

Children and Young People (Information Sharing) (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 and Young People (Information Sharing) (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.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is a response to the Supreme Court's judgment in *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland)* [2016] UKSC 51¹.

4. In that case, the Children and Young People (Scotland) Act 2014 ("the 2014 Act")² was subject to challenge as being outside the legislative

¹ A copy of the full judgment and a press summary can be accessed via <https://www.supremecourt.uk/cases/uksc-2015-0216.html>.

² Available at <http://www.legislation.gov.uk/asp/2014/8/contents>.

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competence of the Scottish Parliament. The grounds for the challenge were that Part 4 of the 2014 Act (on the provision of named persons) related to reserved matters, that it was incompatible with the European Convention on Human Rights (ECHR) and that it was incompatible with European Union law³. The challenge on the first of these grounds did not succeed and the Court determined, in relation to the ECHR challenge on broad grounds to the appointment of a named person for every child that the policy objectives of the 2014 Act were “legitimate and benign”.

5. But the Supreme Court did allow the challenge in relation to the narrow grounds that the information-sharing provisions⁴ of Part 4 of the 2014 were incompatible with the ECHR. In relation to European Union law, the Court found that there was no incompatibility beyond the incompatibility with the ECHR. Specifically, the Supreme Court found that the information-sharing provisions of Part 4 of the 2014 Act (and guidance issued under that Part) did not meet the criterion in article 8 of the ECHR of being “in accordance with the law”⁵. This meant that the Scottish Parliament had acted outwith its legislative competence in relation to these provisions and that these provisions were not law.

³ The limits on the legislative competence of the Scottish Parliament are set out in section 29(2) of the Scotland Act 1998 (see <http://www.legislation.gov.uk/ukpga/1998/46/contents>).

⁴ The Supreme Court judgment generally refers to sections 23, 26 and 27 of the 2014 Act as the “information sharing provisions”.

⁵ The reasons for this are summarised in paragraphs 83 to 85 of the judgment. In brief, the provisions were not in accordance with the law because of “the very serious difficulties in accessing the relevant legal rules” and “the lack of safeguards which would enable the proportionality of an interference with article 8 rights to be examined”. The Court did consider that, but for not being in accordance with the law for these reasons, the 2014 Act would be “capable of being operated in a manner which is compatible with the Convention rights” (paragraph 96 of the judgment). But the Court also expressed concern that the information sharing provisions “may in practice result in a disproportionate interference with the article 8 rights of many children, young persons and their parents” (paragraph 106 of the judgment).

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The Bill addresses this finding by making changes in Part 4 of the 2014 Act as follows:

- amending section 23 (communication in relation to movement of children and young people) by removing the existing duty in section 23(2)(b)(ii) for certain information to be shared (and material supplementary to that duty in subsections (3) to (7)). That duty is replaced by a duty to identify information the sharing of which could promote, support or safeguard the wellbeing of the child or young person and to consider whether that information could be shared in compliance with the Data Protection Act 1998 and other relevant law, such as the law of confidentiality and human rights law. A power to share information if the wellbeing test set out above is met is also provided. That power must be exercised in accordance with new section 26A and the code of practice issued under new section 26B. The existing duties in section 23(2)(a) and (b)(i) are retained.
- replacing section 26 (information sharing) with a new version of that section. In particular, the duties in sections 26(1) and (3) to share information in certain circumstances are removed. Those duties are replaced by a duty to consider, when new information is acquired, whether the sharing of that information with certain persons could promote, support or safeguard the wellbeing of the child or young person and a duty to consider whether that information could be shared in compliance with the Data Protection Act 1998 and other relevant law. A power to share information if the wellbeing test set out above is met is also provided. That power must be exercised in accordance with new section 26A and the code of practice issued under new section 26B.
- repealing section 27 (disclosure of information). This section made additional provision in relation to information shared in breach of a duty of confidentiality, but this provision is no longer necessary as the provisions which purported to permit the sharing of information in breach of a duty of confidentiality (sections 23(7) and 26(11)) are being removed.
- adding new sections 26A and 26B. Section 26A sets out the limitations that apply in relation to information sharing under Part 4.

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Section 26B requires the Scottish Ministers to issue a code of practice in relation to information sharing under Part 4. Compliance with such a code of practice is mandatory.

