improve early learning and childcare for all children, and that there is pressure to increase the categories of eligible children in a number of directions. The power in its current form offers maximum flexibility to enable work towards that longer term ambition.

30. The Scottish Government stated that it agrees with the Committee that the setting of eligibility criteria for early learning and childcare is a matter of substance with a significant impact on children. However, in its view that does not necessarily mean that it is appropriate to make the power subject to the affirmative procedure. The Scottish Government considers that the circumstances are such in this case that the negative procedure is appropriate.

31. The reason the Scottish Government gives in support of that view is that the power will not modify the provision made about eligibility in the primary legislation. The Committee notes however that this is simply because a choice has been made not to include the eligibility criteria on the face of the Bill (other than in relation to children aged 2 or over who are, or have been, looked after or subject to a kinship care order). That in the Committee’s view is not a good reason to avoid detailed Parliamentary scrutiny. In carrying out its scrutiny of delegated powers, the Committee considers the substance of the provision to be made, as well as whether it involves modification of primary legislation.

32. The Committee also notes that, in contrast, the power in section 44(2) of the Bill to modify the mandatory amount of early learning and childcare (i.e. the annual number of hours to be provided) is subject to the affirmative procedure, as is the power in section 47(2) to modify the way in which an education authority must deliver early learning and childcare. The initial mandatory amount of early learning and childcare, and the method of providing it, are set out on the face of the Bill in sections 44 and 47 respectively.

33. The Scottish Government explains that “the potential effect of [the powers in section 44(2) and 47(2)] could mean a significant change to the infrastructure and funding of early learning and childcare and therefore it is appropriate that those powers are afforded a more detailed level of scrutiny in the form of affirmative procedure”. It appears to the Committee however that an increase in the numbers of children eligible for early learning and childcare by virtue of specifying additional categories of eligible children under the power in section 43(2)(c)(ii) could have a similarly significant effect on education authority infrastructure and funding. Accordingly the explanation given does not appear to provide a strong basis for distinguishing between the various powers.
34. More generally, it is not clear to the Committee that amending the number of hours of early learning and childcare to which eligible children are entitled is any more significant than setting and amending the categories of children who may access that entitlement. The setting of eligibility criteria might be thought to be of equal, if not greater, significance.

35. The Committee concludes that specifying categories of children who are entitled to early learning and childcare is in the nature of a substantive matter which might be expected to attract the affirmative procedure. While the current policy intention is that the power will be used to specify 3 and 4 year olds, it may of course be used to make different provision in the future. The Scottish Government response refers to pressure to increase the categories of eligible children to include, for example, 2 year olds living in deprivation, 2 year olds who have a disability or additional support needs, or all 2 year olds. These appear to be significant matters which it is anticipated Parliament may wish the ability to debate in full.

36. The Committee therefore asks the Scottish Government to consider in advance of Stage 2 of the Bill whether the significance of setting eligibility criteria by order under this power is such that the affirmative procedure is a more suitable level of Parliamentary scrutiny of the exercise of this power than the negative procedure.

37. The Committee asks for further comment on this in the Scottish Government’s response to this report.

Section 61(3) – Provision of counselling services to parents and others

<table>
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<tr>
<th>Power conferred on:</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary Procedure:</td>
<td>Negative</td>
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</tbody>
</table>

Provision

38. Section 61(3) enables the Scottish Ministers by order to specify the description of “eligible child” for the purposes of section 61(2). That section provides that the parents of, or persons with parental rights and responsibilities in relation to, an eligible child will be eligible for counselling services.

Comment

39. On considering the power, the Committee was content in principle with the exercise of the power by subordinate legislation. However, it sought further explanation of the choice of the negative procedure.

40. The Scottish Government explains that, in its view, changes to the description of “eligible child” are unlikely to be controversial and consequently it would not be good use of Parliamentary time to initiate a debate on each occasion the power is used. It states that any change to eligibility would most likely be to extend eligibility rather than narrow it, therefore improving the provision of
counselling services to parents and others and ensuring the Government continues to meet the needs of children and families in need.

41. The Scottish Government’s response also explains that, given the nature of the counselling services provided in each area, no change to provision could be effected without substantial consultation and engagement with the service providers and users across each local authority area, which would be undertaken by the Scottish Government. The Committee notes however that there is no requirement on the face of the Bill for such consultation or engagement.

42. The Committee also notes that the Scottish Government’s response overlooks the fact that the power enables the Scottish Ministers not merely to change or extend the eligibility criteria, but to set down the initial eligibility criteria. “Eligible child” is not defined on the face of the Bill, so the power, if used, will be used to specify the initial eligibility criteria. The Committee is prepared to accept that if changes to the criteria are unlikely to be controversial, then the initial setting of the eligibility criteria may also be uncontroversial. However it does not consider that the Government has fully explained why the matter is unlikely to be controversial.

43. Moreover, while the current policy intention is to use the power to set and then potentially extend eligibility, rather than narrow it, the Committee requires to consider the use to which the power could potentially be put in the future. While it accepts the Government's explanation (in paragraph 26 of Annex B) that the eligibility of the parents or carers of certain children for counselling services is not perhaps as fundamental as the provision of aftercare to formerly looked-after children (which is enabled by provision made in section 60(2) of the Bill), it is clearly a matter which may be of significance to the affected individuals. That suggests that the affirmative procedure may be appropriate for the exercise of the power in section 61(3). It is not the sort of power to make operational or technical provision which the Committee might normally expect to attract the negative procedure.

44. The Committee therefore asks the Scottish Government to consider in advance of Stage 2 of the Bill whether the significance of setting eligibility criteria by order under this power is such that the affirmative procedure is a more suitable level of Parliamentary scrutiny of the exercise of this power than the negative procedure.

45. The Committee asks for further comment on this in the Scottish Government’s response to this report.
Section 64(4) – Assistance in relation to kinship care orders

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order  
**Parliamentary Procedure:** Negative

**Provision**
46. Section 64(4) enables the Scottish Ministers by order to specify the description of an “eligible child” for the purposes of the kinship care assistance provisions.

**Comment**
47. On considering the power, the Committee was content in principle with the exercise of the power by subordinate legislation. However, it sought further explanation of the choice of the negative procedure.

48. As in relation to the power at section 61(2) discussed above (provision of counselling services for parents and carers of eligible children), the Scottish Government’s view is that changes to the description of “eligible child” are unlikely to be controversial and consequently it would not be good use of Parliamentary time to initiate a debate on each occasion the power is used. It states again that any change to eligibility would most likely be to extend eligibility rather than narrow it, therefore ensuring the Scottish Government continues to meet the needs of children living in kinship arrangements.

49. Again, the Scottish Government’s response also explains that no change to the eligibility description specified would be effected without substantial consultation and engagement with the service providers and users across each local authority area, which would be undertaken by the Scottish Government. The Committee notes however that there is no requirement on the face of the Bill for such consultation or engagement.

50. The Committee notes again that the Government response overlooks the fact that the power enables the Scottish Ministers not merely to change or extend the eligibility criteria, but to set down the initial eligibility criteria. The Committee is prepared to accept that if changes to the criteria are unlikely to be controversial, then the initial setting of the eligibility criteria may also be uncontroversial. However it does not consider that the Government has fully explained why it considers that the matter is unlikely to be controversial.

