

Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by Camphill Scotland and by Inclusion Scotland on behalf of Johann Lamont MSP, the member who introduced the Bill. The Memorandum has been prepared in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Disabled Children and Young People (Transitions to Adulthood) (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. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill Provisions

2. The aim of the Bill is to improve outcomes for disabled children and young people in the transition to adulthood. It seeks to achieve this by requiring the Scottish Ministers to introduce, and to implement, a National Transitions Strategy to improve outcomes for disabled children and young people in the transition to adulthood; by requiring the Scottish Ministers to assign to a member of the Scottish Government, or to a junior Scottish Minister, special responsibility in relation to the exercise of their functions under the legislation; and to require local authorities to introduce a transitions plan for each disabled child and young person to ensure that each disabled child and young person receives appropriate care and support before, and during, the transition to adulthood.

3. The Bill consists of 21 sections.

4. The Bill:

- Places a duty on the Scottish Ministers to introduce a National Transitions Strategy;

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- Requires the Scottish Ministers, local authorities, Health Boards, Integration Joint Boards and such other persons as may be prescribed by regulations, to comply with the aims and objectives of the National Transitions Strategy in exercising their functions under this legislation;
- Places a duty on the Scottish Ministers to review the National Transitions Strategy;
- Places a duty on the Scottish Ministers to assign to a member of the Scottish Government, or to a junior Scottish Minister, special responsibility in relation to the exercise of their functions under this Act;
- Places a duty on local authorities to prepare and implement a transitions plan for each disabled child and young person within the local authority area to improve outcomes for each disabled child or young person within the local authority area in the transition to adulthood;
- Enables the Scottish Ministers to issue guidance to local authorities about transitions plans;
- Enables the Scottish Ministers to give local authorities, Health Boards, Integration Joint Boards and such other bodies as may be prescribed by regulations, general or specific directions about transitions plans under this legislation; and
- Requires the Scottish Ministers to submit an annual report to the Scottish Parliament on the progress made by the National Transitions Strategy, and by the transitions plans, in improving transitions to adulthood for disabled children and young people.

Rationale for Subordinate Legislation

5. The Bill contains a number of delegated powers provisions, described in more detail below. The Bill is of a “stand-alone” nature. It does not amend existing legislation, and the powers contained in the Bill are new, with no existing powers being amended or repealed. The powers are explained in detail in the following paragraphs, but in considering if, and how, provision should be set out in subordinate legislation rather than on the face of the Bill, the Member has had regard to—

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- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the core provisions of the Bill, and making proper use of Parliamentary time;
- the relatively better position of the Scottish Ministers when compared with an individual Member in making decisions on the best use of public resources to meet objectives;
- the possible requirement to make further provision over time, as the new legislation establishes itself, to ensure that where a need is identified to address practical matters of detail, or to make other refinements so as to assist the effective operation of the Bill, or where other unexpected circumstances arise which require a legislative solution, then these can be readily taken forward by means of subordinate legislation;
- allow detailed administrative arrangements to be kept up to date within the basic structures set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

6. The delegated powers conferred by the Bill relate to matters where, due to their nature, a flexible approach is needed. It would, therefore, be appropriate to address these matters through subordinate legislation.

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 – Duties to Comply with National Transitions Strategy

Power Conferred On:	The Scottish Ministers
Power Exercisable By:	Regulations Made by Scottish Statutory Instrument
Parliamentary Procedure:	Affirmative

Provision

8. The Bill places a duty on the Scottish Ministers to prepare, publish and implement a strategy in relation to improving transitions to adulthood for children and young people with a disability (“the National Transitions Strategy”). Section 4(1) states that the persons listed in section 4(2) must, in exercising their functions under the legislation, comply with the National Transitions Strategy. Section 4(2) gives power to the Scottish Ministers to add, by regulations, to the list of persons who must comply with the National Transitions Strategy.

