

# United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill

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## Revised Delegated Powers Memorandum

### Introduction

1. This revised memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.10 of the Parliament's Standing Orders, in relation to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill as amended at Stage 2. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the revised Explanatory Notes and Policy Memorandum for the Bill. Text has been added to, or deleted from, this Memorandum as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the margin.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

### Outline of Bill Provisions

3. The main purpose of the Bill is to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into Scots Law. The UNCRC is the global "gold standard" for children's rights. The approach which the Bill takes is to provide for the highest protection possible for the UNCRC requirements, ensuring that children's rights are respected, protected and fulfilled by all public authorities, within the powers of the Scottish Parliament. The Bill will do this by incorporating the UNCRC into domestic law so that children and their representatives can vindicate their rights in the domestic courts, and ensuring that there is a proactive culture of everyday accountability for children's rights across public services in Scotland.

4. The Bill is in 7 Parts.

5. Part 1 introduces the basic definitions used in the Bill and makes provision for how the UNCRC requirements should be interpreted.

6. Part 2 establishes the duty of public authorities not to act incompatibly with the UNCRC requirements, as defined in section 1, and makes provision about the consequences of any failure to do so.

7. Part 3 contains a range of provisions aimed at promoting transparency in relation to compliance with the duty to not act in a way which is incompatible with UNCRC requirements under section 6.

8. Part 4 deals with legislation's compatibility with the UNCRC requirements, as defined by section 1. In particular, the Part:

- places the Scottish Ministers under a duty, when putting new legislation, or proposed legislation, before the Scottish Parliament to make a statement about its compatibility with the UNCRC requirements;
- provides that certain legislation (old as well as new) is to be interpreted in a way that is consistent with the UNCRC requirements where possible;
- allows a court which finds that a piece of legislation cannot be interpreted consistently with the UNCRC requirements to either strike it down or declare it to be incompatible with the UNCRC requirements.

9. Part 5 makes provision for a system for the courts to consider compatibility questions (in civil courts) and UNCRC compatibility issues relating to the compatibility of legislation with the UNCRC requirements and public authorities' compliance with section 6.

10. Part 6 empowers the Scottish Ministers to change the law, by regulations, in order to cure an incompatibility (or possible incompatibility) with the UNCRC requirements as defined by section 1. It sets out two processes for making such regulations, one that is normally to be followed and an alternative process where there is a need to act more quickly than the normal process would allow.

11. Part 7 contains general and ancillary provisions.

## Rationale for subordinate legislation

12. Section 38 is the general provision on regulation-making powers. Section 38(1) provides that each power of the Scottish Ministers to make regulations under the Bill includes a power to make different provision for different purposes, and to make any incidental supplementary consequential, transitional, transitory or saving provision which Ministers consider appropriate. This ensures that each of the powers in the Bill can operate effectively as required.

13. The Bill contains a number of delegated powers which are explained later in this document. In deciding whether legislative provisions should be specified on the face of the Bill or delegated powers proposed to be exercisable by subordinate legislation, the Scottish Government has had regard to the need to:

- Strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances without the need for primary legislation; and
- Make proper use of valuable Parliamentary time.

14. The relevant provisions are described in detail below. For each provision, the memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power and the purpose of each such provision; and
- The parliamentary procedure (if any) to which the exercise of the power to make subordinate legislation is to be subject, and why it was considered appropriate to make it subject to that procedure (or not make it subject to any such procedure).

## Delegated Powers

### **Part 1 – The UNCRC Requirements**

#### **Section 3 – Power to modify the schedule**

##### **Power conferred on: the Scottish Ministers**

##### **Power exercisable by: regulations made by Scottish statutory instrument**

#### **Parliamentary procedure: affirmative**

#### **Provision**

15. Section 3 gives the Scottish Ministers the power, by regulations, to modify the schedule, which sets out the text of those parts of the Convention and its optional protocols that are comprehended by the label “the UNCRC requirements” (see section 1(2)). By modifying the schedule, the Scottish Ministers can therefore change what UNCRC requirements public authorities are required not to act incompatibly with (see section 6”).

16. The power to modify the schedule may be used, as the Scottish Ministers consider appropriate, to: take account of an optional protocol to the UNCRC; to take account of amendments to the UNCRC or to an optional protocol; or to add provisions of the UNCRC that are not for the time being set out in the schedule.

