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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

ii. [deleted]

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

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

c. general questions relating to powers to make subordinate legislation;

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

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

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

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

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

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

www.scottish.parliament.uk/delegated-powers
DPLR.Committee@scottish.parliament.uk
0131 348 5175

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# Committee Membership

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Stewart Stevenson
Scottish National Party
Introduction

1. At its meeting on 26 January 2016, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Education (Scotland) Bill as amended at Stage 2 (“the Bill”)\(^1\). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill was introduced on 23 March 2015 by the Cabinet Secretary for Education & Lifelong Learning. It covers a range of school policy issues, in particular school attainment and Gaelic-medium Education.

3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”)\(^2\).

4. The Committee reported on the delegated powers provisions in the Bill at Stage 1 in its 37\(^{th}\) report of 2015\(^3\).
5. The Committee considered each of the new or substantially amended delegated powers provisions in the Bill after Stage 2.

6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the following new or substantially amended delegated powers provisions:

- Section 1B – Plans and reports – inserting new sections 3E(2) and 3F(4) of the 2000 Act
- Section 1C – Guidance – inserting new subsection 13(2) into the 2000 Act
- Section 7 – Initial assessments
- Section 12 – Power to extend Part to early learning and childcare
- Section 17B – Learning hours
- Section 18 – Provision of School Meals – inserting new section 53ZA of the Education (Scotland) Act 1980 (“the 1980 Act”)
- Section 18A – Clothing grants – inserting new section 54A of the 1980 Act
- Section 22A – Head teachers: education and training standards – inserting new sections 90A and 98DA of the 1980 Act
- Schedule – Paragraph 20A – Modifications of the Education (Additional Support for Learning) (Scotland) Act 2004
- Schedule – Paragraph 23 – Modifications of the Education (Additional Support for Learning) (Scotland) Act 2004
Recommendations

7. The Committee’s comments and recommendations on the remaining delegated power in the Bill (as amended) are detailed below.

Schedule – Paragraph 3 – new section 3AA of the Education (Additional Support for Learning) (Scotland) Act 2004

<table>
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Provision

8. The schedule to the Bill makes various amendments to the Education (Additional Support for Learning) (Scotland) Act (“the 2004 Act”) in order to extend to children aged 12 years or over and who have the requisite capacity various rights under that Act. Paragraph 3 of the schedule to the Bill inserts a new section 3AA into the 2004 Act. New section 3AA provides that where an education authority or Tribunal is required to consider whether the wellbeing of a child who has attained the age of 12 would, or would not be adversely affected, the authority or the Tribunal must consider the matter by reference to the extent to which the child is or would be safe, healthy, achieving, nurtured, active, respected, responsible and included. These criteria also appear in section 96 of the Children and Young People (Scotland) Act 2014 (“the 2014 Act”).

9. Section 3AA(3) of the 2004 Act, as inserted by the schedule to the Bill, provides that the Scottish Ministers may by regulations modify the list of wellbeing factors as set out in section 3AA(2). Before making any such regulations, the Scottish Ministers must consult such persons as they consider appropriate. This power is subject to the negative procedure. A power to amend the list of wellbeing factors also exists in section 96(6) of the 2014 Act. That power is subject to the affirmative procedure.

Comment

10. The SDPM explains that this power is required in order to enable the Scottish Ministers to amend the list of wellbeing factors in new section 3AA of the 2004 Act as amended by the Bill where it is necessary to do so in consequence of an amendment being made by Order to the factors listed in section 96(2) of the 2014 Act. The Scottish Government intends to exercise the power only in those particular circumstances and given that the exercise of the power would be consequential upon the exercise of the parallel power in the 2014 Act, the Scottish Government considers that the negative procedure affords the appropriate level of parliamentary scrutiny over the exercise of this power.
11. The Committee considers that this power permits the Scottish Ministers to do the same thing as the power in section 96(6) of the 2014 Act. The power in section 96(6) of the 2014 Act was considered by the Parliament to necessitate the higher form of parliamentary scrutiny afforded by the affirmative procedure. For reasons of consistency with the 2014 Act, the Committee accordingly considers that this power should also be subject to the affirmative procedure, unless strong reasons support the selection of negative procedure. The Committee does not consider the fact that the Scottish Government intends to exercise this power only in circumstances where the parallel power in the 2014 Act is exercised to be a strong justification for selecting the negative procedure, given that those intentions will not be binding upon future administrations.

12. The Committee also notes that the differences between the affirmative and the negative forms of parliamentary procedure could in some circumstances result in regulations under the power in section 3AA(3) of the 2004 Act being made and coming into force before the Parliament has approved an Order under section 96(6) of the 2014 Act. Should those circumstances arise in practice, the Scottish Government’s reasons for choosing the negative procedure for the exercise of the power in the 2004 Act – namely that the regulations will always be consequential upon Parliament approving changes to the list of wellbeing factors in an Order made under the 2014 Act – would be undermined.

13. The Committee accordingly considers that, given that this power permits the textual modification of primary legislation, and that a very similar power exists in another statute where it is subject to the affirmative procedure, this power should also be subject to the affirmative procedure.

14. The Committee accordingly draws the power in the new section 3AA of the 2004 Act, as inserted by paragraph 3 of the schedule to the Bill, to the attention of the Parliament.

15. The Committee calls on the Scottish Government to amend the Bill at Stage 3 so that the power is subject to affirmative procedure.
1 Education (Scotland) Bill as amended at Stage 2 is available at the following website:
http://www.scottish.parliament.uk/S4_Bills/Education%20(Scotland)%20Bill/SPBill64AS042015.pdf
[accessed January 2016]
2 Education (Scotland) Bill Supplementary Delegated Powers Memorandum is available at the following
website:
http://www.scottish.parliament.uk/S4_Bills/Education%20(Scotland)%20Bill/SPBill64ADPMS042016.pdf
[accessed January 2016]
(Scotland) Bill at Stage 1 (SP Paper 756) is available at the following website:
[accessed January 2016]