Reason for Taking Power

9. The Bill allows for the National Transitions Strategy to be reviewed and, if necessary, to be revised. Against this background, the Scottish Ministers may, after the Bill has received Royal Assent, decide it is necessary to place duties on other persons, in addition to those currently listed in section 4(2), to comply with the National Transitions Strategy in exercising their functions under the legislation. The Member believes that flexibility is, therefore, required in relation to adding to those persons listed in section 4(2), and that the best way to achieve this is by conferring the power on the Scottish Ministers to add to the list of persons in section 4(2) by regulations.

10. Section 4(2) is linked with the provisions in section 8, which give the Scottish Ministers the powers to prescribe by regulations duties on local authorities, Health Boards, Integration Joint Boards and such “other persons as they consider appropriate” in relation to transitions plans. In this respect, if the Scottish Ministers decided to use their powers in section 8 to place duties on “such other persons as they consider appropriate” in relation to transitions plans, then the powers in section 4(2) could be used to add those other persons to the list of those who, in exercising their functions under the legislation, must comply with the National Transitions Strategy.

Choice of Procedure

11. The Member believes that any regulations introduced under section 4(2) should require the level of parliamentary scrutiny attached to the affirmative procedure, as the regulations could be used to place statutory duties on persons not already listed in section 4(2).

Section 7 – Duty to Introduce a Transitions Plan

Power Conferred On: The Scottish Ministers

**Power Exercisable By: Regulations Made by Scottish
Statutory Instrument**

Parliamentary Procedure: Affirmative

Provision

12. The Bill requires a local authority to prepare and implement a transitions plan for each child and young person with a disability within the local authority area to improve outcomes in their transition to adulthood. Section 7(4) provides that the transitions plans shall remain in place until the child reaches their twenty sixth birthday, or such higher age as may be prescribed by regulations, or until the transitions plan is ended under section 12(6)(c).

Reason for Taking Power

13. The Bill allows for transitions plans to remain in place until a young person's twenty sixth birthday or the plan is brought to an end, but allows the Scottish Ministers to extend, by regulations, the age limit for transitions plans to remain in place beyond a young person's twenty sixth birthday. As transitions plans are put in place and implemented it may be found necessary to ensure they remain in place beyond young people's twenty sixth birthdays. It is suggested that the Scottish Government might, for example, raise the upper age limit if evidence emerges highlighting that disabled young people would benefit from transitions planning support beyond their 26th birthday. The Member, therefore, believes that flexibility is required in relation to the upper age limit for keeping transitions plans in place. This can be provided by conferring the power on the Scottish Ministers, by regulations in section 7(4)(a), to raise the upper age limit for transitions plans remaining in place beyond the age of twenty six.

Choice of Procedure

14. The Member believes that any regulations introduced to increase the upper age limit for transitions plans remaining in place could have a significant impact upon disabled children and young people, and upon local authorities and other bodies and that this would require the level of parliamentary scrutiny attached to the affirmative procedure.

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Section 8 – Other Duties

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish
Statutory Instrument
Parliamentary Procedure: Affirmative

Provision

15. Section 8 of the Bill states that the Scottish Ministers may by regulations place new duties on local authorities, Health Boards, Integration Joint Boards, and on such other persons as they consider appropriate, in relation to a transitions plan.

Reason for Taking Power

16. After the Bill receives Royal Assent the Scottish Ministers may decide to exercise the powers in section 8 to place new duties on local authorities, Health Boards, Integration Joint Boards, and on such other persons as they consider appropriate, in relation to a transitions plan. The Scottish Ministers may reach the conclusion that such duties are required, as a result of, for example, issues emerging while they have been exercising their statutory duty to keep under review the progress being made on achieving the aims and objectives of the National Transitions Strategy. The Scottish Ministers will also have a statutory duty under section 16 of the Bill to publish an annual report, and to lay it before the Scottish Parliament, outlining the progress made by the National Transitions Strategy, and by the transitions plans, in improving transitions to adulthood for disabled children and young people in that year. As part of that process, the Scottish Ministers, in consultation with its stakeholders, may conclude that it is necessary to place new duties on local authorities, Health Boards, Integration Joint Boards, or on any such other persons they consider appropriate, in relation to transitions plans. This can be achieved by conferring the power on the Scottish Ministers in section 8 of the Bill to introduce these duties through regulations.