51. Moreover, while the current policy intention is to use the power to set and then potentially extend eligibility, rather than narrow it, the Committee requires to consider the use to which the power could potentially be put in the future, and the impact which eligibility, or lack of eligibility, for certain assistance would have on those affected. While it accepts the Scottish Government’s explanation (in paragraph 28 of Annex B) that the eligibility of children, young people or their carers for kinship care assistance may not be as fundamental as the provision of aftercare to formerly looked-after children (which is enabled by provision made in section 60(2) of the Bill), it is clearly a matter of significance. Depending on how it is specified in an order under section 64(2) of the Bill, kinship care assistance will
potentially confer significant benefits on those entitled to it, and may include the provision of counselling, advice, financial support and access to council services.

52. The Committee is accordingly of the view that the issue of eligibility is a substantive matter which Parliament would expect to have the opportunity to debate. In its view, the Scottish Government has not explained why it considers eligibility for kinship care assistance to be of a technical, administrative or other non-controversial nature, such that the negative procedure might be appropriate. From the information available to the Committee, it appears to be a matter for which Parliament’s approval should be required.

53. The Committee therefore asks the Scottish Government to consider in advance of Stage 2 of the Bill whether the significance of setting eligibility criteria by order under this power is such that the affirmative procedure is a more suitable level of Parliamentary scrutiny of the exercise of this power than the negative procedure.

54. The Committee asks for further comment on this in the Scottish Government’s response to this report.

Section 68 – Scotland’s Adoption Register

Inserting section 13A(1) into the Adoption and Children (Scotland) Act 2007

Power conferred on: The Scottish Ministers
Power exercisable by: Arrangement
Parliamentary procedure: None

Provision
55. Section 68 of the Bill inserts section 13A(1) into the Adoption and Children (Scotland) Act 2007. It requires the Scottish Ministers to make arrangements for the establishment and maintenance of Scotland’s Adoption Register. Section 13B(1) provides that such arrangements may in particular authorise an organisation (a “registration organisation”) to perform the Scottish Ministers’ functions in respect of the Register, and provide for payments to be made to that organisation.

Comment
56. The Committee asked the Scottish Government why it is considered appropriate to authorise a registration organisation to perform the Scottish Ministers’ functions in respect of the Register, and to provide for payments to be made to that organisation, by way of arrangements rather than in subordinate legislation.

57. The Scottish Government explained that there is an organisation which currently operates a non-statutory adoption register in Scotland and the Scottish Ministers may consider it appropriate to authorise this organisation to carry out their functions in relation to the Register once the Bill is enacted, given that the organisation has the relevant skills and experience which may be required. For
this reason, it is considered that it would be more appropriate to make the authorisation by arrangement as opposed to in subordinate legislation. The Scottish Government’s response does not say, but the Committee presumes that this is considered to be a more appropriate way of delegating authority because the organisation is not a statutory body or other public authority. The Committee notes that it would nevertheless be possible for subordinate legislation to delegate functions to an organisation such as a charity or private company.

58. The Scottish Government adds that funding arrangements are already in place for this non-statutory register and that these may be used as a basis for the arrangements for the funding of the new register. It is not therefore considered appropriate to provide for payments to the registration organisation by way of subordinate legislation. Again, the Committee accepts this explanation but considers that it would have been possible to replicate the existing funding arrangements in subordinate legislation, if considered appropriate.

59. As regards publication of the arrangements once they have been made by the Scottish Ministers, the Scottish Government states it expects that the details will be made available on the website of Scotland’s Adoption Register.

60. The Committee notes that it appears that the power in section 13A(1) as read with section 13B(1)(b) would enable arrangements to be made requiring payments to the registration organisation by third parties as well as by the Scottish Ministers. If an arrangement is to be capable of imposing liability to make payments on persons other than the Scottish Ministers, the Committee considers that the arrangements should be clear and accessible to those who may be affected.

61. More generally, the Committee notes that any arrangements made under the power will potentially authorise the registration organisation to perform all the Scottish Ministers’ statutory functions relating to the Register (other than the function of making subordinate legislation). This will include the potentially significant functions of receiving information for inclusion in the Register, and disclosing information from it. The exercise of those functions has the potential to substantially affect those individuals concerned.

62. In the interests of transparency and accountability therefore, the Committee would have expected at the very least that a duty be imposed on the Scottish Ministers to publish details of the arrangements once made.

63. The Committee accordingly draws the attention of the lead committee to the power in section 13A(1) as read with section 13B. This power proposes to enable the Scottish Ministers, by arrangements, to delegate their functions in respect of the Register (other than their function of making subordinate legislation) to a registration organisation. It also proposes to enable the Ministers, by arrangements, to provide for payments to be made to such an organisation, which may include payments by persons other than the Scottish Ministers. The Committee considers that any arrangements which impose liability for payment should be clear and accessible to those affected by them.
64. The proposal is that this delegation of functions and the making of provision about payments to the organisation be achieved without the need for subordinate legislation or parliamentary procedure, and without any requirement for publication of the arrangements entered into.

Section 68 – Scotland's Adoption Register

Inserting section 13A(2) into the Adoption and Children (Scotland) Act 2007

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<td>Power exercisable by:</td>
<td>Regulations</td>
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<td>Parliamentary Procedure:</td>
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Provision

65. As referred to above, section 68 inserts section 13A into the Adoption and Children (Scotland) Act 2007 (the 2007 Act), which requires the Scottish Ministers to make arrangements for the establishment and maintenance of a register to be known as Scotland’s Adoption Register. Section 13A(2) provides that the Scottish Ministers may by regulations prescribe information or types of information to be included in the Register. Examples are given of the types of information which may be included. The power also enables the Scottish Ministers to provide for how information is to be retained in the Register, and to make such further provision in relation to the Register as they consider appropriate.

66. Section 13C expands the purposes for which regulations under section 13A(2) may be made. It enables provision to be made in connection with the supply of information for the Register from adoption agencies to the Scottish Ministers or to a registration organisation authorised on the Ministers’ behalf. It also enables further provision to be made in connection with specified matters relating to the supply of such information.

67. Section 13D provides that regulations under section 13A(2) may also make provision about the disclosure of information from the Register. Information may be disclosed to adoption agencies or to other persons specified in the regulations, for certain specified purposes (including any purpose relating to adoption). The power also enables further provision to be made in connection with specified matters relating to the disclosure of such information.

Comment

68. The Committee asked the Scottish Government why the Bill does not define what information the Register is to contain or make provision about what it is to be used for, and why the wide powers taken in section 13A(2) to make provision about the Register are not limited or defined in any way.

69. It also asked for further explanation regarding in what way it is currently anticipated the Register may alter and extend beyond containing information about children and adopters, as referred to in the DPM.
70. The Scottish Government submits that although the Bill does not define the information which the Register is to contain, it is clear from the types of information which may be included in the Register (as provided for in subparagraphs (i) to (v) of section 13A(2)(a)) that the information will all relate in some way to children who are considered suitable for adoption, or to prospective adoptive parents. The Committee notes however that the list of types of information referred to is an illustrative list of examples only, and that the power is wider than that and may be used to prescribe other information or types of information.

71. Moreover, the Committee considers that the Scottish Government has not explained what the Register is to be used for. It appears that the purpose of the Register is likely to be to facilitate adoption in some way, but this is not made clear on the face of the Bill. Were section 13A to define or make provision about the purpose or intended use of the Register, the Committee considers that that would go some way to limit the very broad powers in section 13A(2) to make regulations about the Register.

72. The Scottish Government also considers that paragraphs (a), (b) and (c) of section 13A(2) limit or restrict the power to a certain extent (see paragraphs 29 and 30 of Annex B). As stated above, paragraph (a) provides a non-exhaustive list of information which might require to be included in the Register. The Committee accepts that this provides a guide to the intended use of the power, but not a limitation or restriction on its use. Given that the policy intention is that the information to be provided will relate in some way to children who are considered suitable for adoption, or to prospective adoptive parents, the Committee considers that the power conferred by paragraph (a) should be restricted to that extent.

