

# **CHILDREN AND YOUNG PEOPLE (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **Purpose**

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 (Scotland) Bill. It describes the purpose 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. It is the aspiration of the Scottish Government for Scotland to be the best place to grow up in. The objective of the Children and Young People (Scotland) Bill is to make real this ambition by putting children and young people at the heart of planning and delivery of services and ensuring their rights are respected across the public sector.
  - Reflect in domestic law the role of the United Nations Convention on the Rights of the Child (UNCRC) in influencing the design and delivery of policies and services by placing duties on the Scottish Ministers and the wider public sector, and strengthening the powers of the Children's Commissioner to enable investigations to be conducted in relation to individual children and young people;
  - Improve the way services work to support children, young people and families by: ensuring there is a single planning approach for children who need additional support from services; creating a single point of contact around every child or young person; ensuring coordinated planning and delivery of services with a focus on outcomes, and providing a holistic and shared understanding of a child's or young person's wellbeing;
  - Strengthen the role of early years support in children's and families' lives by increasing the amount and flexibility of free early learning and childcare from 475 hours a year to a minimum of 600 hours for 3 and 4 year olds, and 2 year olds who are, or have been at any time since turning 2, looked after or subject to a kinship care order;
  - Ensure better permanence planning for looked after children by: extending corporate parenting across the public sector; extending support to young people leaving care for longer (up to and including the age of 25); supporting families and the parenting role of

kinship carers through new legal entitlements; and putting Scotland's National Adoption Register on a statutory footing; and

- Strengthen existing legislation that affects children and young people by creating a new right to appeal a local authority decision to place a child in secure accommodation, and by making procedural and technical changes in the areas of children's hearings support arrangements and school closures.

### **Rationale for subordinate legislation**

4. The Bill contains a number of delegated powers which are explained later in this document. In deciding whether legislative provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has had regard to the need to:

- Strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances with the benefit of experience, without the need for primary legislation;
- Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- Make proper use of valuable Parliamentary time;
- Allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- Consider the likely frequency of amendment.

### **Delegated Powers**

#### **Part 1 - The Rights of Children**

##### **Section 3 – Authorities to which section 2 applies**

##### **Subsection (2) – Power to modify schedule 1**

**Power conferred on:           The Scottish Ministers**

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

**Parliamentary Procedure: Affirmative**

##### *Provision*

5. Section 3 provides that the Scottish Ministers may, by order, modify schedule 1 which lists the public authorities that section 2 applies to. This could be by adding a person or description of persons, removing an entry or modifying an entry listed in it.

##### *Reason for taking this power*

6. Section 2 provides that a public authority subject to the duty must publish a report every 3 years setting out what it has done in that period to give better or further effect within its area of responsibility to the UNCRC requirements. Schedule 1 lists the public authorities to which this provision applies. The reason for taking this power is so that the Scottish Ministers can amend the list in schedule 1 which will be useful if any new public authority is created in the future to whom the duty should apply. It will also be useful if any of the public authorities in schedule 1 change their name or cease to exist.

7. The power to amend the schedule by order will give Scottish Ministers flexibility to specify additional persons or amend the list to reflect changed circumstances in the nature or status of specified persons without the need for further primary legislation.

#### *Choice of procedure*

8. The order is subject to affirmative procedure (by virtue of section 77(2)) because it is considered that a more detailed level of Parliamentary scrutiny would be appropriate in order to determine whether the changes are required and given that the order may be used to amend primary legislation.

### **Section 4– Interpretation of Part 1**

#### **Subsection (4) – Power to modify subsection (1) definitions.**

**Power conferred on:** The Scottish Ministers

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

**Parliamentary Procedure:** Negative

#### *Provision*

9. Section 4(4) provides that the Scottish Ministers may, by order, modify subsection (1) as they consider appropriate to take account of any future optional protocol of the UNCRC which the United Kingdom chooses to ratify or any amendment of a document mentioned in the subsection at that time.

#### *Reason for taking this power*

10. The reason for including this power is to ensure that, once in force, the Act can be amended without further primary legislation to recognise any future changes to the content of the UNCRC or the establishment of any additional optional protocols to the UNCRC which the United Kingdom chooses to ratify. The United Kingdom has currently ratified two of the three optional protocols to the Convention.

#### *Choice of procedure*

11. The order is subject to negative procedure. The aim of this provision is to keep the definition of “the rights of children” and “the UNCRC requirements” up to date to take account of changes in the UNCRC and optional protocols to the UNCRC ratified by the United Kingdom over time.

It is anticipated that changes that are affected by this power are unlikely to be controversial and consequently it should not be necessary to require a debate on each occasion that it is used. Clearly, however, the opportunity to debate any Order made under this power in the event that its use is controversial is retained using the negative procedure.

