

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

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## **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**

### **Purpose**

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Children and Young People (Scotland) 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. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

### **PART A – POWERS TO MAKE SUBORDINATE LEGISLATION AMENDED AT STAGE 2**

**The Delegated Powers and Law Reform Committee in their Report of 1 October 2013 suggested some changes which have led to the following revisions:**

#### **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**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Order made by Scottish statutory instrument
<b>Revised or new power:</b>	Revised
<b>Parliamentary Procedure:</b>	Affirmative

#### *Provision*

2. 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)).

3. 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. The policy intention is 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.

4. Subsection (4) provides that an order under section 43(2)(c)(ii) may sub-delegate 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*

5. 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, and thereby provide maximum flexibility and enable progress towards this longer term ambition.

*Choice of Procedure*

6. The Delegated Powers and Law Reform Committee recommended that the procedure for this order be changed. The order was previously subject to negative procedure but has been amended to be subject to an affirmative procedure. The current policy intention is that the power will be used to specify 3 and 4 year olds, however, it could be used to make different provision in the future. Given that this might be a matter which the Parliament may wish to have the ability to debate in full, the Scottish Government is content that affirmative procedure offers a more suitable level of Parliamentary scrutiny. An amendment to section 77(2) has been made at Stage 2 so as to make this order-making power subject to affirmative procedure.

**Part 9 – Services in relation to children at risk of becoming looked after, etc**

**Section 61 – Provision of relevant services to parents and others**

**(Subsection (3) – Power to specify the definition of “eligible child”** – this power has been removed at Stage 2 and a new and different power inserted as follows:)

**Subsection (2)(b) – Power to specify another description of an “eligible child”**

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

*Provision*

7. This subsection provides that the Scottish Ministers may, by order, specify a description of an “eligible child” other than the description of “eligible child” provided for in subsection 61(2)(a); a child at risk of becoming looked after.

*Reason for taking this power*

8. Subsection 61(2)(a) was added as an amendment at Stage 2 and provides that an “eligible child” is a child who the authority considers to be at risk of becoming looked after. This was added to the face of the Bill to address concerns about a lack of detail in this section. The power at subsection 61(2)(b) (which replaces with minor drafting changes what was previously section 61(3)) was also added as an amendment. This power allows the Scottish Ministers to specify by order an additional description of an eligible child to that at subsection 61(2)(a). The reason for taking this power is to ensure that relevant services are targeted at those in greatest need. It is highly desirable to retain flexibility to specify other descriptions of an “eligible child” so that, if necessary, adjustments can be made in the future to ensure that support is focused on those most in need.

*Choice of procedure*

9. The Delegated Powers and Law Reform Committee recommended that the Parliamentary procedure for the power which was contained in section 61(3) should be changed from negative procedure to affirmative procedure. The Scottish Government agrees that a more detailed level of Parliamentary scrutiny is required. This is because the use of the power will result in additional descriptions of children and qualifying persons in relation to such children becoming eligible for relevant services provided by Local Authorities and given that the power could be used to remove or vary any descriptions of children so added (although it is not the intention to remove a description of child once added). This would clearly have an impact on those eligible for, and in receipt of, relevant services, which is why it is considered that affirmative procedure with its more detailed level of Parliamentary scrutiny is more appropriate. An amendment to section 77(2) has been made at Stage 2 to make the power in section 61(2)(b) (which was previously contained in section 61(3)) subject to affirmative procedure.

**Part 10 – Support for kinship care**

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

**(Subsection (4) – Power to specify the description of a child who is considered an “eligible child”** – this power has been removed at Stage 2 and a new and different power added as follows:)

**Subsection (4)(b) – Power to specify another description of an “eligible child”**

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

*Provision*

10. This subsection provides that the Scottish Ministers may, by order, specify a description of an “eligible child” other than the description of “eligible child” provided for in subsection 64(4)(a); a child at risk of becoming looked after.

*Reason for taking this power*

11. Subsection 64(4)(a) was added as an amendment at Stage 2 and provides that an “eligible child” is a child who the authority considers to be at risk of becoming looked after. This was added to the face of the Bill to address concerns about a lack of detail in this section. The power at subsection 64(4)(b) (which replaces with minor drafting changes what was previously section 64(4)) was also added as an amendment. This power allows the Scottish Ministers to specify by order an additional description of an eligible child to that at subsection 64(4)(a). As with subsection 61(2)(b), the reason for taking this power is to ensure that services are targeted at those in greatest need. It is highly desirable to retain flexibility to specify other descriptions of an “eligible child” so that, if necessary, adjustments can be made in the future to ensure that support is focused on those most in need.

*Choice of Procedure*

12. The Delegated Powers and Law Reform Committee recommended that the Parliamentary procedure for the power which was contained in section 64(4) (and which section 64(4)(b) now contains) should be changed from negative procedure to affirmative procedure. The Scottish Government agrees that a more detailed level of Parliamentary scrutiny is required. This is because the use of the power will result in additional descriptions of children and qualifying persons in relation to such children becoming eligible for kinship care assistance provided by Local Authorities and given that the power could be used to remove or vary any descriptions of children so added (although it is not the intention to remove a description of a child once added). This would clearly have an impact on those eligible for, and in receipt of, kinship care assistance, which is why it is considered that affirmative procedure with its more detailed level of Parliamentary scrutiny is more appropriate. An amendment to section 77(2) has been made at Stage 2 to make the power in section 64(4)(b) (which was previously contained in section 64(4)) subject to affirmative procedure.