Choice of Procedure

17. The Member believes that any regulations introduced to place new statutory duties on local authorities, Health Boards, Integration Joint Boards, or on any such other persons they consider appropriate, in relation to transitions plans, would require the level of parliamentary scrutiny attached to the affirmative procedure. The placing of new statutory duties

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on specific bodies or persons could potentially have a significant impact on the activities and resources of the latter. The Member, therefore, believes that the scrutiny provided by the affirmative procedure is necessary to ensure that proper consideration and attention is given to these new duties. This would include assessing the appropriateness of the type of duties proposed, and the potential impact of the duties on these bodies and persons.

Section 10 – Contents of a Transitions Plan

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish
Statutory Instrument
Parliamentary Procedure: Negative

Provision

18. Section 10(1) outlines what must be in a transitions plan, and section 10(2) provides that the Scottish Ministers may by regulations make provision in relation to such other information which is, or is not, to be contained in a transitions plan, and to the form of a transitions plan.

Reason for Taking Power

19. Section 10(1) specifies what must be in a transitions plan, and section 10(2)(a) enables the Scottish Ministers to add, by regulations, to the information which is to be included in transitions plans. This would be any additional information which the Scottish Ministers consider relevant to transitions plans. Section 10(2)(a) also provides that the Scottish Ministers may, by regulations, specify the information which is not required for transitions plans. Section 10(2)(b) provides that the Scottish Ministers may also, by regulations, specify the form which transitions plans should take. This will future proof transitions plans by ensuring the Scottish Ministers can, by exercising the powers in section 10(2), add information requirements to reflect any new developments impacting upon disabled children and young people, and their transitions to adulthood. This could be as a result of issues which emerge after the Bill receives Royal Assent, such as evidence drawn from the experience of disabled children and young people or other stakeholders highlighted during, for example, the consultation on the National Transitions Strategy. The Scottish Ministers' exercise of these powers will help to ensure that a consistent approach is taken by local authorities to the contents, and form, of transitions plans.

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Promoting a consistent approach by local authorities will significantly benefit disabled children and young people in the transition to adulthood.

Choice of Procedure

20. The regulations to be made under this power are of a procedural nature and as such the negative procedure is considered to provide an appropriate level of Parliamentary scrutiny.

Section 11 – Preparation of a Transitions Plan

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish Statutory Instrument

Parliamentary Procedure: Negative

Provision

21. Section 11(1) provides that a local authority must, in preparing a transitions plan under section 7(1), in so far as it is reasonably practicable, ascertain and have regard to the views of various persons. These include, for example, the child or young person with a disability, the parents or other carers, or legally appointed guardian, of the child or young person with a disability, any advocate or support agency instructed to act on behalf of the child or young person, any other local authority or persons providing care and support under the transitions plan, and such other persons as the local authority considers appropriate. Local authorities will also be required to ascertain, and to have regard to, the views of such other persons as the Scottish Ministers may prescribe by regulations.

Reason for Taking Power

22. The Scottish Ministers' exercise of these powers will help to ensure that a consistent approach is taken by local authorities to those consulted during the preparation of transitions plans. Promoting a consistent approach by local authorities will significantly benefit disabled children and young people in the transition to adulthood by ensuring that significant people in their lives are able to help shape and inform transitions plans. The power, therefore, allows the flexibility to determine the relevant consultees, and enables the list of specified persons to be amended from time to time if required.

Choice of Procedure

23. The regulations to be made under this power are of a procedural nature and as such the negative procedure is considered to provide an appropriate level of Parliamentary scrutiny.

