

Children (Care and Justice) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Children (Care and Justice) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 22–EN);
- a Financial Memorandum (SP Bill 22–FM);
- a Policy Memorandum (SP Bill 22–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 22–LC).

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill makes provision about the care and supervision of children, other than in the criminal justice system, and the treatment of children within that system. It also makes provision about the interrelationship between the care system and the criminal justice system. Rather than make free-standing provision, the Bill amends existing legislation in these areas. It is divided into Parts as follows:

- Part 1 deals with aspects of the children's hearings system, with the main change being to the meaning of "child" in section 199 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). This will mean all under 18s will be children for the purposes of the children's hearings system, without any distinction made between children over 16 who are subject to compulsory supervision orders ("CSO") and those who are not. Other changes to the 2011 Act made by Part 1 relate to the measures that may be included in CSOs, placing a duty on the Principal Reporter to inform people, who have a right to request information about the disposal of a

child's case by the children's hearings system, that they have that right and, finally, providing for supervision and guidance for children after they turn 18 up to age 19.

- Part 2 deals with children who are in the criminal justice system when suspected or accused of offences or who are involved as witnesses or victims. Section 8 maintains the current link between the meaning of "child" in the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") and the definition in the 2011 Act so that, for almost all purposes, under 18s will be regarded as children. Many of the other provisions in this Part are consequential on this age change (like section 10) and amend provision for the treatment of children from the point of being arrested by the police through to detention after pleading, or being found, guilty. As part of that, section 12 will introduce restrictions on the reporting of criminal investigations involving children and section 13 will make changes to the current restrictions on the reporting of court proceedings. And sections 16 and 17 will provide, among other things, that under 18s will no longer be eligible for detention in young offenders institutions. Where they are detained in secure accommodation, section 21 will make provision for how local authority duties in relation to "looked after" children will apply to children so detained.
- Part 3 has links to both Part 1 and Part 2 as it is mainly aimed at reforming the legislative landscape around the provision of secure accommodation and the approval and regulation of those who provide it. That also includes changes around cross-border placements into accommodation in Scotland from other parts of the UK, as well as changes in relation to the recognition in Scotland of orders made in other UK jurisdictions.
- Part 4 makes two changes, altering the meaning of "child" in the Antisocial Behaviour etc. (Scotland) Act 2004 so that it covers under 18s (except in the case of parenting orders, where it will remain as under 16s). It also repeals Parts 4 and 5 of the Children and Young People (Scotland) Act 2014.
- Part 5 contains the formal provisions normally found at the end of an Act of the Scottish Parliament. It includes delegated powers to make ancillary provision and to bring the Bill's provisions (if enacted) into force. Its associated schedule modifies other legislation in consequence of the Bill's provisions.

Rationale for subordinate legislation

5. The Bill confers powers on the Scottish Ministers to make regulations in relation to a range of matters dealt with in the Bill. The powers conferred by the Bill are, for the most part, either of a technical and procedural nature or relate to matters which because of their character require a flexible approach and thus are more appropriate to be dealt with by subordinate legislation.

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6. The Scottish Government has, in considering what matters should be set out in subordinate legislation and the appropriate level of parliamentary scrutiny for subordinate legislation, had regard to the need to:

- Strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation being amended by the Bill; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill, and why the selected form of parliamentary procedure has been considered appropriate.

Delegated Powers

Section 4(3) – Compulsory supervision orders: movement restriction conditions

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

8. This section amends the regulation-making power in section 150 of the 2011 Act, thereby extending the list of specific matters which the Scottish Ministers can prescribe as restrictions and monitoring arrangements that may be imposed as part of a movement restriction condition (“MRC”) included in a CSO. The existing power will be amended in three ways.