17. This power is subject to limitations.

18. The power in section 3(1)(a) can only be used to take into account optional protocols which are in force and have been ratified by the United Kingdom. The power in section 3(1)(b) can only be used to take into account amendments that are in force and are binding on the United Kingdom as a matter of international law. These restrictions are necessary because the Bill is seeking to implement the international obligations of the United Kingdom. International conventions and optional protocols only become international obligations of the United Kingdom when they are ratified.

19. In relation to the power in section 3(1)(c), this could only be used to add provisions of the Convention and the first and second optional protocols, which are not for the time being set out in the schedule. It cannot

be used to remove provisions. There is no express requirement that such provisions must be ratified and in force in relation to the United Kingdom because the Convention and first and second optional protocols have already been ratified by the United Kingdom. This power can only be lawfully exercised in respect of any provision which is within the competence of the Scottish Parliament. The intention behind this power is that it could be utilised as and when the legislative competence of the Scottish Parliament changes. This could arise following changes to the Scotland Act 1998 or from a section 30 order. The power will not, and cannot, be used to add provisions to the schedule which are outside of legislative competence.

20. Section 3(5) provides that regulations made under section 3(1) may also allow such consequential modification as the Scottish Ministers consider appropriate of sections 1, 4, 12 and 35 of the Bill. Sections 1, 4 and 12 refer only to the UNCRC and its first and second optional protocols. If, for example, the schedule were modified by regulations to incorporate obligations arising from the third optional protocol (see section 5(4)), sections 1, 4 and 12 would need to be adjusted too in order to refer to that protocol. Section 3(5) enables Scottish Ministers to make such changes to sections 1, 4 and 12 by regulations. It may also be appropriate to include a definition in section 35, so the power extends to that section too.

21. Section 3(5A) requires that before laying draft regulations under section 3(1) the Scottish Ministers must consult such persons as they consider appropriate.

### **Reason for taking this power**

22. The reason for including this power is to ensure that, once in force, the Act can be amended without further primary legislation to recognise any future changes to the content of the UNCRC or the establishment of any additional optional protocols to the UNCRC which the United Kingdom chooses to ratify or the competence of the Scottish Parliament changes in the future. This is one mechanism by which the Bill provides for the maximum protection possible for children's rights within the devolution settlement.

### **Choice of procedure**

23. This power may be used to change the scope of what is required of those public authorities who are obliged not to act incompatibly with the

UNCRC requirements. It is considered that a more detailed level of Parliamentary scrutiny is appropriate for a power of this nature and the power in section 3 is therefore subject to the affirmative procedure. Given that the effect of regulations under section 3 is to modify the UNCRC requirements to which the duties in the Bill apply it is considered that the requirement for consultation in s.3(5A) is appropriate.

## **Section 5 – Power to modify section 4 on ratification of the third optional protocol to the Convention**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative**

### **Provision**

24. Section 5 requires the Scottish Ministers to modify, by regulations, section 4 as they consider appropriate in the event that the United Kingdom ratifies the third optional protocol to the UNCRC. This might be used, for example, to add reference to any parts of the third optional protocol or the protocol's preamble to the material that can be used for interpretative purposes.

25. The third optional protocol allows children to submit a complaint, claiming that their rights have been violated, directly to the CRC, which must consider the complaint and submit views to the State Party. The State Party must give those views due consideration and submit a written response to the CRC on any action taken and envisaged in light of the views and recommendations of the CRC. The CRC is able to receive complaints from children, groups of children or their representatives against any State that has ratified the protocol. The CRC is also able to launch investigations into grave or systematic violations of children's rights and States are able to bring complaints against each other, if they have accepted this procedure.

