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SPICe Briefing Children and Young People (Scotland) Bill

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This paper considers the main provisions in the Children and Young People (Scotland) Bill and provides brief policy and legislative context for some key areas.



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EXECUTIVE SUMMARY

The Children and Young People (Scotland) Bill makes provisions over a wide range of children's services policy. The following summarises these together with expected commencement dates.

In relation to children's rights the Bill will:

- require Scottish Ministers and public bodies listed in Schedule 1 to issue reports on how they have taken the UNCRC into account (Part 1), from 2015.
- enable the Scottish children's commissioner to undertake investigations into cases of individual children (Part 2), from 2016.

In relation to **Getting it Right for Every Child** (GIRFEC), from 2016, the Bill will:

- require local authorities and health boards to develop joint children's services plans, in co-operation with a range of other service providers (Part 3), from
- require a 'named person' for every child, including duties for public bodies listed in Schedule 2 to share information with the 'named person' (Part 4)
- require a 'child's plan' where targeted intervention is necessary (Part 5)
- create a statutory definition of 'wellbeing' (Part 13)

Extending free pre-school from 475 hours to 600 hours a year of **early learning and childcare** for all 3 and 4 year olds and two year olds who have been 'looked after' or have a kinship care residence order (Part 6), from 2014.

In furthering support for looked after children, care leavers, early intervention, kinship carers (from 2015) the Bill will:

- create a statutory definition of '**corporate parenting**,' applying it to organisations listed in Schedule 3 and requiring them to develop plans and issue reports (Part 7)
- increase the age limit for local authority support for **care leavers** (Part 8)
- require local authorities to provide **counselling** services to certain families (Part 9)
- require local authorities to provide assistance to certain **kinship carers** who have or are applying for residence orders (Part 10)

Other changes are expected to apply from 2014. These include:

- putting the **Scottish Adoption Register** into statute (Part 11),
- extending the time Ministers have to decide whether to 'call in' a **school closure** decision (with further changes expected on school closures at stage 2)
- requiring local authorities to provide administrative support to children's hearings' **Area Support Teams** and removing the requirement for local authority consent to their creation.
- ensuring that the Criminal Procedure (Scotland) Act 1995 gives the same rights of appeal against a **secure accommodation order** as is provided for in the Children's Hearings (Scotland) Act 2011

The financial memorandum estimates total financial costs of £139m in the first full year of operation which will be 2016/17. £128m of this falls to local authorities, with the provisions to extend 'early learning and care' being the most costly element. The issues which have received the most comment to date include early learning and care and provision for a 'named person'.

INTRODUCTION

The Bill is in 13 parts and covers a wide range of children's policy. It was introduced by Alex Neil MSP, Cabinet Secretary for Health and Wellbeing on 17 April 2013 and the Education and Culture Committee is the lead committee. The Bill covers four major themes

- Children's rights (parts 1 and 2)
- Getting it Right for Every Child¹ (GIRFEC) (parts 3, 4, 5 and 13)
- Early Learning and Childcare (part 6) and,
- 'Looked After'² children (parts 7 to 11)

Other changes (part 12) include changes to children's hearings and secure accommodation appeals. As introduced, the Bill also includes a minor change to the school closure process although additional changes are expected at stage 2. There will be consultation on this over summer 2013 (Scottish Parliament 2013a).

There was originally to have been two bills. A consultation on a children's rights bill was issued in September 2011 (Scottish Government, 2011). A consultation on a single bill, incorporating the children's rights provisions as well as wider policy issues ran from July to September 2012 (Scottish Government, 2012a).

The policy context for the different parts of the Bill is in many cases extensive and complex. The Bill is part of a range of policies that have developed over a number of years in relation to kinship care, care leavers, integrated services, pre-school education and Getting it Right for Every Child. In all of these areas the Scottish Government has stated its commitment to a rights based approach, early intervention and preventative action. This briefing does not set out this context in detail, but focuses on the provisions in the Bill.

CHILDREN'S RIGHTS (PARTS 1 AND 2)

Part 1 of the Bill makes provision for Ministers and certain organisations to have greater consideration of children's rights. Part 2 extends the investigative powers of the Children's Commissioner to be able to consider individual cases.

UN CONVENTION ON RIGHTS OF THE CHILD (UNCRC)

The UNCRC, ratified by the UK in 1991, is an international human rights treaty which provides for a wide range of civil, political, economic, cultural and social rights for children. A child is a person under 18 years, unless the age of majority is attained earlier. The key principles and many of the individual rights are already reflected in domestic legislation. For example a child has a right to an education and a requirement to have regard to children's views is contained in various Scottish Acts. The UNCRC is enforced through the obligation of states to report to the Committee on the Rights of the Child. The Scottish Government contributes to the UK report and the next report is due in 2014. Children's organisations have a key role to play in this process – often providing their own reports. For example, the UK Children's Commissioners

¹ change programme since 2006 aiming for better integration and personalisation of children's services and of adult services that affect children's wellbeing.

² 'looked after' under the Children (Scotland) Act 1995. In general this covers children in foster, residential care and formal kinship care and children at home under a supervision requirement from a Children's Hearing.

produced a [‘midterm report’](#) in 2011. The [concluding observations](#) of the UN committee from 2008 included recommendations that children’s commissioners investigate individual complaints and that more be done to raise awareness of the Convention (UNCRC 2008). Both of these are addressed in this Bill. The Committee’s other recommendations have been taken forward by policy rather than through legislation.³

DUTIES OF MINISTERS AND PUBLIC AUTHORITIES (PART 1)

The Bill would require Scottish Ministers to “keep under consideration” how to secure better effect of the UNCRC and also requires them to promote awareness of it. The UN Convention already places these duties on Scottish Ministers. Article 2(1) requires that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction.” Article 42 requires “States Parties to undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”

The Scotland Act 1998 transfers these duties to Scottish Ministers by putting it within the legislative competence of the Scottish Parliament to ‘observe and implement international obligations’ (paragraph 7(2)(a) Schedule 5). The Bill therefore reflects existing obligations of Scottish Ministers rather than creating new ones. However, as implied in the Financial Memorandum (para 17, Scottish Parliament 2013b), the Bill creates the possibility of judicial in relation to this duty. In the consultation, there was broad support for a rights based approach, although a minority felt that the proposals do not go far enough. For example, the Children’s Commissioner supports full incorporation as a long term goal⁴ (SCCYP, 2012).

In addition to duties on Ministers, the Bill would require (s.2) both Ministers and public bodies listed in Schedule 1 to report every three years on their progress in ‘giving better or further effect to’ the UNCRC. This is a shorter timescale than that required for reports back to the UN Committee itself, so the two processes are not aligned. It is however aligned with the 3 yearly duty that the Bill would place on some public bodies to plan for children’s services.

The Welsh Government introduced a similar measure in 2011. The Rights of Children and Young People (Wales) Measure 2011 requires Welsh Ministers to have regard to the Convention, promote it and publish a ‘scheme’ of how they will have regard to it.

CHILDREN’S COMMISSIONER INVESTIGATIONS (PART 2)

The Bill would enable the Children’s Commissioner to conduct investigations into the cases of individual children. The Financial Memorandum estimates that there will be 1 to 4 investigations per year, which will require three extra full time staff at a cost of £162,000 p.a. This would be in addition to his existing powers to investigate issues of significance to children generally or specific groups of children. This reflects a recommendation of the UN Committee and the Paris Principles which establish standards for human rights bodies internationally. Respondents to the consultation welcomed the new power.

³ The Scottish Government’s response to the UN Committee’s recommendations in 2008 is available [here](#) (Scottish Government, 2009a)

⁴The Convention is not ‘incorporated’ into UK law – that is, a person cannot take another person to court because they have breached the UNCRC. [Optional protocol 3](#) opened for signatures on 28 February 2012. If ratified, it would enable individual complaints to be taken to the UN Committee on the Rights of the Child. The UK has not signed

At present, the Commissioner can investigate the extent to which a service provider has regard to the rights, interests and views of children. This includes all those in the voluntary, private and public sector who provide a service to children – even if they also provide a service to adults. In the [Commissioner for Children and Young People \(Scotland\) Act 2003](#), this broad scope was balanced by the need for the matter to be of significance to groups of children. In the new proposal, an individual investigation would not require an issue of wider principle to be raised. However, the Commissioner would still be unable to investigate a reserved issue, or duplicate the investigatory functions of another organisation. Complaints handling bodies, such as the Care Inspectorate consider that “there may be limited instances where an investigation by the Commissioner would be beneficial” (para 31, Scottish Parliament 2013b).

The Welsh Children’s Commissioner has always had a power to consider the circumstances of an individual child (s.74 Care Standards Act 2000) but this only applies to certain listed public bodies (schedule 2A and 2B, 2000 Act), where it raises an issue of wider principle and only where it does not duplicate another’s function (art 6, SI 2001/2787). Both commissioners have powers to require information and to take statements under oath. So where an investigation does take place, they have strong powers to obtain information. The Welsh Commissioner has undertaken very few investigations, although, as noted above, their powers are different.