73. As regards paragraph (b), the Committee accepts that paragraph is limited to enabling provision to be made about how information is to be stored. The Committee disagrees however with the Scottish Government's view that it is clear from paragraph (c) that regulations will be restricted to making provision about “other administrative matters associated with the operation of the Register”. Paragraph (c) confers a broad power to make such further provision in relation to the Register as the Scottish Ministers consider appropriate. If the intention in taking the power is, as stated, to enable provision to be made about administrative matters associated with the operation of the Register, then the Committee considers that the power has been drawn too widely. Its terms should be restricted to give effect to the more limited policy intention.

74. As regards the intention that the Register may alter and extend beyond containing information relating to children and adopters, as referred to in the DPM, the Scottish Government explains that there are no current plans for such an extension (although the type of information required about children and adopters may be extended in future). The Committee welcomes this clarification regarding the current intention, but considers that the power in section 13A(2)(a) as currently drafted would allow information to be prescribed for inclusion in the register which goes beyond information concerning children suitable for adoption and potential adopters. It therefore repeats its conclusion above that the power should be
75. The Committee also asked the Scottish Government to provide reasons for taking powers in section 13C to make provision about the supply of information to the Register, and in section 13D about the disclosure of information, in regulations under section 13A(2).

76. The Committee welcomes the explanation of these powers which the Scottish Government has provided. The reason given in relation to the power to make provision about the supply of information under section 13C is to enable the Scottish Ministers to prescribe the detailed processes for operating the Register. The Committee accepts that much of the information which may be prescribed under section 13C relates to operation of the Register. However it considers that prescribing the information which an adoption agency must disclose to the Scottish Ministers or to a registration organisation (section 13C(1)), and prescribing persons other than parents or carers whose consent may be required to the disclosure of information (section 13C(2)(a)(ii)) are substantive rather than operational matters. Nonetheless, it notes that the regulations will be subject to the affirmative procedure and considers that this confers a sufficient degree of scrutiny on the Parliament in relation to the more substantive matters.

77. The reason given in relation to the power to authorise disclosure of information under section 13D is that the power will be used to prescribe detailed information which it is not considered appropriate to make provision for in the Bill. In light of the fact that the purposes for which information may be disclosed under those regulations is, for the most part, set out on the face of the Bill, the Committee considers that explanation to be acceptable.

78. The Committee therefore accepts in principle the power under section 13A(2), as supplemented by sections 13C and 13D, to make regulations in relation to Scotland’s Adoption Register. It is also content with the choice of the affirmative procedure for those regulations. However, it asks the Scottish Government to consider bringing forward amendments to section 13A at Stage 2 to make provision about the purpose or intended use of the Register, in order to inform the broad power in section 13A(2) to make regulations about the Register and the information which it is to contain.

79. The Committee also asks the Scottish Government to consider bringing forward amendments at Stage 2 to restrict the terms of the power in section 13A(2)(a) to reflect the stated intention in taking the power, which is to enable information or types of information relating to children considered suitable for adoption, or to prospective adopters, to be prescribed for inclusion in the Register.

80. The Committee also asks the Scottish Government to consider bringing forward amendments at Stage 2 to restrict the terms of the power in section 13A(2)(c) to reflect the stated intention in taking the power, which is to enable provision to be made about other administrative matters associated with the operation of the Register.
81. The Committee asks for further comment on these matters in the Scottish Government’s response to this report.

Section 74(3) – Assessment of wellbeing

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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Guidance</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
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</table>

**Provision**

82. Section 74(2) contains a list of indicators with reference to which a person required by the Bill to assess the wellbeing of a child or young person is to carry out such an assessment. Section 74(3) requires the Scottish Ministers to issue guidance on how those indicators are to be used to assess wellbeing.

**Comment**

83. Once again, this power to issue guidance raises similar issues to those discussed earlier in this report in relation to sections 28(1) and 29(1), and 39(1) and 40(1). The Committee asked the Scottish Government whether it considers that it would be appropriate to publish guidance on how the wellbeing indicators are to be used by those with functions under the Bill to assess the wellbeing of a child or young person.

84. The Scottish Government responded that it does consider guidance on wellbeing indicators an appropriate mechanism to set out further detail, therefore it is the intention for guidance to be published.

85. For the reasons discussed earlier in this report in relation to the powers in sections 28(1) and 29(1), and 39(1) and 40(1), the Committee concludes that it would be appropriate for the Bill to impose a duty on the Scottish Ministers to publish guidance issued under section 74(3).

86. The Committee therefore asks the Scottish Government to consider bringing forward amendments at Stage 2 to require publication of any guidance issued by the Scottish Ministers under the power contained in section 74(3).

87. The Committee asks for further comment on this in the Scottish Government’s response to this report.
Delegated Powers and Law Reform Committee, 50th Report, 2013 (Session 4)

ANNEX A

Correspondence with the Scottish Government

On 10 September 2013, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

Section 13(1)(b)(ii) – Reporting on children’s services plan

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Negative

1. Section 13(1)(b)(ii) confers a power on the Scottish Ministers to prescribe, by order, outcomes in relation to the wellbeing of children in a local authority area. Section 13(1)(b) requires a local authority and each relevant health board to publish a report every year on the extent to which the provision of services in accordance with the children’s services plan has achieved certain defined aims and any outcomes prescribed using the power in sections 13(1)(b)(ii).

2. The Committee asks the Scottish Government:

   • Given that section 13(1)(b) enables the Scottish Ministers to prescribe outcomes in relation to wellbeing of the children in an area, as regards assessment of the children’s services plan for that area, how will the power achieve its stated aim of allowing the reports to reflect any changes in children’s services or related services?

   • How will the power be used to achieve its stated aim of reflecting “changes in the measures of wellbeing” when it is a power to prescribe outcomes in relation to wellbeing”?

   • What are the reasons for taking the power?

   • Given the significance of the matters to which the power relates why it considers that the negative procedure is appropriate and that more detailed parliamentary scrutiny is not required?

Section 17(6) – Children’s services planning: default powers of Scottish Ministers

Power conferred on: The Scottish Ministers
Power exercisable by: Order
3. Section 17(6) enables the Scottish Ministers, by order, to constitute a joint board of the local authority and relevant health board(s) for an area, to exercise a function relating to children’s services planning under the Bill. The power is available where the Scottish Ministers consider that making a direction under section 17(2) regarding the exercise of the function has been insufficient or would be insufficient.

4. The Committee asks the Scottish Government:

- To clarify whether the power is to constitute a joint board comprising the local authority and health boards which are failing to exercise the function, or the local authority and health boards which have been directed to exercise the function or would be so directed were such a direction considered likely to be sufficient, or either or both of the above, and whether it considers the meaning to be sufficiently clear from the wording of section 17(6)?

Section 30(2) – Interpretation of Part 4 (provision of named persons)

- Power conferred on: The Scottish Ministers
- Power exercisable by: Order
- Parliamentary Procedure: Affirmative

5. Section 30(2) confers power on the Scottish Minsters by order to modify schedule 2 of the Bill to add a person or description of persons, remove an entry in it or vary an entry in it. Schedule 2 contains a list of “relevant authorities”. Persons or bodies which are relevant authorities are subject to the duties in Part 4 to help named persons and to share information with named person service providers.