9. First, it explicitly provides for the Scottish Ministers to prescribe methods of monitoring a child’s movements or whereabouts (including whether a child is at, or not at, a particular place) for the purpose of monitoring compliance with a movement restriction condition. Secondly, it extends the Scottish Ministers’ power to specify devices that may be used for monitoring compliance with a movement restriction condition. As a result, they may also specify any apparatus to be linked to such monitoring devices. Thirdly, and finally, it enables the Scottish Ministers to prescribe certain matters to make sure that specified monitoring devices are used appropriately and proportionately. This includes prescribing (a) how or when information obtained through the monitoring of a child by such devices may, or may not, be gathered,

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retained, used or shared for the purpose of monitoring a movement restriction condition, and (b) how or when a specified monitoring device may, or may not, be used.

Reason for taking power

10. This extension of the regulation-making power seeks to provide greater flexibility in respect of MRCs to keep up with emerging technology, including the use of GPS technology when available as a method of monitoring a child's movements or whereabouts. Currently, a child's movement is monitored in respect of certain fixed places i.e. where a box is installed. It is important that MRCs are recognised as a credible measure that can support children and protect both them and others from future harm. Technological developments could support this. However, there is uncertainty at the pace of future technological developments in this area. Therefore, regulations offer a mechanism to react quickly and flexibly, enabling practice to keep up with any such developments.

11. The power to prescribe appropriate use of devices and how and when information may be gathered, retained, used or shared is important because of the additional data-collecting involved in using technologies such as GPS, and support the appropriate and proportionate use of such technologies.

Choice of procedure

12. Regulations made under section 150 of the 2011 Act are subject to the affirmative procedure and this provides the appropriate level of scrutiny given the sensitivity of the subject matter, namely monitoring arrangements for children subject to a movement restriction condition.

Section 12(2) – Restriction on report of suspected offences involving children

Power conferred on: High Court of Justiciary
Power exercisable by: Act of Adjournal
Parliamentary procedure: Laid, no procedure

Provision

13. This inserts a new section 106B(3) in the Criminal Justice (Scotland) Act 2016. This relates to the process for applications to dispense with the restrictions on the reporting of suspected criminal offences involving children as imposed by section 106A and provides a power to prescribe the form of an application by Act of Adjournal in relation to the process. Where such an application is made in writing (rather than orally) it must be made in such form as may be prescribed by act of adjournal (or as nearly as may be in such form).

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Reason for taking power

14. The courts will require to provide procedure for applications to be made to support the substantive provision in the Bill.

Choice of procedure

15. Matters of this detail which relate to the administrative and procedural work of the court are most appropriately be dealt with by the High Court of Justiciary by Act of Adjournal. As is usual for court rules made by Act of Adjournal, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies.

Section 16(2)(e) – Remand and committal of children before trial or sentence

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

16. This section inserts a regulation-making power into section 51 of the 1995 Act to provide that the Scottish Ministers may by regulations make provision about the detention of children placed on remand in secure accommodation.

Reason for taking power

17. Section 16(2)(e) inserts new subsections (6) to (8) into section 51 of the 1995 Act so that the Scottish Ministers can, by regulations, make provision about the detention of children on remand in secure accommodation. This will allow provision to be made, building on that already contained in the Secure Accommodation (Scotland) Regulations 2013, for the welfare of children detained on remand in secure accommodation, including the review of their cases. Currently the 2013 Regulations deal with children detained in a place of safety under section 51(1)(a)(ii) and make provision for such children to be moved to secure accommodation if necessary, but the 2013 Regulations do not apply to children detained in secure accommodation by virtue of section 51(1)(a)(i). Section 16(2)(e) therefore ensures that a consistent approach can be taken for all children on remand in secure accommodation.

18. As new subsection (7) makes clear, the regulations may also make provision for children to stay in secure accommodation after they turn 18, provided the provision made by regulations does not permit them to so remain after turning 19. Without this sort of provision, a child in secure accommodation who turns 18 would continue to be automatically transferred to a YOI. Instead provision will enable this decision to be made on a case-by-case basis.

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19. Regulations enable a level of flexibility and further consideration to be given to the circumstances in which a child can remain in secure accommodation post-18 and the process for such decision-making to ensure that any decision is in the child's best interests and not contrary to the best interests of other children in the facility. As necessary this could be supplemented with practice guidance.

20. Regulations will also allow greater flexibility to amend the provisions more frequently, including in response to any changes of circumstances, which is considered to further support the taking of these powers being appropriate.

