Delegated Powers and Law Reform Committee

Education (Scotland) Bill
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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.

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Introduction

1. At its meetings on 5 May, 2 June and 9 June 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Education (Scotland) Bill at stage 1 (“the Bill”). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (“the DPM”).

3. 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.

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i Education (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Education%20(Scotland)%20Bill/b64s4-introd.pdf

ii Education (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Education_DPM_.pdf
Overview of the Bill

4. The Bill makes provision in four separate parts. Part 1 of the Bill relates to inequalities of outcome. It imposes a duty on education authorities, when taking decisions of a strategic nature about the exercise of their functions relating to school education, to have regard to the desirability of carrying out those functions in a way designed to reduce inequalities of outcome experienced by pupils which result from socio-economic disadvantage. A similar duty applies to the Scottish Ministers when exercising their functions relating to education.

5. The duties to have regard to the need to reduce inequalities of outcome may be extended so as to capture other prescribed groups of children experiencing inequalities of educational outcome. Education authorities are required to consult various interested parties when taking strategic decisions in exercise of their duties, and they must also have regard to guidance issued by the Scottish Ministers.

6. Part 2 of the Bill relates to the Gaelic Medium Primary Education ("GMPE"). GMPE is the teaching and learning of subjects through the medium of the Gaelic language (and can be distinguished from Gaelic learner education, which is the teaching and learning of the Gaelic language itself). Part 2 establishes a process whereby a parent of a pre-school child may request an education authority to access demand for GMPE within a particular area. Requests must be accompanied by evidence that there is a demand for GMPE from parents of other children in the same year group as the child whose parent made the request.

7. An education authority must carry out an initial assessment of the demand for GMPE following a parental request. Where the initial assessment reveals that the demand for GMPE is of a sufficient level as specified in the Bill, the authority must undertake a full assessment. The full assessment procedure involves extensive consultation by the education authority with various organisations specified in the Bill. At the conclusion of the full assessment procedure, the authority must prepare a report setting out its decision on whether or not to secure the provision of GMPE within the specified area.

8. Part 3 of the Bill makes miscellaneous amendments to a number of enactments relating to education. Section 17 of the Bill introduces the schedule, which makes modifications to the Education (Additional Support for Learning) (Scotland) Act 2004. The modifications extend some of the rights and decision-making powers under that Act to children aged 12 and upwards who are assessed by an education authority or, as the case may be, the Additional Support Needs Tribunals for Scotland ("ASNTS") as having sufficient capacity to exercise those rights or make those decisions.

9. Section 18 of the Bill re-states section 53 of the Education (Scotland) Act 1980 ("the 1980 Act") which regulates the provision of school meals. In particular, it requires education authorities to provide a free school lunch to children who are, or whose parents are, in receipt of various benefits. Section 20 of the Bill amends the 1980 Act so as to require education authorities to appoint a Chief Education Officer, who will advise the authority on the carrying out of its function under the Bill and any other enactment.
10. Section 19 of the Bill amends section 70 of the 1980 Act. Section 70 confers power on the Scottish Ministers to make an order declaring that an education authority, the managers of a school or educational establishment, or another person, is in default of their educational duties under the 1980 Act or any other enactment relating to education. Sections 21-22 of the Bill make provision for, respectively, the registration of independent schools and the employment of teachers in grant-aided schools.

12. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:

- Section 1 – Pupils experiencing inequalities of outcome
- Section 3(1) – Guidance
- Section 4(3) – Reports
- Section 5(5) – Assessment requests
- Section 9(4) – Requests that need not be considered
- Section 14 – Guidance
- Section 18 – Provision of school meals
- Section 19 – Enforcement of statutory duties
- Section 20 – Appointment of Chief Education Officer
- Section 21 – Registration of independent schools
- Section 22 – Employment of teachers in grant-aided schools
- Section 26 – Ancillary provision
- Section 27 – Commencement
- Schedule – Paragraph 16
- Schedule – Paragraph 20
- Schedule – Paragraph 23

13. At its meeting on 5 May, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. This correspondence is reproduced at the Annex.