### **Part 3 – Children’s Services Planning**

#### **Section 7 – Introductory**

**Subsection (3) –Power to specify services which are considered to be included within or excluded from the definition of “children’s service” or “related service” and matters in relation to services which are considered to be included within or excluded from those services**

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

#### *Provision*

12. Section 7(3) provides that the Scottish Ministers may, by order, specify the services that are to be considered to be included within or excluded from the definition of “children’s service” or “related service”, and matters in relation to services which are to be considered to be included or excluded from those services.

#### *Reason for taking this power*

13. It would be useful to provide the Scottish Ministers with the flexibility to change the list in section 7(3) to account for any future changes to children’s services or related services.

#### *Choice of procedure*

14. The order is subject to negative procedure which is considered appropriate. It is considered that a more detailed level of Parliamentary scrutiny is not required to make these changes. Before making any changes, the Scottish Ministers will have to consult with health boards, local authorities and, where the service concerned is provided by one of the other service providers, that service provider.

**Subsection (5) –Power to modify the definition of “other service provider” in section 7(1)**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

#### *Provision*

15. Section 7(5) provides that the Scottish Ministers may, by order, modify the definition of “other service provider” in section 7(1) by adding a person or description of persons, removing an entry or varying an entry listed in it.

*Reason for taking this power*

16. It would be useful to provide the Scottish Ministers with the flexibility to change the list in section 7(1) to account for any future changes to children’s or related services.

*Choice of procedure*

17. The order is subject to affirmative procedure (by virtue of section 77(2)) which is considered appropriate as it will provide a more detailed level of Parliamentary scrutiny given that the order may modify primary legislation.

**Section 8 – Requirement to prepare children’s services plan**

**Subsection (1) –Power to determine commencement of the 3 year period for the purposes of section 8**

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

*Provision*

18. This provides that the Scottish Ministers may specify, by order, when the first 3 year period which is to be covered by a children’s services plan is to begin.

*Reason for taking this power*

19. The reason for taking this power is to enable the Scottish Ministers, in collaboration with stakeholders, to determine when would be the most suitable date for commencement of the 3 year period that the children’s services plan is to cover.

*Choice of procedure*

20. This is subject to negative procedure which is considered appropriate. It is considered that a more detailed level of Parliamentary scrutiny is not required for a provision of this nature.

**Section 13–Reporting on children’s services plan**

**Subsection (1)(b)(ii)– Power to prescribe outcomes in relation to the wellbeing of children in the area**

**Power conferred on:** The Scottish Ministers  
SP Bill 27–DPM

Session 4 (2012)

**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary Procedure:** Negative

*Provision*

21. The Scottish Ministers may, by order, prescribe outcomes in relation to the wellbeing of children in the area that can be used to measure the extent to which the provision of children's services and related services in the area have contributed to an improvement in the wellbeing of children in the area.

*Reason for taking this power*

22. This is to allow the reports to reflect any changes in children's services, related services or the measures of wellbeing.

*Choice of procedure*

23. This order is subject to negative procedure which is considered appropriate as it is not considered that a more detailed level of Parliamentary scrutiny will be required to make these changes.

**Section 17 –Children's services planning: default powers of Scottish Ministers**

**Subsection (6)– Power for the Scottish Ministers to constitute a joint board of the local authority and health board where they consider that a direction under subsection (2) has been insufficient or would be insufficient**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary Procedure:** Affirmative

*Provision*

24. This provides the Scottish Ministers with an order making power to constitute a joint board of the local authority and health board for the area where they consider a direction under 17(2) has been or would be insufficient. The joint board would then carry out the function.

*Reason for taking this power*

25. The direction making power under section 17 provides that if the Scottish Ministers consider the local authority and health board in a local government area are not carrying out a function conferred on them by this Part or in carrying out a function are not complying with section 15(1), then the Scottish Ministers can direct that the function is carried out in a particular way or that it is to be carried out by other persons as the Scottish Ministers consider appropriate. Where the Scottish Ministers consider that such a direction has been or would be insufficient in the particular circumstances, they may, following consultation, constitute a joint board of the local authority and each relevant health board to exercise the function.

*Choice of procedure*

26. The order is subject to affirmative procedure (by virtue of section 77(2)) which allows for a more detailed level of Parliamentary scrutiny which is considered appropriate for a provision of this nature.

**Part 4 – Provision of Named Persons**

**Section 19 – Named person service**

**Subsection (3)(b) – Power to specify training, qualifications, experience or position requirements**

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

*Provision*

27. This subsection provides that the Scottish Ministers may, by order, make requirements as to training, qualifications, experience or position of named persons.

*Reason for taking this power*

28. It would be useful to provide the Scottish Ministers with the power to be able to require named persons to have specific skills and training to enable them to carry out the role and to provide for the position within an organisation that named persons are required to hold. Training requirements or provision may change in the future; therefore it would be useful for the Scottish Ministers to be able to specify these requirements through an order, to provide them with flexibility to adapt to future needs.