Choice of procedure

21. The affirmative procedure has been chosen as the appropriate procedure since, given the nature of the power and level of political interest, it is appropriate that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament.

Section 17(2)(b) and (c) – Detention of children on conviction (summary proceedings)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

22. This section modifies the existing regulation-making power in section 44(5) of the 1995 Act in respect of children convicted under summary proceedings and detained in secure accommodation. The new provisions mean that the regulations that the Scottish Ministers may make are subject to the affirmative procedure (section 44(5B)).

Reason for taking power

23. Section 17(2)(b) and (c) provide that the regulations that the Scottish Ministers can make under section 44 of the 1995 Act are now subject to the affirmative procedure (rather than negative procedure). The amendments also insert new subsection (5A) into section 44, mirroring the amendments made to section 51 of the 1995 Act, and providing power for the regulations made under section 44(5) to make provision for 18 year olds who have been convicted under summary proceedings to remain in secure accommodation (up to a maximum age of 19 years) rather than automatically being transferred to YOIs. Instead provision will enable this decision to be made on a case-by-case basis.

24. Regulations will enable a level of flexibility and further consideration to be given to the circumstances in which a child can remain in secure accommodation post-18 and the process for such decision-making to ensure that any decision is in the child's best

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interests and not contrary to the best interests of other children in the facility. As necessary this could be supplemented with practice guidance.

25. Regulations will also allow greater flexibility to amend the provisions more frequently, including in response to any changes of circumstances, which is considered to further support the taking of these powers being appropriate.

Choice of procedure

26. The affirmative procedure has been substituted for the existing negative procedure to ensure consistency with other powers to make provision about secure accommodation, both those being inserted into the 1995 Act by this Bill and in other legislation, such as the 2011 Act, sections 151 to 153. It is considered that the affirmative procedure is appropriate, given the nature of the power and level of political interest, which means that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament.

Section 17(6) – Detention of children on conviction (solemn proceedings)

Section 17(7) – Detention of children on conviction (fine default)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

27. Section 17(6) inserts new section 208A into the 1995 Act, which contains a regulation-making power to make provision about the detention of children in secure accommodation following conviction under solemn proceedings (either under section 205(2) or 208(1) of the 1995 Act). Section 17(7) inserts a regulation-making power into section 216 of the 1995 Act to make provision about children detained in secure accommodation for fine default. These provisions are considered together given their similar nature.

Reason for taking power

28. Section 17(6) inserts new section 208A into the 1995 Act, which provides at subsections (4) to (6) that the Scottish Ministers may, by regulations, make provision about the detention of children in secure accommodation following their conviction on indictment. Section 17(7) inserts similar provisions in section 216 of the 1995 Act in relation to detention in secure accommodation for fine default. This will allow provision to be made, building on that already contained in the Secure Accommodation (Scotland) Regulations 2013, for the welfare of children detained in secure accommodation, including the review of their cases. Currently the 2013 Regulations apply to some children who are placed in secure accommodation but not all such children, most

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notably some children placed on remand and those convicted under summary proceedings. Whilst the application of these requirements would vary in such cases, taking this power will promote parity of approach for all children detained in secure accommodation via the criminal justice system and ensure they can benefit from such reviews to help safeguard for their welfare.

29. As section 17(6) and 17(7) make clear the regulations may, in particular, also make provision for children to stay in secure accommodation after they turn 18, provided this does not permit them to so remain after turning 19. Without this sort of provision, a child in secure accommodation who turns 18 would continue to be automatically transferred to a YOI. Instead provision will enable this decision to be made on a case-by-case basis.

30. Regulations will enable a level of flexibility and further consideration to be given to the circumstances in which a child can remain in secure accommodation post-18 and the process for such decision-making to ensure that any decision is in the child's best interests and not contrary to the best interests of other children in the facility. As necessary this could be supplemented with practice guidance.

31. Regulations will also allow greater flexibility to amend the provisions more frequently, including in response to any changes of circumstances, which is considered to further support the taking of these powers being appropriate.