GETTING IT RIGHT FOR EVERY CHILD (PARTS 3 - 5, 13)

Getting it Right for Every Child (GIRFEC) is a wide ranging change programme in children’s services that has been developed in pathfinder areas since 2006 and implemented more broadly since 2011. The Bill puts some elements of GIRFEC into statute, while other elements remain as policy. GIRFEC grew out of concerns that service provision needed to be better integrated, more efficient and better focused on the child. It seeks to create change in culture, systems and practice in children’s services and in adult services that have a particular impact on children, (such as services dealing with domestic abuse and substance abuse). A plan for national implementation was published in 2006 (Scottish Executive 2006a). This envisaged a three year change programme including legislation to:

- place a duty on agencies to be alert to the needs of children and to act to improve a child's situation
- place a duty on agencies to co-operate with each other in meeting the needs of children and to establish local co-ordination and monitoring mechanisms
- require agencies involved to agree an action plan and keep it under review where a child's needs are complex or serious and multi-agency input or compulsory measures are likely to be needed

The draft Children’s Services Bill was not taken forward, but GIRFEC policy continued to be developed. Key elements of the GIRFEC approach are:

- mapping existing systems and processes in order to identify duplication and unnecessary bureaucracy
- a named person for every child as a single point of contact to provide advice and support to families and to raise and deal with concerns about a child’s wellbeing. This is legislated for in Part 4 of the new Bill.
- a lead professional where there are particularly complex needs or where different agencies need to work together. This is not legislated for, and will remain a matter of policy and guidance only.
- a single child’s plan, which is the single planning process for individual children who have wellbeing needs. This is legislated for in Part 5 of the Bill.

- a national practice model, which creates a shared language and approach to identifying and meeting concerns. This includes the ‘well-being wheel’ (known as SHANARRI⁵), the ‘my world triangle’⁶ and the ‘resilience matrix’⁷. These provide a shared approach to organising and recording information about a child and to discussing ways of addressing concerns about wellbeing. It is recommended that it is used by all agencies, including when recording routine information. GIRFEC therefore has an emphasis on the way that information is shared and recorded by different professions. The SHANARRI indicators and a concept of ‘wellbeing’ are legislated for in section 73 and Part 13 of the Bill. Other aspects of the national practice model remain as guidance and policy.

GIRFEC has been developed through various ‘pathfinder’ projects, most notably in Highland. This ran from 2006-09, covering children and adult services. Development work in and around Inverness led to implementation across the whole local authority from 2008. In addition, there were four pathfinders focused on domestic abuse and further learning partnerships were established in Edinburgh, North and South Lanarkshire. The Highland evaluation (Scottish Government, 2009b) found that staff were more likely to:

- document the decisions that have been taken
- ensure the evidence for taking these decisions is recorded
- go beyond the immediate concern that has been raised to take into account where there is a wider range of unmet needs and integrate these into the record and plan
- demonstrate a clearer link between assessment and planning, and
- specify the intended outcomes and what would constitute evidence of progress in the achievement of those outcomes.

The Lead Professional

The Bill does not legislate for the role of ‘Lead Professional,’ but this role is an important part of GIRFEC. When there are complex concerns about a child’s wellbeing, which might also need support from more than one agency, a Lead Professional would normally manage and co-ordinate that support. This is described in guidance as a person who:

- makes sure that the child or young person and family understand what is happening at each point so that they can be involved in the decisions that affect them
- acts as the main point of contact for children, young people, practitioners and family members, bringing help to them and minimising the need for them to tell their story several times
- promotes teamwork between agencies and with the child or young person and family
- ensures the child’s plan is implemented and reviewed
- is familiar with the working practices of other agencies
- supports other staff who have specific roles or who are carrying out direct work or specialist assessments
- ensures the child or young person is supported through key transition points, particularly any transfer to a new *Lead Professional*

⁵ Professionals should consider the extent to which a child is: Safe, Healthy, Achieving, Nurtured, Active, Responsible, Respected and Included.

⁶ Frames a discussion about: how I grow and develop, what I need from people who look after me and my wider world. See [Scottish Government website](#) for further information

⁷ Frames consideration of the child’s characteristics and circumstances which contribute to either their resilience or vulnerability. Considers issues such as protective factors in their environment, their self esteem and self efficacy. See [Scottish Government website](#) for further information,

- ensures the child’s plan is accurate and up-to-date.

The Lead Professional is the practitioner who is best placed to provide the co-ordinated, potentially specialist support required – this is often a social worker. See: [Practice Briefing on lead professional](#) (Scottish Government 2010a).

Extent of GIRFEC implementation

Using lessons from the pathfinder projects, a [raft of guidance](#) has been published covering different aspects of GIRFEC, including a Guide to Implementation in 2010 (Scottish Government 2010b). GIRFEC has been implemented in different ways and to different degrees in different areas. While the exemplar is Highland, the Scottish Government also highlight good practice in Lanarkshire and Fife. However, reports have shown inconsistent implementation across the country. From September 2011 to April 2012, Education Scotland looked at the extent of implementation in education services and found that while there is:

“strong commitment to the values and principles of the *Getting it right for every child* approach, there is considerable variance in the extent to which those approaches are being implemented” (Education Scotland, 2012).

Staff training was recognised as a key requirement, but the report found, in the 11 local authorities sampled, that there was: “no systematic, on-going training and development opportunities for education staff to help them understand and use the *Getting it right* approach.” The report found that, despite a clear commitment to integrated working across agencies, it is still that case that:

“the different ways that services are designed and the different approaches they use to plan and assess young people’s needs, to record and share information and the different language and processes they use, can result in children and families experiencing disjointed and poorly coordinated responses to their needs. Across the universal services and other agencies working with children, there is no clear shared interpretation of wellbeing” (Education Scotland, 2012).

One of the main aims of the Children and Young People’s Bill is to encourage greater progress and achieve greater consistency in the implementation of GIRFEC by creating statutory duties in relation to certain elements of it. These include:

- amending existing duties to have children’s services plans (Part 3)
- a named person for every child (Part 4)
- a child’s plan where targeted intervention is required to assure wellbeing (Part 5)
- a statutory definition of wellbeing using the SHANARRI indicators, (s.73 and Part 13) and
- creating statutory duties to share information between agencies where there is a concern about wellbeing (s.26-29 and 38)

CHILDREN’S SERVICES PLANNING (PART 3)

Part 3 of the Bill requires local authorities and health boards to develop joint children’s services plans every three years (s.8) and to report on progress every year (s.13). Plans must be submitted to Scottish Ministers and published (s.10). These will cover services provided to children and also services “capable of having a significant effect on the wellbeing of children.” While it is to be developed jointly by the health board and local authority, the plan must also

cover services provided by others, such as the police, courts and children’s hearings (see definition of ‘children’s services’ and ‘related services’ in section 7). These “other service providers” must be involved in the development of the plan (s.10 (1)). Health boards and local authorities must also consult organisations which represent service users, social landlords and relevant private and voluntary sector organisations (s.10(2)).

The plan relates to services in the local authority area. This means that health boards that cover more than one local authority area will be involved in developing more than one plan. This might be a particular issue for Greater Glasgow and Clyde Health Board which covers 6 local authority areas. Of the other 13 health boards, six have the same boundary as the local authority, three include two local authorities and another three include three local authorities, one Health Board includes four local authorities.

Current law on children’s services plans

Currently, local authorities must prepare children’s services plans covering what are mainly children’s social work type services⁸ (s.19, Children (Scotland) Act 1995 Act, ‘the 1995 Act’). In doing so they must consult health boards, voluntary organisations, the Children’s Reporter, the National Convener of Children’s Hearings Scotland, housing associations and others as directed by Scottish Ministers. These plans must be reviewed ‘from time to time’ as directed by Ministers. They must also publish information about the services they provide (s.20). Local Authorities have a power to request assistance from health boards, other local authorities and anyone else authorised by Ministers. These organisations must comply with such a request if it is compatible with their functions (s.21). With the exception of the duty to publish information, the Bill would replace these requirements with the joint planning requirements set out in Part 3.

Duty to co-operate

The Bill extends the existing duty to co-operate to include all those consulted about the new children’s services plan (s.14). This includes local authorities, health boards, police, fire and rescue, children’s hearings, the courts, Scottish Ministers, social landlords, service user groups and any private and relevant voluntary sector service providers. It therefore represents a considerable extension of the duty to co-operate.

Coverage of new plans

As mentioned, the current duty to create children’s services plans covers mainly social work services. In comparison, the new joint plans would cover every children’s service and every service “capable of having a significant effect on the wellbeing of children” provided in the local authority area by the local authority, health boards, police, fire and rescue, children’s hearings, the courts and Scottish Ministers (s.7(1) read with s.7(2) and s.8(2)).