*Choice of procedure*

29. The order is subject to negative procedure which is considered appropriate given the nature of the provision and the fact that its use will not involve the amendment of primary legislation.

**Section 30– Interpretation of Part 4**

**Subsection (2) – Power to modify schedule 2**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

*Provision*

30. This provision provides that the Scottish Ministers may, by order, modify schedule 2 to add a person or description of persons, remove an entry in it or vary an entry in it.

*Reason for taking this power*

31. The reason for taking this power is so that the services providers in schedule 2 can be modified in the future should new relevant authorities be created, or current service provider's names changed.

*Choice of procedure*

32. The order is subject to affirmative procedure (by virtue of section 77(2)) which allows for a more detailed level of Parliamentary scrutiny which is considered appropriate given that the order may be used to modify primary legislation.

**Part 5 – Child's Plan**

**Section 32– Content of a child's plan**

**Subsection (2) – Power to make provision as to information that is or is not to be contained in, and the form of, the child's plan**

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

*Provision*

33. Section 32(2) provides that the Scottish Ministers may, by order, make provision as to other information which is or is not to be contained in a child's plan and the form of the plan.

*Reason for taking this power*

34. The provision of services and needs of children and young people may change in the future, therefore it is important that the Scottish Ministers have the ability and flexibility to amend what should be included in the plan, and the form in which the information should be set out.

*Choice of procedure*

35. The order is subject to negative procedure which is considered appropriate as it is not considered that a more detailed level of Parliamentary scrutiny will be required to make these changes.

**Section 33 – Preparation of a child's plan**

**Subsection (8) – Power to make further provision about the preparation of the child’s plan**

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

*Provision*

36. This subsection provides that the Scottish Ministers may, by order, make further provision as to the preparation of child’s plan.

*Reason for taking this power*

37. The reason for taking this power is to enable the Scottish Ministers to have the flexibility to make further provision about the details of how a child’s plan is to be prepared to reflect any future changes in children’s services. This is important, for example, if the responsibilities of health boards or local authorities change.

*Choice of procedure*

38. The order is subject to negative procedure which is considered appropriate as it is not considered that a more detailed level of Parliamentary scrutiny will be required to make these changes.

**Section 35– Responsible authority: special cases**

**Subsection (5) –Power to modify section 35so as to make further or different provision as to circumstances in which section 34(1) does not apply in relation to a child**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary Procedure:** Affirmative

*Provision*

39. Section 35(5) provides that the Scottish Ministers may, by order, modify this section so as to make further or different provision as to when the responsible authority is a health board or a local authority or a directing authority, depending on the circumstances.

*Reason for taking this power*

40. It would be useful to provide the Scottish Ministers with the flexibility to require, in particular circumstances, a different body to be the responsible authority instead of the default position that will apply to children generally (see section 34(1)). This will help ensure that particular groups of children that may come to light in the future will have their wellbeing looked after by the most appropriate body.

*Choice of procedure*

41. The order is to be subject to affirmative procedure (by virtue of section 77(2)) as it will allow a more detailed level of Parliamentary scrutiny which is considered appropriate given that the order may modify primary legislation.

**Section 37– Child’s plan: management**

**Subsection (5) – Power to make provision about the management of the child’s plan**

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

*Provision*

42. Section 37(5) provides that the Scottish Ministers may, by order, make provision about the management of child’s plans, including provision about: when and how a child’s plan is to be reviewed in accordance with subsection (1); who is to be the managing authority of a child’s plan; when and to whom management of a child’s plan is to or may transfer under subsection (4)(b); when and how a new targeted intervention may be included in a child’s plan; and the keeping, disclosure and destruction of child’s plans.

*Reason for taking this power*

43. The provision of services and also the needs of children and young people may change in the future, therefore it is important that the Scottish Ministers have the ability and flexibility to amend how the plan should be managed in future to take account of any such changes.

*Choice of procedure*

44. The order is subject to negative procedure which is considered appropriate as it is not considered that a more detailed level of Parliamentary scrutiny will be required to make these changes.

**Part 6 – Early Learning and Childcare**

**Section 43– Duty to secure provision of early learning and childcare**

**Subsection (2)(c)(ii) – Power to specify additional categories of eligible pre-school child**

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

*Provision*

45. Section 43(2) sets out the children who are to be eligible for the mandatory amount of early learning and childcare in accordance with subsection (1); such children are referred to as “eligible pre-school children” and under the Bill they are those children who are under school age and who have not commenced primary school and either fall within subsection (3) (that is they are 2 or over and are, or have been at any time since their 2<sup>nd</sup> birthday, looked after or subject to a kinship care order) or are within such age range, or are of such description, as the Scottish Ministers may by order specify (subsection (2)(c)(ii)).