**Part 11 – Adoption Register**

**Section 68 – Scotland’s Adoption Register (inserting new chapter 1A after section 13 of the Adoption and Children Act (Scotland) 2007)**

**Section 13A – Scotland’s Adoption Register**

**Subsection (1) – Arrangements for the establishment and maintenance of a register to be known as Scotland’s Adoption Register**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Revised or new power:** Revised. The amendment narrows the scope of an existing power.  
**Parliamentary Procedure:** Affirmative

*Provision*

13. This provision inserts into section 13A(1) detail about the purpose of Scotland's Adoption Register.

*Reason for taking this power*

14. In the Delegated Powers and Law Reform Committee's Report it was suggested that the Scottish Government should consider bringing forward amendments to section 13A at Stage 2 to make provision about the purpose and intended use of the Register, in order to inform the broad power in section 13A(2) to make regulations about the Register and the information which it is to contain. The Scottish Government agrees and section 13A(1) is being amended at Stage 2 to clarify that the purpose of Scotland's Adoption Register is for facilitating adoption. There is no change to the procedure for the regulations under section 13A(2) which remains affirmative.

*Choice of Procedure*

15. The regulations under section 13A(2) are subject to affirmative procedure by virtue of Section 117(5)(ia) of the Adoption and Children (Scotland) Act 2007 (as inserted by paragraph 9(5) of Schedule 4 to the Bill). Affirmative procedure allows for a more detailed level of Parliamentary scrutiny, which is considered appropriate.

**Section 13A – Scotland's Adoption Register**

**Subsection (2)(a) – Power to prescribe in regulations the information which is to be included in the Adoption Register**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Revised or new power:** Revised. The amendment clarifies the use of an existing power.  
**Parliamentary Procedure:** Affirmative

*Provision*

16. This provision narrows the powers in section 13A(2)(a) which prescribe information that can be included in the Register.

*Reason for taking this power*

17. In the Delegated Powers and Law Reform Committee's Report it was suggested that the terms of the power in section 13A(2)(a) should be restricted to reflect the stated intention in

taking the power. The Scottish Government agrees and is amending the Bill at Stage 2 to narrow the regulation-making power to make it clear that regulations under section 13A(2)(a) may prescribe information relating to adoption which is to be included in the Register.

### *Choice of Procedure*

18. The regulations are subject to affirmative procedure by virtue of Section 117(5)(ia) of the Adoption and Children (Scotland) Act 2007 (as inserted by paragraph 9(5) of Schedule 4 to the Bill). Affirmative procedure allows for a more detailed level of Parliamentary scrutiny, which is considered appropriate.

**The following revision is not as a result of comments from the Delegated Powers and Law Reform Committee but is a change to existing powers:**

## **Part 7 – Corporate parenting**

### **Section 50 – Corporate parents**

#### **Subsection (3B) – Expansion of power to modify Schedule 3 contained in section 50(2)**

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

### *Provision*

19. The order-making power at section 50(2) allows the Scottish Ministers to modify Schedule 3 to add, remove or vary the list of Corporate Parents in that Schedule. A new section 50(3B) expands that power so that an order made under 50(2) which adds a person, or description of persons, to Schedule 3 may also modify section 50 to provide that the person is not a Corporate Parent for the purposes of section 58 (directions to Corporate Parents).

### *Reason for taking this power*

20. This power was revised by way of Government amendment at Stage 2 to acknowledge that in adding further persons to Schedule 3 in the future using the power in section 50(2) it may not always be appropriate for those persons to be subject to the duty to comply with Ministerial directions issued under section 58. For example, the same Government amendment provided that the Commissioner for Children and Young People in Scotland was not to be a Corporate Parent for the purposes of section 58. This was brought forward to acknowledge that the Commissioner has a statutory protection of independence in the Commissioner for Children and Young People (Scotland) Act 2003 (paragraph 2 of Schedule 1) so that the Commissioner is not subject to the direction or control of any member of the Parliament, the Scottish Government or the Parliamentary corporation. It may be that persons to be added to Schedule 3 in the future will also have a similar degree of independence written into their founding provisions and so it is appropriate to have this level of flexibility built into the revised power in section 50(2).

*Choice of Procedure*

21. The revised power at section 50(2) remains subject to affirmative procedure by virtue of section 77(2) and this is still thought to afford the appropriate level of Parliamentary scrutiny for this power.

**PART B – FURTHER PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED AT STAGE 2**

**Part 5 – Child’s plan**

**Section 31 – Child’s plan: Requirement**

**Subsection (5) – Power to specify persons whose views should be taken into account in deciding whether a child requires a Child’s Plan**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Negative

*Provision*

22. These provisions relate to the persons who require to be consulted about the requirement for a Child’s Plan. The provisions allow the Scottish Ministers to specify such persons by order. This is in addition to those listed on the face of the Bill, which will be the child, the child’s parents and such other persons as the responsible authority in respect of the Child’s Plan considers appropriate.