6. The Delegated Powers Memorandum states that the reason for taking the power is “so that the service providers in schedule 2 can be modified in the future should new relevant authorities be created, or current service providers’ names changed”. This explanation appears to confuse the role of service providers in Part 4 with the role of relevant authorities. “Service provider” is defined in section 30(1) as a health board, local authority or directing authority. Service providers have the function under the Bill of providing a named person service to children and young people. “Relevant authority” is defined in section 30(1) as a person listed, or within a description listed, in schedule 2. Relevant authorities are required to help named persons and to share information with service providers.

7. The Committee asks the Scottish Government:

- Whether, as stated in the Delegated Powers Memorandum, the power is sought to enable changes to be made to the definition of service providers, or whether it is instead intended that the power is being taken to enable schedule 2 to be modified in the future should new
relevant authorities be created, or current relevant authorities’ names changed?

Section 32(2) – Content of a child’s plan

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<th>Power conferred on:</th>
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<tr>
<td>Power exercisable by:</td>
<td>Order</td>
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<td>Parliamentary Procedure:</td>
<td>Negative</td>
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</table>

8. Section 32(2) confers power on the Scottish Ministers by order to make provision as to information that is or is not to be contained in a child’s plan, and the form of a child’s plan.

9. The Delegated Powers Memorandum states it is important that the Scottish Ministers have the ability and flexibility “to amend what should be included in the plan”.

10. The Committee asks the Scottish Government:

   - Whether it agrees that the power at section 32(2) does not enable Ministers to add to, modify or remove any of the matters listed in section 32(1)?

   - To explain the reasons for taking the power, and give an example of the sort of information which might be required to be contained, or not to be contained, in a child’s plan?

   - Why does the Government consider that the negative procedure is appropriate and that more detailed parliamentary scrutiny is not required?

Section 37(5) – Child’s plan: management

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<td>Parliamentary Procedure:</td>
<td>Negative</td>
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11. Section 37(5) confers power on the Scottish Ministers by order to make provision about the management of child’s plans, including provision about when and how a child’s plan is to be reviewed in accordance with section 37(1); who is to be the managing authority of a child’s plan; when and to whom management of a child’s plan is to or may transfer under section 37(4)(b); when and how a new targeted intervention may be included in a child’s plan; and the keeping, disclosure and destruction of child’s plans.
12. The Committee asks the Scottish Government:

- To explain why the negative procedure is considered to be appropriate, given the breadth of the power and the potential scope to use it to make substantive, as opposed to procedural, changes to the management of child’s plans, which changes may impact on children subject to child’s plans, and on their families?

Section 43(2)(c)(ii) – Duty to secure provision of early learning and childcare

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<tr>
<th>Power conferred on:</th>
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<td>Power exercisable by:</td>
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<td>Negative</td>
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13. Section 43(2)(c)(ii) enables the Scottish Ministers by order to specify additional categories of children who are eligible for the mandatory amount of early learning and childcare. Children may be specified by age range or other description.

14. The Committee asks the Scottish Government:

- To explain further the choice of negative procedure, given that:
  - setting the eligibility criteria for early learning and childcare may be considered a matter of substance with a potentially significant impact on children and families; and
  - provision in relation to the mandatory amount of early learning and childcare (section 44) and the way in which an education authority must deliver early learning and childcare (section 47) is set out on the face of the Bill, with power to modify that provision being subject to the affirmative procedure in each case.

Section 61(3) – Provision of counselling services to parents and others

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<td>Power exercisable by:</td>
<td>Order</td>
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<td>Parliamentary Procedure:</td>
<td>Negative</td>
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15. Section 61(3) enables the Scottish Ministers by order to specify the description of “eligible child” for the purposes of section 61(2). That section provides that the parents of, or persons with parental rights and responsibilities in relation to, an eligible child will be eligible for counselling services.

16. The reason given in the Delegated Powers Memorandum for the choice of parliamentary procedure is that the eligibility test is likely to require to be amended from time to time. The Committee notes that the affirmative procedure would also enable amendment from time to time, and considers that the matter of eligibility for counselling may be thought to be a matter of significance for affected individuals.
The Committee asks the Scottish Government whether there are further reasons for the choice of negative procedure.

17. Section 60(2) of the Bill amends the Children (Scotland) Act 1995 to confer power by regulations to specify “eligible needs” in relation to the provision of aftercare to young people. That power is subject to the affirmative procedure.

The Committee asks the Scottish Government in what respect does the power in section 61(3) to specify eligibility for counselling services differ from the power in section 60(2), so as to make negative procedure more appropriate?

Section 64(4) – Assistance in relation to kinship care orders

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary Procedure: Negative

18. Similarly to Section 61(3), Section 64(4) enables the Scottish Ministers by order to specify the description of an “eligible child” for the purposes of the kinship care assistance provisions.

19. The reason given in the Delegated Powers Memorandum for the choice of parliamentary procedure does not accurately describe the scope of the order-making power, given that it may be used to specify the initial eligibility criteria for kinship care assistance, in addition to adding to or amending those criteria. The Committee considers that the matter of eligibility for assistance may be thought to be a matter of significance for affected individuals.

The Committee asks the Scottish Government what the reasons are for the choice of negative procedure.

20. Section 60(2) of the Bill amends the Children (Scotland) Act 1995 to confer power by regulations to specify “eligible needs” in relation to the provision of aftercare to young people. That power is subject to the affirmative procedure.

The Committee asks the Scottish Government in what respect does the power in section 64(4) to specify eligibility for kinship care assistance differ from the power in section 60(2) power, so as to make negative procedure more appropriate?

21. Section 68 inserts section 13A into the Adoption and Children (Scotland) Act 2007 (the 2007 Act). Section 13A(2) provides that the Scottish Ministers may by regulations prescribe information or types of information to be included in the Register. This may include information relating to children who adoption agencies consider ought to be placed for adoption, persons considered by adoption agencies as suitable to have a child placed with them for adoption, matters relating to such children or persons which arise after information about them is included in the Register, or children or prospective adopters outwith Scotland. The Scottish Ministers may also by regulations provide for how information is to be retained in
the Register, and make such further provision in relation to the Register as they consider appropriate.

22. The Committee notes the Bill does not define what information the Register is to contain, or make provision about what it may be used for. Instead it grants extremely wide powers to Ministers to establish to do so in regulations.

23. The Committee asks the Scottish Government:

- To explain why that is the case, and why the wide powers taken in section 13A(2) to make provision about the Register are not limited or defined in any way?
- To give the reasons for taking powers in section 13C(1), (2)(a)(ii) and (3) to use regulations under section 13A(2) to make provision about the supply of information for the Register, as no explanation of these powers is provided in the Delegated powers Memorandum?
- To explain the reasons for taking powers in section 13D(2) and (3) to use regulations under section 13A(2) to make provision about disclosure of information, as again no explanation of these powers is provided in the Delegated Powers Memorandum?
- To explain further in what way it is currently anticipated the Register may alter and extend beyond containing information about children and adopters, and what sort of information might be included in it?

Inserting section 13E(1) into the Adoption and Children (Scotland) Act 2007

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<th>Power conferred on:</th>
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<tr>
<td>Power exercisable by:</td>
<td>Regulations</td>
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<td>Parliamentary Procedure:</td>
<td>Affirmative</td>
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24. Regulations under section 13E(1) of the 2007 Act may authorise a registration organisation to act as agent for the payment or receipt of sums payable by adoption agencies to other adoption agencies, and may require adoption agencies to pay or receive such sums through the registration organisation.

