

LEGISLATIVE CONSENT MEMORANDUM

CHILDREN AND SOCIAL WORK BILL

Background

1. This memorandum has been lodged by John Swinney, Deputy First Minister and Cabinet Secretary for Education and Skills, under Rule 9.B.3.1(c)(ii) of the Parliament's Standing Orders. The Children and Social Work Bill ("the Bill") was introduced in the House of Lords on 19 May 2016. The latest version of the Bill can be found at:

<http://services.parliament.uk/bills/2016-17/childrenandsocialwork.html>

Content of the Bill

2. On introduction, the Bill did not extend to Scotland making provision for areas of children and social work in England and Wales. The Bill has three principal purposes, described on the UK Parliament website as:

- ◆ Improving decision making, and support for looked after and previously looked after children in England and Wales;
- ◆ Enabling better learning about effective approaches to child protection and the wider provision of children's social care in England; and
- ◆ Enabling the establishment of a new regulatory regime specifically for the social work profession in England.

Background

3. As stated, the Bill did not extend to Scotland on introduction. However, amendments tabled on 7 December 2016 extend the Bill to Scotland. The provisions which make the Bill a "relevant" Bill under Chapter 9B of Standing Orders relate to the cross-border placing of children in secure accommodation in England, Wales and Scotland and are considered necessary to deal with a gap in the law which has been identified in relation to the placement of children in secure units in Scotland by local authorities in England and Wales.

4. The legislative gap was identified in a judgment of the Family Division of the High Court of Justice of England and Wales on 12 September 2016, which held that children could not be placed by English or Welsh local authorities in secure accommodation in Scotland under section 25 of the Children Act 1989 ("the 1989 Act"). A number of children have been placed in secure accommodation in Scotland by English local authorities and, given the judgment of the High Court, the UK Government sought to amend the Bill to allow section 25 to extend to Scotland thereby providing a statutory basis to allow cross-border placements to continue. In the interim, the legal basis for such placements is currently being provided for by interim orders of the High Court in England and the Court of Session using its *nobile officium*¹ powers.

¹ The *nobile officium* is the extraordinary equitable jurisdiction vested in the Court of Session. It permits the Court of Session to provide a remedy in cases that are not covered by existing law or legal norms.

Amendments which relate to Scotland

5. The Department for Education, after discussion with the Scottish Government, tabled amendments to the Bill at Committee stage in the Bill's second House (the House of Commons) on 7 December 2016.

6. The amendments tabled make provision in relation to cross-border placements in secure accommodation by introducing a new Schedule to the Bill, which makes various amendments to legislation relating to the placing of children in secure accommodation in England, Scotland and Wales.

7. The new Schedule amends section 25 of the 1989 Act so that it extends to Scotland and allows local authorities in England and Wales to place children in secure accommodation in Scotland. The amendments to section 25 also make technical provision to ensure that orders made under the section in England and Wales are effective and enforceable in Scotland. Sections 168 and 169(1) to (4) of the Children's Hearings (Scotland) Act 2011 are applied so that the police in Scotland have the same powers to enforce orders made by English or Welsh courts under section 25 of the 1989 Act as they would in relation to orders made by courts in Scotland. These powers are necessary to ensure the police can take action if a child were to abscond. The amendments also provide explicit authority to secure accommodation providers in Scotland to restrict a child's liberty in accordance with the terms of a section 25 order. This is simply a technical legal amendment intended to ensure that the order is enforceable in Scotland.

8. The Schedule makes consequential amendments to the Children (Secure Accommodation) Regulations 1991 ("the English 1991 regulations") by extending regulations 10-13 to Scotland, and to the Secure Accommodation (Scotland) Regulations 2013 ("the Scottish 2013 Regulations") by disapplying regulation 5 in relation to a child placed in Scotland under section 25 of the 1989 Act. The amendments relate to the maximum periods that a child can be placed and kept in secure accommodation.

9. In terms of regulation 5 of the Scottish 2013 Regulations, the maximum period without the authority of the children's hearing or the sheriff is an aggregate of 72 hours (whether or not consecutive) in any period of 28 days. This period can be extended by a further period of 24 hours in limited cases where the Principal Reporter has determined that it is necessary for a compulsory supervision order to be made in respect of the child but considers that it would not be reasonably practicable to arrange a hearing within the 72 hour period.