14. In light of the written responses received, the Committee agreed that it was content with the delegated power in Section 10(8) of the Bill. The Committee considered that the Scottish Government had provided substantial further justification for the choice of negative procedure for the exercise of that power, and that it did not need to comment further.
Recommendations

15. The Committee’s comments and recommendations on the remaining delegated powers in the Bill are detailed below.

Section 7 – Initial assessments

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

Provision

16. Section 7 of the Bill relates to initial assessments regarding the provision of GMPE and applies where an education authority receives a parental request under section 5 of the Bill. Where such a request is made, the authority is required to undertake an initial assessment of the need for GMPE both within the area designated as the GMPE assessment area under section 6, and within the specified child’s year group (the specified child is the child whose parent made the request triggering the assessment.

17. Section 7(5) provides that where, following an initial assessment, the authority is satisfied that the conditions in section 7(6) are met, the authority must determine that there is a potential need for GMPE in the area. Where the authority is not satisfied that the conditions in section 7(6) are met, the authority must determine that there is no potential need for GMPE within the assessment area.

18. The conditions in section 7(6) are: (a) taken together, the specified child and the children in respect of whose parents the authority has information as mentioned in section 7(3)(a) number 5 or more; and (b) the demand for GMPE mentioned in section 7(3)(b) is at, or is likely to increase to, a level the authority considers to be reasonable. Section 7(7) of the Bill provides that the Scottish Ministers may by regulations amend section 7(6)(a) so as to substitute a different number for the number of children there specified. The power also enables the Scottish Ministers to provide that the number of children specified is to be read as a different number in the application of that subsection to such education authorities as may be specified in the regulations.

Comment

19. The Committee asked the Scottish Government to explain further why the negative procedure was considered appropriate for the exercise of this power. In its response, the Scottish Government explained that the choice of negative procedure was informed by the need to make proper use of Parliamentary time by focusing a more detailed level of Parliamentary scrutiny where that is considered to be appropriate.

20. The Scottish Government explained that it does not consider that the exercise of the power in section 7(7) would be controversial, on the basis that it would not represent a departure from the existing policy of Part 2 of the Bill. The Government further points out that the terms of the Bill ensure that an education authority retains a discretion to proceed to undertaking a full assessment of the need for GMPE within a particular area even where the threshold figure representing viability for GMPE set out
in section 7(6)(a) is not met. That discretion would subsist notwithstanding the exercise of the power in section 7(7) to change the figure, or to vary it between different education authority areas. The Scottish Government anticipates that the geographic and demographic composition of certain education authority areas may mean that those authorities routinely proceed to exercise their discretion to provide GMPE even where the threshold figure is not met.

21. The Committee considers that the power in section 7(7) of the Bill enables the making of regulations which could have a significant effect on the scope and application of Part 2 of the Bill. Varying the threshold at which an education authority is required to undertake a full assessment could represent an important change in the manner in which Part 2 operates and the effects it has in practice. Substantially increasing the threshold figure could make it more difficult to secure a full assessment (and potentially thereafter GMPE itself), as evidence of demand for GMPE would require to be gathered in respect of a greater number of children. Conversely, a reduction in the threshold figure could mean that a greater number of cases would proceed to the full assessment stage, which could have resource implications for education authorities. The Committee considers that balancing the interests of education authorities and parents in these circumstances is a matter of substance in which the lead Committee and the Parliament as a whole have a clear interest.

22. The Committee further considers that the existence of an overriding discretion for education authorities to provide GMPE even where the threshold figure is not reached does not weaken the case for a high level of Parliamentary scrutiny over any changes to that figure that may be set out in regulations. The Committee views the distinction between what education authorities are required to do by statute and what they have a discretion to do as two separate things and the presence of one does not have an impact on the level of scrutiny that is appropriate to the other. In the Committee’s view, the threshold figure remains important even in the presence of a discretion to override it, because some education authorities may not be willing to exercise the discretion, and parents unable to reach the threshold (for example if it is significantly increased) would have no legal basis to require the authority to do so.

23. Finally, the Committee observes that the negative procedure is commonly considered to represent the appropriate level of Parliamentary scrutiny for administrative matters, or matters of procedural or technical detail. It does not consider that the subject matter of the power in section 7 can readily be described in those terms. The Committee views the power as an important power in policy terms and one which could have significant effects on the manner in which the GMPE assessment process operates both across Scotland and within particular education authority areas. The fact that the Scottish Government does not expect the exercise of the power to be controversial does not of itself lead to the conclusion that the power should be subject to the negative procedure. For these reasons, the Committee recommends that the power in section 7(7) of the Bill be amended at Stage 2 so that it is subject to the affirmative procedure and invites the lead committee to pursue this matter with the Scottish Government.