Choice of procedure

32. The affirmative procedure has been chosen as the appropriate procedure since, given the nature of the power and level of political interest, it is appropriate that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament. In addition, this is also to ensure consistency with other subordinate legislation powers to make provision about secure accommodation, such as sections 151 to 153 of the 2011 Act.

Section 23 – Secure accommodation services

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

33. Section 23(2) and (3) insert a new section 78A in the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”), conferring on the Scottish Ministers a power to make regulations about the approval of secure accommodation services and providing for procedure for those regulations. Approval by the Scottish Ministers remains an essential feature of the definition of a “secure accommodation service” in paragraph 6 of schedule 12 of the 2010 Act, as replaced by section 23(4) of the Bill. Accordingly,

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provision is required to enable Scottish Ministers to set out in regulations a process for approving secure accommodation services.

Reason for taking power

34. This regulation-making power will make the framework for approval of secure accommodation services by the Scottish Ministers clearer and more transparent. New section 78A(2) of the 2010 Act provides a non-exhaustive list of the particular kinds of provision that the new power may be used to make, for example in respect of the procedure to be followed by the Scottish Ministers when deciding on applications; the review, renewal and withdrawal of approvals; and appeals against certain decisions of the Scottish Ministers in respect of approvals.

35. Approval by the Scottish Ministers is necessary for secure accommodation services to operate and is a pre-requisite of registration with the Care Inspectorate under Part 5 of the 2010 Act. Until now, the process for approval has not been specified in legislation. Therefore the power to do so is deemed to be necessary and appropriate, striking the right balance between the importance of the issue and providing flexibility to respond to changing circumstances and make procedural adjustments as frequently as may be required.

Choice of procedure

36. Section 23(3) amends section 104(2) of the 2010 Act to provide that regulations made under new section 78A are subject to the affirmative procedure. The Government thinks it is appropriate that the Parliament should be asked to agree to any proposed process for approving secure accommodation services. This is due to the importance of the subject matter in approving care services the purpose of which is to deprive a child of their liberty, making it distinct from other care services.

Section 24(2) – Regulation of care services providing residential accommodation to children (standards and outcomes)

Power conferred on: The Scottish Ministers

Power exercisable by: Publishing standards and outcomes

Parliamentary procedure: None

Provision

37. Section 24(2) confers a new function on the Scottish Ministers. Under section 50(1) of the 2010 Act, they have a general duty to prepare and publish standards and outcomes applicable to care services and social work services. Section 24(2) inserts new subsections (1A) and (1B) in section 50 to additionally provide for the Scottish Ministers to prepare and publish specific standards and outcomes for specific types of care service which provide residential accommodation to children who are subject to a cross-border placement. Those care services are: (a) care home services which are

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provided wholly or mainly to children, (b) school care accommodation services, and (c) secure accommodation services.

38. It also extends the application of existing provisions in section 50 of the 2010 Act to allow for: the review and amendment of standards and outcomes; prepublication consultation with appropriate persons; the standards and outcomes to be taken into account for the purposes of certain decisions and proceedings; and the making of different provision for different care services.

Reason for taking power

39. This will add to the levers available to the Scottish Government in terms of pursuing policy outcomes on cross-border care placements. Giving Ministers additional powers to prescribe tailored standards and outcomes is intended to ensure that the children being hosted in Scotland from other parts of the United Kingdom are subject to the highest possible standard of care. As with their existing duty under section 50(1), the Scottish Ministers will also be able to delegate their function under new section 50(1A) to the Care Inspectorate or anyone else they consider appropriate.

Choice of procedure

40. In keeping with the Scottish Ministers' existing function under section 50(1) of the 2010 Act, the power conferred by new section 50(1A) will be exercised administratively and, so, will not be subject to any parliamentary procedure.

