

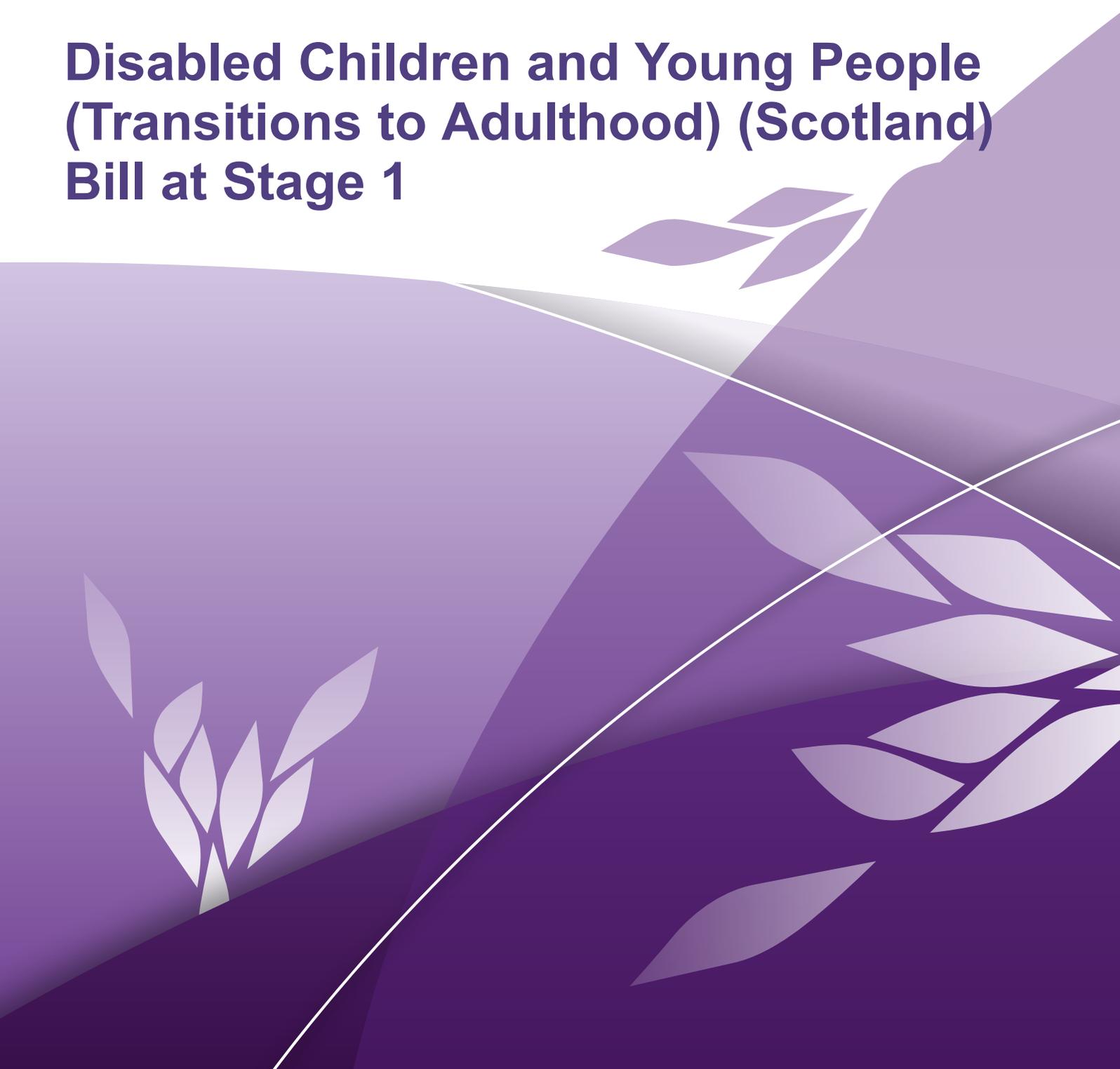


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 8 November and 13 December 2022, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill (“the Bill”) at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#)

Overview of the Bill

3. The Member's Bill was introduced by Pam Duncan-Glancy MSP on 20 April 2022. The lead Committee is the Education, Children and Young People Committee.
4. The stated purpose of the Bill is to improve outcomes for disabled children and young people in their transition to adulthood. The Policy Memorandum for the Bill states that the Bill 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 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”.