25. The reason given in the Delegated Powers Memorandum does not appear to describe the effect of the power taken accurately. New section 13E appears to be a power to give a registration organisation or other person specific functions in relation to payments by adoption agencies. It does not appear to be a power to amend the registration organisation authorised to act on Ministers’ behalf. Such a power appears to be contained in section 13B, which is a power to make arrangements to authorise an organisation to carry out functions on Ministers’ behalf.

- The Committee therefore asks the Scottish Government to explain the reasons for taking the power.
Section 78(b) – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Generally negative but affirmative procedure if making textual changes to an Act.

26. Section 78(b) enables the Scottish Ministers to make such transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, the coming into force of any provision of the Act. The Delegated Powers Memorandum states that the power will be subject to the negative procedure and provides justification for that choice. However, it appears from the face of the Bill that the power is subject to the affirmative procedure where it is used to amend primary legislation.

27. The Committee asks the Scottish Government:

- To confirm that the power is subject to negative procedure other than where it makes textual amendment of the Bill or any other Act, in which case it is subject to affirmative procedure notwithstanding the alternative statement and justification provided in the Delegated Powers Memorandum?

Section 79(2) - Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Laid in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010

28. Section 79(2) provides that the Scottish Ministers may appoint days on which the provisions in the Bill come into force by commencement order if they are not commenced by the Bill. Subsection (3) provides that a commencement order may include transitional, transitory or saving provision.

29. The Committee asks the Scottish Government:

- Whether it considers that section 79(3) enables the same transitional, transitory or saving provision to be made in a commencement order under section 79(2) as could be made in an ancillary order under section 78(b)?
If so, why is it considered that both powers are necessary, and what considerations are likely to determine which power is used to make provision in any individual case?

30. An order under section 78(b) is subject to negative procedure (except where textual amendment of an Act is proposed, in which case affirmative procedure will apply). However, an order under section 79(2) containing transitional, transitory or saving provision would be laid only and not subject to further parliamentary procedure.

• The Committee asks the Scottish Government to explain why the difference in Parliamentary procedure is thought appropriate?

Section 28(1) – Guidance in relation to named person service

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<tr>
<th>Power conferred on:</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Guidance</td>
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<td>Parliamentary procedure:</td>
<td>None</td>
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Section 29(1) – Directions in relation to named person service

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<th>Power conferred on:</th>
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<tr>
<td>Power exercisable by:</td>
<td>Direction</td>
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<td>Parliamentary procedure:</td>
<td>None</td>
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31. Part 4 of the Bill provides for a named person service to be made available to all children and young people, and confers various functions on service providers in connection with the provision of such a service.

32. Sections 28(1) and 29(1) confer power on the Scottish Ministers to issue guidance and directions to service providers about the exercise of those functions.

33. The Committee asks the Scottish Government:

• Whether it considers that it would be appropriate to publish guidance or directions issued under the powers in sections 28(1) and 29(1), in light of the potential impact of the named person service on children or young people, and their families?

Section 39(1) – Guidance on child’s plans

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<td>Parliamentary procedure:</td>
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Section 40(1) – Directions in relation to child’s plans

| Power conferred on: | The Scottish Ministers |
34. Part 5 of the Bill provides for a child’s plan to be created for every child with a wellbeing need which is considered to require targeted intervention. Section 39(1) enables the Scottish Ministers to issue guidance to any person in connection with that person’s functions under this Part of the Bill, while section 40(1) enables Ministers to issue directions to local authorities, health boards and directing authorities.

35. The Committee asks the Scottish Government:

- Whether it considers that it would be appropriate to publish guidance or directions issued under the powers in sections 39(1) and 40(1), in light of the potential impact of the exercise of functions relating to child’s plans on children and their families?

Section 68 – Scotland’s Adoption Register

Inserting section 13A(1) into the Adoption and Children (Scotland) Act 2007

36. New section 13A(1) of the Adoption and Children (Scotland) Act 2007 inserted by section 68 of the Bill requires the Scottish Ministers to make arrangements for the establishment and maintenance of Scotland’s Adoption Register. Section 13B(1) provides that such arrangements may in particular authorise an organisation to perform the Scottish Ministers’ functions in respect of the Register, and provide for payments to be made to that organisation.

37. Does the Committee agree to ask the Scottish Government:

- Why it is considered appropriate to authorise a registration organisation to perform the Scottish Ministers’ functions in respect of the Register, and to provide for payments to be made to that organisation, by way of arrangements rather than in subordinate legislation?

- In what respect the power differs from the power in section 13E(1) of the 2007 Act to authorise a registration organisation or any other person to act as agent in respect of payments by adoption agencies, which power is to be exercised by way of regulations subject to the affirmative procedure?

- What the intentions are regarding publication of the proposed arrangements?

Section 74(3) – Assessment of wellbeing
Power conferred on: The Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None

38. Section 74(2) contains a list of indicators with reference to which a person required by the Bill to assess the wellbeing of a child or young person is to carry out such an assessment. Section 74(3) requires the Scottish Ministers to issue guidance on how those indicators are to be used to assess wellbeing.

- The Committee asks the Scottish Government whether it considers that it would be appropriate to publish guidance on how the wellbeing indicators are to be used by those with functions under the Bill to assess the wellbeing of a child or young person?
On 17 September, the Scottish Government responded as follows:

1. This letter sets out the Scottish Government’s response to the Delegated Powers and Law Reform Committee’s letter of 10 September. The Scottish Government thanks the Committee for their comments and the opportunity to consider these matters. In doing so, this letter seeks to provide an explanation of the following matters:

Section 13(1)(b)(ii) – Reporting on children’s services plan

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<th>Power conferred on:</th>
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<tr>
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<td>Order</td>
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<tr>
<td>Parliamentary procedure:</td>
<td>Negative</td>
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</table>

Given that section 13(1)(b) enables the Scottish Ministers to prescribe outcomes in relation to wellbeing of the children in an area, as regards assessment of the children’s services plan for that area, how will the power achieve its stated aim of allowing the reports to reflect any changes in children’s services or related services?

2. The Scottish Government considers that section 13(1) requires to be read in its entirety. Each local authority and health board has to prepare a report setting out the extent to which services have been provided in accordance with the children’s services plan (section 13(1)(a)) and the extent to which that provision has achieved the aims listed in section 9(2) and outcomes prescribed by Ministers by Order (section 13(1)(b)).

3. This allows the Scottish Ministers to broaden the scope of the report to cover additional material regarding outcomes to be achieved that they consider should be taken into consideration. In that respect the power to prescribe additional outcomes will reflect changes in children’s services, related services or the measures of well-being as stated in the Delegated Powers Memorandum.

How will the power be used to achieve its stated aim of reflecting “changes in the measures of wellbeing” when it is a power to prescribe outcomes in relation to wellbeing”?

4. If over time the measures of wellbeing change the order making power can be used to ensure that the report prepared under section 13(1) takes these into account. These changes can be reflected in the report.

What are the reasons for taking the power?

5. To support effective reporting on children’s services planning across Scotland, the Scottish Government believes it to be advantageous to set a series of common indicators, developed with stakeholders, that should feature in the preparation, and subsequent reporting on, children’s services plans as set out in this part of the Bill. This would build on the extensive work that has already taken
place, both within Scottish Government through the National Performance Framework, and among stakeholders, particularly SOLACE, to develop common indicators that enable a national picture of the wellbeing of children and young people to be developed on a consistent basis across Scotland. The powers set out in section 13(1)(b) are intended to enable such indicators to be developed, in consultation with local authorities, health boards and other key stakeholders, as part of the preparation for the new children’s services plans under this part of the Bill.