*Reason for taking this power*

23. These provisions add an order-making power so that the provisions about Child’s Plans more closely reflect the requirements of the Looked After Children (Scotland) Regulations 2009 (“the 2009 Regulations”). The elements of the Child’s Plan in respect of Looked After Children will be incorporated in to the Child’s Plan required by the Bill, so that there is a single Child’s Plan incorporating all of the relevant information. The 2009 Regulations require persons other than the child and their parents to be consulted on the Child’s Plan, for example, any person who has parental rights and responsibilities. This power has been taken to ensure that the order to be made under Part 5 of the Bill, setting out the procedure for creating, preparing and reviewing Child’s Plans, can contain the necessary provisions so as to incorporate the requirements of the 2009 Regulations.

*Choice of Procedure*

24. The negative procedure is considered appropriate because the order-making powers for the 2009 Regulations are also subject to negative procedure. In a similar way to Regulation 4(2)

of the 2009 Regulations (which requires specified persons to be consulted when assessing a looked after child's needs and how they can be met, after which a Child's Plan is prepared), an order made under this section will allow for the Scottish Ministers to make provision as to who should be consulted about the requirement for a Child's Plan in terms of the Bill. The persons who require to be consulted may change over time, for example to reflect future changes in other legislation. An order made under this section would not allow the criteria for determining whether a Child's Plan is required, as set out in section 31(1), to be amended, but would only allow for detail to be provided as to further persons who require to be consulted about this requirement, in addition to those already specified on the face of the Bill. 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 33 – Preparation of a child's plan**

#### **Subsection (6) and (8)(b) – Power to specify persons whose views should be taken into account in preparing a Child's Plan, and to make provision requiring or permitting a copy of the plan to be given to particular persons**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Order made by Scottish statutory instrument
<b>Revised or new power:</b>	New
<b>Parliamentary Procedure:</b>	Negative

#### *Provision*

25. These provisions relate to the persons who require to be consulted about the preparation of a Child's Plan. The provisions allow the Scottish Ministers to specify such persons by order. This is in addition to those listed on the face of the Bill, which will be the child, the child's parents and such other persons as the authority preparing the Plan considers appropriate. The existing order-making power in section 33(8) is also being widened slightly to allow the Scottish Ministers to provide that a copy of a Child's Plan is to be given to particular persons in certain circumstances.

#### *Reason for taking this power*

26. These provisions add an order-making power so that the provisions about Child's Plans more closely reflect the requirements of the 2009 Regulations. The elements of the Child's Plan in respect of looked after children will be incorporated in to the Child's Plan required by the Bill, so that there is a single Child's Plan incorporating all the relevant information. The 2009 Regulations require persons other than the child and their parents to be consulted on the Child's Plan, for example, any person who has parental rights and responsibilities. They also require a copy of the Plan to be given to the child, their parents and, in certain circumstances, to other persons. This power has been taken to ensure that the order to be made under Part 5 of the Bill, setting out the procedure for creating, preparing and reviewing Child's Plans, can contain the necessary provisions so as to incorporate the requirements of the 2009 Regulations.

*Choice of Procedure*

27. The negative procedure is considered appropriate because the order-making powers for the 2009 Regulations are also subject to negative procedure. The existing order-making power in subsection (8) is subject to the negative procedure, and the above amendment, which is minor in nature, does not necessitate a change in this procedure.

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

**Subsection (2)(b)– Power to specify persons whose views should be taken into account in reviewing a child’s plan**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Negative

*Provision*

28. These provisions relate to the persons who require to be consulted about the review of a Child’s Plan. The provisions allow the Scottish Ministers to specify such persons by order. This is in addition to those listed on the face of the Bill, which will be the child, the child’s parents and such other persons as the managing authority of the Plan considers appropriate.

*Reason for taking this power*

29. These provisions add an order-making power so that the provisions about Child’s Plans more closely reflect the requirements of the 2009 Regulations. The elements of the Child’s Plan in respect of looked after children will be incorporated in to the Child’s Plan required by the Bill, so that there is a single Child’s Plan incorporating all the relevant information. The 2009 Regulations require persons other than the child and their parents to be consulted on the Child’s Plan, for example, any person who has parental rights and responsibilities. This power has been taken to ensure that the order to be made under Part 5 of the Bill, setting out the procedure for creating, preparing and reviewing Child’s Plans, can contain the necessary provisions so as to incorporate the requirements of the 2009 Regulations.

