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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Children and Young People (Information Sharing) (Scotland) Bill at Stage 1



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Contents

Introduction	1
Overview and consideration of the Bill	2
Delegated Powers Provisions	4

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(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;

(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.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 5th, 19th and 26th September and 24th October 2017, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Children and Young People (Information Sharing) (Scotland) Bill (the “Bill”) at Stage 1.ⁱ The Committee submits this report to the lead committee for the Bill (the Education and Skills Committee) under Rule 9.6.2 of Standing Orders.
2. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ

i The Bill is available here: [http://www.parliament.scot/Children%20and%20Young%20People%20\(Information%20Sharing\)%20\(Scotland\)%20Bill/SPBill17S052017.pdf](http://www.parliament.scot/Children%20and%20Young%20People%20(Information%20Sharing)%20(Scotland)%20Bill/SPBill17S052017.pdf)

ii The Delegated Powers Memorandum is available here: [http://www.parliament.scot/Children%20and%20Young%20People%20\(Information%20Sharing\)%20\(Scotland\)%20Bill/SPBill17DPM052017\(1\).pdf](http://www.parliament.scot/Children%20and%20Young%20People%20(Information%20Sharing)%20(Scotland)%20Bill/SPBill17DPM052017(1).pdf)

Overview and consideration of the Bill

Overview of the Bill

3. This Government Bill was introduced by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP, on 19th June 2017.
4. This Bill is the Scottish Government's response to the judgment of the UK Supreme Court ("UKSC") in the case of *Christian Institute and others v the Lord Advocate*, which was issued in July 2016.ⁱⁱⁱ
5. In that judgment, the UKSC held that the information sharing provisions of Part 4 of the Children and Young People (Scotland) Act 2014 ("the 2014 Act") in relation to 'named persons' are incompatible with the rights of children, young persons and parents under Article 8 of the ECHR (right to respect for private and family life). This was on the specific ground that those provisions are not "in accordance with the law", as Article 8 requires, and may in practice result in a disproportionate interference with the Article 8 rights of many children, young persons and their parents, through the sharing of private information.
6. This Bill introduces amendments to the information sharing provisions of Part 4 of the 2014 Act (in relation to named persons). The Bill also introduces amendments to the information sharing provisions of Part 5 of the 2014 Act (in relation to the 'child's plan'). The Scottish Government has chosen to bring forward amendments to Part 5 even though that Part was not subject to challenge and was not criticised by the UKSC in its judgment. The Policy Note explains that the changes to Part 5 are made to ensure that the procedures for information sharing under that Part align with the procedures in Part 4 (as amended).
7. The wider provisions of Parts 4 and 5 of the 2014 Act, beyond information sharing, are unchanged by the Bill. Parts 4 and 5 are not yet in force.

Consideration of the Bill

8. The lead Committee is the Education and Skills Committee. It is considering the policy merits of the legislation.
9. This Committee's role is to consider the delegated powers in the Bill and to take a view as to whether the Bill provides an appropriate balance between primary legislation and delegated powers and whether the scrutiny processes are adequate.
10. At its meeting on 19 September 2017, the Committee took oral evidence on these matters from the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP.
11. The Committee's consideration was also informed by an illustrative draft of the Code of Practice provided by the Scottish Government.^{iv}

ⁱⁱⁱ The Supreme Court judgment is available here: <https://www.supremecourt.uk/cases/docs/uksc-2015-0216-judgment.pdf>

12. The delegated powers are considered further below, in light of the evidence received.

iv The illustrative draft Code of Practice is available here: <http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/cyp-information-sharing-bill-2017/cyp-information-sharing-draft-code-of-practice>

Delegated Powers Provisions

Sections 1(4) and 2(3) – Provision of information

New sections 26B and 40B



Code of Practice in relation to provision of information

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Code of practice issued by Scottish Ministers**
- **Parliamentary procedure: Bespoke (as provided for in sections 26B and 40B)**