The inclusion of services ‘capable of having an effect on the wellbeing of children’ would suggest that the plan could cover most if not all services provided by local authorities, health services and the justice system. It would not cover services provided by colleges as these are not included in the definition of ‘other service provider’. Nor would it cover services provided by

⁸ s.19 requires that plans cover local authority functions under the 1995 Act (children in need and looked after children) and those listed in s.5(1B)(a) to (o) Social Work (Scotland) Act 1968. These include services for disabled children, adoption, foster care, youth justice, housing and certain kinds of payments to assist children. Many provision in the Acts covered have been repealed.

charities unless they were provided on behalf of a local authority, health board or listed service provider. Regulations under s.7(3) will specify the services to be included and excluded.

The 1995 Act simply requires plans “for the provision of” children’s services. In contrast, s.9 of the Bill sets out the aims of plans in some detail. These aims include that both children’s services and those capable of having a significant effect on children’s wellbeing should be provided in a way that “best safeguards, supports and promotes wellbeing.” This implies that some adult services should be planned with a view to their effect on children’s wellbeing.

In addition, services provided specifically to children must be planned with the aim of being integrated and representing efficient use of resources. This is an echo of an existing local authority duty of ‘best value’ (s.1, Local Government (Scotland) Act 2003) which requires continuous improvement and maintenance of an appropriate balance between quality and cost. In fulfilling this 2003 duty, the local authority must have regard to efficiency, effectiveness, economy and equal opportunities and contribute to sustainable development.

The annual report on the plan (s.13) should cover the extent to which those services safeguard, support and promote the wellbeing of children in an integrated and efficient manner. It will also need to show how services have met outcomes set by Scottish Ministers in regulations.

Enforcement

Some respondents to the consultation had concerns about enforcement. The consultation analysis stated that “A recurring comment across a range of sectors was that details of how the duty will be enforced and monitored needed to be worked out.”

Provisions for enforcement have now been included in the Bill. Services must be provided in accordance with the children’s services plan (s.12) and with regard to Ministerial guidance (s.15). They must also comply with any Ministerial directions in relation to children’s services plans (s.16). If a local authority or health board does not comply with the planning requirements or with Ministerial guidance about these plans, then Scottish Ministers can transfer their children’s services planning functions to other health boards or local authorities or require joint boards to be established for the purpose of planning services (s.17).

It is worth noting in this regard that the Public Bodies (Joint Working) (Scotland) Bill would establish “integration joint boards.” It may be that these could be used for the purposes of children’s services as well as adult services.

Links with Public Bodies (Joint Working) (Scotland) Bill

The Public Bodies Bill was introduced on 28 May 2013 and aims to integrate health and social care. It is being considered by the Health and Sport Committee. Although the focus is on adult services, it is relevant to consideration of the Children and Young People Bill because both require joint planning between health boards and local authorities and make provision for joint boards. The policy memorandum to the public bodies bill states:

“Scottish Ministers intend to use the framework to integrate adult health and social care services *as a minimum* [my emphasis] and for statutory partners to decide locally whether to include other functions in their integrated arrangements” (para 2 Scottish Parliament 2013c).

The requirements for a joint children's service plan provided for in the children's bill need therefore to be seen in this broader context of requiring greater integration between health boards and local authorities.

Links to community planning

In the consultation on the children's bill there was support for integrating children's services planning with the community planning partnership (CPP):

“a common view across different sectors was that the CPPs were well placed to accommodate this duty, rather than re-inventing processes or duplicating effort, the duty should become an integral part of the broader CPP framework” (Scottish Government, 2012b).

While the Bill's provisions do not make this specific link in legislation, the financial memorandum suggests that by using existing processes such as 'single outcome agreements' (SOA) there should be no additional cost from these new children's services requirements for planning and reporting (para 37-8 Scottish Parliament 2013b). Education and children's social work together form around 42% of local authority expenditure⁹. Children's services plans are therefore a major element for local authorities in their Community Planning process and SOAs.

Local authorities have a statutory duty for community planning (s.15, Local Government (Scotland) Act 2003). Section 16 of the 2003 Act requires NHS Boards, Scottish Enterprise, Highlands and Islands Enterprise, Joint Police Boards and Chief Constables, Joint Fire Boards¹⁰, the Strathclyde Passenger Transport Authority (SPTA) and the local authority to participate in the Community Planning process. The Scottish Government has recently established a [National Community Planning Group](#).

There is some overlap between the CPP and the Bill's definition of 'other service providers.' Local authorities, health, police and fire services are involved in both. However, the transport authority and enterprise networks are not specifically included in the bill's proposals for children's service planning. More importantly, the courts, Hearings system and Scottish Ministers are not currently required to be involved in CPPs, but would be required to be involved in children's services planning. This mismatch might raise issues about the degree to which children's services planning requirements in this Bill can be fully integrated into the Community Planning process.

[Single Outcome Agreements](#) are not statutory, but there is Government [guidance](#) for their form and content (Scottish Government 2012c). Each SOA is to be agreed between the CPP and the Scottish Government. This doesn't quite fit with Bill's proposals where only the local authority and health board need to agree the children's services plan. If it forms part of the SOA, then in effect, other organisations will also agree the children's plan as part of agreeing the SOA.

Links with Community Empowerment and Renewal Bill

This Bill has not yet been introduced, but [proposals](#) include improving the way that communities can engage in the community planning process (Scottish Government, online). If children's services plans are to be part of the community planning process, this Bill could have implications for the way that children's services plans are developed.

⁹ CIPFA ratings review estimates show total local authority spend in 2012/13 as £12,840m, of which £770m is on children and families social work and £4,613m on education (CIPFA 2013).

¹⁰ These duties for police and fire services are now contained in the Police and Fire Reform (Scotland) Act 2012

NAMED PERSON SERVICE (PART 4)

Every person under 18 years of age in Scotland will have a 'named person'.¹¹ For children under school age this duty is on the health board. For children of school age and over, the duty is with the local authority. The exceptions are that if a child is in secure accommodation the duty transfers to the manager of that secure unit, or if they attend independent schools, the managers of that school. In practice, it is expected that the 'named person' will be a midwife, health visitor, Head, Deputy Head or guidance teacher depending on the age of the child. The Bill documents do not make any suggestions about who within a local authority might take this role for those who leave school at 16. While this group would include those taking up employment or starting college, it would also include a group of very vulnerable young people 'not in education, employment or training'.

The consultation report included suggestions that a nursery manager might be more appropriate for children attending pre-school education and there were also concerns about access to the named person during school holidays (para 7.21, Scottish Government 2012b).

The role of the named person is to help families access services, to provide information and support, and to discuss and address concerns with other agencies (s.19). The other agencies are health, local authorities and all those listed in Schedule 2 to the Bill. These other agencies are also placed under a duty to help the relevant service provider (i.e named person) (s.25). The Bill itself does not give the named person specific duties in relation to the child's plan. However, the financial memorandum implies that they will have such a role in practice:

"The functions of a Named Person will [...] involve the holistic assessment based on information received and observed, any preparation towards the creation of a Child's Plan where needed and management of the plan through on-going involvement with the child and family as required" (para 58, Scottish Parliament 2013b)

For a child in secure accommodation, the manager of that provision will be the named person. Given that young people typically have short placements in secure accommodation, this suggests that there will be a lot of transferring the 'named person' duties for these children. In 2012 there were 237 admissions to secure accommodation. However, at the year end, of the 84 children present, only 20 had been there for more than six months (tables 5.1 and 5.2, Scottish Government 2013a).

The idea of a 'named person service' has received some negative media coverage from those concerned that it is an unwarranted extension of state interference in parenting. In particular, 'Schoolhouse', an organisation campaigning on the right of parents to educate their children at home, have been very vocal in their opposition to the proposals. They have lodged a petition on the ['change'](#) website, although (at time of writing) have not lodged a petition in the Scottish parliament. They consider that the 'named person':

"offers significant scope for children's rights, parenting choices and family decisions to be undermined and/or overruled by an outsider with boxes to tick, whose views may not accord with those of the 'named clients' who have no 'choose to refuse' opt-out [...] The petitioners urge Members of the Scottish Parliament to reject all measures contained within the Children and Young People Bill which allow for the routine gathering and sharing of the personal data of every child and associated adult without their express informed consent, and to reject the imposition, without opt-out, of a 'named person' on every child in Scotland" (Schoolhouse home education, online).

¹¹ those aged over 18 who are still at school will also have a named person.

In contrast, there was considerable support for the idea of the named person in the consultation. Barnardo's consider criticisms to be 'misinformed', saying:

"Barnardo's Scotland staff report that the [GIRFEC] system has helped ensure that children get the support they need when they need it. It is right that the proven benefits of this approach are now rolled out across Scotland to ensure all children benefit" (Martin Crewe, 2013).