46. Section 43(2)(c)(ii) enables the Scottish Ministers to specify by order additional categories of “eligible pre-school child” in relation to whom early learning and childcare will be made by reference to the description of such children and their ages. It is likely that the power will be used to specify that 3 and 4 year olds will be eligible for early learning and childcare from the first term after their 3<sup>rd</sup> birthday in a similar way in which the current law does so by virtue of the order made under section 1(1A) of the Education (Scotland) Act 1980 (the 1980 Act) (which the Bill amends).

47. Subsection (4) provides that an order under section 43(2)(c)(ii) may subdelegate the function of determining eligibility criteria to an education authority so for example the order might provide that a child is an “eligible pre-school child” only if the education authority is satisfied as to any matter relating to the child which is specified in the order.

*Reason for taking this power*

48. The current policy is part of a longer term ambition to increase and improve early learning and childcare for all children. The power will allow the Scottish Ministers to specify additional categories of “eligible pre-school child” in the future, which provides maximum flexibility and enables work towards this longer term ambition.

*Choice of Procedure*

49. The order is subject to negative procedure given that the power is simply being used to further specify entitlement to early learning and childcare as opposed to changing the manner in which early learning and childcare is provided, and therefore it is considered that negative procedure provides an appropriate level of scrutiny. Further, this level of scrutiny is consistent with the predecessor to this power, namely that contained in section 1(1A) and(1B) of the 1980 Act which was also subject to negative procedure (by virtue of section 1(4A) of the 1980 Act). The negative procedure is considered to offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for a provision of this nature.

## **Section 44 – Mandatory amount of early learning and childcare**

### **Subsection(2) – Power to modify the mandatory amount of early learning and childcare**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary Procedure:** Affirmative

#### *Provision*

50. Section 44(1) sets out the “mandatory amount” of early learning and childcare for the purposes of section 43(1) which means that an education authority must in pursuance of its duty under section 1(1) of the 1980 Act secure that 600 hours in each year (or a *pro rata* amount for part of a year) is made available for each “eligible pre-school child”. Section 44(2) provides that the Scottish Ministers may, by order, modify subsection (1) so as to alter the amount of early learning and childcare which is to be made available in pursuance of section 43(1). The order may make different provision in relation to different types of eligible pre-school children so for example the power to modify the mandatory amount could be used to provide differing amounts for different types of children (e.g. children of different ages). Subsection (3) is without prejudice to the power in section 77(1)(a).

#### *Reason for taking this power*

51. The reason for taking this power is to ensure, should future requirements change, that the Scottish Ministers have the ability to amend the amount of hours of early learning and childcare which education authorities are obliged to provide. For example, the order could be used to increase the amount of hours. As noted above, the current policy is part of a longer term ambition to increase and improve early learning and childcare for all children, and that could potentially mean there will be a need to change the mandatory amount, and therefore the flexibility to do so is required.

#### *Choice of procedure*

52. The order is subject to affirmative procedure (by virtue of section 77(2)) as it will provide a more detailed level of Parliamentary scrutiny which is considered appropriate given that the order may be used to modify primary legislation.

## **Section 46 – Duty to consult and plan on delivery of early learning and childcare**

### **Subsection (2) – Power to modify the regularity within which an education authority must consult and plan**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument

## **Parliamentary Procedure: Negative**

### *Provision*

53. Section 46(1)(a) requires an education authority to consult in its area about how it should make early learning and childcare available. Subsection (1)(b) requires the authority, after having had regard to views expressed in that consultation, to prepare and publish a plan for how it intends to make early learning and childcare available. The education authority is required to consult and plan at least once every 2 years. Section 46(2) provides that the Scottish Ministers may, by order, modify subsection (1) so as to vary the regularity within which an education authority must consult and plan in pursuance of this subsection.

### *Reason for taking this power*

54. The reason for taking this power is to provide the Scottish Ministers with a degree of flexibility over the frequency of the requirement to consult and plan. 2 years is necessary in the first instance to achieve momentum on the re-configuration of services required in response to initial consultations and to meet the current policy of improving and increasing flexibility of provision. The regularity with which authorities are required to consult and plan could be reduced if successive consultations were producing similar findings, or if a wide range of flexible provision had been achieved. Conversely, the regularity could be increased if there was, for example, a major policy change emerging in response to local consultations.

### *Choice of procedure*

55. The order is subject to negative procedure which is considered appropriate. The power is not being used to change any of the requirements to consult and plan but only the regularity with which that consultation and planning is to take place and therefore it is considered that the level of Parliamentary scrutiny afforded by negative procedure is sufficient. The negative procedure is considered to offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for a provision of this nature.

## **Section 47 – Method of delivery of early learning and childcare**

### **Subsection (2) – Power to modify the method of delivering early learning and childcare**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary Procedure:** Affirmative

### *Provision*

56. Section 47(1) sets out the minimum framework within which early learning and childcare must be delivered by education authorities. An education authority must ensure that it makes early learning and childcare available by way of sessions which are between 2.5 hours and 8 hours and which are provided during at least 38 weeks of every calendar year. Section 47(2)

provides that the Scottish Ministers may, by order, modify subsection (1) so as to vary the method of delivering early learning and childcare (i.e. the minimum framework).