Provisions

13. New sections 26B and 40B, inserted into the 2014 Act, impose a duty on the Scottish Ministers to issue Codes of Practice about the provision of information under that Act.
14. New section 26B relates to information sharing (including the consideration of whether to share information) by persons exercising functions under Part 4 (named persons). New section 40B relates to information sharing by persons exercising functions under Part 5 (child's plan).
15. Both sections are framed in the same terms. They provide that:
 - the Code of Practice *must* in particular provide for safeguards applicable to the sharing of information; and
 - persons sharing information (or considering whether to share information) *must* do so in accordance with the Code of Practice.
16. Both sections provide for the same consultation and laying requirements. Before issuing the Code, the Scottish Ministers:
 - must consult any person to which the Code relates and such other persons as they consider appropriate;
 - must lay the draft Code before the Scottish Parliament;
 - must not issue the Code until 40 days (excluding recess) after it is so laid; and
 - must take account of any comments expressed by the Parliament within that 40 day period.
17. Other than the requirement that the Code must be laid before the Parliament and that any comments of the Parliament must be taken into account, no formal parliamentary scrutiny is provided for. The Parliament is not required to debate or to approve the final version of the Code that is issued.

Scrutiny of the Code of Practice

18. The Deputy First Minister explained the scrutiny process that the Government will be required to undertake to produce the Code of Practice and the benefits of that approach—
19.  "The Bill requires me to undertake a public consultation on the Code, to consult Parliament and to take account of the comments that Parliament expresses on the Code. I think that that represents a greater sense of interaction with Parliament on the detail and substance of the code of practice, which will be reflected in the consideration that I give to its final contents. I am trying to recognise the importance of generating wider confidence in the contents of the code, and I think that the mechanism that I have set out is of assistance in undertaking that task."^v
20. This process would allow the Parliament to provide comments on the draft Code before it is issued and would require the Government to take account of any such comments made by the Parliament. However, there is no requirement for the Parliament to formally approve the final draft of the Code before it is issued.
21. Given the importance of the Code in responding to the concerns of the Supreme Court, the Committee explored with the Deputy First Minister whether setting out the Code in subordinate legislation would be more appropriate.
22. The Deputy First Minister explained that the Code is intended to be an explanatory document which sets out how the Bill interacts with other legislation but which does not itself change the law. Therefore, the Government did not consider it appropriate to set the Code out in subordinate legislation.
23. However, the Deputy First Minister also stated that—
-  'The Code of Practice will be obligatory and binding on any individual who exercises the responsibilities'.^{vi}

The Committee, therefore, understands that the Code is intended to impose obligations on information holders that must be complied with before information is shared under the Bill.

24. The Committee considers that the wording of the illustrative Code of Practice supports the view that the Code will be intended to impose obligations on those individuals exercising functions under the 2014 Act. For example, paragraph 4 of the illustrative Code states that persons exercising functions under Parts 4 and 5 of the Act **must** comply with the Code of Practice when handling information; and paragraph 6 states that such persons **must** inform the child or parent that information may be shared.
25. In the Committee's view, therefore, the Code could be considered to be more than simply an explanatory document.
26. Moreover, the Committee is aware of other examples of Codes of Practice which have been brought forward by way of subordinate legislation, and which appear to impose duties on individuals in the same way as those envisaged by the Code.^{vii}

^v *Official Report*, 19 September 2017, col. 9.

^{vi} *Official Report*, 19 September 2017, col. 5.

For example, the Letting Agent Code of Practice is set out in the schedule to subordinate legislation and sets out the standards expected of letting agents operating in Scotland.

27. Accordingly, the Committee invites the Scottish Government to re-visit its approach and to give consideration to setting out the Code of Practice in subordinate legislation.

28. As noted earlier, while the Bill as drafted provides an opportunity for the Parliament to contribute to the consultation on the Code, there is no requirement for the Parliament to formally approve the final draft of the Code before it is issued, as would be the case if it was set out in subordinate legislation and subject to the affirmative procedure.

29. The Deputy First Minister explained that, in the Scottish Government's view the bespoke procedure provided for in the Bill—

” provides an opportunity for extensive dialogue with the Parliament”

and

” is designed to ensure that [the Scottish Government] can subject the Code to detailed Parliamentary scrutiny”.