24. The Committee recommends that the power in section 7(7) of the Bill be subject to the affirmative procedure and calls on the Scottish Government to amend the Bill to this effect at Stage 2. The Committee invites the lead committee
to pursue this matter with the Scottish Government.

Section 12 – Power to extend part to early learning and childcare

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative where textual amendments made to primary legislation; otherwise negative

Provision
25. Section 12 of the Bill enables the making of regulations which would extend the provisions of Part 2 of the Bill relating to GMPE to early learning and childcare (“ELC”). At present, Part 2 applies only in respect of primary school education and a request under section 5 can only require an education authority to assess the need for Gaelic medium education in primary schools. The effect of exercise of this power would be to permit a request made under section 5 to be treated by the education authority as a request to assess the need for Gaelic medium education within its area in respect of its duty to provide ELC.

26. Section 12(4)(a) of the Bill provides that regulations made to extend Part 2 to ELC may modify Part 2, the Education (Scotland) Act 1980 or any other enactment. Section 12(4)(b) provides that such regulations may provide for any provision of Part 2, the 1980 Act and any other enactment to apply with or without modifications. The power is generally to be subject to the negative procedure, but where it is exercised so as to make textual amendments to primary legislation, the affirmative procedure will apply.

Comment
27. The Committee asked the Scottish Government to explain further the reasons why this power was subject to the negative procedure unless it is exercised so as to make textual amendments to primary legislation. The extension of Part 2 of the Bill to ELC, and thereby to a new set of children and parents, appeared to the Committee to be a matter of significance meriting the higher level of scrutiny afforded by the affirmative procedure.

28. In its response, the Scottish Government has explained that it considers the negative procedure strikes the appropriate balance between proper use of Parliamentary time and effective scrutiny of the exercise of this power. It also states that the power would not be exercised without extensive prior consultation with relevant stakeholders.

29. The Committee again considers that the extension of Part 2 of the Bill to cover ELC is another significant matter in which the Parliament would be likely to have a strong interest. Expanding Part 2 would mean that the GMPE assessment process would apply in a new range of circumstances, and to a new cohort of parents and children. It could also – as the Scottish Government acknowledges in its response – have resource implications for education authorities. The Committee considers that the Parliament may wish to have a clear opportunity, as a matter of the procedure ascribed to the power to make those regulations, to actively debate those resource implications. The Committee also observes that there is no apparent requirement on the face of the
Bill for consultation to take place prior to making regulations in exercise of this power. In the Committee’s view, the stated intention that regulations would be subject to extensive prior consultation does not remove or diminish any interest the Parliament may have in considering and debating those regulations itself.

30. The Committee further considers that a range of factors affects the choice of procedure appropriate to the exercise of a delegated power, not simply the question of whether the regulations introduce new policy, or represent a departure from existing policy. The Committee commonly recommends that a power be subject to the affirmative procedure notwithstanding the fact that it does not contemplate new policy, but simply because the power is a significant one which appears to the Committee to concern matters in which the Parliament has an interest or which it may wish to debate.

31. In this case, the Scottish Government has acknowledged that the reason for taking a power in section 12 is that it would be premature to extend Part 2 of the Bill to ELC at present, because the sector is not yet settled and the Children and Young People (Scotland) Act 2014 is not yet fully embedded. The Government also wishes to obtain experience from the operation of Part 2 in relation to primary education before taking a decision as to whether the Part should be extended to ELC.

32. In the Committee’s view, these points demonstrate that any decision to expand Part 2 of the Bill to ELC will be an important one, to be informed by careful consideration of a number of complex issues, including an assessment of the resource implications for education authorities that the extension of Part 2 to ELC may give rise to. The Committee considers that the lead Committee and the Parliament as a whole should have the opportunity to be actively involved in that debate. For these reasons, the Committee recommends that the power in section 12 of the Bill should be subject to the affirmative procedure in its entirety, and calls on the Scottish Government to bring forward an appropriate amendment to this effect at Stage 2.

33. The Committee recommends that the power in section 12 of the Bill be subject to the affirmative procedure in its entirety, and calls on the Scottish Government to amend the Bill at Stage 2 to this effect.
Annex

Correspondence with the Scottish Government—

On 5 May 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 5 May and seeks an explanation of the following matters:

Section 7 – Initial assessments

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2. Section 7 of the Bill relates to initial assessments of the need for Gaelic Medium Primary Education (GMPE), and applies where an education authority receives a parental request under section 5 of the Bill. Where the authority is required to make an initial assessment for the need for GMPE, both within the area designated as the GMPE assessment area under section 6 and within the specified child’s year group.