*Choice of Procedure*

30. The negative procedure is considered appropriate because the order-making powers for the 2009 Regulations are also subject to negative procedure. In a similar way to Regulation 44(3) of the 2009 Regulations (which requires specified persons to be consulted when reviewing a looked after child’s case and revising their Child’s Plan), an order made under this section will allow the Scottish Ministers to make provision as to who should be consulted about the review of a Child’s Plan in terms of the Bill. The persons who require to be consulted may change over time, for example to reflect future changes in other legislation. An order made under this section will not allow the requirements for the review of a child’s plan, as set out in section 37(1), to be amended, nor will it change the existing consultation requirements as set out in section 37(2), but

would only allow for detail to be provided as to further persons who require to be consulted about the review, in addition to those specified on the face of the Bill. 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 38 – Assistance in relation to child’s plan**

### **Subsection (6) – Power to modify Schedule 2A**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Order made by Scottish statutory instrument
<b>Revised or new power:</b>	New
<b>Parliamentary Procedure:</b>	Affirmative

#### *Provision*

31. The Bill has been amended at Stage 2 to create a new Schedule 2A, which lists persons who are required to provide information and assistance to an authority exercising Child’s Plan functions under Part 5. In large part, Schedule 2A replicates the existing Schedule 2 in the Bill. However, a separate Schedule was considered necessary because the Scottish Ministers, by virtue of a Stage 2 amendment to Part 4, required to be removed from the existing Schedule 2. A separate Schedule which included the Scottish Ministers for the purpose of Part 5 was therefore necessary. The order-making power being taken here is to allow for the Scottish Ministers to modify the new Schedule 2A by order.

#### *Reason for taking this power*

32. The reason for taking this power is so that the list of persons in Schedule 2A can be modified in the future should new bodies be created, or listed persons' names be changed.

#### *Choice of Procedure*

33. An order made under this provision is subject to affirmative procedure (by virtue of section 77(2)) which allows for a more detailed level of Parliamentary scrutiny. This is considered appropriate given that the order may be used to modify primary legislation.

## **Part 6 – Early learning and childcare**

### **Section 49A –Duty to consult and plan in relation to power to provide school education for pre-school children (Early Learning and Childcare)**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Order made by Scottish statutory instrument
<b>Revised or new power:</b>	New
<b>Parliamentary Procedure:</b>	Negative

#### *Provision*

34. Part 6A of the Bill amends section 1 of the Education (Scotland) Act 1980 (“the 1980 Act”). Section 1(2B)(a) of the 1980 Act requires an education authority to consult within its area about whether, and if so how, it should provide school education to pre-school children under its powers in section 1(1C) of the 1980 Act (this is the power to provide non-mandatory Early Learning and Childcare over and above that which authorities are statutorily obliged to provide under section 43(1) and 44 of the Bill). Section 1(2B)(b) of the 1980 Act requires the authority, after having had regard to the views expressed in that consultation, to prepare and publish Plans for how it intends to make non-mandatory Early Learning and Childcare available. The education authority is required to consult and plan at least once every 2 years. Section 1(2C) of the 1980 Act provides that the Scottish Ministers may, by order, modify subsection (2B) so as to vary the regularity within which an education authority must consult and plan in pursuance of that subsection.

#### *Reason for taking this power*

35. 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. Two years is necessary in the first instance to provide consistency with momentum of consultation on statutory entitlement to the mandatory amount of Early Learning and Childcare; and, to co-ordinate, integrate and align those processes of consultation. The regularity within 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*

36. The order is subject to negative procedure in terms of section 1(2D) of the 1980 Act. The power is not being used to change any of the requirements to consult and plan but only the regularity within which that consultation and planning is to take place and therefore it is considered that the level of Parliamentary scrutiny afforded should be subject to negative procedure is sufficient. Further, negative procedure is consistent with the procedure selected for the current power in section 46(2) (power to modify regularity in relation to the mandatory amount of Early Learning and Childcare) of the Bill. 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 49B –Duty to consult and plan in relation to day care and out of school care**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Order made by Scottish statutory instrument
<b>Revised or new power:</b>	New
<b>Parliamentary Procedure:</b>	Negative

#### *Provision*

37. Part 6B of the Bill inserts new subsections (1A), (1B), (3A), (3B), (3C) and (3D) into section 27 of the Children (Scotland) Act 1995 (“the 1995 Act”). Section 27(1A)(a) of the 1995 Act requires a Local Authority to consult in its area every 2 years about how it should provide day care for pre-school children who are in need which they have a duty to provide in terms of section 27(1) of the 1995 Act. Section 27(1B)(a) of the 1995 Act contains a similar consultation requirement in relation to how and whether the Local Authority should provide day care to pre-school children who are not in need which they have a power to provide in terms of section 27(1) of the 1995 Act.

38. Section 27(1A)(b) and (1B)(b) of the 1995 Act requires the Local Authority, after having regard to the views expressed in that consultation, to prepare and publish plans for how it intends to make day care for pre-school children in need available and whether and, if so how, it intends to make day care for pre-school children, who are not in need available.

39. Section 27(3A)(a) of the 1995 Act requires a Local Authority to consult in its area every 2 years about how it should provide appropriate out of school care for school aged children who are in need which they have a duty to provide in terms of section 27(3) of the 1995 Act. Section 27(3B)(a) of the 1995 Act contains a similar consultation requirement in relation to whether, and if so how, the Local Authority should provide appropriate out of school care for school aged children who are not in need which they have a power to provide in terms of section 27(3) of the 1995 Act.

40. Section 27(3A)(b) and (3B)(b) of the 1995 Act requires the authority, after having regard to the views expressed in that consultation, to prepare and publish a Plan for how it intends to make out of school care for school aged children in need available and in relation to the provision of out of school care for school aged children who are not in need.