6. In addition, within Part 5 of the 2014 Act (which deals with child's plans), the Bill amends section 40 of the 2014 Act and adds new sections 40A and 40B. These changes ensure that the procedures for information sharing under that Part align with those in Part 4.

Rationale for subordinate legislation

7. The Bill contains no delegated powers provisions as such and it does not insert any such powers into the 2014 Act. It does, however, insert sections 26B and 40B into the 2014 Act. These new sections will confer power on the Scottish Ministers to issue codes of practice on information sharing under Parts 4 and 5 of the Act. These sections therefore fall within the remit of the Delegated Powers and Law Reform Committee.

8. The Government has had regard, when deciding whether provision should be set out in a code of practice rather than on the face of the 2014 Act, to:

- the nature of the material that might be contained in the code of practice;
- the need to strike the right balance between the importance of the issue and providing sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- the need to ensure proper use of valuable Parliamentary time;
- the need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation; and
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation.

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Section 1(4) – Provision of information by and to named person service provider

New section 26B – Code of Practice in relation to provision of information

Power conferred on: the Scottish Ministers
Power exercisable by: Code of practice issued by Scottish Ministers
Parliamentary procedure: Bespoke (akin to affirmative procedure) (see paragraph 19 for further information) as provided for in section 26B(4) to (9).

Provision

9. Section 1(4) inserts new section 26B into Part 4 of the 2014 Act.

10. Subsection (1) of section 26B imposes an obligation on the Scottish Ministers to issue a code of practice about the provision of information under Part 4. Subsection (2) provides that the code of practice must in particular provide for safeguards applicable to the provision of information. Subsection (1) also permits the issue of revised codes of practice as the Scottish Ministers consider appropriate⁶.

11. A code of practice issued under section 26B will provide more detail on the steps in relation to consultation with, and notification of, children and young people (and their parents) that require to be taken to ensure that, if information is provided (including the consideration of the provision of information) under Part 4 of the Act it is done in compliance with the Data Protection Act 1998 and other relevant law.

12. Subsection (2) makes the code of practice mandatory – service providers and relevant authorities providing information or considering the provision of information must act in accordance with the code of practice (or any revised code of practice) when exercising functions under Part 4.

⁶ Section 7(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 states that statutory duties may be performed from time to time

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13. Subsections (4) to (9) set out the procedures in connection with consultation and consideration by the Scottish Parliament that require to be followed before the first, or any subsequent, code of practice is issued.

Reason for taking power

14. The Supreme Court determined that Ministers needed to provide greater clarity about the basis on which health visitors, teachers and other professionals who support families will share and receive information in their Named Person role. It ruled that the information-sharing provisions of Part 4 of the 2014 Act as they were originally framed are incompatible with article 8 of the European Convention on Human Rights, and that changes are needed to make those provisions compatible with article 8, to ensure respect for a person's "private and family life, his home and his correspondence".

15. The Supreme Court highlighted that it did not consider that these defects could be remedied by amending the existing revised draft statutory guidance published under section 28 (Guidance in relation to named person service) of the 2014 Act. It found that 'changes [were] needed both to improve the accessibility of the legal rules and to provide safeguards so that the proportionality of an interference can be challenged and assessed.'

16. Careful consideration was given to how best to respond to the findings of the Supreme Court including making provision for subordinate legislation or conferring a power on Scottish Ministers to issue directions, guidance or a code of practice. The primary objective for the Scottish Government is to respond to the findings of the Supreme Court and ensure clarity of understanding of the relationship between the information-sharing provisions of the Bill and relevant law, including the Data Protection Act 1998, human rights and the law on confidentiality and to ensure appropriate safeguards are in place.

17. It would not be practicable to put the kind of material that will be covered in the code of practice into the Bill. A Bill is not the vehicle for explaining the processes that need to be followed in order to meet requirements that are set out elsewhere in existing law. In addition, the level of detail that may be required in the code practice in terms of setting out appropriate safeguards is beyond that normally contained in primary legislation and to the extent that the code of practice needs to reflect legal

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requirements, it may require to be changed in light of legislative changes in due course.

18. Providing for a power to make subordinate legislation, instead of setting out the material in the Bill, was considered. However, for similar reasons to those set out in paragraph 17, it is the Government's opinion that this would not be practicable given the nature and likely content of the code of practice, particularly the level of detail that will be included in the code of practice. In particular, setting this out in a legislative form would be too restrictive to allow for a full explanation of the relationship between the information-sharing provisions of the 2014 Act as amended by the Bill and the relevant law.

