

Children (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Children (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Bill is comprised of 25 sections.

3. The Bill confers powers on the Scottish Ministers to make regulations in relation to a range of matters dealt with in the Bill. The powers conferred by the Bill are, for the most part, either of a technical and procedural nature or relate to matters which, because of their character, require a flexible approach and thus are more appropriate to be dealt with by subordinate legislation.

Rationale for subordinate legislation

4. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the need to:

- strike the appropriate balance between the importance of the issue and providing sufficient flexibility to respond to changing or unforeseen circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment; and

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- anticipate the unexpected, which might otherwise frustrate the purpose of the provision approved by the Parliament.

5. The delegated powers provisions are listed below, by reference to the section of the Bill and any Act into which they are inserted, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

Delegated Powers

Section 4(3)/11A(3) of the Vulnerable Witness (Scotland) Act 2004: Power to modify the list of conduct for the purposes of deeming a person to be a vulnerable witness in relevant proceedings under the Children’s Hearings (Scotland) Act 2011 or to make other modifications to this section

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

6. Section 4(3) inserts provision which provides that the Scottish Ministers may by regulations amend the list of conduct that, if alleged, would lead to a person being prohibited from personally conducting their own case in relevant proceedings under Part 10 and section 154 of the Children’s Hearings (Scotland) Act 2011 Act.

Reason for taking power

7. The power gives the flexibility to allow the list of conduct to be kept up to date and reflect any new criminal offences. In addition, this gives the flexibility to include English, Welsh or Northern Irish offences and other jurisdictions if required.

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Choice of procedure

8. The affirmative procedure is considered appropriate to give a high level of scrutiny to the detail which may result in changes to primary legislation. This also reflects the severity of the impact of being prohibited from personally conducting a case.

Section 4(3)/11B(6) of the Vulnerable Witness (Scotland) Act 2004: Power to modify the list of relevant offences for the purposes of deeming a person to be a vulnerable witness in proceedings concerning orders under section 11(1) of the Children (Scotland) Act 1995 or make other modifications to this section

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

9. Section 4(3) inserts provision into the Vulnerable Witnesses (Scotland) Act 2004 including section 11B(6) which allows the Scottish Ministers by regulations to modify the list of relevant offences in new section 11B(5). The list may be modified by adding an offence, or removing, or modifying the description of, an offence added by regulations. The Scottish Ministers may make any other modifications to section 11B that appear to the Scottish Ministers to be necessary or expedient in consequence of provision modifying the list.

10. The person against whom a relevant offence is committed (or is alleged to have been committed) by a party in the proceedings is deemed a vulnerable witness by virtue of new section 11B(4). Where a witness is deemed to be a vulnerable witness by virtue of section 11B(4), there is a presumption that the party to the proceedings who committed (or is alleged to have committed) the relevant offence should be prohibited from conducting their own case in person.

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Reason for taking power

11. These powers give the flexibility to allow the list of relevant offences to be kept up to date and to reflect any new criminal offences which the Scottish Ministers consider the victims (or alleged victims) of which should be deemed to be vulnerable witnesses (where the offence is committed or allegedly committed by another party in the proceedings).

Choice of procedure

12. The affirmative procedure is considered appropriate to give a high level of scrutiny to the detail which may result in changes to primary legislation. This also reflects the potential impact of modifying the list of relevant offences. A party convicted (or being prosecuted for) a relevant offence committed against a witness in the proceedings, would be made subject to a presumption that they should be prohibited from personally conducting their case.

Section 6(2): Power to make provisions in relation to the register of solicitors who may be appointed by a court under section 22B(6) of the Vulnerable Witness (Scotland) Act 2004

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative (or affirmative if used to amend primary legislation)

Provision

13. Section 4(4) inserts a new section 22B into the Vulnerable Witnesses (Scotland) Act 2004. The new section 22B will allow courts to prohibit parties from conducting their own cases in certain proceedings in order to protect vulnerable witnesses. The new section further requires that the court appoint a solicitor for any party who is subject to the prohibition but has not engaged a solicitor to conduct the case. The new section requires that any solicitor appointed by the court must be on the register of solicitors established under section 6 of the Bill.

