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

Delegated powers in the Children (Care and Justice) (Scotland) Bill (as amended at Stage 2)



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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.



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Introduction

1. At its meeting on 26 March 2024, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Children \(Care and Justice\) \(Scotland\) Bill](#) (as amended at Stage 2).
2. This Scottish Government Bill was introduced by the Cabinet Secretary for Education and Skills, Shirley-Anne Somerville MSP on 13 December 2022. The lead committee is the Education, Children and Young People Committee.

Overview of the Bill

3. The Committee previously considered the delegated powers in this Bill at Stage 1 and published [a report on 22 March 2023](#), stating that it was content with the 13 delegated powers contained in the Bill at that stage. The Bill has since been amended to include a further 12 powers and 1 revised power, and therefore, the Committee considered the Bill as amended at Stage 2.
4. The Bill amends several pieces of legislation in respect of the care system and the justice system with regards to children. One of the main purposes of the Bill is to amend the definition of “child” for the purpose of eligibility for referral to the Children’s Hearing System. Previously, restrictions applied in terms of the referral of those aged 16 and 17. This Bill enables all of those under the age of 18 to be referred to the Principal Reporter.
5. The amended Bill confers 12 new powers and one revised power to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a [Supplementary Delegated Powers Memorandum](#) (“SDPM”) which sets out the reasons for taking the delegated powers in the Bill and the parliamentary scrutiny procedures that have been chosen.
6. The Committee is required by Rule 9.7.9(b) of the Standing Orders to consider and report to the Parliament on new or substantially altered delegated powers after Stage 2.

Review of relevant additional/revised delegated powers

Section 1A – Child assessment and child protection measures: secure accommodation (new section 57B of the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”))

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

7. Section 1A of the Bill amends provisions of the 2011 Act concerning the emergency placement of a child in secure accommodation as a result of child assessment and child protection measures. It inserts a new section 57A which states that a child assessment order, child protection order, or an order made by a justice of the peace under section 55 of that Act may include an authorisation that enables the child to be taken or removed to, and kept in, a place or a place of safety that is secure accommodation. This is caveated by the requirement that such an authorisation is not included unless the child has previously absconded and is likely to abscond again and it is likely that the child’s health, safety or development would be at risk if the child did abscond, or that the child is likely to engage in self-harming conduct unless kept in secure accommodation, or that the child is likely to cause physical or psychological harm to another person unless the child is kept in secure accommodation.
8. New section 57B provides that the Scottish Ministers may by regulations make further provision about the placing and keeping of a child in secure accommodation. Regulations may, in particular, make provision requiring the consent of the person in charge of the residential establishment containing the secure accommodation in which the child is to be placed, or requiring the agreement of the chief social work officer. Regulations may also specify the criteria to be applied and the procedure to be followed by the head of unit or chief social work officer in deciding whether to give such consent or agreement, and the procedure for the notification of decisions and the giving of reasons for decision. Regulations could also impose requirements in connection with the protection of the welfare of a child being placed and kept in secure accommodation.
9. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

10. The Scottish Government states in its SDPM that the power will enable provision to be made consistent with the placement and keeping of a child in secure accommodation by virtue of other statutory provisions. Such regulations were made in 2013 under s151 of the 2011 Act and contain the level of detail appropriate

for subordinate legislation rather than primary legislation. The Committee therefore considers it appropriate that an equivalent power to make further provision is included in this Bill. Given the sensitivity of the issue, and to remain consistent with other statutory powers relating to the detention of children in secure accommodation, it is the Committee's view that the affirmative procedure will apply.

- 11. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 6A – Support for Victims in the children’s hearings system (new section 179D of the 2011 Act)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory instrument

Parliamentary procedure: Negative

Revised or new power: New

Provision

12. Section 6A inserts new section 179D into the 2011 Act to require the Scottish Ministers to make regulations about the provision of support services to persons against whom an offence appears to have been committed or who have been harmed by the behaviour of a child who has been referred to a children’s hearing. Such regulations could include provision about the support to be provided, who could provide support services and how those might be provided, the training and qualifications of support service providers and the provision of information to and by service providers.
13. Before making such regulations, the Scottish Ministers must consult with the Scottish Children’s Reporter Administration, Children’s Hearings Scotland, persons who are providing support services to persons in relation to offence perpetrated against or in respect of those person and such other persons as the Scottish Ministers consider appropriate.
14. Regulations made under this power will be subject to the negative procedure.