19. For these reasons, the Government thinks that the best way to provide the clarity sought between the operation of the information-sharing provisions inserted by the Bill and existing relevant law, and to ensure that appropriate safeguards are in place, is through a code of practice rather than by setting out the content of such a code in the Bill or in subordinate legislation under it.

Choice of procedure

20. The Government accepts, however, that the code of practice is an important document and, while not being set out in the Bill or in subordinate legislation (for the reasons set out in paragraphs 17 to 19), should be subject to a degree of public and Parliamentary scrutiny. Section 26B(4) to (9) sets out a bespoke procedure Scottish Ministers must follow when issuing a code of practice under section 26B(1). This procedure is not a standard affirmative procedure but is, in some respects, akin to affirmative procedure and will allow Parliament to be involved in the scrutiny of the draft code of practice. It is considered that such a detailed level of Parliamentary scrutiny is appropriate given the binding nature of the code of practice and the significance of the code to the operation of the Named Person service. The Government will also require to undertake public consultation and scrutiny before the code of practice is published.

21. In summary, these provisions require Scottish Ministers, before issuing a code of practice or revised code of practice, to consult any person to which the code of practice relates and such other persons as they consider appropriate. Scottish Ministers must lay a draft of any code of practice they propose to issue before the Scottish Parliament and must not

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issue the code of practice until after the expiry of the period of 40 days, beginning with the day on which the draft code of practice was laid before the Parliament. Ministers must take account of any comments on the draft code of practice expressed by Parliament within that period.

Section 2(3) – Provision of information in relation to child’s plans

New section 40B – Code of practice in relation to provision of information

Power conferred on: the Scottish Ministers
Power exercisable by: Code of practice issued by Scottish Ministers
Parliamentary procedure: Bespoke (akin to affirmative procedure) (see paragraph 25 for further information). as provided for in section 40B(4) to (9).

Provision

22. Section 2(3) inserts new section 40B into Part 5 of the 2014 Act.

23. Subsection (1) of section 40B imposes an obligation on the Scottish Ministers to issue a code of practice about the provision of information under Part 5. Subsection (2) provides that the code of practice must in particular provide for safeguards applicable to the provision of information. Subsection (1) also permits the issue of revised code of practice as the Scottish Ministers consider appropriate⁷. The further subsections of new section 40B are the same as in new section 26B as set out above.

Reason for taking power

24. The reason for taking the power is the same as for section 26B explained in paragraphs 14 to 19, that it would not be practicable to put the kind of material that will be covered in the code of practice into the Bill. A Bill is not the vehicle for explaining the processes that need to be followed in order to meet requirements that are set out elsewhere in existing law. In addition, the level of detail that may be required in the code of practice in

⁷ Section 7(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 states that statutory duties may be performed from time to time

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terms of setting out appropriate safeguards is beyond that normally contained in primary legislation and to the extent that the code of practice needs to reflect legal requirements, it may require to be changed in light of legislative changes in due course.

Choice of procedure

25. As for section 26B, the Government accepts that the code of practice is an important document and, while not being set out in the Bill or in subordinate legislation (for the reasons set out in paragraphs 17 to 19), should be subject to a degree of public and Parliamentary scrutiny. Section 40B(4) to (9) sets out a bespoke procedure Scottish Ministers must follow when issuing code of practice under section 40B(1). This is the same procedure as applies to codes of practice under section 26B and while it is not a standard affirmative procedure, it is, in some respects, akin to affirmative procedure and will allow Parliament to be involved in the scrutiny of the draft code of. In particular, it is considered that a more detailed level of Parliamentary scrutiny is appropriate given the binding nature of the code of practice and significance of the code to the operation of the procedures around the creation and delivery of Child's Plans.

26. In summary, these provisions require Scottish Ministers, before issuing a code of practice or revised code of practice, to consult any person to which the code of practice relates and such other persons as they consider appropriate. Scottish Ministers must lay a draft of any code of practice they propose to issue before the Scottish Parliament and must not issue the code of practice until after the expiry of the period of 40 days, beginning with the day on which the draft code of practice was laid before the Parliament. Ministers must take account of any comments on the draft code of practice expressed by Parliament within that period.

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