Section 12 – Management of a Transitions Plan

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish Statutory Instrument

Parliamentary Procedure: Negative

Provision

24. Section 12(1) of the Bill requires a local authority to keep under review the transitions plans of each disabled child and young person within the local authority area. Section 12(3) requires the local authority, as part of the review process, to consult various persons. These include, for example, the child or young person with a disability, the parents, legally appointed guardian or other carers of the disabled child or young person, any advocate or support agency instructed to act on behalf of the child or young person, any other local authority or persons providing care and support under the transitions plan, and such other persons as the local authority considers appropriate. Local authorities will also be required to ascertain, and to have regard to the views of such other persons, as the Scottish Ministers may prescribe by regulations.

Reason for Taking Power

25. The Scottish Ministers' exercise of these powers will help to ensure that a consistent approach is taken by local authorities to those consulted during the review of transitions plans. Promoting a consistent approach by local authorities will significantly benefit disabled children and young people in the transition to adulthood by ensuring that significant people in their lives are able to contribute to the review of their transitions plans. The power, therefore, allows the flexibility to determine the relevant consultees, and enables the list of specified persons to be amended from time to time if required.

Choice of Procedure

26. The regulations to be made under this power are of a procedural nature and, as such, the negative procedure is considered to provide an appropriate level of Parliamentary scrutiny.

Section 13 – Dispute Resolution

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish Statutory Instrument

Parliamentary Procedure: Affirmative

Provision

27. The Bill gives the Scottish Ministers powers under section 13 to make provision by regulations about the resolution of disputes concerning a transitions plan. These would include, for example, disputes arising from the preparation of, or the contents of, or the management of or the delivery of a transitions plan.

Reason for Taking Power

28. Section 13 is intended to provide that a single dispute resolution regime will apply to resolving disputes relating to transitions plans. This will help to ensure that a consistent approach is taken to dispute resolution in relation to transitions plans across Scotland.

29. The Bill is a standalone piece of legislation, and will introduce transitions plans on a statutory basis. It is vital that the Bill introduces a dispute resolution regime, which will help to resolve disputes relating to transitions plans. The Scottish Government will want to consider the interests of all stakeholders in transitions plans in developing the dispute resolution framework, including the interests of disabled children and young people. Developing this framework will, therefore, require a degree of flexibility. In this respect, the regulation-making power in section 13 will provide the Scottish Ministers with the flexibility to prescribe, by regulations, the procedure for dispute resolution in relation to transitions plans. The power will also afford greater flexibility to modify the dispute resolution regime should the need arise in the light of developments arising from the new legislative requirements for transitions plans to be prepared and

implemented. This power will allow the Scottish Ministers some flexibility to make necessary changes to the procedures as required.

Choice of Procedure

30. The Member believes that the regulations which will introduce the dispute resolution regime for transitions plans, and for transition planning, require the level of parliamentary scrutiny attached to the affirmative procedure. The Member believes this is important because the Bill is a standalone piece of legislation, and the dispute resolution regime introduced by the regulations will outline arrangements tailored to resolve disputes relating to transitions plans. The Member also believes this procedure will give the Parliament an appropriate degree of scrutiny to consider if the interests of all stakeholders in relation to transitions plans, and in particular the interests of disabled children and young people, have been taken into account in developing the dispute resolution framework.

Section 13 – Dispute Resolution

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish
Statutory Instrument
Parliamentary Procedure: Affirmative

Provision

31. Section 13 also provides that the dispute resolution provisions would relate to disputes between any local authority or any other bodies or persons as may be prescribed by regulations, and any disabled child or young person, or their parents or other carers or their guardian.

