



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

12th Report, 2014 (Session 4)

Children and Young People (Scotland) Bill as amended at stage 2

Published by the Scottish Parliament on 5 February 2014

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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
 - (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
 - (c) general questions relating to powers to make subordinate legislation;
 - (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
 - (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and
 - (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.
 - (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

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Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson

Committee Clerking Team:

Clerk to the Committee

Euan Donald

Assistant Clerk

Elizabeth White

Support Manager

Daren Pratt



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12th Report, 2014 (Session 4)

Children and Young People (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meeting on 4 February 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Children and Young People (Scotland) Bill as amended at Stage 2 (“the Bill”)¹. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. In broad outline, the Bill concerns the rights and wellbeing of children and young people, and the duties of public authorities to support children, young people and their families. It places duties on the Scottish Ministers and other public authorities in line with the requirements of the United Nations Convention on the Rights of the Child, and amends the powers of the Children’s Commissioner to enable investigations to be conducted in relation to individual children and young people.

3. The Bill also makes provision about the way public services work to support children and young people, by providing for a single planning approach for children who need additional support from services (“child’s plans”) and creating a single point of contact around every child or young person (the “named person service”). It also requires authorities which provide children’s services to have a coordinated approach to planning and delivery of those services, and makes provision about the approach to assessing the wellbeing of children and young people.

4. The Bill also extends the duties of local authorities to provide early learning and childcare for pre-school age children and extends the support available to looked after children and young people leaving care. It makes provision for counselling services and other forms of assistance to be made available to parents and kinship carers, and creates a statutory adoption register for Scotland.

¹ Children and Young People (Scotland) Bill as amended at Stage 2 available at: [http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20\(Scotland\)%20Bill/b27as4-stage2-amend-rev.pdf](http://www.scottish.parliament.uk/S4_Bills/Children%20and%20Young%20People%20(Scotland)%20Bill/b27as4-stage2-amend-rev.pdf)

5. Finally, the Bill amends existing legislation which 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 arrangements in the areas of children's hearings support arrangements and school closures.

6. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill ("the SDPM"²).

7. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its [50th report of 2013](#).

DELEGATED POWERS PROVISIONS

8. The Committee considered each of the new or substantially amended delegated powers provisions in the Bill after Stage 2.

9. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the new or substantially amended delegated powers provisions listed below and that it is content with the Parliamentary procedure to which they are subject:

- 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
- Section 50 – Corporate Parents. Subsection (4) – Expansion of power to modify Schedule 3 contained in section 50(2)
- Section 61 – Provision of counselling services to parents and others. Subsection (2)(b) – Power to specify another description of an "eligible child"
- Section 64 – Assistance in relation to kinship care orders. Subsection (4)(b) – Power to specify another description of an "eligible child"
- Section 68 – Scotland's Adoption Register insofar as inserting section 13A and section 13DA of the Adoption and Children (Scotland) Act 2007 – Scotland's Adoption Register
- 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.

² Children and Young People (Scotland) Bill Supplementary Delegated Powers Memorandum available at: http://www.scottish.parliament.uk/S4_Bills/CYP_SDPM.pdf

- 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
- 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
- Section 38 – Assistance in relation to child’s plan. Subsection (6) – Power to modify schedule 2A
- New Part 6A – Section 49A: Duty to consult and plan in relation to power to provide school education for pre-school children
- New Part 6B – Section 49B: Duty to consult and plan in relation to day care and out of school care
- 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
- Section 60 – Provision of aftercare to young people. Subsection (2) – Inserting new section 29(1)(b) of the Children (Scotland) Act 1995
- Section 60 – Provision of aftercare to young people. Subsection (3) – Inserting new section 30(2)(b)(ii) of the Children (Scotland) Act 1995
- Section 68E(4) – Inserting new section 17B (Review by the Panel) into the Schools (Consultation) (Scotland) Act 2010
- Section 68E(5) – Inserting new schedule 2A (School Closure Review Panels) into the Schools (Consultation) (Scotland) Act 2010 paragraphs 1(9) and 2(5)
- Section 71A(3) – Power to provide for children’s legal aid to be available to other persons in relation to court proceedings (inserting new section 28LA of the Legal Aid (Scotland) Act 1986)
- Section 77A: Guidance and directions – requirement to publish guidance and directions.

10. The Committee’s comments and, where appropriate, recommendations on the other delegated powers in the Bill are detailed below.

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

11. Section 52(2)(a) allows the Scottish Ministers to modify section 52(1) by order to confer, remove or vary duties on corporate parents. Section 52(2)(b) 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 any modification conferring, removing or varying a duty.

12. The SDPM states that 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.

13. The Committee considers this to be an important power since it allows Ministers to remove, add or vary new duties which are to be fulfilled by corporate parents. The Committee agrees with the Scottish Government that powers to modify duties set out in primary legislation, particularly in the manner proposed, merit the affirmative procedure.