Committee consideration

15. The Scottish Government states in its SDPM that there is considerable interest in supporting the victims of children who have been referred to the children’s hearing system, given that the nature of the Children Hearing’s System means that it is the referred child that is at the centre. It states that a degree of flexibility is required as the hearing system is to be consulted on in Spring 2024, and therefore regulations may require to be updated to changing circumstances in the hearing system. Given the requirement on the face of the Bill to make such regulations, the Committee considers it appropriate that the Scottish Ministers have the power to make detailed provision by regulations and update those regulations to adapt to changing circumstances, should the policy in principle be endorsed by the Parliament during the passage of this Bill. It is the Committee's view that the negative procedure is

also appropriate.

16. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.

Section 6B – Duty to establish an information sharing system

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

17. Section 6B requires the Scottish Ministers to establish by regulations a system to provide information from the children’s hearing system to a person affected by the child’s offence or behaviour through a single point of contact.
18. It requires that regulations provide for a tiered approach to information-sharing under which specified information must always be provided to the person affected, a risk assessment is carried out in each case to determine what other information should be provided to the person affected and where a child is released from secure accommodation and transferred to an adult prison, the affected person is notified. These requirements are all subject to the caveat that they would not apply should the affected person indicate that they do not wish to receive such information.
19. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

20. The Scottish Government states in its SDPM that the power allows for detailed proposals to be worked up and consulted on to ensure that the new system is effective. It states that a regulation making power provides the necessary flexibility to tailor the new system in the most appropriate and balanced way to meet the needs of victims.
21. Given the requirement on the face of the Bill to make such regulations, and the level of detail included in the provision, the Committee considers it appropriate that the Scottish Ministers have the power to make detailed provision by regulations and update those regulations to adapt to changing circumstances, should the policy in principle be endorsed by the Parliament during the passage of this Bill. It is the Committee's view that the affirmative procedure is also appropriate.

22. The Committee may wish to find the power acceptable in principle and be content that it is subject to the affirmative procedure.

New section 90A(1) of the Children and Young People (Scotland) Act (“the 2014

Act”) – Secure transportation: duty of Scottish Ministers to prepare and publish standards**Power conferred on: The Scottish Ministers****Power exercisable by: Publishing standards****Parliamentary procedure: None****Revised or new power: New***Provision*

23. Section 21A inserts a new section 90A to the 2014 Act. It places a duty on the Scottish Ministers to prepare and publish standards applicable to a “secure transportation service” in relation to children and young people (under 19) who are being placed, kept or detained in secure accommodation by virtue of a relevant enactment and the service serves the purpose of transporting those persons to or from secure accommodation.
24. The standards must include the minimum standards to be met by a provider which may relate to: the manner in which, and the extent to which, the service provider is to have regard to the rights of the persons being transported, risk control measures and procedures, the circumstances in which restraint or control of persons who require to be transported may or may not be appropriate, and training for staff.
25. The Scottish Ministers must consult such persons as they consider appropriate before publishing standards, or revised standards.
26. The Scottish Ministers must publish the first standards no later than one year after the day on which section 21A comes into force. Standards must be kept under review and may be revised at any time.
27. The standards are to be published and are not subject to any further parliamentary procedure. However, a copy of the first standards, and any revised standards are to be laid before the Parliament.

Committee consideration

28. The Scottish Government states in its SDPM that the conditions of secure transport are not currently subject to any legal regulation, and that the lead committee’s Stage 1 report highlighted concerns around secure transportation particularly regarding delays for children and the lack of consistent reporting of incidents of restraint within secure transport. The Scottish Government considers that the duty to publish standards will go some way to addressing these concerns whilst striking an appropriate balance between setting standards and not exacerbating existing issues with the lack of supply.
29. The Stage 1 report from the lead committee states that duties relating to secure transport lie principally with the local authority responsible for the child’s placement, and transport is purchased by individual authorities on a spot purchase basis. It explains that local authorities have long-standing issues associated with secure transport, including the limited availability of Scottish based providers and the lack of standards and expectations for services.

