

# Children (Care and Justice) (Scotland) Bill

## [As amended at Stage 2]

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## Supplementary Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Children (Care and Justice) (Scotland) Bill ("the Bill"). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

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

### Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

### Delegated Powers

Section 1A – Child assessment and child protection measures: secure accommodation (new section 57B of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"))

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

## Provision

4. Section 1A of the Bill amends relevant provisions of the 2011 Act concerning the emergency placement of a child in secure accommodation as a place of safety as a result of child assessment and child protection measures under sections 35, 37, 55 and 56 of the 2011 Act. Whilst it has always been possible for a child to be taken or removed to, and kept in, secure accommodation, by virtue of these emergency measures, in practice the use of secure accommodation for this purpose has been rare and at times the ability to do so contested between agencies. New section 57A of the 2011 Act therefore provides greater legal certainty as regards the tests for such placements (which must meet criteria similar to other placements in secure accommodation under section 83(6) of the 2011 Act and must also be considered necessary by the decision-maker). Moreover, new section 57B of the 2011 Act enables further appropriate procedural safeguards to be made in relation to such placements consistent with placements in secure accommodation by virtue of other statutory provisions.

5. New section 57B of the 2011 Act allows the Scottish Ministers to make regulations to make further provision about the placing and keeping of a child in secure accommodation by virtue of the provisions mentioned in new section 57A. This will enable further provisions to be made in regulations to ensure that the child's welfare is appropriately safeguarded during such placements. For example, this could enable provision to be made to require that any placement be subject to the consent or agreement of the head of unit of the secure accommodation and Chief Social Worker of the relevant local authority, specifying the procedure for notifying and giving reasons for such decisions and imposing requirements to protect the welfare of the child.

6. The existing regulation-making power in section 57 of the 2011 Act, concerning the placement of a child by virtue of section 55 or 56 of the 2011 Act, is consequentially amended. That is just to clarify that this power does not regulate the placement of a child in secure accommodation given that is the purpose of the new regulation-making power in section 57B of the 2011 Act.

## Reason for taking power

7. This new regulation-making power will enable provision to be made consistent with the placement and keeping of a child in secure accommodation by virtue of other statutory provisions such as a secure accommodation authorisation under section 83(5) of the 2011 Act. The Regulations can help ensure that a child's legal rights are fully considered and upheld where decision making could result in the deprivation of a child's liberty, particularly under Article 5 of the European Convention on Human Rights and Article 37 of the UN Convention on the Rights of the Child.

## Choice of procedure

8. Regulations under new section 57B are subject to the affirmative procedure and this provides the appropriate level of scrutiny given the sensitivity of the subject matter and potential risks to a child's rights when placed or kept in secure accommodation.

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This is also consistent with other regulation-making powers in the Bill concerning the placement or detention of children in secure accommodation (for example, sections 16(2)(e), 17(2)(b) and (c), 17(6) and 17(7) of the Bill).

## Section 6A – Support for Victims in the Children’s Hearings System (New Section 179D Of The 2011 Act)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: New

### Provision

9. Section 6A of the Bill inserts a new section 179D into the 2011 Act to require the Scottish Ministers to make provision in regulations for or in connection with the provision of support services to persons against whom an offence appears to have been committed or who have been harmed by the behaviour of a child who has been referred to a children’s hearing, or the relevant persons of such persons who are children (“relevant persons” are defined in section 200 of the 2011 Act, and can include a parent or guardian or a person having parental responsibilities or rights in relation to the child), or any other persons or classes of person specified in the regulations.

10. The regulations could include provision about the support to be provided, who could provide support services and how those might be provided (including under arrangements (contractual or otherwise) made with the Scottish Ministers), the training and qualifications of support service providers, provision of information to and by service providers and payments of expenses, fees and allowances in relation to support services. Any regulations would be subject to prior consultation with the Scottish Children’s Reporter Administration (“SCRA”), Children’s Hearings Scotland (“CHS”), persons who provide support services (such as, for example, a victim support organisation) and such other persons as the Scottish Ministers consider appropriate.

### Reason for taking power

11. There is considerable interest in supporting the victims of children who have been referred to the children’s hearing system, given the welfare based nature of the system which puts referred children at its centre. This new power will enable a degree of flexibility to ensure that there is an ability to adapt to changing circumstances in the hearing system which will be consulted on in spring 2024. The regulations will be consulted on to allow all stakeholders to contribute to this complex area.

### Choice of procedure

12. It is considered that the negative procedure should allow an appropriate level of Parliamentary scrutiny given that, in accordance with section 6A(4) the regulations will require to be subject to prior consultation including those are providing support services

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to persons affected by a child's offence or behaviour, to inform what may be appropriate by way of support to such persons.