6. While a set of indicators have not yet been defined, they would need to draw upon existing datasets, be widely recognised as being able to capture the different dimensions of ‘wellbeing’, as defined as SHANARRI in the Bill, and allow for changes to be measured over time. This would be a minimum dataset; as part of wider community planning processes, and building on the good practice already in place for local authorities developing Integrated Children’s Services Plan under the Children (Scotland) Act 1995, we would anticipate that a wider set of measures would be used by local partnerships in developing the new children’s services plans. By using a common framework for considering the wellbeing of children and young people, the planning around children’s services in different parts of Scotland will have a common, but not identical, basis. How the indicators will be used specifically in the development of the plans and the proposed annual reporting against those plans will be set out in guidance through discussion with stakeholders, but it is anticipated that the measures would enable progress to be considered in each local area over the period of the children’s services plan and beyond.

7. As the power relates to the development of a common set of measures with local stakeholders, building on the existing technical work that has already been done in this area, a negative procedure has been considered more appropriate.

Given the significance of the matters to which the power relates why it considers that the negative procedure is appropriate and that more detailed parliamentary scrutiny is not required?

8. The Scottish Government considers that it is appropriate for the power to prescribe outcomes to be exercised by negative procedure. The Scottish Government does not consider that there should be a requirement to debate every Order made under this subsection given that the purpose of the Order is to add to a list of outcomes. Clearly use of negative procedure does not prevent the Order being subject to Parliamentary debate should Members have difficulties or concerns with regard to what is proposed on any occasion that the power is used.

Section 17(6) – Children’s services planning: default powers of Scottish Ministers

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<tr>
<td>Parliamentary procedure:</td>
<td>Affirmative</td>
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To clarify whether the power is to constitute a joint board comprising the local authority and health boards which are failing to exercise the function, or the local authority and health boards which have been directed to exercise the function or would be so directed were such a direction considered likely to be sufficient, or either or both of the above, and whether it considers the meaning to be sufficiently clear from the wording of section 17(6)?

9. Following further discussion with COSLA, the Scottish Government now intends to seek the removal of the joint board powers from section 17 (i.e. 17(6)-(9)) by Stage 2 amendment. As a result, the power will no longer be required.

Section 30(2) – Interpretation of Part 4 (provision of named persons)

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary Procedure: Affirmative

Whether, as stated in the Delegated Powers Memorandum, the power is sought to enable changes to be made to the definition of service providers, or whether it is instead intended that the power is being taken to enable schedule 2 to be modified in the future should new relevant authorities be created, or current relevant authorities’ names changed?

10. The Scottish Government confirms that this power is being taken to enable Schedule 2 to be modified in the future should new relevant authorities be created, or current relevant authorities’ names be changed.

Section 32(2) – Content of a child’s plan

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary Procedure: Negative

Committee asks whether it agrees that the power at section 32(2) does not enable Ministers to add to, modify or remove any of the matters listed in section 32(1)?

11. The Scottish Government agrees that the power at section 32(2) does not enable the Scottish Ministers to add to, modify or remove any of the matters listed in section 32(1) of the Bill. The intention in taking this power is to allow additional information to that described in section 32(1) to be added to the child’s plan as appropriate, and to allow for the format of the plan to be changed as required.

To explain the reasons for taking the power, and give an example of the sort of information which might be required to be contained, or not to be contained, in a child’s plan?

12. The Scottish Government advises that this power is being taken because the information which may require to be contained in a child’s plan may change over time. There are other existing legislative requirements relating to plans for
children, which may affect the information to be included in a child’s plan – for example, in respect of children who have or require a co-ordinated support plan in terms of the Education (Additional Support For Learning) (Scotland) Act 2004, or children who are “looked after” in terms of the Children (Scotland) Act 1995 and, as such, who have or require a “child’s plan” in terms of the Looked After Children Regulations 2009. This power is intended to be used to specify the minimum data set in a way which takes account of these existing requirements. It also allows for changes to the child’s plan to be made in response to changes in the legislation governing these other plans.

Why does the Government consider that the negative procedure is appropriate and that more detailed parliamentary scrutiny is not required?

13. An order made under this section will allow for detail to be provided as to the content and format of a child’s plan. As noted above, the information required to be contained in a child’s plan may change over time, for example to reflect future changes in other pieces of secondary legislation. These matters relate to operational issues, and are considered too detailed to be on the face of the Bill. As noted above, an order made under this section will not allow the primary content of a child’s plan, as set out in section 32(1), to be amended. They will not change policy.

14. Additionally, there is a precedent for this type of power being subject to the negative resolution procedure, as the provisions relating to co-ordinated support plans in the Education (Additional Support For Learning) (Scotland) Act 2004 allow the Scottish Ministers to make regulations as to the form and content of such plans and the relevant enabling power, at section 11(8) of the 2004 Act, is subject to the negative resolution procedure.

15. For these reasons, the Scottish Government considers that it is appropriate that the power in section 32(2) be subject to the negative procedure.

Section 37(5) – Child’s plan: management

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary Procedure:</td>
<td>Negative</td>
</tr>
</tbody>
</table>

To explain why the negative procedure is considered to be appropriate, given the breadth of the power and the potential scope to use it to make substantive, as opposed to procedural, changes to the management of child’s plans, which changes may impact on children subject to child’s plans, and on their families?

16. This procedure allows the Scottish Ministers to make provision about the management of a child’s plan, including when and how a child’s plan is to be reviewed and the keeping, disclosure and destruction of child’s plans. This power is being taken in order to make provision about the detailed operational systems
which underpin the policy position as set out in the Bill. These matters are considered too detailed to be on the face of the Bill. They will not change policy. They will not amend primary legislation.

17. Additionally, there is a precedent for this type of power being subject to the negative resolution procedure, as the provisions relating to co-ordinated support plans in the Education (Additional Support For Learning) (Scotland) Act 2004 allow the Scottish Ministers to make regulations as to the procedures for the review of such plans and the keeping, disclosure and destruction of such plans - the relevant enabling power, at section 11(8) of the 2004 Act, is subject to the negative resolution procedure.

18. For these reasons, the Scottish Government considers that it is appropriate that the power in section 37(5) be subject to the negative procedure.

Section 43(2)(c)(ii) – Duty to secure provision of early learning and childcare

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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary Procedure:</td>
<td>Negative</td>
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</table>

To explain further the choice of negative procedure, given that:

- setting the eligibility criteria for early learning and childcare may be considered a matter of substance with a potentially significant impact on children and families; and

- Provision in relation to the mandatory amount of early learning and childcare (section 44) and the way in which an education authority must deliver early learning and childcare (section 47) is set out on the face of the Bill, with power to modify that provision being subject to affirmative procedure in each case.

19. The Scottish Government comments that the current policy of securing early learning and childcare for eligible children is part of a longer term ambition to increase and improve early learning and childcare for all children. There is a strong consensus and wide support for this ambition, with pressure to increase the categories of eligible children, e.g. 2 year olds living in deprivation; 2 year olds who have a disability or additional support needs; all 2 year olds.

20. The power will allow the Scottish Ministers to specify additional categories of “eligible pre-school child” in the future, which provides maximum flexibility and enables work towards this longer term ambition. The Scottish Government agrees that the setting of eligibility criteria for early learning and childcare is a matter of substance with a significant impact on children. However, that does not necessarily mean that it is appropriate to make the power subject to affirmative procedure, but it is considered that negative procedure is appropriate in the circumstances.
21. The power in section 43(2)(c)(ii) of the Bill contrasts with the powers in section 44 and 47 of the Bill. The potential effect of these powers could mean a significant change to the infrastructure and funding of early learning and childcare and therefore it is appropriate that those powers are afforded a more detailed level of scrutiny in the form of affirmative procedure.

