

Children (Care, Care Experience and Services Planning) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Children (Care, Care Experience and Services Planning) (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 74–EN);
 - a Financial Memorandum (SP Bill 74–FM);
 - a Policy Memorandum (SP Bill 74–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 74–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill makes provisions in two areas: Part 1 relates to the children's care system and Part 2 relates to children's services planning.
5. The first part relates to the children's care system and is made up of three chapters:
 - a) Chapter 1 makes provisions in relation to aftercare and associated corporate parenting duties in regard to persons who are or have been "looked after", in relation to the creation of rights of access to care experience advocacy services and in relation to guidance in relation to care experience.

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- b) Chapter 2 makes provision in relation profit limitation in the children's residential care sector, requires fostering services to be charities and provides for the establishment and maintenance of a register of foster carers.
- c) Chapter 3 makes various changes in relation to children's hearings, including removing the child's obligation to attend children's hearings and revising the processes through which section 67 grounds are accepted or established.

6. Part 2 amends Part 3 of the Children and Young People (Scotland) Act 2014 so that any integration joint board which exists in relation to a local authority area is jointly responsible, along with the local authority and relevant health board, for the planning of children's services in the area.

7. A summary of each legislative proposal can be found in the Policy Memorandum.

Rationale for subordinate legislation

8. The Bill contains a number of delegated powers. These are explained in more detail in the sections below with an explanation of who the power is conferred on; whether it is exercisable by guidance, regulations or direction; what each power allows; why the power has been taken in the Bill; and why the selected form of parliamentary procedure is considered appropriate.

9. In deciding whether legislative provisions should be set out in subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had due regard to:

- strike the right balance between the importance of the issue and providing
- flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation being amended by the Bill;
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament the need to make proper use of valuable parliamentary time;
- the need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament

Delegated powers

Section 4: Advocacy Services for Care-Experienced Persons

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

10. Section 4 of the Bill requires the Scottish Ministers to make regulations conferring rights of access to care experience advocacy services. Scottish Ministers are required to ensure that care experience advocacy services are available to the extent necessary for a right conferred by regulations made under subsection (1) to be exercised by every person who has the right.

11. Section 4(4) provides an illustrative list of matters that might be covered by regulations including specifying the circumstances in or in or in relation to which, or particular descriptions of care-experienced persons by whom, the right is to be exercisable and how care-experienced persons are to be informed about the availability of care experience advocacy services and the standards that care experience advocacy services are to meet.

12. Section 4(6) fines “care-experienced persons” for the purposes of section 4, which includes children who are or have been looked after or subject to a kinship order, as well as adults who were looked after or subject to a kinship order at any point in their childhood. The Scottish Ministers can also, through the regulations, specify additional types additional types of care or support, receipt of which during childhood will mean that a person is “care-experienced” for the purposes of section 4.

13. The Scottish Ministers must consult with care-experienced persons, persons who represent the interests of care-experienced persons or any other relevant persons before making regulations under section 4.

Reason for taking power

14. It is considered that the use of regulations in this instance will provide the necessary degree of flexibility to ensure that advocacy support is tailored and the right support is available during an individual’s care journey and will be able to be updated in the future, to reflect future circumstances and needs of the care-experienced community. As set out in the policy memorandum, however, it is not intended that the right conferred by the regulations should cut across or duplicate existing bespoke entitlements to advocacy services (such as, for example, children’s hearing advocacy services under section 122 of the Children’s Hearings (Scotland) Act 2011).

Choice of procedure

15. The affirmative procedure has been chosen as the appropriate procedure since, given the nature of the power and level of political interest, it is appropriate that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament whilst still allowing for future adaptations to be made to the scope of those advocacy services and entitlements to them, to appropriately support the care-experienced community. The regulations will be developed following consultation and engagement with that community and their representatives to ensure that the scope of the right is appropriately tailored to meet their needs whilst not cutting across any existing bespoke entitlements to advocacy support.

Section 5: Guidance in relation to care experience

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: Laid only

Provision

16. Section 5(1) of the Bill requires the Scottish Ministers to issue guidance for the purposes of promoting understanding by public authorities and others exercising functions of a public nature (for example, persons delivering services on behalf of local authorities on a contractual basis) of care-experienced persons and their experiences. Subsection (2) provides an illustrative list of matters which the guidance may cover, including the promotion of best practice in communicating with care-experienced persons, or using language in a way that avoids stigmatising care experience. Section 6 requires that consultation must be carried out before guidance is issued (or revised) and publishing the guidance. A public authority must have regard to the guidance when exercising their functions in relation to care-experienced persons, which involve those persons exercising functions of a public nature, to also have regard to the guidance when exercising those functions.