Section 24(3) – Regulation of care services providing residential accommodation to children (registration of care services)

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

41. Section 24(3) adds a new section 59A to the 2010 Act. Section 59A(2) confers two powers on the Scottish Ministers to prescribe (see the definition of “prescribed” in section 105(1) of the 2010 Act) certain matters in relation to applications for registration of any of (a) a care home service which is to be provided wholly or mainly to children, (b) a school care accommodation service, (c) a secure accommodation service. New section 59A(2)(a) enables the Scottish Ministers to prescribe, by order, such information about cross-border placements as they deem appropriate to be included in an application for registration of these services. New section 59A(2)(b) also enables them to prescribe, by order, the form in which notice of the application is to be given to the persons mentioned in new section 59A(3). Those persons are the relevant local authority and health board who are responsible for children’s services planning under Part 3 of the Children and Young People (Scotland) Act 2014. By virtue of section

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104(1)(c) of the 2010 Act, those order-making powers include the power to make different provision for different purposes.

Reason for taking power

42. Currently, prospective care service providers who wish to register with the Care Inspectorate do not need to provide any information on whether or not they propose to host children on cross-border placements. The power in section 59A(2)(a) enables information to be prescribed which will lead to the Care Inspectorate being able to identify from the outset of the establishment of a new care service whether or not it may host children from other UK jurisdictions. The power in section 59A(2)(b) will allow improved information-sharing at the stage when new services are proposing to register, to ensure that the bodies tasked with children's services planning have early warning of when these services propose to begin to operate. Order-making powers in this area allow for flexibility in order to respond to changing practices regarding applications from establishments proposing to host cross-border placements, or future best practice in how to align with bodies involved in children's service planning practices. The detail relating to the prescribed matters will be the subject of consultation with stakeholders.

Choice of procedure

43. Orders made under new section 59A(2) of the 2010 Act are subject to the negative procedure, by virtue of section 104(3) of that Act. The Government considers that this provides the appropriate level of scrutiny given that the order-making powers relate to procedural matters. It is also in keeping with the procedure that applies to the order-making power in section 59(2)(a) of the 2010 Act, which enables the Scottish Ministers to prescribe other (more general) information to be included in applications for registration of care services.

Section 24(4) – Regulation of care services providing residential accommodation to children (care service requirements)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

44. Section 24(4) adds new subsections (2A) and (2B) to section 78 of the 2010 Act. They expand on the general regulation-making power in section 78(2), which allows the Scottish Ministers to impose on care services any requirements they consider appropriate for the purposes of Part 5 of the 2010 Act. The new provisions expressly enable the Scottish Ministers to use that power, in particular, to impose specific requirements on specific types of care service which provide residential accommodation to children who are subject to cross-border placements. Those care services are: (a) care home services which are provided wholly or mainly to children, (b) school care accommodation services, and (c) secure accommodation services. Any requirements

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imposed by virtue of new section 78(2A) would constitute “relevant requirements” for the purposes of section 64(1)(b) of the 2010 Act. This means that a care service’s failure to comply with any such requirement could result in it being de-registered.

Reason for taking power

45. This power affords the Scottish Ministers the necessary flexibility to impose further, more tailored, requirements on care services which accept or propose to accept cross-border placements. It also enables the Care Inspectorate to take action where these requirements are not adhered to. The landscape is evolving at pace with the development of a National Care Service and the Independent Review of Inspection, Scrutiny and Regulation, but the outcomes that may impact on children’s services are not yet known.

Choice of procedure

46. Regulations made under section 78 of the 2010 Act are subject to the affirmative procedure, by virtue of section 104(2) of that Act, and this provides the appropriate level of scrutiny given the importance of the subject matter.

Section 25 – Cross-border placements: effect of orders made outwith Scotland

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

47. Section 25 amends section 190 of the 2011 Act, which confers a regulation-making power on the Scottish Ministers to make provision for specific non-Scottish orders to have effect in Scotland. Those are orders made by a court in England and Wales, or in Northern Ireland, which appear to the Scottish Ministers to be an equivalent of a CSO. The power enables them to provide for the orders to have effect in Scotland as if they were a CSO. To that end, regulations made under section 190 may apply the Social Work (Scotland) Act 1968 or the 2011 Act to the specified orders with such modifications as are necessary or appropriate.

48. The amendments give the Scottish Ministers greater flexibility in specifying (a) which kinds of non-Scottish order are to have effect in Scotland, and (b) how each specified non-Scottish order is to have effect.