22. In contrast, the power in section 43(2)(c)(ii) will not modify primary legislation. The power cannot be used to modify the categories of “eligible pre-school child” already listed in section 43(2)(a), (b) and (3) of the Bill; instead the power will either (i) add to the categories of eligible pre-school child as part of the longer term ambition discussed above, or (ii) provide more detail about the age range or description of such eligible pre-school children. The power therefore will be used to put more meat on the bones of the fundamental longer term policy ambition to increase and improve early learning and childcare for all children.

23. The Scottish Government would also add that there is precedent for this type of power being subject to negative resolution procedure as the precursor to the power contained in section 43(2)(c)(ii) of the Bill which was contained in section 1(1A) of the Education (Scotland) Act 1980 (the 1980 Act) was also subject to negative procedure (in terms of section 1(4A) of the 1980 Act).

24. For these reasons, the Scottish Government would submit that it is appropriate that the power in section 43(2)(c)(ii) be subject to negative procedure.

Section 61(3) – Provision of counselling services to parents and others

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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary Procedure:</td>
<td>Negative</td>
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</table>

The Committee asks the Scottish Government whether there are further reasons for the choice of negative procedure.

25. When deciding on whether to use affirmative or negative procedures, the Scottish Government has sought to strike a balance between making proper use of valuable Parliamentary time and focusing a more detailed level of Parliamentary scrutiny where appropriate. The Scottish Government’s view is that changes to the description of “eligible child” are unlikely to be controversial and consequently it would not be good use of Parliamentary time to initiate a debate on each occasion the power is used. Any change to eligibility would most likely be to extend eligibility rather than narrow it – therefore improving the provision of counselling services to parents and others and ensuring we continue to meet the needs of children and families in need. In addition, given the nature of the counselling services provided in each area, no change to provision could be effected without substantial consultation and engagement with the service providers and users across each local authority area, which would be undertaken by the Scottish Government.
The Committee asks the Scottish Government in what respect does the power in section 61(3) to specify eligibility for counselling services differ from the power in section 60(2), so as to make negative procedure more appropriate?

26. The Scottish Government’s view is that given the high level of interest in what might constitute the eligible needs of those requiring aftercare by a wide range of stakeholders (including the Scottish Parliament) and the fact that eligible needs are not otherwise defined in our Bill amendments to section 29 of the Children (Scotland) 1995 Act (as amended by Bill section 60), the affirmative Parliamentary procedure is more appropriate. The legal definition of “eligible needs” in an order made under section 29(8) of the Children (Scotland) 1995 Act will have such a large bearing on whether or not a young person will receive aftercare, it is felt that Parliamentary debate would constitute appropriate use of valuable Parliamentary time and that Parliamentary scrutiny would be useful here.

Section 64(4) – Assistance in relation to kinship care orders

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary Procedure: Negative

The Committee asks the Scottish Government what the reasons are for the choice of negative procedure.

27. As above, the Scottish Government’s view is that changes to the description of “eligible child” are unlikely to be controversial and consequently it may not be good use of Parliamentary time to initiate a debate on each occasion the power is used. The reasons for this would be that any change would likely be to extend rather than narrow terms of eligibility – ensuring we continue to meet the needs of children living in kinship arrangements. No change to the eligibility description specified would be effected without substantial consultation and engagement with the service providers and users across each local authority area, which would be undertaken by the Scottish Government.

The Committee asks the Scottish Government in what respect does the power in section 64(4) to specify eligibility for kinship care assistance differ from the power in section 60(2) power, so as to make negative procedure more appropriate?

28. As previously noted, the Scottish Government’s view is that the changes effected by the power in 64(4) are unlikely to be controversial and would be subject of thorough consultation with the sector therefore negative procedure is felt to be most appropriate. However, given the legal definition of “eligible needs” in section 60(2) of the Bill will have such a large bearing on whether or not a young person will receive aftercare it is felt that greater Parliamentary scrutiny would be useful here making the affirmative parliamentary procedure more appropriate.
Adoption Register

The Committee notes that the Bill does not define what information the Register is to contain or make provision about what it is to be used for and asks for an explanation as to why that is the case, and why the wide powers taken in section 13A(2) to make provision about the Register are not limited or defined in any way?

29. As stated in the Delegated Powers Memorandum, given that this is likely to be a lengthy list of very detailed information, and given the information which is prescribed is likely to be amended from time to time as the adoption process changes, it is considered to be more appropriate for it to be provided for in regulations than the Bill. Although the Bill does not contain a definition as such of what information the Register is to contain, it is submitted that it is clear from the examples of the types of information which may be included in the Register which are provided for in subparagraphs (i) to (v) of section 13A(2)(a) that the information will all relate in some way to the children who are considered suitable for adoption, or to the prospective adoptive parents.

30. As to limitations on the power, we think that paragraphs (a), (b) and (c) of section 13A(2) do go some way to limit the power. As stated above, it is submitted that it is clear from the examples provided for in paragraph (a) that the information which is likely to be included in the Register will be restricted to information which is relevant to adoption. It is also the Scottish Government’s view that it is clear from paragraphs (b) and (c) that the regulations will be limited to or restricted to making provision for how this information is to be stored and to other administrative matters associated with the operation of the Register.

To give the reasons for taking powers in section 13C(1), (2)(a)(ii) and (3) to use regulations under section 13A(2) to make provision about the supply of information for the Register, as no explanation of these powers is provided in the Delegated powers Memorandum?

31. Section 13C(1) provides that regulations under section 13A(2) may prescribe the information which must be provided to the Scottish Ministers by an adoption agency about children who it considers ought to be placed for adoption or persons who were included in the Register as such children and persons who it considers as suitable to have a child placed with them for adoption or persons who were included in the Register as such persons.

32. The reason for providing that regulations under section 13A(2) may also prescribe this information, is to enable the Scottish Ministers to specify what information must be supplied by adoption agencies for entry in the Register. As with section 13A(2) above, this will be a lengthy list of detailed information which may be amended from time to time, therefore it is considered more appropriate to provide for this in regulations as opposed to in the Bill.

33. Section 13C(2)(a)(ii) provides that regulations under section 13A(2) may also prescribe those persons whose consent must also be obtained before an adoption
agency may pass information in relation to a child to the Scottish Ministers for entry in the Register.

34. The reason for providing that regulations under section 13A(2) may also prescribe this information, is to give the Scottish Ministers the flexibility to amend the list of those persons whose consent has to be obtained before information is shared with Ministers should this be required, without having to amend primary legislation.

35. Section 13C(3) provides that regulations under 13A(2) may (a) provide that information is to be provided to a registration organisation instead of to the Scottish Ministers, (b) provide for how and by when information is to be provided, (c) prescribe a fee which is to be paid by an adoption agency when providing that information and (d) prescribe the form in which consent is to be given for the purposes of subsection (2).

36. The reason for providing that regulations under section 13A(2) may also provide for the above is to enable the Scottish Ministers to prescribe the detailed processes for operating the Register and to allow changes to be made to the processes if required (without the need to amend primary legislation).

37. The procedure in relation to all of the above is affirmative, as the power to make the regulations is in section 13A(2). This allows Parliament a more detailed level of scrutiny which is considered appropriate given it relates to the establishment of a new statutory Register and how it will develop to meet any changes in the adoption process.

To explain the reasons for taking powers in section 13D(2) and (3) to use regulations under section 13A(2) to make provision about disclosure of information, as again no explanation of these powers is provided in the Delegated Powers Memorandum?