## Section 6B – Duty to Establish An Information Sharing System

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

### Provision

13. Section 6B requires the Scottish Ministers to establish by regulations a system to provide information from the children's hearing system to a person affected by the child's offence or behaviour through a single point of contact (which may be a victim support organisation). It would require regulations to provide a tiered approach to information-sharing under which specified information must always be provided unless the person has indicated that they do not wish to receive it. That is, information on how the joint reporting process or children's hearings system works, access to victim support, and decisions about children's hearing referrals or measures. The tiered system would require other information to be shared subject to the carrying out of a risk assessment, and would require a person to be notified where a child is to be released from secure accommodation or transferred to an adult prison, unless the person indicates that they do not wish to be so notified. It would also require information to be provided in accordance with trauma-informed practice, in an accessible format, on an opt out basis, and would provide for information-sharing arrangements to be put in place between relevant bodies such as CHS, SCRA, Police Scotland and local authorities.

### Reason for taking power

14. This is a complex area and this new power allows for detailed proposals to be worked up and consulted on and to ensure that the new system is effective. A regulation-making power provides the necessary flexibility to tailor the new system in the most appropriate and balanced way to meet the needs of victims.

### Choice of procedure

15. Given the nature of the power and level of political interest, the affirmative procedure means that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament in this key area where the interests of victims and the rights of referred children interact.

## Section 21A – Standards for Provision of Secure Transportation

16. Section 21A of the Bill inserts a new Part 16A (secure transportation) into the Children and Young People (Scotland) Act 2014 (the "2014 Act"). Part 16A comprises three new sections (sections 90A, 90B and 90C) to regulate secure transportation

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services. New sections 90A(1) and (7), 90B(4) and 90C(7), (8) and (9) contain delegated powers which are explained separately below.

## New Section 90A (1) Of The 2014 Act – Secure Transportation: Duty of Scottish Ministers to Prepare and Publish Standards

Power conferred on: The Scottish Ministers

Power exercisable by: Publishing standards

Parliamentary procedure: None

Revised or new power: New

### Provision

17. New section 90A places a duty on the Scottish Ministers to prepare and publish standards applicable to a “secure transportation service” in relation to children and young people (those under 19) and define such a service. The standards must be developed in consultation with those who Ministers consider appropriate. The Scottish Ministers must publish the standards no later than one year after section 21A of the Bill comes into force. Ministers are also required to keep the standards under review and may publish revised standards as appropriate. The new section contains an illustrative and non-exhaustive list of matters that may be covered by the standards, drawing on the national service specification which was developed by a sub-group of the national Secure Care Group, in response to issues raised by local authorities. The list of matters that may be covered in the standards include: the establishment of measures and procedures to prevent or minimise a risk of a “serious incident” (as defined) occurring; the establishment of measures and processes to deal with, and prevent the recurrence of, a serious incident, should one occur; and the circumstances in which restraint or control of children and young people who require to be transported to or from secure accommodation may or may not be appropriate.

### Reason for taking power

18. The conditions of secure transport are not currently subject to any legal regulation. The Education, Children and Young People Committee’s Stage 1 report highlighted concerns around secure transportation including the lack of locally available provision resulting in delays for children and the lack of consistent reporting of incidents of restraint within secure transport. It is considered that the provision addresses the concerns and strikes an appropriate balance between setting appropriate standards and not exacerbating existing issues with the lack of supply.

### Choice of procedure

19. This new power will be exercised administratively and, so, will not be subject to any parliamentary procedure. However, the first published standards and any published revised standards require to be laid before Parliament, enabling Parliamentary oversight.

## New Section 90A (7) Of The 2014 Act – Secure Transportation: Duty of Scottish Ministers to Prepare and Publish Standards (Modification of the Definition Of “Relevant Enactment”)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

### Provision

20. New section 90A(1) provides that a secure transportation service is one which consists of or includes providing secure transportation for persons who have not attained the age of 19 years and in relation to whom the taking to or the placing, keeping or detention in secure accommodation is authorised or required under or by virtue of a “relevant enactment”. New section 90A(6) provides a definition of “relevant enactment”, which means the Children (Scotland) Act 1995, the Criminal Procedure (Scotland) Act 1995, the Adoption and Children (Scotland) Act 2007 and the Children’s Hearings (Scotland) Act 2011. New section 90A(7) contains power to make regulations to modify the definition of “relevant enactment” by adding an enactment, removing an enactment for the time being listed in that definition or by varying a reference to an enactment for the time being listed in that definition.

### Reason for taking power

21. The definition of “relevant enactment” reflects the various legal routes into secure accommodation. However, it is considered desirable to future-proof the definition and allow for the list of enactments to be updated as appropriate – for instance, to adapt to any change of circumstances in which children and young people enter or remain in secure care. This power provides the necessary flexibility to do that, without the need for further primary legislation, and to ensure the law remains effective.