Delegated Powers

5. The Bill confers 11 powers to make subordinate legislation, one power to make directions, and one power to issue guidance on the Scottish Ministers.
6. The Member in charge has produced a [Delegated Powers Memorandum](#) ("DPM") which sets out its reasons for taking the delegated powers in the Bill and for the procedures chosen. Comment on the powers and a suggested course of action for the Committee is set out below.
7. At its meeting on 8 November 2022, the Committee was content with the following delegated powers:
 - Section 4 – Duties to comply with National Transitions Strategy
 - Section 7 – Duty to introduce a transitions plan
 - Section 8 – Other duties
 - Section 10 – Contents of a transitions plan
 - Section 11 – Preparation of a transitions plan
 - Section 12(3)(e) - Management of a transitions plan
 - Section 12(7) – Management of a transitions plan
 - Sections 13 – Dispute resolution
 - Sections 14(1)(f) – Guidance (power to prescribe such other persons who must have regard to guidance issued under section 14)
 - Section 15 – Directions
 - Section 17 – Ancillary provision
8. It did, however agree to write to the Member in charge to raise questions in relation to the following regulation-making power:
 - Section 14(1) - power to issue guidance.
9. On receipt of the response from the Member in charge, the Committee reconsidered this regulation-making power at its meeting on 13 December 2022.
10. At the meeting on 13 December, the Committee also considered correspondence received from the Scottish Government where it offered its view on the point raised in the Committee's letter to the Member in charge in relation to guidance issued under Section 14.
11. A copy of all correspondence can be found in the **Annex**.
12. The issue considered by the Committee in relation to this power, together with its recommendation, is set out below.

Sections 14(1) – Guidance

Power conferred on: the Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: none

Provision

13. Section 14(1) of the Bill provides that the Scottish Ministers may issue guidance about transitions plans to local authorities, Health Boards, Integration Joint Boards, Further Education Institutions, Higher Education Institutions and to such other bodies as may be prescribed by regulations. Such bodies must have regard to the guidance. Before issuing guidance under this section, the Scottish Ministers must consult such persons as they consider appropriate.
14. Guidance issued under section 14 would not be subject to any parliamentary procedure.

Committee consideration

15. The Committee asked the Member in charge whether she considered that, given that the bodies would be expected to follow the guidance in order to meet their duties under the Bill and whether it would be appropriate that the Parliament had some oversight on the content of the guidance, via the negative procedure.
16. In her response, the Member in charge indicated her expectation that those prescribed would have regard to such guidance, and would be expected to follow it in order to meet their duties under the Bill. She agreed that the negative procedure would be appropriate level of parliamentary scrutiny and indicated that she would be willing to lodge an amendment to this effect.
17. However, in its response to the Committee's letter to the Member in charge, the Scottish Government questioned the appropriateness of making guidance issued under Section 14 of the Bill subject to the negative procedure as it stated that this is a procedure designed to ensure appropriate parliamentary scrutiny of subordinate legislation.
18. The Scottish Government stated its view that guidance is not subordinate legislation and that it does not consider the legal duty to have regard to guidance may only be departed from under “exceptional” circumstances.
19. In its consideration of the power, the Committee noted that it would not always be appropriate to subject a power to issue guidance to the negative procedure, as guidance can be lengthy, changeable and often supplements detailed provision made on the face of the Bill. However, it acknowledged that where persons are expected to follow guidance, it could be said that such guidance is legislative in character and therefore it is appropriate that it is subject to parliamentary scrutiny. It considered, therefore, that this is one example where the power to issue guidance should be subject to parliamentary scrutiny.