41. The education authority are required to consult and plan at least once every 2 years. Section 27(3C) of the 1995 Act provides that the Scottish Ministers may, by order, modify subsections (1A), (1B), (3A) or (3B) so as to vary the regularity within which a Local Authority must consult and plan in pursuance of those subsections.

*Reason for taking this power*

42. 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. Two years is necessary in the first instance to provide consistency with momentum of consultation on statutory entitlement to the mandatory amount of Early Learning and Childcare and to co-ordinate, integrate and align those processes of consultation. The regularity within 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*

43. The order is subject to negative procedure in terms of section 27(3D) of the 1995 Act. 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 should be subject to negative procedure is sufficient. Further, negative procedure is consistent with the procedure selected for the current power in section 46(2) (power to modify regularity in relation to the mandatory amount of Early Learning and Childcare) of the Bill. 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.

**Part 7 – Corporate parenting**

**Section 51 – Application of Part: children and young people**

**Subsection (2)(b) – Power to extend eligibility for corporate parenting support to additional descriptions of formerly looked after young persons**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Order made by Scottish statutory instrument
<b>Revised or new power:</b>	New
<b>Parliamentary Procedure:</b>	Affirmative

*Provision*

44. A new subsection (2) was added to section 51 by amendment at Stage 2. It inserts a new power to allow the Scottish Ministers to extend the application of Part 7, and therefore the eligibility for Corporate Parenting support, to such persons who are between the ages of 16 and 26 and who are not of the description in section 51(1)(b)(ii) but are of such other description of person formerly but no longer looked after by a Local Authority, as they may specify by order.

*Reason for taking this power*

45. Taking this power will allow Ministers to, in the future, widen the application of Part 7 of the Bill to new groups of young people who have been formerly looked after, effectively extending eligibility criteria for Corporate Parenting support under that Part.

*Choice of Procedure*

46. The higher level of scrutiny afforded by affirmative procedure is more appropriate than negative to allow Parliament to debate the merits of extending Corporate Parenting support to new categories of young people who were formerly looked after. This is achieved by adding the power to section 77(2) of the Bill.

**Section 52 – Corporate parenting responsibilities**

**Subsection (2) – Power to modify Section 52(1) to add, remove or vary the list of corporate parenting duties and to apply different duties to different corporate parents**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Affirmative

*Provision*

47. This order-making power allows the Scottish Ministers to modify section 52(1) to confer, remove or vary a duty on Corporate Parents. The power also allows Ministers to provide that section 52(1) is to be read, in relation to a particular Corporate Parent or Corporate Parents of a particular description, with a modification conferring, removing or varying a duty.

*Reason for taking this power*

48. It is useful to be able to adjust the duties of Corporate Parents in light of the experience of these provisions taking effect and the Corporate Parent role in practice evolving over time. A power to amend section 52 gives the flexibility to allow what may be progressive adjustments to be made without the requirement of primary legislation to make the changes. The power to apply certain duties to certain Corporate Parents would also allow for more duties to be tailored for particular Corporate Parents which might not be appropriate to apply to all Corporate Parents listed in Schedule 3.

*Choice of Procedure*

49. As the new power in section 52(2) is a power to modify primary legislation it is thought that affirmative procedure is appropriate and this is achieved by adding the power to section 77(2). Affirmative procedure affords Parliament a higher level of scrutiny and to debate the merits of any proposed addition of new duties or variation or removal of existing duties in section 52. The power is also wide enough to allow the modification in relation to particular

Corporate Parents and, again, modifying the application of primary legislation in this way merits affirmative procedure being used.

## **Part 8 – Aftercare**

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

#### **Subsection (2) – Inserting new Section 29(1)(b) of the Children (Scotland) Act 1995**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Affirmative

#### *Provision*

50. This provision inserts a new section 29(1)(b) of the 1995 Act to allow Ministers to extend eligibility for Aftercare support to such descriptions of formerly but no longer looked after persons, as they may specify by order.

#### *Reason for taking this power*

51. Taking this power will allow Ministers to, in the future, widen the application of section 29 of the 1995 Act to new groups of young people who have been formerly looked after, effectively extending eligibility criteria for Aftercare under that section.

#### *Choice of Procedure*

52. The higher level of scrutiny afforded by affirmative procedure is more appropriate than negative to allow Parliament to debate the merits of extending this type of support to new categories of young people who were formerly looked after. This is achieved by provision made in new section 29(1A) of the 1995 Act.

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

#### **Subsection (3) – Inserting new Section 30(2)(b)(ii) of the Children (Scotland) Act 1995**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Order made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Affirmative

#### *Provision*

53. This provision inserts a new section 30(2)(b)(ii) of the 1995 Act to allow Ministers to extend eligibility for financial assistance towards expenses of education or training under that

section to such descriptions of formerly but no longer looked after persons, as they may specify by order.

*Reason for taking this power*

54. Taking this power will allow Ministers to, in the future, widen the application of section 30 of the 1995 Act to new groups of young people who were formerly looked after, effectively extending eligibility for financial assistance towards the expenses of education or training under that section.

*Choice of Procedure*

55. The higher level of scrutiny afforded by affirmative procedure is more appropriate than negative to allow Parliament to debate the merits of extending this type of support to new categories of young people who were formerly looked after. This is achieved by provision made in new section 30(2A) of the 1995 Act.