He further explained that the Scottish Government considers the requirement to take account of any comments that the Parliament expresses on the draft Code—

” is a greater obligation on Ministers than is carried by the affirmative procedure”.^{viii}

30. Given the central role of the Code of Practice in ensuring the proper operation of the information sharing provisions in the 2014 Act, the Committee agrees with the Scottish Government's view that extensive dialogue and detailed Parliamentary scrutiny on the content of the Code of Practice is appropriate. The Committee therefore welcomes the opportunity provided in the Bill for the Parliament to comment on the draft Code and for those comments to be taken into account by the Scottish Government.

31. However, while welcoming the opportunity for consultation on the proposed draft of the Code provided for in the Bill, the Committee is mindful of the binding nature of the Code of Practice and its central importance in responding to the concerns of the Supreme Court and in seeking to ensure that a proportionate approach is taken to information sharing under the 2014 Act. In light of this, the Committee considers that it

vii *Official Report*, 19 September 2017, col. 17. See the Letting Agent Code of Practice, which is set out in the schedule to subordinate legislation and which sets out the standards expected of letting agents operating in Scotland. That code is available here:<http://www.legislation.gov.uk/ssi/2016/133/contents/made>

viii *Official Report*, 19 September 2017, col 8.

would be appropriate for the final version of the Code to be subject to approval by the Parliament before it could be issued.

32. The Committee therefore encourages the Scottish Government to consider retaining the requirement that the proposed draft Code is laid before the Parliament and that any comments are taken into account, as currently provided for in the Bill. The Committee further encourages the Scottish Government to consider combining this with a requirement for the final draft of the Code to be laid before and approved by a resolution of the Parliament before it can be issued, and for this requirement to be set out on the face of the Bill.
33. The Committee considers that this would enhance the opportunity for Parliamentary scrutiny of the Code, in line with the importance of the Code as set out above, by requiring both a pre-scrutiny Parliamentary consultation phase on the proposed draft Code, and a vote to approve the final draft Code before it could be issued.

Balance between the Bill and the Code

34. The Committee also considered the balance struck by the Bill in terms of what is set out on the face of the legislation and what is left to be dealt with in the Code. Whilst the Committee recognises that it would not be appropriate to set out on the face of the Bill all the detail which it is envisaged will be covered by the Code, the Committee explored with the Deputy First Minister whether the Bill could be strengthened by adjusting that balance, specifically in regard to the issue of consent.
35. The Committee asked the Deputy First Minister whether a requirement for information holders to consider whether the consent of the child or parents should be sought before information is shared should be stated on the face of the Bill.
36. The Deputy First Minister explained that the purpose of the Bill is to make new law. He contended that as the Government is not proposing to change the law around when consent to share information should be sought, there is no need to address this in the Bill. He stated that—

” ‘I am not changing the legislative provisions around consent. If I was changing the arrangements around consent, I would have to put that into primary legislation, but I am not doing that’.^{ix}
37. The Committee is not entirely persuaded by the arguments as to why it would not be appropriate to address the issue of consent on the face of the Bill.
38. The Bill already expresses that information may not be shared if this would breach any other restriction or prohibition arising under data protection or other law. This provision in the Bill appears to restate the current position under the existing law. However, the provision sends out a message that the Bill does not empower

^{ix} *Official Report*, 19 September 2017, col. 12.

information holders to share information where this would conflict with data protection or other law.

39. A provision in the Bill requiring information holders to consider whether the consent of the child or parents should be sought before information is shared would likewise be a restatement and clarification of the law. However, such a provision would send out a message that the Bill does not empower information holders to share information unless they have considered, and where appropriate obtained, the consent of the child or parents.
40. The Committee understands that this issue has been raised in a number of responses to the call for evidence issued by the Education and Skills Committee in respect of this Bill.

41. **The Committee therefore encourages the Education and Skills Committee to explore further with the Government how the issue of consent could be more satisfactorily addressed on the face of the Bill.**