49. Section 25(2)(a) broadens the application of the power. It amends section 190(1) so that the power is no longer limited to CSO-equivalent orders. Instead, it will cover more generally non-Scottish orders which relate to the care, protection or supervision of a child. Section 25(2)(c) extends the definition of “non-Scottish order” in section 190(3)

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so that it includes arrangements made by virtue of any enactment with the approval of a court in England and Wales or in Northern Ireland.

50. Currently, under section 190(2)(a), the Scottish Ministers may specify the circumstances in which, and the purposes for which, non-Scottish orders are to have effect in Scotland. Section 25(2)(b) adds a new sub-paragraph (iii) to that provision so that they can also specify the conditions on which such orders are to have effect.

51. Section 25(2)(b) makes a number of other changes to section 190(2). It adds a new paragraph (aa). This enables the Scottish Ministers to provide that a specified non-Scottish order is to have effect as if it were a CSO or an interim CSO, or is to have whatever other effect they specify as being appropriate in the circumstances. As a result of this, it extends the power in section 190(2)(b) to apply and modify enactments so that it covers any enactment, including the Children (Scotland) Act 1995 as well as the Social Work (Scotland) Act 1968 and the 2011 Act. It also adds a new paragraph (ba), enabling the Scottish Ministers to impose certain kinds of requirement in relation to specified non-Scottish orders. These relate to: the provision and sharing of information; the provision of services needed to support a child who is the subject of a non-Scottish order; and the payment of costs incurred in giving effect to a non-Scottish order. New section 190(2)(ba) also includes the power to make provision as to the enforcement of any such requirements or any condition specified under new section 190(2)(a)(iii).

Reason for taking power

52. There are various types of order that a child may be made subject to elsewhere in the United Kingdom before being placed in an appropriate care establishment in Scotland, all of which will serve different purposes and may require to have different legal consequences. There is a need to ensure that the Scottish Ministers have a power which allows them to make appropriate provision to recognise those orders which currently are not recognised in Scots law. Further policy work is required with other UK administrations to consider the manner in which different orders ought to be recognised and the conditions which should attach to that recognition. Again, the Scottish Ministers need as much flexibility as possible to make different provision in respect of different orders and in specifying the purposes for which orders are to be recognised as a matter of Scots law.

Choice of procedure

53. Regulations made under section 190 of the 2011 Act are subject to the affirmative procedure. The Government continues to be of the view that this provides the most suitable level of scrutiny given the importance and sensitivity of the subject matter.

Section 28 - Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative.

Provision

54. This section provides that the Scottish Ministers may use regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purpose of, in connection with or for giving full effect to the Bill. Any such regulations may modify any enactment, whether primary or secondary legislation.

Reason for taking power

55. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. It is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

56. Without the power to make incidental, supplementary, consequential, transitional, transitory or saving provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter that is clearly within the scope and policy intentions of the original Bill. That would not be an effective use of either the Parliament's or the Government's resources.

57. It is considered that such matters are best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for giving full effect to the Bill.

Choice of procedure

58. Regulations are subject to the affirmative procedure if they textually modify primary legislation (including, if this Bill is passed, the resulting Act). Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this kind, and is considered to provide an appropriate level of scrutiny where there is a proposal to amend legislation.

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Section 31 - Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

59. This section provides that the Scottish Ministers may make regulations to bring the provisions of the Bill, with the exception of this section and sections 28, 29 and 32 (which will come into force on the day after the Bill, if passed, receives Royal Assent), into force on such day as the Scottish Ministers appoint. It also provides that such regulations may include transitional, transitory or saving provision, or make different provision for different purposes.

Reason for taking power

60. It is usual practice for commencement provisions to be dealt with by subordinate legislation, and it is appropriate for those provisions in the Bill not coming into effect on Royal Assent to be commenced at such a time as the Scottish Ministers consider suitable.

Choice of procedure

61. As is usual for regulations relating to commencement, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. This is considered appropriate as the regulations will be making provision for the orderly commencement of provisions that have already been considered and passed by the Scottish Parliament.

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