### **Reasons for taking this power**

26. The Bill cannot incorporate the third optional protocol as it has not yet been ratified by the United Kingdom Government. The Scottish Government believes that the UK should ratify the third optional protocol so that children and young people in Scotland and elsewhere can submit

complaints to the CRC and that communications of the CRC provide an important source of interpretation to courts and public authorities when applying the UNCRC. The reason for including this power is to ensure that, if the UK Government ratifies the third optional protocol of the Convention, the Act can be amended swiftly and without further primary legislation

## **Choice of procedure**

27. The regulations are subject to negative procedure which is considered appropriate. Were the UK Government to ratify the third optional protocol the power under section 3(1), which is subject to the affirmative procedure, could be used to incorporate that protocol into Scots law (by making appropriate amendments to the schedule). The power in section 5 is only concerned with adding to the list of things a court or tribunal may consider when determining a question which has arisen in relation with the UNCRC requirements. This power could only be used in very limited circumstances if the third optional protocol was ratified by the UK Government. On ratification the third optional protocol would become part of the UK's international obligations and so use of the power would be consistent with implementing those obligations. The Scottish Government consider that alerting courts to the fact that they may take certain elements of the third optional protocol into consideration, in those circumstances, would not require a more detailed level of parliamentary scrutiny and the power has therefore been made subject to the negative procedure.

## **Part 2 – Duties on Public Authorities**

### **Section 7(5) – Power to add to the powers of a tribunal to ensure an appropriate remedy**

#### **Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

## **Provision**

28. Section 7(1) provides that a person who claims that a public authority has acted, or proposes to act, in a way which is made unlawful by section 6(1) can bring proceedings against the authority in any civil court or tribunal which has jurisdiction to grant the remedy sought or can rely on the UNCRC requirements concerned in any legal proceedings.

29. Subsection (5) provides a power for the Scottish Ministers to add to the relief or remedies which a particular tribunal may grant if they consider it necessary to do so to ensure that the tribunal can provide an appropriate remedy in relation to an act or proposed act of a public authority which is unlawful as a result of section 6(1). This power may also be used to add to the grounds on which the tribunal may grant a remedy or the orders which the tribunal may make. The Scottish Ministers must exercise this power where they consider it is necessary to ensure that a particular tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1).

30. Section 7(5A) requires that before laying draft regulations under section 7(5) the Scottish Ministers must consult such persons as they consider appropriate.

### **Reason for taking this power**

31. The Scottish Government recognises that it is vital to ensure children and young people have access to effective remedies for breaches of their rights. This power ensures that the Scottish Ministers can make provision for additional remedies to be provided quickly and without having to resort to primary legislation where, for example, in a particular circumstance, a tribunal does not have the power to provide a remedy for a breach of children's rights. The provision made in subsection (5) is similar to that in section 7(11) of the Human Rights Act 1998.

### **Choice of Procedure**

32. As this power relates to the powers of tribunals rather than administrative and procedural matters, it is considered that the Parliament should be afforded a high degree of scrutiny and that it is appropriate that it should be subject to the affirmative procedure. Section 7(5A) requires that Scottish Ministers consult such persons as they consider appropriate before exercising the power at section 7(5).

### **Section 16(2) – Power to add to the listed authorities to which the section 15 duty applies**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

## **Provision**

33. The power provides that the Scottish Ministers may, by regulations, modify section 16(1), which lists the public authorities to which the duty in section 15 apply. This could be by adding a public authority or description of public authority, removing an entry or modifying an entry listed in it. Only bodies which are public authorities may be added to the list (for the meaning of public authority, see paragraph 27 above and sections 6(3), (4) and 35 of the Bill).

## **Reason for taking this power**

34. Section 15 replaces the duty in section 2 of the Children and Young People (Scotland) Act 2014 (“the 2014 Act”). It requires the authorities which are listed in section 16 of the Bill to prepare and publish reports every three years on what they have done to comply with the duty in section 6. Section 16 lists the public authorities to which this provision applies. The authorities listed in section 16 are the same as those in schedule 1 of the 2014 Act.

35. The reason for taking this power is so that the Scottish Ministers can amend the list in section 16 which will be useful if any new public authority is created in the future to whom the duty should apply or it is considered that an existing public authority currently not on the list should be added to it. It will also be useful if any of the public authorities in section 16 change their name or cease to exist.

36. The power to amend the list by regulations will give Scottish Ministers flexibility to specify additional persons or amend the list to reflect changed circumstances in the nature or status of specified persons without the need for further primary legislation.

## **Choice of procedure**

37. The regulations are subject to affirmative procedure as it is considered that this power could be used to impose duties on public authorities. A more detailed level of Parliamentary scrutiny would be appropriate in order to ensure an appropriate balance between the desired flexibility to impose such a duty and the Parliament’s ability to scrutinise any additional administrative burden that might be imposed.