*Reason for taking this power*

57. The reason for taking this power is to provide the Scottish Ministers with a degree of flexibility for amending this section as a result of changes in the future. For example, it may be that in the light of local consultation exercises evidence emerges that indicates parents' early learning and childcare needs are changing and that other or additional delivery mechanisms should be considered and consulted upon. Therefore, this power will ensure that the minimum framework is capable of amendment in response to future changes in policy or parental early learning and childcare needs.

*Choice of procedure*

58. The order is subject to affirmative procedure (by virtue of section 77(2)) as it will provide a more detailed level of Parliamentary scrutiny which is considered appropriate given that the order may be used to modify primary legislation.

**Part 7 – Corporate Parenting**

**Section 50– Corporate parents**

**Subsection (2) – Power to modify schedule 3**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

*Provision*

59. Section 50(2) provides that the Scottish Ministers may modify, by order, schedule 3 which lists the persons or description of persons who are corporate parents for the purposes of Part 6.

*Reason for taking this power*

60. It would be useful to allow the Scottish Ministers to change the list in schedule 3 to specify additional persons or change the list to reflect changed circumstances in the nature or status of specified persons. This would be helpful, for example, if any new public body is created which should be considered a corporate parent, or if any of the public bodies listed in the schedule change their name or cease to exist.

*Choice of procedure*

61. The order is subject to affirmative procedure (by virtue of section 77(2)) as it is a power to amend primary legislation and so it is considered that a more detailed level of Parliamentary scrutiny would be appropriate in order to determine whether the changes are required.

## **Part 8 – Aftercare**

### **Section 60 – Provision of aftercare to young people**

**Subsection (2)(e) –Power to specify what “eligible needs” are for the purposes of new section 29(5A)(a) of the Children (Scotland) Act 1995 (“the 1995 Act”).**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

#### *Provision*

62. Section 60(2) makes various amendments to section 29 of the 1995 Act, with the effect that a person between the ages of 19 and 26 who was formerly looked after by a local authority may apply to the authority to request that they provide them with advice, guidance and assistance. A local authority is under a duty to assess that person’s needs under section 29(5). After carrying out the assessment, new subsection (5A)(a) provides that the local authority must, if satisfied that the person has eligible needs which cannot be met other than by taking action under this subsection, provide the person with such advice, guidance and assistance as it considers necessary for the purposes of meeting those needs.

63. Section 60(2)(e) inserts new subsections (8) and (9) into section 29 to give the Scottish Ministers a power to specify by order what “eligible needs” are for the purposes of new subsection (5A)(a).

#### *Reason for taking this power*

64. It is anticipated that the definition of what are to be considered “eligible needs” for the duty in new subsection (5A)(a) will need to be changed from time to time as circumstances change. For example, as current and future UK welfare reforms affecting this group come into effect, changes may be required to deal with any unintended consequences. It is therefore preferable to take a power to specify “eligible needs” in secondary legislation with the flexibility to amend them as circumstances change rather than requiring further primary legislation to make the necessary adjustments.

#### *Choice of procedure*

65. The order is subject to affirmative procedure (by virtue of section 29(9) of the 1995 Act (as inserted by section 60(2)(e) of the Bill)) which will allow a more detailed level of Parliamentary scrutiny which is considered appropriate for a provision of this nature.

*Consequential amendment to regulation-making power in Regulation of Care (Scotland) Act 2001*

66. In consequence of the provision made at section 60, paragraph 6 of schedule 4 makes a minor modification to an existing regulation-making power contained in section 73(2)(a) of the Regulation of Care (Scotland) Act 2001 (asp 8). This power allows the Scottish Ministers, in regulations, to specify the manner in which assistance may be provided under subsections (1) and (2) of section 29 of the 1995 Act. The power at section 73(2)(a) of the 2001 Act is amended so that it is exercisable in relation to the duties in new subsections (5A) and (5B) of section 29 of the 1995 Act.

67. It is thought necessary to adjust this power so that it may be used in the future to specify the manner in which assistance may be given under the new duties in section 29 inserted by section 60. This is an existing regulation-making power subject to negative procedure and, as these amendments do not alter the nature of that power, this is still considered to be an appropriate level of scrutiny for these regulations.

## **Part 9 – Counselling Services**

### **Section 61– Provision of counselling services to parents and others**

#### **Subsection (1) – Power to specify the description of counselling services a local authority must secure for persons residing in a local authority area**

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

#### *Provision*

68. This subsection provides that a local authority must make arrangements to secure that counselling services of such description as the Scottish Ministers may, by order, specify are made available for persons residing in its area who fall within subsection (2).

#### *Reason for taking this power*

69. This power allows the Scottish Ministers to specify by order different descriptions of counselling service and gives the Scottish Ministers the flexibility to add to the number or amend the type of counselling services that might be required in different circumstances, or which is required to assist with different issues.