Reason for Taking Power

32. The Scottish Ministers' exercise of these powers under section 13 will help to ensure that a consistent approach is taken within the dispute resolution framework to those who can rely on the framework to resolve disputes relating to transitions plans, and to transitions planning. Promoting a consistent approach will ensure that more disputes are resolved, and that disputes can be resolved efficiently and timeously. This, in turn, will help to reduce the levels of stress and anxiety currently experienced by many disabled children and young people and their families during the children's and young people's transition to adulthood, exacerbated when disputes

arise with local authorities and other agencies about the types, and levels, of care and support that the children and young people require before, and during, the transition to adulthood.

Choice of Procedure

33. The Member believes that the regulations which will add new bodies or persons to those which will be subject to the dispute resolution provisions in the Bill relating to transitions plans, and to transition planning, require the level of parliamentary scrutiny attached to the affirmative procedure. The Member believes this is important because the Bill is a new, standalone piece of legislation, and will be supported by a dispute resolution regime introduced by the regulations. The dispute resolution regime introduced by the regulations will outline arrangements tailored to resolve disputes relating to transitions plans and to transitions planning. The Member believes it is important that the affirmative procedure is used to ensure the Parliament has an opportunity to consider if it would be appropriate for additional bodies and persons to be subject to this dispute resolution regime. It will also provide the Parliament with an opportunity to consider whether or not specific bodies and persons should be subject to this regime, after taking into account the merits, including the advantages and disadvantages, of doing so.

Section 14 – Guidance

Power Conferred On: The Scottish Ministers
Power Exercisable By: Guidance
Parliamentary Procedure: None

Provision

34. Section 14(1) provides that the Scottish Ministers may issue guidance about transitions plans to local authorities, Health Boards, Integration Joint Boards and to such other bodies as may be prescribed by regulations. Before issuing guidance under this section, the Scottish Ministers must consult such persons as they consider appropriate.

Reason for Taking Power

35. The Member considers it would be appropriate for the Scottish Ministers to issue guidance to local authorities, Health Boards, Integration Joint Boards and to such other bodies as may be prescribed by regulations, which would benefit from guidance relating to transitions plans, and to

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transition planning. The member believes this power would give the Scottish Ministers flexibility, and enable them to respond appropriately to new developments. In this respect, these additional bodies, to whom guidance should be issued, could be identified after the Bill receives Royal Assent, and as a result of evidence drawn from the experience of disabled children and young people or other stakeholders highlighted during, for example, the consultation on the National Transitions Strategy.

Choice of Procedure

36. As guidance does not have the force of law, requiring the Parliament to scrutinise guidance would not be the best use of parliamentary time.

Section 14 – Guidance

Power Conferred On:	The Scottish Ministers
Power Exercisable By:	Regulations Made by Scottish Statutory Instrument
Parliamentary Procedure:	Affirmative

Provision

37. Section 14(2) of the Bill outlines the power, by regulations, to prescribe other bodies to whom guidance can be issued in relation to transitions plans.

Reason for Taking Power

38. The Member considers it would be appropriate for the Scottish Ministers to add, by regulations, to the list of bodies and persons in section 14(2) who must have regard to any guidance issued to them by the Scottish Ministers in relation to transitions plans. The member believes this power would give the Scottish Ministers flexibility, and enable them to respond appropriately to new developments. In this respect, the additional bodies, who must have regard to any guidance issued to them by the Scottish Ministers could be identified after the Bill receives Royal Assent, and as a result of evidence drawn from the experience of disabled children and young people or other stakeholders highlighted during, for example, the consultation on the National Transitions Strategy.

Choice of Procedure

39. The Member believes that any regulations introduced to add to the bodies which must have regard to the guidance about transitions plans would require the level of parliamentary scrutiny attached to the affirmative procedure. These additional bodies would have to have regard to this guidance, which could potentially have a significant impact upon the latter's activities and resources. The Member, therefore, believes that the scrutiny provided by the affirmative procedure is necessary to ensure that proper consideration and attention is given to these new duties. This would include assessing the appropriateness of the type of duties proposed, and the potential impact of the duties on these bodies.