Reason for taking power

17. The purpose of this guidance is to promote a better understanding and awareness of care experience and the care system, and best practice which in turn should help reduce stigma associated with individuals who have care experience. This will apply to all public authorities including Scottish Ministers, local authorities and wider corporate parents, in the course of their work and interaction with the care-experienced community. However, as indicated in the policy memorandum, it is not intended that the guidance will cut across existing legislative entitlements that care-experienced persons may have (for example, statutory rights to aftercare under section 29 of the Children (Scotland) Act 1995).

18. The guidance will describe what is meant by the term care experience, as well as wider guidance around language and terminology. It will also assist in raising awareness of social factors that can lead to involvement with the care system and how

we drive the change required on how people think about care experience. The guidance will be co-designed with people with care experience and trusted organisations that have a leading role in the sector to address language and an understanding of the care system. This will enable a more flexible approach, which acknowledges a broad range of care experience, to developing guidance which can be reviewed and revised going forward to reflect future circumstances.

Choice of procedure

19. In addition to the duty on the Scottish Ministers to publish and publicise the guidance, section 6(2) of the Bill includes a requirement to lay the guidance before the Scottish Parliament as soon as practicable after it is issued (including after any revision of the guidance). Given the level of political interest, it is considered that this provides an appropriate level of scrutiny and opportunity for debate by the Scottish Parliament.

Section 7: Children's residential care services: profit limitation - Inserting new sections 78E to 78G into the Public Services Reform (Scotland) Act 2010

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

20. Section 7 of the Bill amends the Public Services Reform (Scotland) Act 2010 ("the 2010 Act") by inserting new sections 78E to 78G.

21. New section 78(1)(a) of the 2010 Act requires the Scottish Ministers to exercise the power to make regulations conferred by section 78(2) of the 2010 Act to impose an "initial information requirement" on residential childcare providers such as a children's care home or school accommodation service, to provide to the Scottish Ministers such financial and other information as is required for the purpose of assessing the level of profit being made.

22. In light of assessment of that information, new section 78(1)(b)) of the 2010 Act will enable the Scottish Ministers to make regulations to limit the profits of the providers of those services, in accordance with a framework to be set out in those regulations, where Ministers are satisfied that it is necessary to do so, having regard to the public interest in securing that providers are providing care on terms which represent value for money and having regard to the welfare of the children placed there, the interests of local authorities and the interests of providers. Moreover, before imposing profit limitation requirements, the Scottish Ministers must consult local authorities, those representing the interests of providers and such other persons as considered appropriate.

23. Imposition of a profit limitation requirement will be accompanied by the imposition through the regulations of a continuing information requirement, which will be used to assess whether the level of profit permitted by the profit limitation requirement should be adjusted or removed, as well as to monitor compliance with that requirement.

Reason for taking power

24. The enhanced financial transparency provided for by these provisions will enable local authorities to manage their budgets and make decisions about residential care placements. This information will allow the Scottish Government to understand the range of different types of care support offered, and to understand what 'need' and 'complex need' of children and young people looks like in more detail, in order to build clarity around how that translates into fees charged and subsequently determine whether or not excessive profit is being made.

25. Any future limiting of excessive profit would ensure that excessive levels of profit are not made from local authorities and from finite public funds, in relation to the provision of accommodation and services for vulnerable looked after children in Scotland

Choice of procedure

26. Regulations under section 78(2) are subject to affirmative procedure by virtue of section 104(2) of the 2010 Act. The affirmative procedure has been chosen as the appropriate procedure since, given the nature of the power and the potential impact on the residential care market in Scotland, it is appropriate that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament.

Section 8: Fostering Services to be Charities

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

27. Section 8 of the Bill amends section 59(3) of the 2010 Act to require that any person providing a fostering service must be a charity. Section 8 also amends section 105(1) of the 2010 Act to insert a new definition of "charity" for the purposes of that Act. This definition covers organisations registered as charities in Scotland, and those registered or exempt from registration in England and Wales or Northern Ireland.

28. Further, Section 8 inserts a new subsection (4) into section 105 of the 2010 Act, which provides Scottish Ministers with the power to make regulations modifying the definition of "charity" in subsection (1) of section 105. This would allow Ministers to specify further descriptions of persons who are to be regarded as a charity, for the purposes of the care services regulatory framework.

Reason for taking power

29. The power is necessary to provide flexibility for Scottish Ministers to recognise as eligible providers of fostering services those organisations established as charities in other UK jurisdictions, where equivalent regulatory safeguards exist. This ensures that only organisations operating on a not-for-profit basis - namely, those established for exclusively charitable purposes and providing public benefit - can operate fostering services in Scotland, regardless of where they are registered. It also allows Ministers to ensure that organisations registered or exempt from registration in other parts of the UK are subject to charity law regimes that are sufficiently robust to prevent profit extraction or the diversion of assets for private or personal gain. This supports the overarching policy aim of strengthening the not-for-profit model in foster care provision in Scotland, while maintaining consistency with the regulation of cross-border fostering services.