30. The Committee considers it appropriate, given the evidence heard at Stage 1, that a power is included to publish standards or order to try to achieve a consistent approach to secure transport across Scotland without being too prescriptive which could risk exacerbating the situation. The level of detail that will be included is likely better placed in standards rather than in legislation itself, and therefore the Committee also considers it appropriate that such standards will be published administratively. As such, it appears appropriate that the standards will be laid before the Parliament but will not be subject to any further parliamentary procedure.

31. The Committee finds the power to publish standards acceptable in principle and is content that standards will be laid before the Parliament but will not be subject to further parliamentary procedure.

New section 90A(7) of the 2014 Act – Secure transportation: duty of Scottish Ministers to prepare and publish standards (modification of the definition of “relevant enactment”)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

32. As outlined above, a “secure transportation service” is a service that serves the purpose of transporting children and young people (under 19) who are being placed, kept or detained in secure accommodation by virtue of a relevant enactment to or from secure accommodation enactment and the service serves the purpose of transporting those persons to or from secure accommodation. The relevant enactments are listed in new section 90A(6). There is a delegated power in new section 90A(7) which enables the Scottish Ministers to modify the definition of “relevant enactment” by adding, removing or varying a reference to an enactment listed in that subsection.

33. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

34. The Scottish Government explains in its SDPM that the list of “relevant enactments” currently set out in the Bill reflects the various legal routes into secure accommodation at the time being. It notes that it is desirable to future-proof the definition to allow for the list to be updated as appropriate.

35. The Committee considers it appropriate to have a delegated power enabling Scottish Ministers to make such a change without the need for primary legislation. As such given regulations will textually amend primary legislation, it is the Committee's view that it is appropriate that the affirmative procedure will apply.

36. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

New section 90B(4) of the 2014 Act – Secure transportation: duty of providers to meet standards

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

37. New section 90B(1) imposes a duty on providers of secure transportation services to meet the applicable standards, and new section 90B(2) provides that the persons mentioned in subsection (3), that is a local authority and the Scottish Ministers, are to ensure that when commissioning a secure transportation service, that service meets the applicable standards.
38. New section 90B(4) contains a power which enables the Scottish Ministers to add, remove or vary a description of a person from that list.
39. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

40. The Scottish Government explains in its SDPM that those currently listed in section 90B(3) are the only persons who currently commission secure transportation services. It states that it considers it desirable that the flexibility is retained in order that the list can be modified in the future should other persons commission secure transportation services.
41. The Committee considers that it is appropriate to have the flexibility to update this list, should that be required in the future. It also agrees that it is appropriate that the exercise of the power is subject to the affirmative procedure, as such regulations would modify primary legislation.

42. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

New section 90C(7), (8) and (9) of the 2014 Act – Secure transportation: reports

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: section 90C(7) and (8) – negative procedure; section 90(9) – affirmative procedure

Revised or new power: New

Provision

43. New sections 90C(1) and (2) provide that a person who has provided a secure transportation service or made arrangements with another person for the provision of a secure transportation must prepare a report on how the relevant person monitored the secure transportation service to ensure that the service met the applicable standards and the extent to which the service met the applicable standards. The reporting period is the period of 3 years beginning with the day on which section 21A of the Bill comes into force, and each subsequent period of 3 years until a date specified in regulations by the Scottish Ministers.
44. Section 90C(7) provides that the Scottish Ministers may make regulations prescribing information that reports must contain. Regulations made under 90C(7) will be subject to the negative procedure.
45. Section 90C(8) enables the Scottish Ministers to specify a date in regulations that the reporting requirements will be switched off. Regulations made under this power will be subject to the negative procedure.
46. Section 90C(9) enables the Scottish Ministers to modify, by regulations, the definition of “relevant person”, currently defined as a local authority, to add, remove or vary a description in the list in the event that other persons start to commission secure transportation services in the future. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