Section 15 – Directions

Power Conferred On: The Scottish Ministers

Power Exercisable By: Directions

Parliamentary Procedure: None

Provision

40. Section 15(1) provides that the Scottish Ministers may issue directions about transitions plans to local authorities, Health Boards, Integration Joint Boards and to such other bodies as may be prescribed by regulations.

Reason for Taking Power

41. The Member considers it would be appropriate for the Scottish Ministers to issue directions about transitions plans to local authorities, Health Boards, Integration Joint Boards and to such other bodies as may be prescribed by regulations. The member believes this power would give the Scottish Ministers flexibility, and enable them to respond appropriately to new developments, and to ensure a measure of consistency of approach to transitions plans and to transitions planning.

Choice of Procedure

42. As the power is to be used to address specific and general circumstances relating to the operation and implementation of transitions plans, an administrative direction-making power of the Scottish Ministers rather than a legislative power would be appropriate. Parliamentary

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scrutiny is not considered to be necessary or appropriate. Accordingly, no parliamentary procedure is attached to the exercise of this power.

Section 15 – Directions

Power Conferred On: The Scottish Ministers
Power Exercisable By: Regulations Made by Scottish
Statutory Instrument
Parliamentary Procedure: Affirmative

Provision

43. Section 15(1) enables the Scottish Ministers to add, by regulations, to those bodies to whom the Scottish Ministers may issue directions about transitions plans. Section 15(3) provides that local authorities, Health Boards, Integration Joint Boards, and any such other bodies as may be prescribed by regulations, must comply with any directions under section 15(1).

Reason for Taking Power

44. The member believes this power would give the Scottish Ministers flexibility, and enable them to respond appropriately to new developments. In this respect, the additional bodies, to whom directions might be issued, could be identified after the Bill receives Royal Assent, and as a result of evidence drawn from the experience of disabled children and young people or other stakeholders highlighted during, for example, the consultation on the National Transitions Strategy.

Choice of Procedure

45. Section 15(1) gives the Scottish Ministers the power, by regulations, to add to those bodies to whom directions may be issued. These regulations should require the level of parliamentary scrutiny attached to the affirmative procedure. The Member believes it is important that the Parliament has this higher level of scrutiny over whether it is appropriate to add specific new bodies or persons to those outlined in section 15(1), as the instructions contained in any directions will be legally binding orders. The use of the affirmative procedure would enable the Parliament to consider if it was appropriate for the Scottish Ministers to add additional bodies by regulations to those bodies in section 15(1) to whom they can issue directions. Any additional bodies will have to comply with

general or specific directions issued to them by the Scottish Ministers, and the affirmative procedure will, therefore, ensure the Parliament is able to assess whether or not it is appropriate and proportionate for a new body to be added to those to whom directions can be issued by the Scottish Ministers.

Section 17 – Ancillary Provisions

Power Conferred On: The Scottish Ministers

**Power Exercisable By: Regulations Made by Scottish
Statutory Instrument**

**Parliamentary Procedure: Affirmative If Amending an Act,
Otherwise Negative**

Provision

46. Section 17 provides the Scottish Ministers with a regulation making power to make any incidental, supplementary, consequential or transitory provision that they consider appropriate for the purposes of, in connection with, or for giving full effect to this Bill.

Reason for Taking Power

47. This power is necessary to allow flexibility to address circumstances that may arise in light of the experience of the operation of the legislation. This is particularly relevant as the legislation will introduce new measures to improve outcomes for disabled children and young people in the transition to adulthood. These include the introduction of a National Transitions Strategy, and of statutory transitions plans for disabled children and young people.

Choice of Procedure

48. Regulations made under section 17 which contain a provision which adds to, omits or replaces any part of an Act are subject to the affirmative procedure. Otherwise, regulations made under section 17 are subject to the negative procedure. This approach is normal for ancillary powers of this type.

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