## **Part 6 – Remedial Regulations**

### **Section 32(1) – Power to make remedial regulations**

#### **Power conferred on: the Scottish Ministers**

#### **Power exercisable by: regulations made by Scottish statutory instrument**

#### **Parliamentary procedure: Affirmative (except where section 34(6) applies, then negative)**

### **Provision**

38. Section 32(1) gives power to the Scottish Ministers to make remedial regulations in consequence of any provision of affected legislation (see the definition in section 32(5)) or any exercise or purported exercise of functions by the Scottish Ministers, which is or may be incompatible with the UNCRC requirements. Ministers may make such provision as they consider to be necessary or expedient where Ministers consider there are compelling reasons for remedying the incompatibility by making remedial regulations as opposed to taking other action to remedy the incompatibility. The provision made in Part 6 of the Bill is similar to that in Part 6 of the Convention Rights (Compliance) (Scotland) Act 2001 (“the 2001 Act”) which gives Scottish Ministers power to remedy ECHR incompatibilities.

39. Remedial regulations made under section 32(1) may relate to all, or only specific types of, cases to which the power extends. The power may be used to modify any enactment or prerogative instrument or other instruments or documents relating to the exercise or purported exercise of functions by Scottish Ministers. Similar to the 2001 Act, the power can also be used to create criminal offences. Subsection (4) makes provision about the maximum penalties that may be provided for in remedial regulations which reflects the current position on sentences for summary convictions provided for in the 2001 Act. Remedial regulations may make retrospective provision, except where creating a criminal offence or increasing the punishment for a criminal offence. The power may also be used to delegate functions. This power is intended to be capable of being used to address the range of provision which may require to be made in remedial regulations and reflects the provision which may be made using the power in section 12 of the 2001 Act.

40. Section 32(1)(a), (5) and (6) ensure that ‘affected legislation’ captures the same range of enactments which are referred to in section 19 of the Bill.

### **Reason for taking this power**

41. The Bill will ensure that, as far as possible within legislative competence, legislation and practice is compatible with children’s rights and that where this is not the case, incompatibilities are identified and may be remedied. It is important that the Scottish Ministers can act swiftly to remedy incompatibilities or potential incompatibilities in legislation or in relation to the exercise of functions by the Scottish Ministers. The power is not intended to take the place of primary legislation; it is intended to be used in circumstances where there are compelling reasons to take remedial action by making regulations rather than taking any other action.

42. The suite of powers available to Ministers under Part 6 of the 2001 Act have proven to be useful in relation to remedying ECHR incompatibilities or potential incompatibilities. For example, Scottish Ministers made the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 which amended the Agricultural Holdings (Scotland) Act 2003 to remove an incompatibility with ECHR rights identified by the Supreme Court in the case of *Salvesen v Riddell* [2013] UKSC 22. The power in the 2001 Act was also used to remedy potential incompatibilities in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 following a declaration of incompatibility having been made by the Supreme Court in relation to provisions in the Police Act 1997 (as those provisions applied in England and Wales).

43. The Scottish Government considers that equivalent powers are similarly appropriate in relation to the UNCRC requirements. The power may be used where a court has found relevant legislation to be incompatible, or where an exercise of functions by Scottish Ministers has been found to be incompatible. The power may also be used where there is a clear risk of incompatibility and it may be necessary for Ministers to take early preventative action.

### **Choice of procedure**

44. Section 33 sets out the normal procedure for making remedial regulations under section 32. An alternative process is set out by section 34 for urgent situations. Section 33 provides that remedial regulations are

normally subject to parliamentary scrutiny by way of the affirmative procedure. Section 33 provides for additional procedural requirements, beyond those of the usual affirmative procedure. This procedure is similar to the procedure under section 13 of the 2001 Act. Subsection (2) requires the Scottish Ministers to carry out a type of consultation process before laying draft remedial regulations. Before laying draft remedial regulations Scottish Ministers are required to lay before the Scottish Parliament a draft of the proposed remedial regulations and give public notice of the content of the proposed remedial regulations together with a statement of their reasons for proposing to make the regulations. Ministers must invite the public to make comments on the draft within a 60-day comment period and take into account written observations received during that period. Ministers may thereafter lay the draft regulations for approval under the usual affirmative procedure. Subsection (4) requires that, when the draft regulations are laid, Scottish Ministers must also lay before the Parliament a document summarising the comments received during the consultation period and, if the draft regulations being laid before the Parliament differ from the draft of the regulations consulted on, a statement of how they differ and why.