3. Section 7(5) provides that where, following an initial assessment area, the authority is satisfied that the various conditions in section 7(6) are met, the authority must determine that there is a potential need for GMPE in the area.

4. There are 2 conditions in subsection (6), in (a) and (b). Paragraph (a) provides that the child specified in the request and the children resident in that GMPE assessment area who are in the same year group as the specified child, and in respect of whose parents the authority holds information about demand as mentioned in section 5(3), total 5 or more in number. Paragraph (b) provides that the demand for GMPE in respect of children in a different year group is at, or is likely to increase to, a level that the authority considers reasonable.

5. Section 7(7) provides that the Scottish Ministers may by regulations amend section 7(6)(a) so as to substitute a different number for the number of children there specified. The power also enables the Ministers to provide that the number of children specified is to be read as a different number, in the application of that subsection to such education authorities as may be specified in the regulations. In essence the power enables the Scottish Ministers to change the threshold figure for determining whether there is demand for GMPE in a particular area, sufficient to justify securing GMPE, or to apply different threshold figures for different education authorities.

6. The power is subject to the negative procedure and, while not altering the substance of the duty placed on education authorities to determine that there is a need for GMPE in a particular area when a certain threshold is reached, the power is nonetheless significant to the practical operation of Part 2 of the Bill and its scope and application.
7. **The Committee therefore asks the Scottish Government:**

- For further justification of the choice of negative procedure for the exercise of this power, given its apparent significance and the fact that it permits the variation of the threshold figure beyond which an education authority must determine that there is a potential need for GMPE in a particular assessment area?

**Section 10 – Full assessments**

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8. Section 10 of the Bill relates to full assessments of the need for GMPE. Where, at the conclusion of the initial assessment process, an education authority determines that there is a potential need for GMPE in that assessment area, the authority must either carry out a full assessment, or proceed directly to securing GMPE. Where the authority concludes at the end of the initial assessment process that there is *not* a potential need for GMPE in the area, it is not required to take any further action. However it may still exercise its discretion and either undertake a full assessment, or proceed directly to securing GMPE.

9. The full assessment procedure requires the education authority to consult with the bodies as specified in section 10(3). The education authority must then decide whether to secure the provision of GMPE in the particular assessment area. Section 10(7) sets out a list of matters to which the education authority must have regard in making its decision. In addition to the matters specified in the list in section 10(7), the authority must also have regard to any other matters it considers to be relevant to the decision.

10. Section 10(8) provides that the Scottish Ministers may by regulations modify sections 10(3) or 10(7). They may also make such other modifications of section 10, as they consider necessary or expedient in consequence of any modification of section 10(3). The power is subject to the negative procedure, and permits the modification of primary legislation.

11. Section 10(8)(b) also permits the Scottish Ministers to make “such other modifications” of section 10 as they consider necessary or expedient in consequence of any modification of section 10(3). However there is no further specification of what those consequential modifications may include.

12. **The Committee therefore asks the Scottish Government:**

- Why is it considered appropriate that the power in section 10(8)(b) is subject to the negative procedure, given that it permits modifications to primary legislation, the nature of which is not specified further beyond the requirement that Ministers consider them to be necessary or expedient in consequence of any modification of subsection (3)?
Section 12 – Power to extend part to early learning and childcare

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative where textual amendments made to primary legislation; otherwise negative

13. Section 12 of the Bill enables the making of regulations which would extend the provisions of Part 2 of the Bill, relating to GMPE, to early learning and childcare.

14. At present, Part 2 applies only in respect of primary school education. A request under section 5 can only require the education authority to assess the need for Gaelic Medium education in primary schools. This power is subject to the negative procedure, except where it is exercised to make textual modifications to primary legislation. The power would permit a request made under section 5 to be treated by the education authority as a request to assess the need for Gaelic medium education in its area in respect of the duty to provide early learning and childcare.

15. Section 12(4)(a) provides that regulations made to extend Part 2 to early learning and childcare may modify Part 2, the 1980 Act or any other enactment. Section 12(4)(b) provides that such regulations may provide for any provision of Part 2, the 1980 Act and any other enactment to apply with or without modifications. The power is generally to be subject to the negative procedure, but where it is exercised so as to make textual amendments to primary legislation, the affirmative procedure will apply.