#### *Choice of procedure*

70. This power is subject to negative procedure which is considered appropriate. It is considered that it is not necessary to require the Parliament to carry out a more detailed level of scrutiny and to agree to the specification by order of every different type of counselling service that might be considered appropriate in relation to different types of family circumstance or issues.

**Subsection (3) – Power to specify the definition of “eligible child”**

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

*Provision*

71. This subsection provides that the Scottish Ministers may, by order, specify the description of “eligible child” for the purposes of subsection (2) (the parents or persons with parental rights and responsibilities in relation to such a child, will be eligible for counselling services).

*Reason for taking this power*

72. The reason for taking this power is to ensure that counselling services are always targeted at the appropriate families i.e. those in greatest need. It is highly desirable to retain flexibility to amend any eligibility test to ensure it achieves its aim of focusing support on the intended recipients and in order to avoid unintended consequences.

*Choice of procedure*

73. This power is subject to negative procedure which is considered an appropriate level of Parliamentary scrutiny because it is likely that the “eligibility” test will require to be amended from time to time to ensure that the counselling services are always targeted at the appropriate families i.e. those in greatest need.

**Section 62 – Counselling services: further provision**

**Subsection (1) – Power to make provision about counselling services**

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

*Provision*

74. This subsection provides that the Scottish Ministers may, by order, make provision about when or how counselling services specified in an order under section 61(1) are to be provided; when or how a local authority is to consider whether a child is an eligible child for the purpose of section 61(2); when or how a local authority is to review whether a child continues to be an eligible child for the purposes of 61(2); and such other matters about the provision of counselling services specified in an order under section 61(1) as the Scottish Ministers consider appropriate.

*Reason for taking this power*

75. The reason for taking this power is that it is considered more appropriate for the detail as to when or how counselling services are to be provided by a local authority, as to how a local  
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authority is to decide whether a child is “eligible” for the counselling services and as to such other practical matters about the provision of the services as the Scottish Ministers may consider appropriate, to be specified in secondary legislation. It also provides the Scottish Ministers with the flexibility to amend the detail to meet the changing needs of families and as the process develops.

#### *Choice of procedure*

76. This power is subject to negative procedure which is considered appropriate. It is considered that it is not necessary to provide the Parliament with a more detailed level of scrutiny in relation to how a local authority decides when and how to provide the counselling services etc. to families given it is likely that the “eligibility” test in particular will be subject to change to reflect the changing needs of families, and therefore the provision as to how a local authority assesses eligibility will likely require to be amended also.

### **Part 10 – Support for Kinship Care**

#### **Section 64 – Assistance in relation to kinship care orders**

##### **Subsection (2) – Power to specify kinship care assistance which local authorities must make arrangements to provide for those persons residing in their areas**

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

#### *Provision*

77. This order making power allows the Scottish Ministers to specify the description of kinship care assistance that local authorities must make arrangements to secure, for persons that fall within subsection (3).

#### *Reasons for taking this power*

78. It would be useful to provide the Scottish Ministers with the flexibility to amend the elements of support available to eligible kinship carers to reflect changing circumstances or the future identification of further support needs.

#### *Choice of Procedure*

79. This order making power is subject to negative procedure which is considered appropriate. It is not considered necessary to provide the Parliament with a more detailed level of parliamentary scrutiny to have to consider each time the description of assistance that local authorities are required to provide is added to or amended.

**Subsection (4) – Power to specify the description of child who is considered an “eligible child”**

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

*Provision*

80. This subsection provides that the Scottish Ministers may, by order, specify the description of child that is an “eligible child” for the purposes of subsection (3).

*Reasons for taking this power*

81. It would be helpful to provide the Scottish Ministers with the flexibility to amend the eligibility criteria in relation to the receipt of kinship care assistance, in the future, should that be deemed necessary. It is reasonably likely some minor changes will be required to ensure the assistance targets the appropriate groups of children.

*Choice of procedure*

82. The order is subject to negative procedure which is considered appropriate. It is considered that it would not be necessary or appropriate for the Parliament to have a more detailed level of parliamentary scrutiny to consider each use of the order making power, when it is simply being used to add to or amend one or more of the eligibility criteria.

**Section 65 – Orders which are kinship care orders**

**Subsection (2) – Power to specify a further category of “qualifying person” who has obtained an order under the Children (Scotland) Act 1995, a “kinship care order”.**

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

*Provision*

83. This subsection provides that the Scottish Ministers may, by order, specify such other relationship to or connection with a child, a person has which makes them a qualifying person for the purposes of subsection (1) (a person who has one of the orders under subsection (1), to be known as a “kinship care order” for the purposes of this provision, which entitles them to assistance from the local authority).

84. It would be helpful to provide the Scottish Ministers with the flexibility to specify an additional category of person who could be considered a qualified person, for the purposes of subsection (1), which therefore entitles them to support from the local authority, in order to adapt to the changing family environment.