30. The delegated power enables Scottish Ministers to modify the definition of a “charity” for the purposes of regulating fostering services. This allows Ministers to include organisations that are recognised as charities under the law of other jurisdictions within the UK, where they are satisfied that the applicable regulatory framework ensures that assets are used for exclusively charitable purposes and not for private gain. The power could also be used, if necessary, to exclude particular categories of organisation from qualifying if the relevant regulatory regime does not provide sufficient assurance that the policy objective—ensuring fostering services operate on a not-for-profit basis—is being met. This flexibility supports the effective implementation of the policy objective while respecting the role of charity regulators in their respective jurisdictions.

31. Taking this power also allows Ministers to respond flexibly and at pace if the definition of “charity” requires to be amended to support the effective regulation of fostering services or to respond to future developments in the sector or in charity regulation.

Choice of procedure

32. The affirmative procedure is considered appropriate for the exercise of this power, as any changes to the definition of “charity” for the purpose of regulating care services could have significant implications for providers, children and young people, and the regulatory bodies. Given the nature of the power and the potential impact on the structure and operation of the foster care market in Scotland - including the role of Independent Fostering Agencies - it is important that such changes are subject to enhanced parliamentary scrutiny and debate. The use of the affirmative procedure ensures that Parliament has oversight of any amendments and provides an appropriate level of transparency, given the public interest in how fostering services are delivered and regulated

Section 9: Register of Foster Carers: Inserting new sections 30A to 30G into the Children (Scotland) Act 1995

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

33. Section 9 of the Bill inserts new sections 30A to 30G into the Children (Scotland) Act 1995 to provide for the establishment, operation and regulation of a national register of foster carers.

34. Section 30A(2) sets out information which is to be included in the register and, enables Scottish Ministers to specify in regulations additional information in relation to a foster carer's approval status and other information about the carer or members of their household.

35. Section 30B also confers a delegated power on Ministers to make further provision via regulations. This includes the ability to set out circumstances in which information is not to be included; requirements on fostering services to provide or update information, rules on data retention and removal, offences associated with failure to comply with these requirements and arrangements for charging fees in relation to the register. These regulation-making powers provide flexibility to address practical and operational issues that may arise in the design, maintenance and implementation of the register.

Reason for taking power

36. The creation of a register for foster carers is intended to enhance safeguarding and oversight by allowing fostering services to easily and quickly determine whether a person has previously been approved or deregistered; robust national data on foster carers; support the professional recognition of foster carers; support the portability of foster carers; and to enable better coordination for respite care and placement matching across agencies.

37. It is considered that the use of regulations in this instance will provide the necessary degree of flexibility to ensure the register can adapt to meet the needs of the foster care sector.

38. Given the operational complexity and evolving nature of data and technology, regulation-making powers are required to adapt implementation to reflect best practice in digital security, data protection, and the needs of foster carers.

Choice of procedure

39. The affirmative procedure is appropriate given the breadth and significance of the powers conferred, particularly as they relate to the safeguarding of children and the professional status of foster carers. The procedure ensures a high degree of scrutiny for regulations affecting the scope of the register, its use, data protections, and enforcement provisions. The level of political and stakeholder interest in the establishment of a national register further supports this enhanced scrutiny.

Chapter 3, Section 10: Single member children's hearings and pre-hearing panels

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

40. Section 10(13) of the Bill amends section 177 of the Children's hearings (Scotland) Act 2011 Act to enable Scottish Ministers to make further regulations regarding those matters which may be determined by a pre-hearing panel consisting of one member of the Children's Panel.

Reason for taking power

41. The use of regulations to specify those matters which are capable of being determined by a pre-hearing panel consisting of one member of the Children's hearing Panel is necessary to ensure that flexibility is available to adequately reflect the needs of individual cases.

Choice of procedure

42. Rules under section 2(aa) will be subject to the affirmative procedure. This is considered appropriate to reflect the changing approach to how pre-hearing matters will be carried out. This is also consistent with the procedure which applies to rules specifying which matters may be considered by a pre-hearing panel under section 2(a).

Section 24: Ancillary Provisions

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative

Provision

43. This section provides that the Scottish Ministers may use regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purpose of, in connection with or for giving full effect to the Bill. Any such regulations may modify any enactment, whether primary or secondary legislation

Reason for taking power

44. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. It is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

45. Without the power to make incidental, supplementary, consequential, transitional, transitory or saving provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament's or the Government's resources.

46. It is considered that such matters are best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for giving full effect to the Bill.

Choice of procedure

47. Regulations are subject to the affirmative procedure if they textually modify primary legislation (including, if this Bill is passed, the resulting Act). Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this kind, and is considered to provide an appropriate level of scrutiny where there is a proposal to amend legislation.

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