### Choice of procedure

22. Regulations under new section 90A(7) are subject to the affirmative procedure, as Parliamentary approval is considered appropriate where they textually modify primary legislation.

## New Section 90B (4) Of The 2014 Act – Secure Transportation: Duty of Providers to Meet Standards

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

## Provision

23. New section 90B(1) imposes a duty on providers of secure transportation services to meet the applicable standards, and section 90B(2) provides that the persons mentioned in subsection (3) must, when commissioning a secure transportation service, ensure that the service meets the applicable standards. New section 90B(3) provides that the persons who must comply with section 90(2) are local authorities and the Scottish Ministers. New section 90B(4) contains power to make regulations to modify the list of persons prescribed in section 90B(2) by adding a person or description of persons, removing a person or description of persons for the time being listed or by varying a description of a person for the time being listed.

## Reason for taking power

24. The persons listed in section 90B(3) reflect those persons who currently commission secure transportation services. It is considered desirable to retain flexibility so that the list can be modified if, for example, another person commissions secure transportation services in the future.

## Choice of procedure

25. Regulations under new section 90B(4) are subject to the affirmative procedure, as Parliamentary approval is considered appropriate where they textually modify primary legislation.

## New Section 90C (7), (8) And (9) Of The 2014 Act – Secure Transportation: Reports

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: section 90C (7) and (8) - negative procedure; section 90(9) – affirmative procedure

Revised or new power: New

## Provision

26. New section 90C provides for a reporting mechanism. Where “relevant persons” (as defined in new section 90C(8) to mean a local authority) and the Scottish Ministers have provided a secure transportation service, or made arrangements with another person for the provision of a secure transportation service, they are under a duty to prepare and publish reports. The reports must set out how they monitored the secure transportation service to ensure that the service met the applicable standards and the extent to which the service met those standards during the reporting period. Local authorities are required to provide a copy of their report to the Scottish Ministers. In addition to the Scottish Ministers reporting on their own fulfilment of these duties, they require to publish a consolidated report on how they and local authorities have monitored the secure transportation services provided or arranged by them to ensure the services met the applicable standards during the reporting period, and the extent to

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which those services met the applicable standards. This consolidated report requires to be laid before Parliament. The provisions allow flexibility for reports to be published in such a manner as local authorities and Scottish Ministers deem appropriate and local authorities may publish their reports together with or as part of another report. New section 90B(8) provides that the reporting period is every 3 years beginning with the day on which section 21A of the Bill comes into force.

27. New section 90C(7) contains power to make regulations to prescribe information that reports must contain. New section 90C(8) provides power to make regulations to specify an end date for the reporting period. Both of these provisions are subject to the negative procedure, by virtue of section 99(4) of the 2014 Act (as amended by section 21A(3)(c) of the Bill).

28. New section 90C(9) contains a regulation making power to modify the definition of “relevant person” by adding a person or description of persons, removing a person or description of persons for the time being mentioned in that definition or by varying a description of a person for the time being mentioned in that definition. This provision is subject to the affirmative procedure, by virtue of section 99(2) of the 2014 Act (as amended by section 21A(3)(b) of the Bill).

### Reason for taking powers

29. It is considered desirable to include the power in section 90C(7) to prescribe the information that reports must contain so that there is consistency in reporting. The regulation making power in section 90C(8) is sought to enable the reporting requirements to be “turned off” if, for example, secure transport becomes regulated under Part 5 of the Public Services Reform (Scotland) Act 2010. The regulation making power in section 90C(9) is sought to retain flexibility so that the definition can be modified if, for example, another person commissions secure transportation services in the future.

### Choice of procedure

30. The regulation making powers in section 90C(7) and (8) are subject to the negative procedure because it is considered that this provides the appropriate level of scrutiny given that they relate to procedural and operational matters.

31. The regulation making power in section 90C(9) is subject to the affirmative procedure in accordance with the usual procedure applied where a power enables textual modification of primary legislation.



## Section 25 – Cross-Border Placements: Effect of Orders Made Outwith Scotland (Further Amendments of Section 190 Of The 2011 Act)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new powers: Revised

### Provision

32. Section 25 is amended in consequence of the insertion of a new regulation-making power in section 25A of the Bill, discussed below. The effect of this is that, under section 190(1) of the 2011 Act, the Scottish Ministers will be able to provide for a non-Scottish order which appears to them to correspond to a compulsory supervision order (CSO) to have effect in Scotland, whether by “converting” it into a CSO or otherwise. “Non-Scottish order” will retain the existing definition in section 190(3) of the 2011 Act – that is, “an order made by a court in England and Wales or in Northern Ireland”.