**Part 8A – Continuing care**

**Section 60A – Inserting new section 26A into the Children (Scotland) Act 1995 – various order making powers**

**Powers conferred on:** The Scottish Ministers  
**Powers exercisable by:** Order made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Affirmative

*Provision*

56. This provision inserts a new Part 8A on Continuing care which inserts a new section 26A into the Children (Scotland) Act 1995. New section 26A places a duty on Local Authorities to provide “continuing care” to “eligible persons” who cease to be looked after by them. “Continuing care” is defined in new section 26A(4) and “eligible person” in subsection (2) as meaning a person who is at least sixteen years of age and is not yet such higher age as may be specified. Subsection (6) provides that a Local Authority’s duty to provide continuing care lasts, subject to subsection (7), until the expiry of such period as may be specified. “Specified” is defined in subsection (12) as meaning specified by order made by the Scottish Ministers.

57. Subsections (5) and (7) respectively set out when the duty to provide continuing care does not apply and when it ceases. Subsection (8) provides, for the purposes of subsection (7)(b), examples of situations in which accommodation ceases to become available. Subsection (9) takes powers for Scottish Ministers to, by order –

- (a) make provision about when or how a local authority is to consider whether subsection (5)(c) or (7)(c) is the case (i.e. when or how they consider that providing or continuing to provide the care would significantly adversely affect the welfare of the person);

- (b) modify subsection (5) so as to add, remove or vary a situation in which the duty to provide continuing care does not apply;
- (c) modify subsection (7) or (8) so as to add, remove or vary a situation in which the duty to provide continuing care ceases.

58. Subsection (11) provides that orders made under new section 26A may make different provision for different purposes and are subject to the affirmative procedure.

*Reason for taking these powers*

59. Taking the power in subsection (2) to specify the upper age of an “eligible person” and the power in subsection (6) to specify the period for which the Local Authority’s duty to provide care lasts in subsection (6) will allow Ministers to extend the eligibility for continuing care over the coming years to additional cohorts of young persons with the eventual policy aim that it be available to all care leavers up to the age of 21.

60. Taking the order-making powers contained in subsection (9) will allow Ministers to add, remove or vary the situations in which the duty to provide continuing care either does not apply or ceases to apply. This will allow Ministers to modify subsections (5), (7) or (8) in light of experience of the duty being operated in practice so that, for example, if a particular situation in (5) is framed too widely or too restrictively it can be varied or if it comes to light that a new situation in which accommodation ceases to be available needs to be added to subsection (8) it can be done by order. It is also conceivable that, for example, in modifying the situations in subsections (5) or (7), different provision may need to be made for different purposes and so that is why the power in subsection (11)(a) is sought.

*Choice of Procedure*

61. The higher level of scrutiny afforded by affirmative procedure is more appropriate than negative to allow Parliament to debate the merits of extending eligibility for continuing care to additional cohorts of young care leavers. Also, as the powers in subsection (9) include powers to modify primary legislation, it is, therefore, appropriate to attach affirmative procedure to those particular powers.

**Part 11 – Adoption Register**

**Section 68 – Scotland’s Adoption Register (inserting new chapter 1A after section 13 of the Adoption and Children (Scotland) Act 2007)**

**Section 13C – Supply of information for the Register**

**Subsection (3) – Inserting new paragraph to section 13C(3) of the Adoption and Children (Scotland) Act 2007**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Affirmative

*Provision*

62. A new paragraph is being inserted into section 13C(3) of the Adoption and Children (Scotland) Act 2007 by amendment at Stage 2. This provision creates a new power to prescribe in regulations circumstances in which adoption agencies will not be required to disclose information to Scotland's Adoption Register.

*Reason for taking this power*

63. This power will allow Ministers to prescribe in regulations any circumstances in which an adoption agency, despite the requirement in section 13C(1) to provide information, is not to disclose prescribed information to the Register. At the same time, section 13C(2) of the Adoption and Children (Scotland) Act 2007 (as added by section 68 of the Bill), which requires the consent of certain persons before the disclosure of information to the Adoption Register, is being removed. It is anticipated that the circumstances in which information is not to be disclosed to the Register prescribed by regulations may include circumstances where consent may be an issue.

*Choice of Procedure*

64. Affirmative procedure allows for a more detailed level of Parliamentary scrutiny, which is considered appropriate. This is achieved by paragraph 9(5) of Schedule 4 to the Bill which amends section 117(5)(ia) of the Adoption and Children (Scotland) Act 2007.

**Section 13DA — Fees and other payments**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Affirmative

*Provision*

65. New section 13DA is being added to the Adoption and Children (Scotland) Act 2007 by amendment at Stage 2. Paragraphs (a) and (b) of that new section directly replace existing sections 13C(3)(c) and 13D(3)(d). Section 13DA(c) contains a new power to prescribe in regulations under section 13A(2) fees to be paid by adoption agencies or payments to be made by them in relation to the Adoption Register.