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14. Section 6(2) provides for certain provision about the register to be made by regulations. In particular, it provides that that the Scottish Ministers must by regulations:

- specify the requirements that a person must satisfy in order to be included, and remain, on the register (which may include requirements as to training and qualifications),
- set out the processes for including a person on, and removing a person from, the register (including appeal rights),

15. Section 6(2) further provides that regulations may:

- provide for the remuneration by the Scottish Ministers of solicitors appointed under section 22B(6) of the Vulnerable Witnesses (Scotland) Act 2004, including expenses and outlays (such as counsel fees),
- confer on a person other than themselves the responsibility of maintaining the register (and in order to facilitate that the regulations may amend other enactments, for example to provide a basis in the legislation setting up a statutory body for it to take on the role of maintaining the register).

Reason for taking power

16. Detailed provision will be required to establish a register of solicitors who may be appointed by a court under section 22B(6) of the Vulnerable Witnesses (Scotland) Act 2004 if a party or witness is prohibited from personally conducting their case. In particular flexibility will be required in order that the eligibility criteria such as training and qualification requirements, and rates of remuneration may be kept up to date on an ongoing basis.

Choice of procedure

17. The negative procedure is considered appropriate given that the nature of the power is to make administrative, operational and procedural provision in relation to establishment of a register of lawyers.

18. If, however, the power is used to make consequential modifications to primary legislation (as discussed in paragraph 14) its exercise will be subject

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to the affirmative procedure. This is the approach ordinarily taken in relation to ancillary powers that can be used to modify primary legislation.

Section 7(2)/11B(6)(d) of the Children (Scotland) Act 1995 – Power to prescribe special measures for the purpose of reducing distress to vulnerable parties

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure

Provision

19. Section 7(2) inserts section 11B into the Children (Scotland) Act 1995 authorising the court to order the use of special measures to reduce distress to vulnerable parties caused by attending or participating in hearings. Section 11B(6)(a)-(c) specify the special measures. Section 11B(6)(d) provides that Scottish Ministers may by regulations prescribe further special measures that may be used to assist vulnerable parties.

Reason for taking power

20. These powers are important to ensure there is flexibility to allow the range of special measures which the court may order to assist vulnerable parties to be kept up to date with developments across the wider justice system, such as the adoption of new or improved technology, the identification of other appropriate support measures and changes in best practice for supporting vulnerable parties.

Reason for choice of procedure

21. The affirmative procedure is considered appropriate to give a high level of scrutiny to the detail which may result in changes to primary legislation.

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22. The use of the affirmative procedure also mirrors the affirmative procedure required to add additional special measures under section 18 of the Vulnerable Witnesses (Scotland) Act 2004¹ (the 2004 Act).

Section 8(2)/101A(3) – Power to make provision for or in connection with the register of child welfare reporters

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

23. Section 8(2) inserts provision which provides that the Scottish Ministers may by regulations make provisions for or in connection with the register for Child Welfare Reporters, including:

- the requirements that a person must satisfy in order to be included, and remain, on the register (including requirements as to training and qualifications),
- the processes for including a person on, and removing a person from, the register (including appeal rights),
- the process of how, and by whom, a registered person is to be selected as the appointed child welfare reporter in a case,
- the remuneration by the Scottish Ministers of child welfare reporters, including expenses and outlays,
- the operation and management of the register.

Reason for taking power

24. Detailed rules will be required to provide for the management and operation of the register of child welfare reporters. Regulations will also allow the necessary flexibility to ensure that all child welfare reporters meet a minimum standard in terms of training and qualifications, including that they will be suitably trained in key areas such as domestic abuse, coercive control and whether there has been any deliberate attempt to undermine the relationship between the child and a parent of the child, or any person who

¹ <http://www.legislation.gov.uk/asp/2004/3/contents>

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has parental responsibilities and rights. Regulations also ensure that there is a consistent approach in relation to the remuneration received by child welfare reporters.

Choice of procedure

25. Other provisions in the Bill detail the new functions of child welfare reporters (sections 15 and 16). The delegated power in section 8(2) is of a lesser significance as it relates to the management and organisation of child welfare reporters, for example, qualifications, training requirements and monitoring processes. The negative procedure is considered appropriate given that the nature of the power is to make administrative, operational and procedural provision in relation to the functioning of the register of child welfare reporters, the criteria required to be a child welfare reporter and their remuneration.

26. A similar power in relation to safeguarders in Children's Hearings, set out at section 34(1) of the Children's Hearings (Scotland) Act 2011, is subject to the negative procedure². In addition, the provisions giving the Scottish Ministers the power to set the eligibility criteria for membership of the Scottish Tribunals and the fees tribunal members may receive in the Tribunals (Scotland) Act 2014 is subject to the negative procedure³.