33. The illustrative list of how the section 190(1) power can be used in section 190(2) has been expanded at Stage 2. The amendments to that power, which were included in the Bill at introduction, enable the Scottish Ministers to specify conditions which require to be met in order that a “non-Scottish order” be recognised in Scots law, as well as to impose more general requirements which apply during a child’s placement in Scotland. In addition, as a result of Stage 2 amendments to ensure that further regulation of cross-border placements is as effective as possible, the power will enable a mechanism to be developed to monitor whether the relevant conditions and requirements are being adhered to, and will enable future regulations to set out the consequences of breaching these. To that end, section 190(2) now empowers Ministers to make provision for or in connection with this.

### Reason for taking power

34. The Scottish Ministers consider that it is appropriate to retain the power in section 190 of the 2011 Act, with the amendments detailed. This is to ensure that orders of courts in England, Wales and Northern Ireland which appear to them to correspond to a CSO can be appropriately recognised in this jurisdiction without recourse to the Scottish courts.

35. Whilst the existing power under section 190 only permits Ministers to recognise these orders as if they were a CSO, it is considered that further flexibility is needed to ensure that alternative provision can be made where appropriate. In particular, where the intention is that a child will only stay in Scotland for a short period of time, it may not best serve the child’s interests to “convert” their non-Scottish order into a CSO and to subject them to processes and procedures under the children’s hearings system.

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36. As noted above, Ministers also consider that further specificity in the power in relation to the monitoring and enforcement of conditions and requirements is necessary. This will ensure that future regulations enabled by the section 190 power are as effective as possible in promoting the welfare of, and protecting the rights of, children who are placed in Scotland.

### Choice of procedure

37. The affirmative procedure currently applies to regulations under section 190 of the 2011 Act and Ministers consider this remains appropriate, given the importance and sensitivity of the subject matter.

## Section 25A – Regulation of Cross-Border Placements (New Section 33A Of the Children (Scotland) Act 1995 (“The 1995 Act”))

Power conferred on: Scottish Ministers

Power exercisable by: Regulation made by Scottish Statutory Instrument

Parliamentary procedure: Affirmative

Revised or new power: New

### Provision

38. This provides a new power in section 33A of the 1995 Act for the Scottish Ministers to regulate cross-border placements from England, Wales and Northern Ireland which are legally authorised in that jurisdiction under statute, a court order, or both. This power is broader in scope than that under section 190 of the 2011 Act, in recognition of the fact that there are a variety of legal bases on which children may become subject to a cross-border placement into Scotland and that not all of these will entail a court order. In particular, some children - who would otherwise be accommodated in their home jurisdiction under provisions equivalent to section 25 of the 1995 Act – may come to be accommodated in Scotland on a voluntary basis.

39. New section 33A(2) of the 1995 Act provides an illustrative list of the way in which the new power could be used. In particular, it sets out that specified persons may be required to provide or share specified information; to provide, or make arrangements for the provision of, any services to support a child who is the subject of a cross-border placement; to meet the costs incurred in relation to, or as a consequence of, the placement; and to keep the placement under review. Section 33A(2) also specifies that Ministers may make provision for or in connection with the safeguarding and promotion of the welfare of a child who is subject to placement.

40. The new power permits Ministers to modify any enactment in its application by virtue of the regulations to a cross-border placement, including the Social Work (Scotland) Act 1968 and the 1995 Act itself. Ministers are also empowered to make any incidental, supplementary, consequential, transitional, transitory or saving provision that

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they consider appropriate for the purposes of, in connection with or for giving full effect to the regulations.

### Reason for taking power

41. This power will ensure that Ministers are able to regulate all cross-border placements of children into Scotland which arise lawfully from other parts of the UK, whether these arise by virtue of statute, court order, or both. This will ensure that children's rights can be upheld and that their welfare can be safeguarded and promoted whilst they are subject to a placement, without requiring recourse to Scottish courts.

42. The Scottish Government continues to engage with counterparts in England, Wales and Northern Ireland to consider the variety of legal routes by which children may become subject to a cross-border placement and the circumstances in which these placements may arise. Given the wide range of such routes and circumstances, and the possibility for these to evolve in the future, Ministers require as much flexibility as possible to make provision for different placements in different ways, including the power to make ancillary provision and to modify any enactment in its application by virtue of the regulations to a cross-border placement.

### Choice of procedure

43. Regulations under new section 33A of the 1995 Act are subject to the affirmative procedure. As with the power under section 190 of the 2011 Act, the Ministers take the view that this provides the most suitable level of scrutiny given the importance and sensitivity of the subject matter.

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