In the consultation, stakeholders were asked: Do you agree with the proposal to provide a point of contact for children, young people and families through a universal approach to the Named Person role? Two hundred and twenty six respondents answered this question of which 72% agreed and 18% disagreed. However, there is an important caveat that many of those agreeing did so in principle, but reserved full judgement until more practical details had been worked up.

While some of the named person duties might be described as 'signposting' or 'referring' and be similar to the way teachers, midwives and health visitors already work, it is not clear – from the bill drafting – the extent of the duty to 'support.' In the consultation, there was a common concern about the scale of the work expected and the capacity of staff to deliver.

"A common view was that generally the proposed responsibilities were the right ones, but they were not deliverable without addressing what were perceived to be very challenging resourcing and capacity issues associated with the proposal" (Scottish Government, 2012b).

The financial memorandum anticipates a margin of error in their calculations due to the difficulties in creating a definitive costing for this part of the Bill (para 41). However, it estimates that for schools extra resources would only be required in the first year. The rationale is that the named person service would lead to less time being spent on issues such as child protection case conferences and attending children's hearings. That said, it is interesting to note recent research from SCRA which has called for greater involvement of school staff in hearings. They found:

"School representatives were present at 44% of Hearings. Whilst it may not always be appropriate for them to be at Hearings, their input can be valuable as they have day to day contact with the child. SCRA will examine its own practice to facilitate schools attendance at Hearings and ensure that information on the child's education is available for Panel Members" (SCRA, 2013).

For the NHS, the financial memorandum estimates that there will be on-going costs. For 80% of children there is an estimated need for an extra two hours per year per child for midwives, one hour per year per child for Health visitors, and no extra hours per year for health visitors for three and four year olds. For 2% of children, there is already significant health service involvement, reflecting their complex needs. It is not expected that they will have additional resource requirements due to this Bill.

For the remaining 18% of children, who have "emerging or significant concerns," it is expected that an initial requirement for 10 hours per child in the first year for NHS staff will reduce to between three and eight hours per child by 2019/20 (Scottish Parliament, 2013b). This would suggest that the expected extra work commitment for 'named persons' and 'child plan' would be fairly minimal. The issue remains though whether this is reflected in the Bill drafting and what degree of practice change is expected for this amount of extra time commitment.

CHILD'S PLAN (PART 5)

The Bill requires a child's plan¹² to be developed for an individual child if they have a "wellbeing need" that requires a targeted intervention (s.31). A targeted intervention is one that is different to the services provided to children generally by health boards, local authorities, managers of grant aided schools or proprietors of independent schools (s.31(4) read with s.41).

The duty to prepare the child's plan lies with the responsible authority (i.e the health board for pre-school children, the local authority, grant aided or independent school for age 5 to 18). Existing statutory requirements for plans are not repealed. These are:

- Looked After child plan under the Looked After (Children) (Scotland) Regulations 2009
- Co-ordinated Support Plan under the Education (Additional Support for Learning) (Scotland) Act 2004. This is prepared by the education authority when a child or young person requires significant additional support from the education authority and from at least one other agency from outwith education in order to benefit from school education. There are specific rights of appeal in relation to this plan.

The Bill would provide a broad framework for the 'child's plan', with further detail in regulations and guidance. These will need to be compatible with looked after children and additional support for learning legislation. For example, local authorities are already required to identify and meet additional support needs that form a barrier to a child's learning. This includes non-educational factors which can impact on education – including being 'looked after', bereavement, being a young carer, divorce etc. The factors that can impact on education are likely to be similar to factors that might create a more general 'wellbeing' need under this Bill. This creates a need for considerable integration between all three legislative frameworks.

In addition, there are many non-statutory plans used, including:

- Child Protection Plan (under Child Protection Guidance 2010, Scottish Government 2010c).
- Individual Education Plans under [Supporting Children's Learning](#) statutory code of practice (revised 2010, Scottish Government, 2010d).
- assessment, planning and reporting requirements in the school curriculum.

WELLBEING (PART 13 AND S.73)

Section 74 introduces a definition of 'wellbeing' and requires that it is used by any person who 'requires to assess' this under the Bill. Wellbeing is to be assessed with reference to the extent to which a child is safe, healthy, achieving, nurtured, active, respected, responsible and included. In addition, section 73 adds this concept of "wellbeing" to existing statutory duties to "safeguard and promote the welfare" of looked after children and children in need. The 'welfare' duty is not repealed, so the two concepts will exist in parallel. Whereas 'wellbeing' is defined in this Bill and will be expanded on in guidance, 'welfare' does not have a specific statutory definition. It is however a well-established principle that is applied by the courts. Wilkinson and Norrie (1999) comment that:

"Rarely (do the courts) establish strict precedents or lay down rules of law on what is best for the child [...] One rule can, however, be laid down, with both certainty and force. It is that the child's welfare is to be understood comprehensively, embracing material,

¹² While Part 3 relates to strategic planning of services, Part 5 is about the plan that relates to an individual child

physical, intellectual, emotional, psychological, moral and so far as it admits of assessment, spiritual wellbeing. It has for long been recognised that that is so.” (Wilkinson and Norrie, 1999 at 10.09).

While ‘wellbeing’ is added to the statutory duty to safeguard and promote welfare for children in need and looked after children, it is not added to the statutory duty of the courts to consider welfare under other provisions of the 1995 Act. In particular, the courts are currently required to regard the welfare of the child as the paramount consideration when making orders affecting parental rights and responsibilities under s.11 of that Act. Under s.16 of the 1995 Act, decisions of the Court or a Children’s Hearing should have a child’s welfare throughout his childhood as the paramount consideration and under s.22, a local authority may ‘provide accommodation’ (i.e. take into care) a child in order to “safeguard and promote his welfare.”

There was considerable support for the idea of ‘wellbeing’ in the consultation where 194 out of 216 respondents (90%) agreed that a wider understanding of children and young people’s wellbeing should underpin the Bill’s provisions. However, nine respondents highlighted concerns that the definition of wellbeing lacked consistency with the word ‘welfare’. One commented:

“If the Bill uses ‘wellbeing’ instead of ‘welfare’ this will not tie in at all with other existing legislation affecting duties to and powers for children, services for children and their rights. This will lead to confusion and a lack of clarity which will not assist children or service provision” (BAAF, 2012).

The definition of wellbeing in s.74 applies more widely than just to ‘children in need’ and ‘looked after children.’ The table below shows where in the Bill such an assessment of wellbeing would be undertaken using this new definition, and by whom.

Bill section	Provision which might entail an assessment of wellbeing.	By whom?
s.9 (1)	Plans to aim at children’s services which best safeguard, supports and promotes wellbeing	Health board, local authority
s.19(5)	Named person to promote, support or safeguard wellbeing	Health board, local authority, manager of independent school or secure unit.
s.26(4)	Information to be shared where it might affect wellbeing and ought to be shared	Health board, local authority, manager of independent school or secure unit, all Schedule 2 bodies and contracted out services
s.31(2)	Child’s plan required if a matter might affect wellbeing	Health board, local authority, manager of independent school.
s.45(1)(b)	Assessing whether a 2 year old requires an alternative to early learning and childcare	Education Authority
s.52(a)	All corporate parents to be alert to matters affecting wellbeing	Schedule 3 bodies
s.54	Collaborative working between corporate parents where this safeguards or promotes wellbeing	Schedule 3 bodies
s.73	In safeguarding and promoting the wellbeing of looked after children and children in need.	Local authorities

INFORMATION SHARING

The Bill places a duty on a range of organisations (including all those listed in Schedule 2) to share any concern about a risk to a child's wellbeing with the child's Named Person and for a more limited number of organisations¹³ to share information in relation to a child's plan. It is not restricted to instances where there is significant risk of harm. The Privacy Impact Assessment (Scottish Government, 2013b) states: "Information sharing requirements therefore should not solely be in response to a crisis or serious occurrence but should be constant throughout the development and progression to adulthood for every child." The Bill also makes specific provision that information can be shared even where this breaches a duty of confidentiality.

Current practice is to share information with consent, unless there is a significant risk of harm to the child. The current national child protection guidance states:

"In general, information will normally only be shared with the consent of the child (depending on age and maturity). However, where there are concerns that seeking consent would increase the risk to a child or others or prejudice any subsequent investigation, information may need to be shared **without consent**. At all times, information shared should be relevant, necessary and proportionate to the circumstances of the child, and limited to those who need to know"

[...]

If a child is considered to be at risk of harm, relevant information must always be shared.