² http://www.legislation.gov.uk/asp/2011/1/pdfs/asp_20110001_en.pdf

³ <http://www.legislation.gov.uk/asp/2014/10/contents>

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Section 9(3)/101C(2) of the Children (Scotland) Act 1995 - Power to make provision of contact services

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

27. Section 9(3) inserts provision which provides that the Scottish Ministers may by regulations make provisions about the regulation of contact services in relation to the requirements of a contact order, in particular to:

- make provision for the minimum standards to be met by contact service providers, including qualifications and training of staff and minimum standards for accommodation at contact centres;
- make provision for the registration of contact service providers that meet those minimum standards and the refusal or revocation of registration of contact service providers that do not (including appeal rights);
- appoint a person or persons for the purposes of administering the registration of contact service providers;
- confer functions on the appointed person or persons;
- determine the fees payable in connection with the registration of a contact service provider; and
- make provision about the handling of complaints against a regulated contact service provider.

Reason for taking power

28. Detailed rules will be required to provide the necessary flexibility to establish the minimum standards that contact service providers must meet and to appoint an organisation to undertake the role of administering the registration of contact service providers and ensuring that services meet the required minimum standards.

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29. The regulations will ensure that all contact service providers meet a minimum standard in terms of the contact service they provide.

Choice of procedure

30. The affirmative procedure is considered appropriate as the regulations under this section can be wide ranging in scope and there may be significant public interest in the way in which these standards and functions are to be applied. Accordingly the affirmative procedure is considered appropriate to give a high level of scrutiny to the detail.

31. The use of the affirmative procedure also mirrors the affirmative procedure required to regulate care services under section 78 of the Public Services Reform (Scotland) Act 2010⁴.

Section 13(3)/101B(2) of the Children (Scotland) Act 1995 - Power to make provision for or in connection with the register of curators ad litem

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

32. Curators ad litem may be appointed by the court to represent the interests of a person who lacks capacity, such as a child.

33. Section 13(3) inserts provision which provides that the Scottish Ministers may by regulations make provisions for:

- the requirements that a person must satisfy in order to be included, and remain, on the register (including requirements as to training and qualifications);
- the processes for including a person on, and removing a person from, the register (including appeal rights),

⁴ <http://www.legislation.gov.uk/asp/2010/8/contents>

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- the process of how, and by whom, a registered person is to be selected as the appointed curator ad litem in a case,
- the remuneration by the Scottish Ministers of curators ad litem appointed in accordance with section 11D, including expenses and outlays,
- the operation and management of the register.

Reason for taking power

34. Detailed rules will be required to provide for the management and operation of the register of curators ad litem appointed in cases under section 11 of the Children (Scotland) Act 1995. Regulations will also allow the necessary flexibility to ensure that all curators ad litem meet a minimum standard in terms of training and qualification. Regulations also ensure that there is a consistent approach in relation to the remuneration of curators ad litem.

Choice of procedure

35. The negative procedure is considered appropriate given that the nature of the power is to make administrative, operational and procedural provision in relation to the functioning of the register of curators ad litem, the criteria required to be a curator ad litem, and their remuneration.

36. The use of the negative procedure is consistent with the regulations at section 8(3) of this Bill in relation to the regulation of child welfare reporters.

Section 15(2)/11E(6) – Power to modify the list of persons who can give an explanation of court decisions to the child

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

37. Section 15(2) inserts provision which provides that the Scottish Ministers may by regulations modify section 11E(4)(b), which provides that if

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the court is not going to explain a decision to a child itself it can task a child welfare reporter with doing so. By regulations, Ministers will be able to amend the provision to add other categories of person who can be assigned to explain decisions to children.

Reason for taking power

38. This power ensures that if the Scottish Ministers consider it appropriate, another way of explaining a court decision to a child, in addition to the court providing the explanation themselves or the decision to be explained by a child welfare reporter, can be added to the list. This flexibility is necessary as there may, over time, be other options to allow for impartial feedback to be provided to a child. For example, there is currently work being undertaken by various areas of Scottish Government in relation to advocacy workers/ child support workers, and it may be considered appropriate to add these to the list in the future.

Choice of procedure

39. The affirmative procedure is considered appropriate to give a high level of scrutiny to the detail which may result in changes to primary legislation.