38. Section 13D(2) provides that regulations under section 13A(2) may authorise Ministers or a registration organisation to disclose information derived from the register to an adoption agency for the purposes set out in subparagraphs (i) and (ii) of paragraph (a) or to any person (whether or not established or operating in Scotland) specified in the regulations for the purposes set out in subparagraphs (i) to (v) of paragraph (b).

39. The reason for providing that regulations under section 13A(2) may also provide for the above, is to enable the Scottish Ministers to authorise disclosure of information from the Register to adoption agencies for the purposes set out in subsection (2)(a), to specify any other person that this information may be disclosed to provided it is disclosed for the purposes set out in subsection (2)(b), to set out the detailed terms and conditions for such disclosures, the detailed steps to be taken by adoption agencies receiving this information and to allow the Scottish Ministers to prescribe a fee in respect of a disclosure of information. As above, this will be detailed information which may need to be amended or added to from time to time and therefore it is not considered appropriate to make provision for this in the Bill.
To explain further in what way it is currently anticipated the Register may alter and extend beyond containing information about children and adopters, and what sort of information might be included in it?

40. There are no current plans to extend the Register beyond containing information about children and adopters (though the type of information about children and adopters required may be extended in future)

Inserting section 13E(1) into the Adoption and Children (Scotland) Act 2007

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations</td>
</tr>
<tr>
<td>Parliamentary Procedure:</td>
<td>Affirmative</td>
</tr>
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</table>

The Committee therefore asks the Scottish Government to explain the reasons for taking the power.

41. This power enables the Scottish Ministers to authorise a registration organisation or any other person to act as an agent for the payment or receipt of sums payable by adoption agencies to other adoption agencies and may require adoption agencies to pay or receive such sums through the organisation.

42. The reason for providing that regulations under section 13A(2) may also enable the Scottish Ministers to authorise a registration organisation or other person to act as agent is because the Scottish Ministers may or may not choose to make such an authorisation (hence it is not provided for in the Bill). Further, if the Scottish Ministers do choose to exercise the power to authorise either a registration organisation or some other person to act as agent, they may wish to exercise the power subsequently to amend this authorisation and this power would then allow them to choose a different person to act as agent for the payment.

43. However it is appreciated that the power in section 13E differs from the power in section 13B(1), which is a power to make arrangements to authorise an organisation to carry out the Scottish Ministers functions relative to the Register.

Section 78(b) – Ancillary provision

<table>
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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Generally negative but affirmative procedure if making textual changes to an Act.</td>
</tr>
</tbody>
</table>

To confirm that the power is subject to negative procedure other than where it makes textual amendment of the Bill or any other Act, in which case it is subject to affirmative procedure notwithstanding the alternative statement and justification provided in the Delegated Powers Memorandum?
44. The Scottish Government confirms that the power in section 78(b) is subject to negative procedure (by virtue of section 77(4)) other than where it makes textual amendment of the Bill or any other Act, in which case it is subject to affirmative procedure (by virtue of section 77(3)) notwithstanding the alternative statement and justification provided in the Delegated Powers Memorandum.

Section 79(2) - Commencement

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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Laid in accordance with section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010</td>
</tr>
</tbody>
</table>

Whether it considers that section 79(3) enables the same transitional, transitory or saving provision to be made in a commencement order under section 79(2) as could be made in an ancillary order under section 78(b)?

45. The Scottish Government considers that whilst there is some degree of overlap between the two powers, in practical terms the power in section 79(3) is more likely to be used for simple transitional, transitory or savings provisions whilst the power in section 78(b) is more likely to be used for more complex transitional, transitory or savings provisions.

If so, why is it considered that both powers are necessary, and what considerations are likely to determine which power is used to make provision in any individual case?

46. The Scottish Government considers that it is necessary and appropriate that there should be two mechanisms for the making of transitional, transitory or savings provisions for the purposes of, or in connection with, the coming into force of the Bill. The commencement order power under section 79(2) and (3) of the Bill would likely be used to make simple transitional, transitory or saving provision, whilst the power in section 78(b) would be used for more complex transitional, transitory or savings provisions.

The Committee asks the Scottish Government to explain why the difference in Parliamentary procedure is thought appropriate?

47. The Scottish Government considers that, in light of our comments above, where a commencement order made under section 79 of the Bill contains simple transitional, transitory or savings provisions then it is appropriate that the order is simply laid and not subject to any further Parliamentary procedure. However, where an order is made under section 78(b) and which as mentioned above is likely to contain more complex transitional, transitory or savings provisions then it is appropriate that such an order be subject to more detailed Parliamentary scrutiny.
Section 28(1) – Guidance in relation to named person service

Power conferred on: The Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None

Section 29(1) – Directions in relation to named person service

Power conferred on: The Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: None

Whether it considers that it would be appropriate to publish guidance or directions issued under the powers in sections 28(1) and 29(1), in light of the potential impact of the named person service on children or young people, and their families?

48. The Scottish Government confirms that it does consider it appropriate and therefore intends to publish guidance and, if relevant, directions under the powers in sections 28(1) and 29(1) of the Bill.

Section 39(1) – Guidance on child’s plans

Power conferred on: The Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None

Section 40(1) – Directions in relation to child’s plans

Power conferred on: The Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: None

Whether it considers that it would be appropriate to publish guidance or directions issued under the powers in sections 39(1) and 40(1), in light of the potential impact of the exercise of functions relating to child’s plans on children and their families?

49. The Scottish Government confirms that it does consider it appropriate and as such intends to publish guidance and, if relevant, directions under the powers in sections 39(1) and 40(1) of the Bill.

Section 68 – Scotland’s Adoption Register

Inserting section 13A(1) into the Adoption and Children (Scotland) Act 2007

Power conferred on: The Scottish Ministers
Power exercisable by: Arrangement
Parliamentary procedure: None
Why it is considered appropriate to authorise a registration organisation to perform the Scottish Ministers' functions in respect of the Register, and to provide for payments to be made to that organisation, by way of arrangements rather than in subordinate legislation?

50. There is an organisation which currently operates a non-statutory adoption register in Scotland and the Scottish Ministers may consider it to be appropriate to authorise this organisation to carry out their functions in relation to the Register going forward, given the organisation has the relevant skills and experience which may be required. For this reason, it is considered that this authorisation would be more appropriate to be made by arrangement as opposed to by subordinate legislation.

51. It is not considered appropriate to provide for payments to the registration organisation to be in subordinate legislation given that funding arrangements are already in place for the non-statutory register and therefore that these may be used as a basis for the arrangements for the funding of the new register.

In what respect the power differs from the power in section 13E(1) of the 2007 Act to authorise a registration organisation or any other person to act as agent in respect of payments by adoption agencies, which power is to be exercised by way of regulations subject to the affirmative procedure?

52. At present there is no requirement for adoption agencies to use the non-statutory adoption register and there is no organisation or person which currently acts as agent in relation to payments by adoption agencies. Once use of the statutory register becomes a requirement, there may or may not be a need for the Scottish Ministers to authorise an organisation or person to act as agent, although it is not currently envisaged that this power will be used. If it is used, as previously noted, the Scottish Ministers may subsequently seek to amend the person acting as agent.

What the intentions are regarding publication of the proposed arrangements?

53. It is expected that the details will be made available on the website of Scotland's Adoption Register.

Section 74(3) – Assessment of wellbeing

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<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Guidance</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>None</td>
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</table>

The Committee asks the Scottish Government whether it considers that it would be appropriate to publish guidance on how the wellbeing indicators
54. The Scottish Government confirms that it does consider guidance on wellbeing indicators an appropriate mechanism to set out further detail, therefore it is the intention for guidance to be published.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.