The application of this principle can be highly sensitive, particularly where children and young people make use of a service on the basis of its confidentiality. Good examples of this are helplines set up to support children and young people, such as ChildLine. Many young people need the time and space that such confidential services can offer to talk about their problems with someone who can listen and advise without necessarily having to refer. However, on some occasions, this contract of confidentiality can be suspended if the information received concerns life-threatening situations, risk to other children, adult abusers and/or abuse by an adult in authority. (Scottish Government, 2010c)

Recent guidance from the Information Commissioner states:

"Most practitioners are confident about appropriate and necessary sharing where there is a child protection risk. The problem can be where circumstances do not yet reach the child protection trigger yet professional concerns exist, albeit at a lower level. [...] Where a practitioner believes, in their professional opinion, that there is a risk to a child or young person that may lead to harm, proportionate sharing of information is unlikely to constitute a breach of the [*Data Protection*] Act in such circumstances. [...] If there is any doubt about the wellbeing of the child and the decision is to share, the Data Protection Act should not be viewed as a barrier to proportionate sharing" (Information Commissioner, 2013)

Sharing information has been a policy concern for many years. Reports into child deaths have consistently found that the full seriousness of a child's situation was not appreciated because agencies held only part of the relevant information. No-one put together the whole picture. However, it is also necessary to ensure that in increasing the number of people with access to information about a family, information remains confidential within those agencies. If personal details were to become available to say, an abusive partner, then the family might be at risk.

¹³ health boards, local authorities and managers of independent schools

While appropriate information sharing can protect a child, inappropriate sharing might put them at risk. The Bill therefore places a duty of confidentiality on those with whom information is shared (s.27).

There have been previous attempts to legislate on sharing child welfare information. In 2006, information sharing provisions were dropped from the Protection of Vulnerable Groups (Scotland) Bill following concerns expressed during parliamentary scrutiny (Berry, K. 2007). The duty in Part 3 of that Bill was for 'relevant persons' to share information with a local authority where relevant to protecting a child from harm. Relevant persons would also have had to co-operate with a local authority in making enquiries about child protection. 'Relevant persons' had some overlap with those required to provide 'wellbeing' information in this new bill, but there are some interesting differences. Unlike the current Bill, the previous legislation included care service providers, regulatory bodies and registered social landlords but did not include (as this current Bill does) organisations such as sportscotland, Children's Commissioner, colleges, the courts and the fire service (see Schedule 2 to 2013 Bill and s.80 of the 2006 Bill). The provisions were dropped following the Education Committee's stage 1 report on the 2006 Bill. Similar provisions were proposed later that year in the draft Children's Services Bill (Scottish Executive, 2006b), but this Bill was never progressed.

In the current Bill, under s.26-27, the duty to provide information falls to: health boards, local authorities, grant-aided and independent schools (all called service providers under this Part) and all those listed in Schedule 2. In general terms, this covers: Scottish Ministers, various health organisations, Skills Development Scotland, Care Inspectorate, Sports Council, police, fire services, courts, Children's Commissioner and colleges. It also includes all contracted out services (s.26(7)). So, for example, a GP would be under a duty to provide information to a school where that information would aid discussion about that child's wellbeing.

These duties are reciprocal – so just as the service providers and relevant authorities have a duty to provide information to the named person, the named person has a duty to provide information to service providers and relevant authorities if doing so “might be relevant to the named person's functions” and “ought to be provided” (s.26(2) and 26(3)).

The duty to provide information is not limited to the child's records. This implies that information could be provided about a parent, where this is relevant for the child's wellbeing. Nor is the duty to share limited to the provision of children's services but applies to the whole agency or organisation. It therefore places a duty on adult services to share information with the Named Person where, in their professional judgement, this might affect a child's wellbeing. The Privacy Impact Assessment (PIA) (Scottish Government 2013b) acknowledges the challenges involved:

“there is a difficult balance between the right to privacy and the need to safeguard, promote and support a child's wellbeing. This balance requires the test of proportionality on what is being shared, a clear understanding of the purpose and where possible the child to be aware of the decision and the reasons to share.”

However, it finds that the duties in the Bill create a compelling public interest for sharing information:

“In cases where a duty of confidentiality is expected by an individual, the sharing of the personalised information would nevertheless be justified by the compelling public interest factors: safeguarding, promoting and supporting children's wellbeing as per the provisions of the Bill.”

In mitigation of the risks involved, the PIA summarises the intent of guidance that will be produced. This includes:

- advice on proportionality ensuring information is only shared when necessary
- involvement of child and family ensuring where possible they are aware of the information sharing and the reasons
- advice as to how information can, could and should be shared
- the use of information sharing protocols and agreements
- putting in place mechanisms for the child or young person or family to complain about the conduct of their Named Person in line with existing systems for their profession

The Bill itself does not use the word ‘necessary’. Instead information must be provided if it “might be relevant” to wellbeing and “ought to be provided” (s.26(2) and 26(4)). The PIA says:

“The data held and shared under the provisions of the Bill will be restricted to that which is proportionate and adequate to ensure a child or young person’s wellbeing. There shall be no routine sharing and each instance will require a purpose and will be subject to reasoned decision making.”

The concerns of ‘Schoolhouse’ have been referred to above. In contrast to these concerns the PIA notes that:

“Amongst the stakeholders consulted, there was general consensus that the proposed legislation will be more efficient and lead to better outcomes than current practice. No stakeholder suggested that the Bill should not proceed because of concerns about an impact on privacy.”

Current law

Article 8 of the European Convention on Human Rights provides that interferences in private life must be in accordance with the law, pursue a legitimate aim and be ‘necessary in a democratic society’. ‘Necessity’ has been taken to mean there is a pressing social need, the reasons for any interferences are both relevant and sufficient and involves a test of proportionality in assessing whether the relationship between the action taken and the aim of the intervention is acceptable. The key issue is deciding what is proportionate.

Under the Data Protection Act sensitive personal information can be shared where any one of the conditions for lawful processing is met. These include where “necessary for [...] exercising statutory or governmental functions” (Schedule 3 DPA). The Bill would create a new specific statutory function for sharing information and places an express obligation on relevant authorities to share information where the holder considers that it might be relevant to the exercise of any function of the Named Person.

EARLY LEARNING AND CHILDCARE (PART 6)

DEFINITION

The Bill would require provision of 600 hours of early learning and childcare defined in s.42 as “a service, consisting of education and care”. This would imply that such a service would have to provide both education and care rather than either education or care. The Bill adds ‘early learning and childcare’ to the existing definition of ‘school education’ in s.1(5) of the Education (Scotland) Act 1980. Therefore, any provider could be inspected by HMIE under Ministers’ power to cause inspection of any establishment providing school education (s.66 1980 Act).

Other than certain two year olds, the exact definition of which age group will receive early learning and childcare is left to regulations. However, the financial memorandum is based on the assumption that the current arrangement of starting in the term following the third birthday will continue (para 80, Scottish Parliament 2013b). This issue has been raised by Reform Scotland (2013) who consider that “every child should be entitled to two years of government-funded nursery provision, regardless of when their birthday falls.”

HOURS PROVIDED

The duty to provide free pre-school education was introduced under the Standards in Scotland’s Schools etc Act 2000 (in force since 2002). At that time, minimum provision was 412.5 hours per year. This was increased to 475 hours per year in 2007 and this Bill will increase it to a minimum of 600 hours per year. In England, three and four year olds have been entitled to 570 hours a year of pre-school education since 2010.

In practice, current provision in Scotland is generally two and a half hours a day over 38 weeks. 600 hours could equate to two and a half hours, Monday to Friday over 48 weeks or three hours, Monday to Friday over 40 weeks or a range of other options. At present, local authorities are given discretion as to how they arrange pre-school hours. Current legislation does not prevent pre-school education being available outwith school terms, but the normal practice is that it is only provided at these times. The Bill would require that provision is made for at least 38 weeks a year for between two and a half and eight hours a day. Local authorities must consult representatives of parents about what the pattern of provision should be in their area and reconfigure services over time to provide “an appropriate degree of choice”. The Bill would not however, introduce a right for a parent to use a particular provider (such as the one that is nearest to them, or which they are already using for their child’s nursery care).

TWO YEAR OLDS

The Bill would extend provision to certain two year olds. These are children who are, or who have been since turning two, ‘looked after’ or subject to a kinship care order. This would apply to around 1,700 two year olds¹⁴ at an estimated cost of £1m.

From September 2013 in England, around 20% of two year olds (based on free school meals eligibility) will be entitled to 570 hours of pre-school education. This will be extended to 40% of

¹⁴ based on number of looked after two year olds and two year olds under a kinship care order (Scottish Government personal communication, June 2013).

all two year olds in September 2014. This will cover around 260,000 two year olds with funding of £760m in the dedicated schools grant (DfE, online a).

There have been calls to extend the Scottish plans to cover all vulnerable or disadvantaged two year olds. For example, the consultation analysis referred to 46 mentions of extending coverage to “all vulnerable groups of two year olds, such as those already in kinship care arrangements; those living in poverty; those with additional support needs; and so on.” There was a pilot scheme in Scotland from 2006-08 providing pre-school education to vulnerable two year olds which found:

“Parents of vulnerable children in the extended pilot programme showed improved parenting capacity compared to comparison group parents. Children in the pilot programme showed improved developmental outcomes but their progress was not significantly different from that of comparison group children” (Woolfson and King 2008).