20. **The Committee welcomes the Member's response and commitment to lodging an amendment and calls on the Member to lodge an amendment that would require the Scottish Ministers to issue guidance by regulations subject to the negative procedure in section 14(1) of the Bill.**

Annex

14 November 2022, Letter from the Committee to Pam Duncan-Glancy MSP

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on 8 November and seeks an explanation of the following:

Sections 14(1) – Guidance

Power conferred on: the Scottish Ministers

Power exercisable by: Guidance Parliamentary procedure: none

As you are aware, Section 14(1) provides that the Scottish Ministers may issue guidance about transitions plans to local authorities, Health Boards, Integration Joint Boards, Further Education Institutions, Higher Education Institutions and to such other bodies as may be prescribed by regulations. Before issuing, varying or revoking guidance under this section, the Scottish Ministers must consult such persons as they consider appropriate. However, guidance issued, varied or revoked under section 14 would not be subject to any parliamentary procedure.

The Delegated Powers Memorandum indicates that requiring the Parliament to scrutinise guidance would not be the best use of parliamentary time, as it does not have the force of law. However, prescribed persons “must have regard to” such guidance and such guidance will inform prescribed persons as to how they will be expected to meet their duties under section 7 of this Bill.

The Committee considers that the guidance issued will be an important measure for the practical implementation of the Bill since those people prescribed in the Bill to have regard to the guidance will be expected to follow it, unless there are exceptional reasons for not doing so.

The Committee therefore considers it may be appropriate that there should be some parliamentary oversight over the content of such guidance and that the negative procedure could be appropriate in these circumstances.

The Committee asks whether you agree that those prescribed to have regard to such guidance will be expected to follow it in order to meet its duties under the Bill, and therefore the negative procedure could allow an appropriate level of parliamentary scrutiny in these circumstances?

I would be grateful if you could please email your response to dplr.committee@parliament.scot by **Wednesday, 23 November 2022**. The Committee will then consider your response at a future meeting and report on the delegated powers in the Bill to the lead committee.

1 December 2022, Pam Duncan-Glancy MSP responded:

Thank you for your letter of 14th November 2022.

In terms of the point raised by the committee about the parliamentary scrutiny of the guidance I would respond as follows:

1. My expectation is that those prescribed will have regard to such guidance, and will be expected to follow it in order to meet their duties under the Bill; and
2. I would agree that the negative procedure would allow an appropriate level of parliamentary scrutiny for the guidance provisions.
3. I would consider amending the Bill to reflect this, and will speak to the legislative team about whether or not I can amend the Bill now, or if I will need to table an Amendment to the Bill at Stage 2.

9 December 2022, letter from the Scottish Government

I note the Committee's letter dated 14 November 2022 to Pam Duncan-Glancy MSP in relation to the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill. While it is of course for the Member in charge of the Bill to respond to the Committee's correspondence, it might be helpful for the Committee to receive the Scottish Government's view on the point raised in the letter too.

The Committee's letter appears to overstate the extent of a legal duty to "have regard" to guidance issued by the Scottish Ministers. It certainly requires those on whom the duty is imposed to consider the guidance, but it does not require it to be considered as the only or top priority, which may only be departed from in "exceptional" circumstances.

There does not appear to be anything out of the ordinary about the guidance that may be issued under section 14 of the Bill, or about the manner in which the power is to be exercised, which would render it necessary to make it subject to parliamentary procedure.

In the Scottish Government's view, it would be inappropriate to make guidance issued under section 14 of the Bill subject to the negative procedure. This is a procedure designed to ensure appropriate parliamentary scrutiny of subordinate legislation. Guidance is not subordinate legislation, as is clear from section 37 of the Interpretation and Legislative Reform (Scotland) Act 2010 (read with section 27 and the definition of "subordinate legislation" in schedule 1), and Rule 9.3.3B of the Standing Orders of the Scottish Parliament.

I would also highlight other existing approaches to enable parliamentary scrutiny of guidance. For example, the laying of draft guidance before the Scottish Parliament in advance of it being finalised or the requirement for the Scottish Ministers to lay a copy of the guidance before the Parliament.

I hope that this letter is of some assistance to the Committee, and I look forward to reading your Stage 1 report (and that of the Education, Children and Young People Committee) in due course.