16. The extension of Part 2 to early learning and childcare would represent a significant departure in policy terms from the position under the Bill at present, as the assessment process presently applies only in respect of primary education.

17. The Committee therefore asks the Scottish Government:
   - For further explanation why this power is not subject to the affirmative procedure in its entirety, rather than to the negative procedure where regulations made in its exercise do not make textual amendments to primary legislation?

On 19 May 2015, the Scottish Government responded as follows:

Thank you for your letter dated 5 May to Chris Nicholson seeking an explanation of a number of delegated powers within the Education (Scotland) Bill. The Scottish Government thanks the Committee for their comments and an opportunity to consider these matters. Please see our response below to each of these matters:

Section 7 – Initial assessments

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

The Committee asks the Scottish Government for further justification of the choice of negative procedure for the exercise of this power, given its apparent
significance and the fact that it permits the variation of the threshold figure beyond which an education authority must determine that there is a potential need for GMPE in a particular assessment area?

The Scottish Government agrees that the powers in section 7(7) of the Bill allow the Scottish Ministers to amend the threshold figure which is one limb of the test that prescribes whether an education authority must determine that there is or is not a potential need for GMPE at the culmination of an initial assessment. That figure has been chosen because current provision of GME throughout Scotland suggests that the existence of demand for GMPE from the parents of five or more children in the same year group represents the point that it becomes viable for an education authority to deliver GMPE. However, section 7(7)(a) of the Bill provides a power for Scottish Ministers to vary this figure (with universal application) if, in light of experience of the operation of the provisions (which allow discretionary provision of GMPE even when the threshold is not met) and the promotion of GME and Gaelic language education as required by the Bill, it becomes clear that education authorities consider it viable to deliver GMPE for classes of fewer than five children. Section 7(7)(b) of the Bill also provides a power for the Scottish Ministers to provide that the threshold figure should be read as a different figure in different education authority areas. The reason for taking this power is that we anticipate that the geographic and demographic composition of certain education authorities may mean that, contrary to the trend across Scotland, those authorities routinely proceed to exercise their discretion to provide GMPE even when the threshold of five is not met because they consider it viable to deliver GMPE to classes of fewer than five children.

The intention is that the powers in section 7(7) will only be exercised to ensure that the assessment process in the Bill adapts to the evolving concept of ‘viability’ of GMPE delivery (which can only happen in the light of experience) and – in that sense – the power will not be used to change the policy behind section 7(6)(a) which will already have been debated during the passage of the Bill.

When deciding whether affirmative or negative procedure is appropriate for these powers, the Scottish Government has sought to strike a balance between making proper use of valuable Parliamentary time and focussing a more detailed level of Parliamentary scrutiny where appropriate. The Scottish Government’s view is that the exercise of either of the section 7(7) powers would be unlikely to be controversial because it would be in line with the existing policy of the Bill and the operation of the provisions in practice, therefore, it would not be a good use of parliamentary time to initiate a debate on each occasion the powers are used. This is particularly so, given that the intention is to use the powers only to reflect the evolving concept of ‘viability’ (both across Scotland and in particular education authorities where unusual conditions exist). As is standard practice, the Scottish Government would ensure that consultation and engagement with relevant interests preceded the preparation of such regulations. We also note that negative procedure would not prevent debate if members had concerns about a particular set of regulations.

For these reasons, the Scottish Government considers that it is appropriate that the powers in section 7(7) be subject to the negative procedure.
## Section 10 – Full assessments

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The Committee asks the Scottish Government why is it considered appropriate that the power in section 10(8)(b) is subject to the negative procedure, given that it permits modifications to primary legislation, the nature of which is not specified further beyond the requirement that Ministers consider them to be necessary or expedient in consequence of any modification of subsection (3)?

As the Committee have identified, the powers in section 10(8)(a) of the Bill will enable the Scottish Ministers to alter the list of bodies at subsection (3) whose views must be sought by an education authority when carrying out a full assessment as well as the list of matters at subsection (7) which an education authority must have regard to in undertaking a full assessment. The intention is that these powers will provide the flexibility to respond to the creation of new bodies and any change in the name or status of existing bodies as well as enable the Scottish Ministers to react to unforeseen issues in the operation of section 10(7) or matters that practice suggests have been omitted from section 10(7) and that education authorities should be obliged to have regard to in carrying out a full assessment of whether or not to secure the provision of GMPE.