Currently, local authorities are required to provide daycare for children ‘in need’ from birth to five years under s.27 of the 1995 Act. ‘Children in need’ includes disabled children, children affected by disability and those children unlikely to achieve a reasonable standard of health or development in the absence of local authority services. It is arguable that all looked after children are ‘children in need.’ However, this existing duty only requires ‘day care’ to be provided, whereas the Bill would require a specific number of hours of ‘early learning and care’ to be provided.

PURPOSE

Provision of early learning and childcare has two purposes – to aid child development and to assist parents access employment. In terms of child development it has been found that high quality pre-school provision is beneficial, particularly for disadvantaged children. However, full day provision is no more beneficial than half day (Sylva et al, 2003).

Subsidising childcare can also help parents access or keep employment. Free pre-school is one element of subsidy – subsidising supply. The other main sources are demand side subsidies at UK level - employers childcare vouchers and provision to reimburse 70% of childcare costs under Working Tax Credit. Referring to the proposed extension to free pre-school hours, Jackie Brock of Children in Scotland recently told the Equal Opportunities Committee:

“That is welcome, but when you place the £80 million in the context of the system—which is worth nearly £1 billion—that is subsidising parents in Scotland, we are really just tinkering, so we have to ask whether the current way of subsidising childcare and out-of-school care is fit for purpose and will meet our aspirations. We say that it is not and will not; the members of Children in Scotland would say that we need at least to have a vision of subsidising the supply side” (col 1247, Scottish Parliament Equal Opportunities Committee, 2013).

In Scotland, 25 hours of nursery care for a child under two costs an average of £100 (Children in Scotland and Daycare Trust, 2012). The consultation described the Bill’s proposals as a first step which would: “set the stage for more fundamental, long-term consideration of how we provide high quality, integrated early learning and childcare that meets the needs of all children, families, parents and employers in the future” (Scottish Government, 2012a).

COSTS

The early learning provisions are the most costly in the Bill, with an estimated additional cost to local authorities of £101m in its first full year of operation. This includes capital costs of £30m. The costs have been developed in consultation with COSLA. Local authorities spent an estimated £311m on providing pre-school education in 2012/13. Spending has fluctuated in recent years: £329m in 2009/10, £318m in 2010/11, £306m in 2011/12 (CIPFA).

The number of children under five years old is expected to increase from 294,000 in 2010 to 299,000 in 2015 reaching 302,000 by 2020 before falling again. Provision will therefore need to cater for increasing numbers of children over the next 10 years (GROS 2011).

The main cost is staff which varies according to their level of qualification. Neither the Bill nor the financial memorandum set out any particular staffing mix. In particular, costs will be affected by local authorities' use of teachers in early years settings as their terms and conditions are set nationally. The number of FTE teachers working in pre-school varies by local authority but has reduced from 1,648 in January 2006 to 1,463 in September 2012¹⁵ (Table 7, Scottish Government 2012d).

Another important issue for costs is the amount paid to 'partner providers.' Local authorities vary in their use of the independent and third sector but, in September 2012, 37% of all pre-school establishments were partner providers. Until 2007, the Scottish Executive issued a recommended 'advisory floor' payment of £3.73 per hour per child to partner providers. The Scottish Government no longer issue this guidance and the financial memorandum notes that there has been no consistent increase across local authorities since then. It also notes that some partner providers are concerned about this. The financial memorandum uses an inflationary linked estimate of £4.09 per hour (para 82 Scottish Parliament 2013b).

In England, the extension of provision from 12 ½ hours a week to 15 hours a week and provision for greater flexibility in delivery was budgeted at £340m for 2010/11 and was initially delivered as a specific grant within the Standards Fund. This was based on a per child cost of, generally, between £4 and £5 per hour (DfE, online b).

LOOKED AFTER CHILDREN (PARTS 7 TO 12)

CORPORATE PARENTING (PART 7 & SCHEDULE 3)

Under Part 7 of the Bill, 23 public bodies as well as health boards and all local authorities are defined as 'corporate parents' of looked after children and care leavers. This would require them to be "alert to matters which, or which might, adversely affect the well-being" of looked after children and care leavers, to promote their interests, to assess their needs for the services which that public body provides and to provide opportunities to participate in activities. 'Corporate parent' public bodies would be required to produce a plan for how they would perform these functions, to report on progress, to have regard to Ministerial guidance, to provide information to Scottish Ministers and to collaborate with other corporate parents.

Local authorities have existing legal duties to 'safeguard and promote' the welfare of looked after children (s.17, 1995 Act). This duty falls to the entire local authority – not just to the social

¹⁵ more children become eligible for pre-school in January each year so it would be expected to have slightly higher numbers of teachers in January compared with September

work department. Every part of a local authority is responsible for the welfare of looked after children – leisure, housing, corporate services, education etc. The same legal duty does not apply to other public bodies. However, Scottish Government guidance in 2007 described corporate parenting in much broader terms as the:

“formal and local partnerships needed between all local authority departments and services, and associated agencies, who are responsible for working together to meet the needs of Looked After children and young people and care leavers” (Scottish Executive 2007)

Further guidance, ‘These are our bairns,’ described how community planning partnerships could approach the idea of corporate parenting (Scottish Government, 2009). The Bill therefore significantly extends the number of public bodies subject to a legal duty. In doing so it goes beyond existing guidance – which refers to CPPs, and includes bodies such as Sportscotland, Creative Scotland and Bord na Gaidhlig. While Scottish Ministers are included, backbench MSPs are not.

The new duty is far more specific than the existing duty to ‘promote and safeguard welfare’ as it includes requirements to assess needs and promote interests.¹⁶ The financial memorandum estimates the cost of preparing corporate parenting plans, but does not address whether there will be any financial cost for assessing and promoting the needs of looked after children. While some of the listed organisations will already be doing this (eg local authorities, SCRA), many will not (eg Bord na Gaidhlig, Creative Scotland, Fire service).

CARE LEAVERS (PART 8)

Part 8 of the Bill extends the age at which care leavers can continue to receive support from the local authority from those aged up to 21 years to up to 26 years. Currently local authorities are required to provide support, where necessary, to 17 and 18 year old care leavers and have discretion to provide support to 19 and 20 year olds. This is based on an assessment of need. Such support, guidance and assistance can include payments in kind or in cash (s.29 1995 Act).

The Bill extends support to young people aged up to 26 years and creates a duty to provide support where there was previously only a discretion. This is in response to consultation submissions which considered that a duty to assess need is not much use without a duty to provide for that need (para 115, Scottish Parliament 2013a). Where requested by a care leaver aged 19 to 25 inclusive, the local authority must carry out an assessment of whether they have ‘eligible needs’. Eligible needs are to be defined in regulations, although the policy memorandum suggests that it will refer to “those essential for daily living” (para 110, Scottish Parliament, 2013a). If the young person is found to have such needs and they “cannot be met other than by taking action under this section”, then the local authority has a duty to provide advice, guidance and assistance. In their response to the consultation, Who Cares? Scotland said: “To be of any real benefit the support needs to be available prior to the point of crisis and offered pro-actively.”

The kinds of costs considered in the financial memorandum are one off costs such as furnishing a new tenancy, and ongoing costs such as help with travel (up to £400 a year), emergency payments (up to £200 per year) and payments to other agencies to provide support (up to £1,500 per year).

¹⁶ n.b in addition to the new corporate parenting duty, local authorities would have extended duties towards looked after children under s.17, 1995 Act through the creation of a ‘wellbeing’ duty by s73 of this Bill.

Care leavers (in parts 8 and 9 of the Bill and in existing duties under the 1995 Act) do not include all those who have been 'looked after' but only those who are 'looked after' when they turn 16.

COUNSELLING SERVICES (PART 9)

Section 61 of the Bill requires local authorities to provide counselling services to parents and children. The type of services to be provided and eligible recipients are left to regulations. However, the financial memorandum states that provision will be restricted to those families where a child is assessed as being at risk of being looked after (para 134, Scottish Parliament 2013b). Although these measures are discussed in the policy and financial memoranda in relation to kinship care, there is nothing in the drafting of Part 9 that limits provision in this way.

Local authorities are already required to safeguard and promote the welfare for children in need by providing a range and level of services appropriate to the child's needs (s.22, 1995 Act). Such services may be provided to an individual child or, if provided with a view to safeguarding or promoting the child's welfare, to the child's family. It has been found that this creates a general duty to provide services but not an absolute right for individual children to receive specific services ([R v. London borough of Barnet \[2003\] UKHL 57¹⁷](#)).