*Reasons for taking this power*

85. It would be helpful to provide the Scottish Ministers with the flexibility to specify an additional category of person who could be considered a qualified person, for the purposes of subsection (1), which therefore entitles them to support from the local authority, in order to adapt to the changing family environment.

*Choice of procedure*

86. The order is subject to negative procedure which is considered appropriate. It is considered that it would not be necessary or appropriate for the Parliament to have a more detailed level of parliamentary scrutiny to consider each use of the order making power, when it is simply being used to add a new category of person who could be entitled to support from the local authority.

**Section 66 – Kinship care assistance: further provision**

**Subsection (3) – Power to make provision specifying when or how assistance is to be provided by a local authority**

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

*Provision*

87. This subsection provides that the Scottish Ministers may, by order make provision about when or how kinship care assistance may be provided; when or how a local authority is to consider whether a child is eligible; when or how a local authority is to review whether a child continues to be an eligible child for the purposes of section 64(3); and such other matters about the provision of kinship care assistance as the Scottish Ministers consider appropriate.

88. It is considered that it is appropriate for the detail as to when or how assistance to kinship carers is to be provided by a local authority, as to how a local authority is to decide whether a child is “eligible” for the assistance; and as to such other practical matters about the provision of the assistance as the Scottish Ministers may consider appropriate, to be specified in secondary legislation.

It provides the Scottish Ministers with the flexibility to amend the detail to meet the changing needs of families and as the process develops.

*Choice of procedure*

89. This power is subject to negative procedure which is considered appropriate. It is not considered necessary for the Parliament to be provided with a more detailed level of scrutiny

given it is likely that the “eligibility” test in particular will be subject to change to reflect the changing needs of families, and therefore provision about how the local authority considers whether a child is eligible is likely to require to be amended also.

## **Part 11 – Adoption Register**

### **Section 68 – Scotland’s Adoption Register**

#### **Section 68 inserts section 13A into the Adoption and Children (Scotland) Act 2007 - Section 13A(2) – Power to prescribe information to be included in the Register**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

#### *Provision*

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

#### *Reason for taking this power*

91. This is a power to prescribe information to be included in the Register, how this information is to be retained in the Register, and such other further provision in relation to the Register as the Scottish Ministers consider appropriate. Given this is likely to be a lengthy list of very detailed information, and given the information which is prescribed is likely to be amended from time to time as the adoption process changes, it is more appropriate for it to be in regulations than the Bill.

#### *Choice of Procedure*

92. The order is subject to affirmative procedure by virtue of section 117(5)(ia) of the 2007 Act (as inserted by paragraph 9(5) of schedule 4 to the Bill). It may be that the use of the Register will change in future and may alter and extend beyond containing information in relation to children and adopters, as currently proposed. Affirmative procedure allows for a more detailed level of Parliamentary scrutiny, which it is considered is appropriate if it is proposed to change the original use and purpose of the Register.

**Section 68 inserts section 13E into the Adoption and Children (Scotland) Act 2007 - Section 13E(1) – Power to authorise a registration organisation to act as agent for payment or receipt of sums payable**

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

*Provision*

93. Section 68 inserts section 13E into the Adoption and Children (Scotland) Act 2007 (the 2007 Act). Section 13E(1) provides that the Scottish Ministers may, by regulations, authorise a registration organisation to act as agent for the payment or receipt of sums payable by adoption agencies to other adoption agencies and may require adoption agencies to pay or receive such sums through the organisation.

*Reason for taking this power*

94. The Scottish Ministers may or may not choose to exercise this power. However, if they do, they may wish to amend the registration organisation which they authorise to act on their behalf. As such, a regulation making power is required.

*Choice of procedure*

95. The order is subject to affirmative procedure (by virtue of section 117(5)(ib) of the 2007 Act (as inserted by paragraph 9(5) of schedule 4 to the Bill). This will afford the Parliament a more detailed level of scrutiny which is considered appropriate given it involves the Scottish Ministers delegating their powers in relation to the payment or receipt of sums payable by adoption agencies to other adoption agencies, and potentially in relation to the payment or receipt of such sums through the organisation.

**Part 12 – Other Reforms**

**Section 71 – Appeal against detention of child in secure accommodation**

**Section 71 inserts section 44A into the Criminal Procedure (Scotland) Act 1995 - Section 44A(3) – Power to make further provision about appeals**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Regulations made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

*Provision*

96. Section 71 inserts section 44A into the Criminal Procedure (Scotland) Act 1995. Section 44A(1) provides that a child, or relevant person in relation to the child, may appeal to the sheriff against a decision by a local authority to detain the child in secure accommodation in pursuance

of an order made under section 44. Section 44A(3) provides that the Scottish Ministers may, by regulations, make further provision about appeals under section 44A(1). Subsection (4) provides that regulations under subsection (3) may in particular specify the period within which an appeal may be made, make provision about the hearing of evidence during an appeal and provide for appeals to the sheriff principal and Court of Session against the determination of an appeal.