Section 19(2)/4B(1) of the Children (Scotland) Act 1995 – Power to make provision for the conferral of Parental Responsibilities and Parental Rights where birth is registered outwith the United Kingdom

Power conferred on: the Scottish Ministers

**Power exercisable by: Regulations made by Scottish
statutory instrument**

Parliamentary procedure: Negative

Provision

40. Section 19(2) inserts section 4B into the Children (Scotland) Act 1995 which provides that the Scottish Ministers may by regulations make provision for the conferral of parental responsibilities and parental rights on a father or second female parent who has not acquired those responsibilities and rights

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by virtue of existing provision in the 1995 Act. The power only allows parental responsibilities and rights to be conferred in a case where the child's birth is registered outwith the United Kingdom, where the person has acquired parental duties, rights or responsibilities in relation to the child through a process specified in the regulations, and where the mother of the child has consented to the person acquiring those duties, rights or responsibilities.

Reason for taking power

41. Detailed provision will be required to establish a list specifying the various processes in overseas jurisdictions that the Scottish Ministers wish to provide should result in the conferral parental responsibilities and rights. Flexibility is required to ensure that this list can be updated quickly if required in response to changes in overseas legal systems. The provision required will necessarily be detailed in order to take account of the differing processes by which parental duties responsibilities and rights are obtained, and the differing nature of the resultant rights, in overseas jurisdictions.

Choice of procedure

42. The negative procedure is considered appropriate given that the nature of the power is to list the processes within overseas jurisdictions that the Scottish Ministers wish to specify. It also takes into account the clear parameters within which the power has to be exercised.

Section: 22(1) - Power to replace descriptions with actual dates

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid no further procedure

Provision

43. Section 22 enables the Scottish Ministers to amend legislation to replace a reference to the date that certain provisions come into force so that those provisions instead show the actual coming into force date of the provisions.

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44. For example, section 7 of the Bill inserts a new section 11B into the Children (Scotland) Act 1995. Subsection (2) of the new section states that it applies to proceedings commenced on or after the day that section 7 of the Bill comes into force (i.e. the new section does not apply to proceedings that had already begun before the new section was inserted into the 1995 Act). Section 7 of the Bill is to be commenced by regulations. So to establish what proceedings the new section 11B of the 1995 Act applies to, the reader would have to find the applicable commencement regulations. To spare the reader that trouble, regulations under section 22 will allow the Scottish Ministers to overwrite the reference to the coming into force of section 7 so that the reader sees the coming into force date that has been appointed, by regulations, for section 7.

Reason for taking power

45. As explained above, the power in section 22 is being taken to make the law resulting from the Bill easier for end users to follow.

Choice of procedure

46. The power under section 22 is highly limited. It can only be used to replace one string of text (i.e. a reference to a commencement date) with another (i.e. the actual date of commencement). The Scottish Ministers will have no policy discretion as to how the power is exercised and the regulations will therefore reflect no choices for the Parliament to scrutinise. On that basis, the Government's view is that no procedure, apart from laying in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, is the most appropriate scrutiny procedure for regulations under section 22.

Section 23(1) - Ancillary Provision

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if it amends an Act, otherwise negative

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Provision

47. Section 23 empowers the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or savings provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Subsection (2) confirms the power allows different provision for different purposes, and regulations under this section to modify any enactment, including the provision made by the Bill.

Reason for taking power

48. Such provision is common in Bills to provide flexibility to make any necessary adjustments that may arise in light of experience on the operation of the Act as timeously as possible. The Scottish Government recognises the potentially broad application of this power, which includes the facility to modify primary legislation, and to alter the provisions in the Bill. Any supplementary use of the power would though be strictly construed. It is however considered important to ensure the workability in practice and in light of experience of the complex and technical matters addressed in the Bill.

Choice of procedure

49. In light of the potentially broad application of this power in some respects, in particular modifying primary legislation, and the provisions in the Bill, any use of this power which adds to, omits or replaces any part of an Act would require the level of parliamentary scrutiny attached to the affirmative procedure. Other uses will require the negative procedure. These procedures are typical for ancillary powers

Section 24(2): Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid no further procedure

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Provision

50. Section 24(2) provides for the Scottish Ministers by regulations to appoint a day when the provisions of the Bill come into force. They may appoint different days for different purposes and include transitional, transitory or saving provision.

Reason for taking power

51. This regulation-making power is required to ensure effective commencement of the Bill and also allows transitional, transitory and saving provision to be made where appropriate to avoid the Bill affecting legal proceedings already commenced or applications to court before the Act comes into operation.

Choice of procedure

52. The regulations will be laid subject to no further procedure aside from laying in Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, which is typical for powers to bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. The power to make transitory, transitional provisions and savings provision is also limited to arrangements made in bringing measures which the Parliament has already considered into force.

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