The difference the Bill would make is to create a clearer duty for the local authority to provide counselling to some of these families. However, from the financial memorandum, it would appear that it is expected that only a very small proportion of those who might be considered to be 'children in need' would receive counselling (between 2.5% and 7.5% of referrals to the Reporter) (Table 29). It states that regulations will define eligibility as: "those families whose circumstances give rise to a substantial risk that a child will be looked after within a period of time, in the absence of additional support." This raises the question of whether in fact a much larger proportion of these children and their families would benefit from counselling. The severity of the 'at risk' test will therefore be crucial in deciding the scale of services that will be provided.

The financial memorandum describes the services to be provided as: "intensive family therapy at an early enough point [...] to stabilise the care environment and offset or reduce the risk of a child eventually becoming looked after," (para 134, Scottish Parliament 2013b). Although the accompanying documents refer only to family mediation and family group conferencing, they also state that local authorities will be given discretion to determine the best form of intervention (para 124, Scottish Parliament, 2013a). In considering the type of counselling that might be required, it is interesting to note the types of difficulties present in families where children are in informal kinship care. Recent UK research found that these included:

- indifference and lack of commitment 64%
- drug misuse 44%
- alcohol misuse 36%
- domestic violence 35%
- bereavement 30%
- mental illness 22%
- abandonment or rejection 26%
- parental illness 15%
- prison 15%

(Table 3.1, Selwyn, J et al, 2013)

¹⁷ Although this is an English case, it relates to very similar statutory duties and so is useful in considering the situation in Scotland.

The report notes that: “the description of children’s early lives were very similar to those recorded in the case files of looked after children.” It is likely therefore that these are the sorts of issues that any counselling service would need to tackle in order to prevent a child needing to become ‘looked after’.

KINSHIP CARE (PART 10)

Kinship care is where a friend or relation takes on the care of a child because the parent is unable to do so. This can be done on an informal basis with little or no social work involvement, or it can be done on a formal basis where the placement is arranged and assessed by the social work department. In practice, there can be a grey area between ‘formal’ and ‘informal’ arrangements and this can have implications for the level of support provided. General background is available in Kidner, C. (2012) ‘Kinship Care.’

Part 10 of the Bill creates a new duty for local authorities to provide assistance to kinship carers if a child is not ‘looked after’ by the local authority. There are currently three main legal routes for local authorities to provide support:

- Section 50 of the Children Act 1975 enables local authorities to make payments for maintenance or accommodation for children not living with their families. This is discretionary rather than a requirement and is not restricted to looked after children.
- Section 22 of the Children (Scotland) Act 1995 allows local authorities to make services available to ‘children in need’. These services may include giving assistance in kind or, in exceptional circumstances, in cash. Again, this is not a duty to provide specific support, nor is it restricted to looked after children.
- The Looked After Children (Scotland) Regulations 2009 provide for the assessment, approval and support of kinship carers of looked after children. Kinship carers approved under these regulations must have a written agreement with the local authority specifying the assistance and support that they will receive (regulation 12). Schedule 4 to the regulations sets out the obligations of the local authority and of the kinship carers. Regulation 33 provides that “local authorities shall, subject to such conditions as they consider necessary, pay an allowance as they see fit,” to foster and kinship carers of looked after children who are assessed and have an agreement under the 2009 regulations.

The problem with the first two routes is that they are discretionary. Although there is a duty to provide support under the third route of ‘approved kinship carer’, it only applies to a relatively small number of kinship carers. The Bill would add a fourth route to assistance. That is a requirement to provide assistance to ‘qualifying’ kinship carers of ‘eligible’ children where the kinship carer has, or is applying for, a residence order.

Kinship care orders and residence orders

Section 11 of the 1995 Act enables a court to regulate parental responsibilities and rights.¹⁸ In particular, it enables a court to specify residence and contact. The court has wide discretion but is guided by the principles of child welfare, the child’s views and that it is better to make no order than to interfere unnecessarily in family life. One way to get legal recognition of a kinship

¹⁸ PRRs are set out in s.1 of the 1995 act and include the responsibility to safeguard and promote the child’s health, welfare and development and the right to have the child live with you or regulate their residence, to control, direct and guide the child’s upbringing and to maintain contact,

care situation is to apply for a residence order. The 'kinship care order' defined in the Bill is not a new order, but is a residence order issued to 'qualifying' kinship carers of 'eligible' children.

The definition of 'eligible child' is left to regulations, but the financial memorandum suggests that there will be "a qualifying test which is linked to the current or projected risk that a child may need to become formally looked after" (para 114). This is likely to be done through a parenting capacity assessment undertaken by the local authority (para 120, Scottish Parliament 2013c). Not every kinship carer applying for a s.11 order will therefore be eligible for assistance.

A qualifying person is someone who is related to the child, is a friend or acquaintance of a person related to the child or someone specified in regulations. Not everyone related to the child will qualify. The Bill disqualifies parents and guardians. Under this part of the Bill, 'parent' is not defined. This matters because 'parent' could be defined as 'a person with parental responsibilities and rights', or it could be defined as the biological parents of the child. Because it is not defined, it is not entirely clear who would be disqualified from kinship care support because they are a 'parent'.

Assistance provided

The current provision of assistance, particularly financial payments, is very variable across Scotland. This has been a policy issue since at least 2007 when the Concordat between the Scottish Government and COSLA stated that by 2011 local authorities would provide allowances for kinship carers of looked after children to treat them on an equivalent basis to foster carers. In practice, Citizen's Advice Scotland found that, by April 2011, the average payment was £100 per week, with a range from £30 to £196 (Kidner, C. 2012). Kinship care allowances are currently the subject of a Scottish Government review on which recommendations are expected by the end of the year (Scottish Government personal communication, June 2013).

The assistance to be provided for informal kinship care under the Bill will be defined in regulations but can include counselling, advice or information, financial support or provision of a local authority service on a subsidised basis (section 64(2)). The financial memorandum sets out the type of support envisaged. With the exception of the transition from formal to informal kinship care, this does not include the provision of a regular allowance. It includes:

- information, advice and counselling support
- essential start up grant of up to £500
- assistance with essential transport to comply with s.11 contact order. The financial memorandum suggests that only 10% of applicants are likely to need this support).
- help with applying for the court order. Legal aid for a s.11 order is estimated at £1,500, but it may be that some would only need advice and assistance. The financial memorandum suggests this may be needed by around two thirds of applicants.
- transitional support. Where a child moves from 'formal' to 'informal' kinship care there will be a 'top up' allowance, but only for a limited period and only if equivalent support is not available through the UK benefits system. The financial memorandum uses an estimate of £70 per week for 3 years.

Reducing formal kinship care

One purpose of introducing the kinship care order in the Bill is: "to reduce unchecked growth in formal kinship care" (financial memorandum para 128). The policy memorandum explains the rationale somewhat differently at para 117 as: "to encourage more individuals to become kinship

cares for those children who do not require regular supervision or corporate parenting and whose long term welfare is based served by being cared for in such a way.” The consultation described the policy intention as: “to provide an alternative to being in care (for those children at risk of becoming looked after or already looked after in kinship care) and, in so doing, improve the support available for kinship carers” (para 151, Scottish Government 2012a).

The financial memorandum assumes that by 2019/20 between 6 to 11% of ‘formal’ kinship carers will apply for the new kinship care order (table 24). In transferring from ‘formal’ to ‘informal’ kinship care, it will be important to be clear about the differences in local authority involvement. It will mean that such kinship carers would no longer be entitled to the support that is required under the looked after children regulations. Neither would the local authority have the same duties towards these children, because they would no longer be ‘looked after’. The Scottish Government will be consulting with stakeholders about the precise package of support for those on the new kinship care order that will be set out in secondary legislation.

The financial memorandum refers to cost savings created “because the kinship care order acts to prevent a child becoming looked after unnecessarily” (para 130). This implies that some children have become ‘looked after’ unnecessarily. It is certainly true that there has been a large increase in the number of children in formal ‘kinship care’ over the last 10 years. It is not clear however whether or not this has been necessary. (It is however, in line with guidance that kinship care ought to be considered as a first option for a looked after child’s placement). In this regard it is interesting to note findings (eg Selwyn et al, 2013) of striking similarities between kinship and foster care placements. There tended to be similar issues creating the need for the placement, similar levels of need, and children tended to make similar levels of progress whilst there. The main difference was that kinship carers tended to persist with a difficult placement for longer than an unrelated foster carer.

In England, there has also been a growth in kinship care. However, unlike Scotland this growth has occurred through residence and special guardianship where, Selwyn et al comment “financial support is discretionary and social work support rare.” The report refers to examples in England of carers being pressurised into taking out residence orders rather than becoming a formal kinship carer.

Previous proposals

In 2005, the Adoption Policy Review Group noted the use of s.11 orders to secure long term fostering or kinship care. It noted that support provided by local authorities tended to be withdrawn in these circumstances and so recommended that “when a s.11 order has been granted for the long term security of a looked after child, the local authority should assess and plan to meet the support needs of the child and the carers.” Although the Scottish Executive at the time supported this proposal (Scottish Executive, 2005) it was not included in the Adoption and Children (Scotland) Act 2007.