*Reasons for taking this power*

97. It is considered that it is more appropriate to provide for the administrative, evidential and procedural aspects in relation to appeals under section 44A(1) in regulations as opposed to the Bill, given the level of detail likely to be required. It is also considered that it would be useful to have the flexibility to change the administrative aspects of the appeal process if the need arises.

*Choice of procedure*

98. The regulations are subject to affirmative procedure (by virtue of subsection (5) of section 44A). It is considered appropriate in relation to this regulation making power to allow the Parliament a more detailed level of scrutiny given the potential effect of an unsuccessful appeal on the child and on his or her family.

## **Part 13 – General**

### **Section 74 – Assessment of wellbeing**

#### **Subsection (6) – Power to modify the list of wellbeing indicators**

**Power conferred on:           The Scottish Ministers**  
**Power exercisable by:       Order made by Scottish statutory instrument**  
**Parliamentary Procedure: Affirmative**

*Provision*

99. Section 74(6) provides that the Scottish Ministers may, by order, modify the list of wellbeing indicators set out in subsection (2).

*Reason for taking this power*

100. The reason for taking this power is to allow the Scottish Ministers a degree of flexibility should there be new evidence in the future on childhood development that may require the wellbeing indicators to be amended.

*Choice of procedure*

101. The order is subject to affirmative procedure (by virtue of section 77(2)) which will allow for a more detailed level of Parliamentary scrutiny which is considered appropriate given that the order may be used to modify primary legislation.

## **Section 78 – Ancillary provision**

### **Subsection (1)(a) – Power to make ancillary provision as is appropriate for the purposes of, in connection with, or for giving full effect to any provision of the Bill**

<b>Power conferred on:</b>	<b>The Scottish Ministers</b>
<b>Power exercisable by:</b>	<b>Order made by Scottish statutory instrument</b>
<b>Parliamentary procedure:</b>	<b>Generally negative but affirmative procedure if making textual changes to an Act.</b>

#### *Provision*

102. Section 77(1)(a) of the Bill confers on the Scottish Ministers a power to make, by order, such supplementary, incidental or consequential provision as they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision made by, or by virtue of, the Bill.

#### *Reason for taking this power*

103. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. For example, consequential provision may be required in order to make necessary changes to related legislation – a number of consequential amendments are identified in the Bill as introduced (see schedule 4) – but this power would allow the Scottish Ministers to make further consequential changes as may be required. We consider the order making power to be necessary to allow for this flexibility. We consider that the power to make such provision should extend to the modification of enactments.

Without the power to make supplementary, incidental and consequential provision, it may be necessary to return to Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intentions of the original Bill.

104. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purposes of giving full effect to any provision made by, or by virtue of, the Bill.

#### *Choice of procedure*

105. Section 77(3) of the Bill provides that any order made under section 78 will be subject to affirmative procedure if it contains provisions which makes textual changes to an Act. Otherwise, it will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation.

**Subsection (1)(b) – Power to make transitional, transitory or saving provision as the Scottish Ministers consider appropriate for the purposes of, or in connection with, the coming into force of any provision of this Act**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** Negative

*Provision*

106. Section 77(1)(b) of the Bill provides power for the Scottish Ministers to make, by order, such transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, the coming into force of any provision of the Bill.

*Reason for taking this power*

107. The Scottish Government considers the order making power to be necessary to allow for flexibility as provisions within the Bill are brought into force, to make required transitional, transitory or savings arrangements. Without the power, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter which could be dealt with through this power. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power, whilst potentially wide is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, or in connection with, the coming into force of any provision of the Bill.

*Choice of procedure*

108. An order made under section 77(1)(b) of the Bill will be subject to negative procedure which is considered to offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny of a provision of this nature.

**Section 79 – Commencement**

**Subsection (2) – Power to commence provisions of the Bill**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Parliamentary procedure:** No procedure

*Provision*

109. Section 79(2) provides that the Scottish Ministers may, by order, appoint days on which the provisions in the Bill may come into force. Part 12 of the Bill (apart from sections 74, 75 and 76) comes into force on the day after Royal Assent. Subsection (3) provides that an order under section 78 may include transitional, transitory or saving provision.

*This document relates to the Children and Young People (Scotland) Bill (SP Bill 27) as introduced in the Scottish Parliament on 17 April 2013*

*Reason for taking this power*

110. The power will enable the Scottish Ministers to bring the provisions of the Bill into force.

*Choice of procedure*

111. Section 77(5) has the effect that any such commencement order will not be subject to Parliamentary procedure. This is typical of commencement powers.

**CHILDREN AND YOUNG PEOPLE (SCOTLAND)  
BILL**

**DELEGATED POWERS MEMORANDUM**