45. Under the section 34 process for urgent cases, remedial regulations can be made where Ministers consider, for reasons of urgency, that remedial regulations should be made without following the usual procedure in section 33. This process is similar to the procedure set out in section 14 of the 2001 Act.

46. The urgent procedure allows Ministers to make remedial regulations where, for reasons of urgency, Ministers consider it is necessary to do so without following the usual procedure under section 33. In these circumstances Ministers may make remedial regulations immediately and thereafter follow the procedural requirements in section 34. Ministers would, as is the case under the usual procedure in section 33, require to give public notice of the content of remedial regulations and invite comments during a 60 day comment period. A statement of Ministers' reasons for making the regulations must be laid when the regulations are laid before the Scottish Parliament. Ministers are also required to have regard to written observations submitted during the 60 day comment period. In addition, Ministers must lay before the Scottish Parliament a summary of the written observations and must also set out any changes to the remedial regulations which Ministers consider appropriate to make. Where Ministers decide to make changes to the regulations, Ministers are

required to make replacement regulations to reflect those changes. The procedure which must be followed for the replacement regulations depends upon the provision being made. Where the regulations revoke the original urgent remedial regulations made under subsection (1), the regulations are subject to the negative procedure. All other replacement regulations are subject to the affirmative procedure. Subsection (8) provides that the original regulations or any replacement regulations cease to have effect if they are not approved by the Scottish Parliament within 120 days of the original remedial regulations being made. The affirmative procedure is considered appropriate, given the nature of the power in section 32(1) and that the urgent procedure allows the power to be used prior to the regulations being laid before the Scottish Parliament. The procedural requirements which must follow the making of remedial regulations under the urgent procedure builds in additional scrutiny and public consultation which is appropriate in the case of regulations made under this urgent procedure.

47. It is considered that, where the power is being used simply to revoke the original regulations made under the urgent procedure, the negative procedure will ensure the appropriate level of scrutiny.

48. These powers and the choice of procedures are modelled on Part 6 of the 2001 Act.

## **Part 7 – Final Provisions**

### **Section 39(1) – Power to make ancillary provision**

#### **Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative if amend primary legislation, otherwise negative**

#### **Provision**

49. Section 39(1) of the Bill confers on the Scottish Ministers a power to make, by regulations, any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, or in connection with, or for giving full effect to, any provision made by, or by virtue of, the Bill. Section 39(2)(b) allows the power to be

used to modify other enactments (including the Act that the Bill will become).

### **Reason for taking this power**

50. As with any new body of law, this Bill may give rise to a need for a range of ancillary provision. For example, consequential provision may be required to make necessary changes to related legislation. The Scottish Government considers the power to make ancillary provision to be necessary to allow for this flexibility and that it is appropriate for the power to extend to the modification of enactments.

51. Without the power to make supplementary, incidental and consequential provision, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with a matter which is clearly within the scope and policy intention of the original Bill. That would not be an efficient use of resources by the Parliament or the Scottish Government.

52. The power, whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, giving full effect to any provision made by, or by virtue of, the Bill.

### **Choice of procedure**

53. Section 39(3) of the Bill provides that regulations made under section 39(1) will be subject to the affirmative procedure if they contain provision which makes textual changes to an Act. Otherwise, they will be subject to negative procedure. This provides the appropriate level of parliamentary scrutiny for ancillary provision and is typical for ancillary powers.

### **Section 40(2) – Commencement**

54. The power to make commencement regulations that was included in section 40(2) of the Bill at introduction was removed by amendment at Stage 2.

55. Sections 35, 38, 39, 40 and 41 will come into force on the day after the Bill receives Royal Assent (section 40(1)).

This document relates to the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (SP Bill 80) as amended at Stage 2

56. All other provisions will come into force at the end of a period of 6 months beginning with the day of Royal Assent (section 40(2)).

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