10. There is a similar maximum period specified in regulation 10 of the English 1991 Regulations. Regulations 11 and 12 of those Regulations go on to specify that the maximum period for which a court may (subject to particular rules for children on remand) authorise a child to whom section 25 of the Children Act 1989 applies to be kept in secure accommodation is three months but this can be extended for a further period not exceeding six months at any one time. Extending these provisions to Scotland is considered appropriate to ensure that placements in Scotland under court orders from England and Wales remain subject to the maximum periods relevant to those jurisdictions.

11. Regulation 5 of the Scottish 2013 Regulations is being disappplied in relation to a child placed in Scotland under section 25 of the 1989 Act to ensure that there is not a conflict between the maximum periods provided for in that regulation and the equivalent maximum periods provided for in the English 1991 Regulations.

12. An amendment is also made to the Scottish 2013 Regulations to ensure that the Secretary of State or the Welsh Ministers are provided with relevant records held by the secure unit in Scotland on request (e.g name, date of birth and sex of the child, the statutory provision under which the child is being detained, date and time of placement and dates of reviews undertaken in respect of the child).

Reasons for seeking a legislative consent motion

13. The Scottish Government agrees the amendments are necessary to fill the legislative gap in the law for cross-border secure placements, as identified by the High Court in England and the Court of Session. Whilst a legal basis is currently being provided for such placements on an interim basis by the High Court and Court of Session a permanent legislative solution is required.

14. Allowing local authorities in England and Wales to continue to place children in Scottish secure accommodation also provides valuable flexibility in the secure accommodation estate across the UK and is in the best interests of the children involved. Reciprocal provisions exist which allow Scottish local authorities to place children in England or Wales under compulsory supervision orders.

15. Scottish Government officials and their counterparts in Department for Education have explored a number of possible legislative options, but consider UK primary legislation to be the comprehensive way forward as it was the only way of amending section 25 of the 1989 Act so that it allows English or Welsh courts to place children in Scotland. The Bill provides a timeous solution capable of dealing with both reserved and devolved aspects in a single legislative vehicle.

16. It has been agreed with UK Government officials that consideration will be given to suitable mechanisms for managing the secure accommodation estate during periods of high capacity in future and this will be taken forward by the Scottish Government separately in discussions with the Department for Education.

17. It is the view of the Scottish Government that it is in the best interests of the Scottish people and of good governance that the relevant amendments made to the UK Children and Social Work Bill, as outlined above, which fall within the legislative competence of the Scottish Parliament should be considered by the UK Parliament.

Consultation

18. The amendments are limited and technical in nature so have not been the subject of a public consultation.

Financial implications

19. There will be no costs to the Scottish Government or public authorities as a result of the amendments. There would only be financial/resource implications if cross-border placements were to cease. The withdrawal of English placements would lead to a loss of income to one or more of the Scottish units, with the possibility it would force at least one provider into an early and unplanned closure.

Conclusion

20. The Scottish Government has fully considered the matter of children from England and Wales being placed in secure accommodation in Scotland and the various legislative options available to address the issue. It has concluded that the most effective and practical approach, which is in the best interests of all interested parties and, in particular, the well-being of the young people affected, is to lodge a legislative consent motion in the Parliament to close the legislative gap and allow children to be placed in secure accommodation in Scotland under section 25 of the 1989 Act. The Scottish Government therefore invites the Scottish Parliament to agree the Legislative Consent Motion.

Draft Legislative Consent Motion

21. The draft motion, lodged by the Deputy First Minister and Cabinet Secretary for Education and Skills, is:

“That the Parliament agrees that amendments to the Children and Social Work Bill, introduced in the House of Commons on 7 December, which relate to the cross-border placement of children in secure accommodation, so far as these provisions fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT

December 2016

This Legislative Consent Memorandum relates to the Children and Social Work Bill (UK legislation) and was lodged with the Scottish Parliament on 15 December 2016

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