47. The Scottish Government states in its SDPM that the power to prescribe the information that must be contained in reports is required to ensure consistency in reporting. It also states that as the power relates to procedural and operational matters, the negative procedure is appropriate. The Committee considers the power is necessary and that the associated procedure provides the appropriate level of scrutiny.
48. The Scottish Government further states in its SDPM that the power in 90C(8) is required in order that it can “switch off” the reporting requirements in the event that the secure transport becomes regulated under another regime for example. It states that this is also an operational matter and that the negative procedure is therefore appropriate. The Committee considers it is sensible to have a power to “switch off” the reporting requirements. Should secure transport become regulated under another regime, the Parliament will have oversight of that decision and therefore, it is the Committee's view that the negative procedure is appropriate.
49. Finally, the Scottish Government also states that the regulation making power in 90C(9) is required to retain flexibility should the definition require to be modified if other persons commission secure transportation services in the future. The Committee considers this is a sensible approach. Given that regulations made under this power will modify primary legislation, it is also the Committee's view that the affirmative procedure is appropriate.

50. **The Committee finds the powers in 90C(7), 90C(8) and 90C(9), acceptable in principle, and is content that the powers in 90C(7) and 90C(8) are subject to**

the negative procedure, and the power in 90C(9) is subject to the affirmative procedure.

Section 25 – Cross-border placements: effect of orders made outwith Scotland (further amendments of section 190 of the 2011 Act)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

51. The Committee considered a delegated power in section 25 at Stage 1 and was content with that power. That power enabled Scottish Ministers to make provision for specific non-Scottish orders to have effect in Scotland. Section 25 has been amended at Stage 2 and expands the power enabling Scottish Ministers to make provision about how such orders are to have effect, including providing that provision can be made about the monitoring of conditions and the consequences of breaching these.
52. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

53. The Scottish Government states in its SDPM that flexibility is needed to ensure that alternative provision can be made where appropriate. It gives the example of where the child will only stay in Scotland for a short period of time, and it may therefore not best serve the child's interests to "convert" their non-Scottish order into a CSO. It also states that further specificity in the power in relation to the monitoring and enforcing of conditions is necessary to ensure that future regulations are as effective as possible in promoting the welfare of and protecting the rights of children who are placed in Scotland.
54. The Committee considers that the level of detail which will be included in such regulations is appropriate for subordinate legislation rather than primary legislation. It is therefore the Committee's view that the further specification to the regulation making power is appropriate. Given the subject matter, the affirmative procedure is also considered appropriate.

55. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

Section 25A – Regulation of cross-border placements (new section 33A of the Children (Scotland) Act 1995 ("the 1995 Act"))

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

56. Section 25A inserts a new section 33A to the Children (Scotland) Act 1995 in order that the Scottish Ministers may by regulations make provision in relation to all cross-border placements from England, Wales and Northern Ireland. This new power is in recognition of the fact that there are a variety of legal bases on which children may become subject to a cross-border placement into Scotland and not all of these will entail a court order, for example it could be under statutory provision where a child has been abandoned.
57. Section 33A(2) provides that regulations made under this power may require specified persons to provide or share specified information.
58. Regulations may modify any enactment in its application to cross-border placements, and may make any incidental, supplementary, consequential, transitional, transitory or saving provision that the Scottish Ministers consider appropriate.
59. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

60. The Scottish Government states in its SDPM that the power will ensure that all cross-border placements of children into Scotland which arise lawfully from other parts of the UK whether these arise by virtue of statute, court order or both. The Committee considers it appropriate that Scottish Ministers have the power to make provision in relation to all cross-border placements in Scotland, no matter how they have come to be placed in Scotland. It also considers that the ancillary power is appropriate, allowing Scottish Ministers to make any required amendments in order that the law can operate effectively and as intended. Given the sensitivity of the subject matter, it is the Committee's view that the affirmative procedure is appropriate.

61. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