Section 10(8)(b) provides the power to “make such other modifications of [section 10] as the Scottish Ministers think necessary or expedient in consequence of any modification of subsection (3)”. This power is intended to provide the flexibility to modify section 10 should tweaks be necessary or expedient and the only permitted modifications are those that are in consequence of the modification of section 10(3) (a further limitation on the power). The Scottish Government considers that, if the power to modify subsection (3) is exercised (to change the list of bodies that must be consulted during a full assessment), consequential changes might be required to subsection (4) to impose an obligation on the additional/alternative bodies to provide their views and potentially elsewhere e.g. to subsection (2) to ensure that the nature of the consultation duty continues to operate effectively and subsection (7) to ensure that both compulsory and voluntary views continue to be mandatory considerations in a full assessment.

Although this power permits modification of primary legislation, it will not be used to alter the basic duty on education authorities to request views from relevant bodies and have regard to those views if provided or the duty on certain relevant bodies to provide those views within in a specified time. As such, the exercise of these powers would be consistent with the existing policy of the Bill and the Scottish Government considers it unlikely that use of these powers would be controversial.

Additionally, the power in section 10(8)(b) is not capable of being used to modify primary legislation in general; it is, as noted, exercisable only so as to modify section 10 for limited, consequential purposes. It is therefore not comparable to say, section 12, which may be used more broadly to alter any Act (in which case, the instrument would be subject to affirmative procedure).
Once again, the Scottish Government has sought to strike a balance between making proper use of valuable Parliamentary time and focussing a more detailed level of Parliamentary scrutiny where appropriate. The Scottish Government's view is that it would not be a good use of parliamentary time to initiate a debate on each occasion this power is used. This is particularly so, given that the Scottish Government would ensure that consultation and engagement with relevant interests (as is standard practice) preceded the preparation of such regulations and if any concerns did arise it would still be possible for these matters to be debated in Parliament under negative procedure.

For these reasons, the Scottish Government considers that it is appropriate that the power in section 10(8)(b) be subject to the negative procedure.

Section 12 – Power to extend part to early learning and childcare

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The Committee asks the Scottish Government for further explanation why this power is not subject to the affirmative procedure in its entirety, rather than to the negative procedure where regulations made in its exercise do not make textual amendments to primary legislation?

The Scottish Government agrees that Part 2 of the Bill currently applies only in respect of primary school education. However, the Scottish Government does not agree that extension of Part 2 to early learning and childcare (“ELC”) would represent a significant departure from the policy behind the Bill. The policy rationale for restriction of Part 2 to primary school education is that GME is most effective when provided from a young age. However, the potential resource implications of extending Part 2 of the Bill beyond primary school education at this stage means that the Scottish Government has taken a power to enable them to do so via secondary legislation at a future date, if and when the time is right, rather than to do so in the Bill.

It is envisaged that the power in section 12 would be exercised when a combination of circumstances exist: when the ELC sector is more settled as a result of the Children and Young People (Scotland) Act 2014 being more fully embedded and where the experience of the operation of Part 2 demonstrates that parents should be able to request GME at ELC level.

The policy intention is clear from the existence of section 12 in the Bill and this policy will be debated thoroughly during the Bill’s Parliamentary progress. Parliament will, through the Bill process, have already approved the principle of potentially applying Part 2 of the Bill to ELC; the regulations would simply contain provision to give effect to that principle.

As such, the Scottish Government does not consider that it would be a good use of Parliamentary time to initiate a debate on regulations under section 12 under the affirmative procedure (unless the regulations are making textual amendments to primary legislation). This is particularly so because, given the effect of such
regulations, they could not operate without first carrying out extensive consultation and engagement with relevant interests prior to their preparation. If any concerns did arise in relation to regulations under section 12, it would still be possible for these matters to be debated in Parliament under the negative procedure.

One way the power to modify primary legislation under section 12 may be used is to make provision that is linked to, or consequential on, the principal provisions of the regulations that enable the purpose mentioned in section 12(2) to be achieved. Such linked provision would be of the kind mentioned in section 26 of the Bill, ie, ancillary to the purposes of the regulations. The Scottish Government considers it would be inconsistent to make instruments under section 12 that textually amend primary legislation subject to negative procedure, while ancillary provision under section 26 that textually amends primary legislation is subject to affirmative procedure. So while the power in section 12 is, in general, subject to the negative procedure for the reasons stated, its being subject to affirmative procedure where it amends primary legislation ensures consistency in the approach to parliamentary procedure within the Bill.