*Reason for taking this power*

66. The new section brings the provisions for fees and payments in relation to the Adoption Register together in one place and the new power will enable Scottish Ministers to prescribe in regulations any fees to be paid or payments to be made by adoption agencies in relation to the Register. This new power addresses the concerns of the Delegated Powers and Law Reform Committee expressed in their Stage 1 Report with regard to the provision in section 13B(1)(b) of

the Adoption and Children (Scotland) Act 2007 for payments to be made in relation to the Register, in particular that any provision for payments should be clear and accessible to those affected.

*Choice of Procedure*

67. Affirmative procedure allows for a more detailed level of Parliamentary scrutiny, which is considered appropriate. This is achieved by paragraph 9(5) of Schedule 4 to the Bill which amends section 117(5)(ia) of the Adoption and Children (Scotland) Act 2007.

**Part 11A – School closure proposals, etc.**

**Section 68E – Inserting new section 17B (Review by the Panel) into the Schools (Consultation) (Scotland) Act 2010**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Negative

*Provision*

68. Part 11A of the Bill makes a number of amendments to the process for School Closure proposals under the Schools (Consultation) (Scotland) Act 2010 (the 2010 Act). Section 68E adds section 17B to the 2010 Act (Review by the Panel) and section 17B(5) provides a power for Scottish Ministers to make provision in regulations as to the procedures to be followed by a School Closure Review Panel in carrying out a review under section 17B(1).

*Reason for taking this power*

69. The reason for taking this power is to provide the Scottish Ministers with a power to set out in regulations the procedures that Panels are to follow in carrying out a review of a School Closure proposal under the 2010 Act. This is a useful power to ensure that Ministers can specify procedures for the Panels to follow in carrying out their review of a School Closure proposal once called in by Ministers if it is decided that such regulations are necessary either at the point the Panels are set up or at a later point to address any issues that have arisen during their operation, for example, in carrying out their first reviews. The Panels will be new, so it is appropriate to provide this power in case it is required. It is appropriate that these procedures and any revisions to them should be set out in regulations rather than primary legislation, given they will relate to procedures and processes to be followed by the Panels as opposed to anything more substantive.

*Choice of Procedure*

70. Negative procedure is considered to be appropriate for these regulations, which would set out the detail of procedures that Panels were to follow in carrying out a review of a School Closure proposal once called in by Ministers. The provision to be set out in regulations will be

technical and procedural in nature rather than affecting the powers or responsibilities of a School Closure Review Panel, therefore, it is not considered that a higher level of Parliamentary scrutiny is required.

**Section 68E – Inserting new section 17A which introduces new Schedule 2A (School Closure Review Panels) into the Schools (Consultation) (Scotland) Act 2010**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Revised or new power:** New  
**Parliamentary Procedure:** Negative

*Provision*

71. Section 68E of the Bill also inserts a new section 17A (Referral to the Convener of the School Closure Review Panels) into the 2010 Act which provides that the Scottish Ministers must refer any School Closure proposal once called in under section 17 of the 2010 Act to the Convener of the School Closure Review Panel. New section 17A also introduces new Schedule 2A (School Closure Review Panel) into the 2010 Act. Paragraph 1(9) of Schedule 2A allows the Scottish Ministers to make regulations regarding the appointment of the Convener of the School Closure Review Panels. These regulations may cover eligibility for and disqualification from appointment, the Convener's tenure and removal from office, remuneration arrangements, and any other matters in relation to the appointment of the Convener which the Scottish Ministers think fit.

*Reason for taking this power*

72. It is considered that it is more appropriate to provide for the administrative and procedural aspects in relation to appointment of the Convener in regulations rather than in the primary legislation, given the level of detail that is likely to be required. It is also considered that it would be useful to have the flexibility to change the administrative aspects of the appointment process if the need arises and that doing so through primary legislation would not be an effective use of Parliamentary time.

*Choice of Procedure*

73. The regulations are subject to negative procedure given the administrative and technical nature of the provision that is to be made in them. The negative procedure is considered to offer an appropriate balance between, on the one hand, expediency and convenience and on the other, the need for scrutiny for a provision of this nature.

**Section 68E – Inserting new section 17A (Referral to the Convener of the School Closure Review Panels) which introduces new Schedule 2A (School Closure Review Panels) into the Schools (Consultation) (Scotland) Act 2010**

<b>Power conferred on:</b>	The Scottish Ministers
<b>Power exercisable by:</b>	Regulations made by Scottish statutory instrument
<b>Revised or new power:</b>	New
<b>Parliamentary Procedure:</b>	Negative

*Provision*

74. Section 68E in new Part 11A of the Bill inserts section 17A (Referral to the Convener of the School Closure Review Panels) into the 2010 Act and new section 17A introduces new Schedule 2A (School Closure Review Panel) into the 2010 Act. Paragraph 2(5) of Schedule 2A allows the Scottish Ministers to make regulations about appointment and selection of members of the School Closure Review Panels. This includes eligibility for (and disqualification from) appointment, tenure and removal from office, the process for the selection of panel members, remuneration arrangements, and any other matters in relation to the appointment and selection of School Closure Review Panel members.

*Reason for taking this power*

75. The reason for taking this power is to provide for Scottish Ministers to set out clear arrangements for the appointment and selection of members of the School Closure Review Panels, ensuring that these Panels, who will operate independently and at arm's length from Government, with members appointed by the Convener of the School Closure Review Panels, are subject to transparent and accountable appointment procedures. Making this provision in regulations is appropriate given the level of detail that is likely to be required and the desirability for flexibility to update these arrangements over time as the need arises.