14. At present the Bill applies all duties to all corporate parents. A further power will allow Ministers to alter this “one size fits all” model so as to tailor the duties to specific corporate parents or classes of corporate parent. The Committee finds this acceptable in principle. The power is framed in such a way that suggests the duties will become fragmented between primary legislation (which appears absolute in applying to all) and modifications in subordinate legislation. The Committee is concerned that the proposed structure could lead to confusion in determining which duties are owed by which authorities unless the interaction between the primary and secondary legislation is clear.

15. The Committee finds the power in section 52(2)(b) acceptable in principle and that it is subject to the affirmative procedure.

16. However, the Committee reports that it is concerned that the structure proposed by the power of a mandatory list of duties in primary legislation modified by subordinate legislation which requires those duties to be read in a different way could lead to confusion and a lack of clarity.

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

17. New part 8A inserts a new section 26A into the Children (Scotland) Act 1995 which places a duty on local authorities to provide “continuing care” to “eligible persons” who cease to be looked after by them. The provision confers several powers on the Scottish Ministers within this framework. Ministers have to specify the upper age limit of eligible persons (subsection (2)). Ministers also specify the period for which the duty to provide continuing care subsists (subsection (6)). Subsection (9) allows Ministers to modify the Bill to provide when the duty to provide continuing care does not apply or when it ceases. Subsection (11) provides that all powers under new section 26A may make different provision for different purposes.

18. The SDPM explains that the powers in subsections (2) and (6) will allow Ministers to extend the eligibility for continuing care over the coming years to additional cohorts of young persons on a staged basis with the eventual policy aim that it be available to all care leavers up to the age of 21.

19. The SDPM explains that 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 in light of experience of the duty being operated in practice.

20. The Committee considers that the duty to provide continuing care for looked after children is a significant addition to the Bill. Within the framework provided by the Bill there are a number of powers which are themselves of importance in structuring the scope and application of the duty over time. As a result of these being inserted in the Bill at stage 2 the Committee does not have the opportunity to scrutinise the purpose of the power and its effects as effectively as it would at stage 1 since time does not permit it.

21. The powers offer maximum flexibility to Ministers to structure the duty and to vary the application of the duty over time in the manner they consider appropriate. Whilst it is understood that Ministers intend to “roll out” the duty to different cohorts over time, the power could be used very differently. Each of the powers is subject to the affirmative procedure which affords a high level of scrutiny and for active involvement by the Parliament but there is no requirement for consultation with local authorities, Social Care and Social Work Improvement Scotland or persons who may be affected. The Committee considers that the subject matter is of sufficient importance that some prior consultation with such persons should be required when using the delegated powers to alter the scope of the duty. This could also assist the Parliament in its scrutiny of proposals for the “roll out” of the duty.

22. **The Committee reports that it is concerned that powers of this significance have been added at stage 2 which has reduced the scrutiny which the Committee has been able to apply.**

23. **The Committee recommends that there should be a requirement for consultation with local authorities, SCSWIS and persons representing the interests of looked after children before the powers are exercised.**

Section 68 – Scotland’s Adoption Register inserting section 13C(3) of the Adoption and Children (Scotland) Act 2007 – Supply of information for the Register

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

24. A new power has been inserted into section 13C(3) of the Adoption and Children (Scotland) Act 2007 by amendment at Stage 2. This provision permits Ministers to prescribe circumstances in which adoption agencies must not disclose prescribed information concerning information relevant to Scotland’s Adoption Register despite the general duty to do so set out in section 13C(1). Section 13C(3)(a) provides that disclosure may be to a registration organisation rather than to the Scottish Ministers.

25. On introduction section 13C(2) required the consent of certain persons to be obtained before disclosure was required. That provision has been removed and replaced with the power in section 13C(3)(d) to prescribe circumstances in which the adoption agency is not to disclose information. The Scottish Government anticipates that the circumstances in which information is not to be disclosed may include circumstances where consent will be required.

26. Given the nature of the information to which the obligation on disclosure relates the Committee views the exercise of this power as significant in ensuring that the disclosure regime is compatible with ECHR rights. On introduction the requirement placed upon adoption agencies to provide the Scottish Ministers with information about children who ought to be placed for adoption and suitable adopters was tempered by a requirement for consent to that disclosure to be obtained from the child’s parents and any other prescribed persons. The *requirement* to obtain consent to disclosure has now been removed from the face of the Bill. In its place is a power which *permits* the Scottish Ministers to prescribe the circumstances in which prescribed information is not to be disclosed.

27. By removing the consent requirements from the face of the Bill Parliament has given up its control over them to the Ministers. The Committee considers this to be an issue of importance which it should draw to the Parliament’s attention. In so doing the Parliament has retained the ability to reject any proposed regulations under the affirmative procedure. But the Parliament can no longer insist on the

Government bringing forward regulations which make consent to disclosure mandatory.

28. The Committee reports that it is concerned that the requirement for consent to be obtained for disclosure under section 13C of the 2007 Act has been removed from the face of the Bill and has been replaced with a power which enables Ministers to prescribe those circumstances in which disclosure is not permitted but which does not *require* consent to disclosure to be obtained.

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Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland

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ISBN 978-1-78392-727-2