Permanence Orders

A residence order is one option for long term kinship care. Another would be for the local authority to apply for a Permanence Order. These were introduced in the Adoption and Children (Scotland) Act 2007 and enable long term fostering or kinship care while retaining ‘looked after’ status. They are very flexible and enable the transfer of some or all parental rights and responsibilities to a carer or the local authority.

ADOPTION REGISTER (PART 11)

Part 11 of the Bill would create a statutory national adoption register and enable Ministers to delegate its management to another organisation. Adoption agencies will be required to provide information to it and the Bill would enable Ministers to charge fees for this. However, the financial memorandum states that the current policy intention is that fees will not be charged (para 157). The register will contain details of children waiting for adoption (where parents consent) and potential adoptive parents (where they consent). It is only for use by local authorities and adoption agencies and the information will not be available to the public. Much of the detail is to be provided in regulations.

Proposals for a statutory adoption register go back over 10 years. It was one of the issues that the adoption policy review group was asked to consider in 2001. The UK Adoption and Children Act 2002 provided for a UK wide statutory register and, through a sewel motion, provision was made for this to extend to Scotland (s125-129). In the Sewell motion debate – in January 2002 – Scott Barrie, MSP stated: “A national register is clearly the sensible way to go forward. I congratulate the minister on recognising that and am glad that we are doing something about the matter at long last” (col 5881 Scottish Parliament 2002). However, this part of the Act has never been brought into force and, in any event, the provisions that extend to Scotland are being removed by clause 6 of the Children and Families Bill (HC Bill5) currently before the UK Parliament. This change was approved in the Scottish Parliament on 21st May 2013 (S4M-06645). So, while provision was made for a UK wide statutory adoption register in 2002, it was never used, and is very likely to be removed in 2013. Scotland and England and Wales are instead pursuing separate statutory registers.

There is a voluntary [adoption register for England and Wales](#) which has been operated by the British Association of Adoption and Fostering since December 2004. A Scottish [voluntary register](#), also run by BAAF, was established in 2011. It has so far achieved 31 adoptions (Scottish Parliament 2013c para 136) compared to 262 looked after children living with prospective adopters in 2011/12. The arrangements for the current register include that:

“Children or adopters should only be referred to the Register following approval by the Agency Decision Maker; where there is not already a link identified locally which is being actively pursued. It is expected that agencies take no longer than 3 months to identify whether a link can be pursued locally” (Scottish Adoption Register online).

There were 137 replies on this issue in the consultation, of which 56% agreed with the proposal for a statutory register and 23% disagreed. Of those who disagreed, there was concern that local procedures and matching ought to have priority. The consultation analysis stated: “It was commonly felt that the Register might curtail local variation in approaches to securing appropriate placements, and that local authorities should be able to retain the discretion to apply different approaches on a case-by-case basis” (Scottish Government, 2012b).

BAAF stated: “If there is a duty to refer every child to SAR, we do not think that this will necessarily improve children’s chances of finding adopters [...] Commitment rather than compulsion would be preferable and in the spirit of practice to date”. While the policy memorandum states part of the rationale is to increase the number of adoptions (para 136), BAAF stated that it: “will not in itself increase the number of families available to children in need of adoption.” They recommended initiatives to raise public awareness and additional resources for adoption allowances for children with complex needs.

CHILDREN'S HEARINGS (PART 12)

This part of the Bill would amend parts of the Children's Hearings (Scotland) Act 2011 (the 2011 Act). The main changes are to remove local authorities' veto over the establishment of area support teams (ASTs¹⁹) and to require local authorities to provide administrative support to ASTs.

The 2011 Act created a new structure for children's hearings which included a National Convener, a new national organisation '[Children's Hearings Scotland](#)' and provided for local support and administration through ASTs. When the Bill was going through the parliament there was considerable controversy about the balance of local authority and national control in the new structure. In particular, this related to the role of local authorities in the ASTs which are being established by the national convener of Children's Hearings Scotland.

Requirement for local authority consent

On introduction, the Children's Hearings (Scotland) Bill had provided that local authorities would be consulted before the national convener established an AST. COSLA objected to the arrangements for ASTs on the grounds that they did not give enough control to locally accountable structures (COSLA, 2010). Successful non-government amendments at stage 2 placed ASTs under the control of local authorities. Government concerns about the ECHR implications²⁰ of this led to a compromise at stage 3 whereby ASTs were placed back under the control of the National Convener, but local authority consent was required in order to establish ASTs (Kidner, C. 2011).

The 2011 Act is in the process of being brought into force and this has included establishing ASTs. However, the policy memorandum to the Children and Young People Bill states that this process has been inconsistent and delayed, "mainly as a consequence of the varied ways in which local authorities have interacted with the process." Aileen Campbell MSP and Scottish Government officials appeared before the Education and Culture Committee on 8th May 2012 to explain why implementation of the 2011 Act was being delayed. One issue had been the difficulty in establishing ASTs. Kit Wyeth (Scottish Government) said:

"It is taking longer than we originally envisaged to get the area support team structure agreed. Each local authority has its own perspective and we have had to work with them to ensure that what they are being asked to provide to support the area support teams is manageable and affordable. We are getting to that point now, but those negotiations and discussions have necessarily taken some time (Scottish Parliament EC Committee 2012)

Section 69 of the Bill reinstates the Government's original policy intention of a requirement to consult local authorities, rather than a requirement to obtain consent.

Administrative support

The Children and Young People Bill would also require local authorities to provide administrative support to ASTs "as the National Convener considers appropriate" (section 70). Local authorities had always provided administrative support to CPACs which ASTs replace, and the policy intention appears to have been for this to continue. However, the 2011 Act

¹⁹ ASTs replace Children's Panel Advisory Committees (CPACs). They are volunteers who support the children's panel at a local level. CPAC members were appointed by Ministers and AST members by the National Convener.

²⁰ Scottish Government position was that the conflict of interest involved for local authorities would breach article 6 ECHR – right to a fair trial and so was outwith legislative competence.

currently requires the National Convener to “maintain” ASTs (Sch 1, para 12(1) to 2011 Act). (The word ‘maintain’ is repealed by s.69 of this new Bill). In spite of this, in relation to support costs, the financial memorandum to the Children’s Hearings Bill had stated:

“Close interaction between the National Convener, area support teams and local authorities will be needed to ensure effective support for panel members at the local level. It is envisaged that under the Bill local authorities will play a key role in area support teams and in the continued provision of local support to hearings, e.g. provision of office space, clerical support, and local support during the national recruitment campaign. It is proposed to change the emphasis and functions of local authorities in relation to the Hearings system, but costs are not expected to change. Table 2 therefore sets out local authority costs as **£2.99m** per annum.”

A Children’s Hearings Scotland report on ASTs states that local authorities will provide salaried positions to support ASTs.

“Partnership Agreements with local authorities for the provision of a clerk and administrative support for ASTs are currently being developed. These salaried staff will play a critical role in supporting AST members and therefore panel members” (Children’s Hearings Scotland, 2012).

This reflects the traditional support of clerking services provided to CPACs and administrative support to the children’s panel by the local authority. The change in the Children and Young People Bill creates a statutory requirement to provide this support.

ANNEX 1: PLANNING AND REPORTING REQUIREMENTS

The Bill includes requirements for planning and reporting across a wide range of provisions. There are requirements to provide reports and/or plans in relation to: children's rights (s.1, 2), corporate parenting (s. 53, 55, 59), children's services (s.7, 13), early education (s.46) and child's plan (s.31). The local authority and/or health board are required to provide most of these, but other agencies are required to report on corporate parenting and children's rights and be involved in children's services planning.

Scottish Ministers

Ministers are required to provide a corporate parenting plan and report to parliament every 3 years. They must also develop a children's rights plan and report every 3 years.

Local authorities and Health Boards

These bodies are required to provide: a corporate parenting plan and report on this every 3 years, a children's rights report every 3 years, a children's services plan every 3 years and individual child's plans as required. The local authority is also required to provide an early education and care plan every 2 years.

Corporate parenting and children's rights

In addition, the following are required to provide a plan report on corporate parenting and report on children's rights every 3 years.

Children's Hearings Scotland, Health boards, Scottish Children's Reporter Administration, Health Improvement Scotland, Scottish Qualifications Agency, Skills Development Scotland, SCSWIS, Scottish Sports Council, chief constable of the Police Service Scotland, Scottish Policy Authority, Scottish Fire and Rescue Service, Mental Welfare Commission, Scottish Housing Regulator, Bord na Gaidhlig and Creative Scotland.

Only Corporate Parenting

The following are required to provide reports on corporate parenting every three years, but do not have to report on children's rights.

Scottish Funding Council, colleges, convener of Children's Hearings Scotland, the principal reporter, Scottish Courts Service, Scottish Legal Aid Board. (The children's commissioner does not have to report on children's rights under this legislation, but does have to do so under the Act establishing that office).

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