*Choice of Procedure*

76. The regulations are subject to negative procedure given the administrative and procedural nature of the provision that can be made in them. 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.

## **Part 12 – Other Reforms**

### **Section 71A – Power of Scottish Ministers to provide for children’s legal aid to be available to other persons in relation to court proceedings**

#### **New section 28LA of the Legal Aid (Scotland) Act 1986**

<b>Power conferred on:</b>	Scottish Ministers
<b>Power exercisable by:</b>	Regulations made by statutory instrument
<b>Revised or New Power:</b>	New
<b>Parliamentary procedure:</b>	Affirmative

#### *Provision*

77. Section 71A(3) inserts section 28LA into the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Subsection (1) provides the Scottish Ministers with a regulation-making power to make children’s legal aid available for specified court proceedings under the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”) to specified persons, other than where children’s legal aid is already available. The power includes the power to vary or remove the children’s legal aid previously made available.

78. Subsections (2) to (5) make provision as to the eligibility tests which must be used in any regulations made by the Scottish Ministers under subsection (1). The tests will be applied by the Scottish Legal Aid Board. The tests reflect the existing tests, under sections 28D, 28E and 28F of the 1986 Act, which already apply to children and other persons.

#### *Reason for taking power*

79. The power is needed to allow Scottish Ministers to make children’s legal aid available for court proceedings under the 2011 Act to persons other than in the circumstances already covered by provisions of the 1986 Act. One instance of potential use of the power has already been identified in respect of individuals to whom section 126 of the 2011 Act applies. The power would be exercised in respect of court proceedings involving those individuals at first instance and on appeal.

80. However, this may not be the only situation in which the power is needed – hence the general nature of the power. Other examples of persons in respect of whom the power might be used are a child who has now become an adult, or a person has formerly been a relevant person.

81. It was previously thought that section 28L of the 1986 Act was sufficient in respect of court proceedings, but further investigation has shown that that power is not suitable other than in respect of children’s hearings.

82. The power being taken maintains consistency with other provisions of the 1986 Act in respect of the eligibility tests which applicants must satisfy in order for children’s legal aid to be provided.

### *Choice of procedure*

83. The regulation-making power is subject to affirmative procedure. This is consistent with the similar existing power under section 28L of the 1986 Act, and other provisions of the 1986 Act regarding eligibility for legal aid. The Scottish Government considers that affirmative power is appropriate as it allows the Parliament to consider the impact and need for any regulations which the Scottish Ministers bring forward. The Government recognises these are important matters requiring thorough Parliamentary scrutiny.

## **PART C – OTHER MATTERS RAISED BY THE DPLRC**

### **Guidance and Direction-making powers**

84. In paragraphs 17, 24 and 86 of their 50<sup>th</sup> Report, 2013 (Session) 4, the Delegated Powers and Law Reform Committee asked the Scottish Government to consider bringing forward amendments at Stage 2 to require the publication of any guidance or directions issued by the Scottish Ministers under the powers contained in sections 28(1), 29(1), 39(1), 40(1) and 74(3).

85. After consideration of these points, Scottish Government amendments were brought forward at Stage 2 of the Bill to amend the various guidance and direction-making powers across the Bill to make them more consistent with each other. Also, a new general section on guidance and directions was inserted in Part 13 (section 77A) which draws together the common elements of all these powers and includes a requirement that the Scottish Ministers must publish (in such manner as they consider appropriate) any guidance or directions issued by them under the Bill. This is in response to the points raised by the Committee and the requirement covers *any* guidance or directions issued under the Bill and not just those highlighted in the Committee's 50<sup>th</sup> Report.

### **Requirement to publish arrangements (authorisation to perform functions and provision for payments) relating to Scotland's Adoption Register**

86. At paragraphs 63 and 64 of the Committee's 50<sup>th</sup> Report, they drew to the lead Committee's attention the duty of Scottish Ministers to make arrangements for the establishment and maintenance of Scotland's Adoption Register contained in new section 13A of the Adoption and Children (Scotland) Act 2007 as read with new section 13B (both inserted by section 68 of the Bill). In particular the Committee was concerned that any arrangements which authorise the Scottish Ministers' functions in respect of Scotland's Adoption Register to be carried out by a registration organisation and provide for payments to be made to such an organisation should be clear and accessible to those affected by them.

87. In light of these concerns, new section 13B was amended at Stage 2 to provide that the Scottish Ministers must publish arrangements under section 13A(1) so far as they authorise a registration organisation to perform the Scottish Ministers' functions in respect of the Register. New section 13B(1)(b) was also amended to make it clear that any arrangements made by the Scottish Ministers authorising a registration organisation to run the Adoption Register may include provision for payments to be made by the Scottish Ministers to that organisation. A new section 13DA(c) which was inserted at Stage 2 will allow regulations made by the Scottish

*This document relates to the Children and Young People (Scotland) Bill as amended at Stage 2 (SP Bill 27A)*

Ministers under 13A(2) to prescribe fees and other payments and this is covered earlier in this Memorandum at paragraphs 65 to 67.

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

## **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**