

# Scottish Languages Bill

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## Delegated Powers Memorandum

### Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Scottish Languages Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 39–EN);
  - a Financial Memorandum (SP Bill 39–FM);
  - a Policy Memorandum (SP Bill 39–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 39–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform the debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### Outline of Bill provisions

4. The Bill consists of three Parts:
  - Part 1 of the Bill concerns the Gaelic language and is divided into two Chapters: Support for the Gaelic language, and Education,
  - Part 2 of the Bill concerns the Scots language and is divided into two Chapters: Support for the Scots language, and School education,
  - Part 3 of the Bill contains its final provisions.

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5. In these Notes:

- the “1980 Act” means the Education (Scotland) Act 1980,
- the “2005 Act” means the Gaelic Language (Scotland) Act 2005,
- the “2016 Act” means the Education (Scotland) Act 2016.

6. The Bill includes a number of measures to clarify duties on public authorities, to make proportionate activity more effective and to address gaps and obstacles in the delivery of Gaelic education. The Bill also includes provisions amending the functions of Bòrd na Gàidhlig. For Scots the measures aim to build on the existing non-legislative structures that are in place with a more effective system to provide support for Scots. This legislation seeks to put in place the correct structures and powers to allow Scotland to support its indigenous minority languages, balancing the needs of the languages nationally while also allowing for local variation.

## Rationale for subordinate legislation

7. The Bill contains a number of delegated powers. These are explained in more detail in the sections below with an explanation of who the power is conferred on; whether exercisable by guidance, regulations or direction; what each power allows; why the power has been taken in the Bill and why the selected form of Parliamentary procedures is considered appropriate.

8. In deciding whether legislative provisions should be set out in subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had due regard to:

- the need to make proper use of valuable Parliamentary time;
- the need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

9. The Bill includes a number of measures to clarify the duties on public authorities, to make proportionate activity more effective and to address gaps and obstacles in the delivery of Gaelic education. The bill also includes provisions amending the functions of Bòrd na Gàidhlig. For Scots, the measures aim to build on the existing non-legislative structures that are in place with a more effective system to provide support for Scots. The conferral of delegated powers where appropriate is an important part of the balance. This legislation seeks to put in place the correct structures and powers to allow Scotland to support its indigenous minority languages, balancing the needs of the languages nationally while allowing for local variation.

## Delegated powers

### Section 4(2): Areas of linguistic significance

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: none

#### Provision

10. Section 4 inserts a new section 1B(11) in the 2005 Act, providing for a Ministerial power to give guidance to local authorities relating to local authorities' new functions under section 1B(11) of the 2005 Act. A local authority must have regard to such guidance.

11. Section 4 of the Bill modifies the 2005 Act to insert two new sections. Inserted section 1A sets out the circumstances in which an area may be designated as an area of linguistic significance under section 1B.

12. Inserted section 1B then sets out the process for a local authority to designate all or part of its area as an area of linguistic significance, if it considers that the area falls within the description set out in section 1A(1). In particular, the local authority must consult interested persons and publicise the proposed designation before submitting it to the Scottish Ministers for approval. A designation may be varied or revoked, with such variation or revocation being subject to the same process of consultation, publication and submission for approval.

#### Reason for taking power

13. The power for the Scottish Ministers to give guidance to local authorities relating to their functions under this section is to allow guidance to be provided to assist local authorities in their consideration of which parts of their area falls within the description set out in section 1A(1). For example, guidance could set out the sources of information that may be helpful in identifying the Gaelic language skills of the area's population and/or the historical connections with the use of Gaelic. Guidance could provide examples of how an area in which teaching and learning by means of the Gaelic language is provided may be identified. Guidance could also provide examples of activity relating to the Gaelic language or Gaelic culture so that local authorities consider these activities when considering a designation for their area or part thereof.

#### Choice of procedure

14. Allowing local authorities to consider, at a local level, their area and to have the option to designate all, part, or none of the authority area as an area of linguistic significance based on the local circumstances, is considered the most appropriate way to approach the task of identifying areas which may require differential consideration due to linguistic significance. Local circumstances will vary considerably in terms of

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demography, historical connection and current levels of activity. Guidance is considered to be an appropriate method for signposting resources and contacts some of which operate nationally, some locally and with varying level of profile. Guidance is also considered an appropriate method for highlighting the approaches which local authorities may wish to consider in taking forward a designation. None of the information envisaged for setting out in guidance would be suitable for a regulation-making power or for further detailing on the face of the Bill. It is not considered appropriate to provide for Parliamentary process for guidance in relation to this function.

## Section 4(3)(b): Areas of linguistic significance

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### Provision

15. Section 4(3)(b) of the Bill makes an amendment to an existing power in section 3(7) of the 2005 Act. The existing power is a power which allows the Scottish Ministers by regulations to make further provision in relation to the content of Gaelic Language Plans. There is a requirement in the existing power for the Scottish Ministers to consult with Bòrd na Gàidhlig prior to exercising the power. Section 11 of the Act provides that the existing regulation-making power is subject to negative procedure. The amendment introduced by section 4(3)(b) inserts that the existing power to make regulations can “include provision about the required content of Gaelic language plans in respect of areas of linguistic significance”.

### Reason for taking power

16. It is considered appropriate to amend the existing regulation-making power to ensure that it is put beyond doubt that the power enables provision to be made about the content of Gaelic language plans in respect of areas of linguistic significance. The section 3(7) power has not yet been exercised by the Scottish Ministers. However, in considering the suite of powers that would be appropriate for the Gaelic language, it was identified that the exercise of this power could be helpful in assisting to streamline the administration and support the delivery of Gaelic Language Plans. Therefore, in retaining this power it is necessary to ensure that it reflects the new provisions elsewhere in the Bill on areas of linguistic significance

### Choice of procedure

17. No change is being made to the procedure for making regulations under this power. No amendment is proposed to section 11 of the 2005 Act which provides for negative procedure to attach to the existing section 3(7) regulation making power. The power as modified will therefore simply continue to be subject to negative procedure. The power is still considered to be appropriate to exercise by negative procedure. The level of detail which may be set out in regulations under this power is

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not suitable for primary legislation. The use of the negative procedure will allow for flexibility for adjustments to take place as the designation of areas of linguistic significance develops.

## Section 6(2): Gaelic language standards

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

18. Section 6(2) of the Bill inserts a new section 2C into the 2005 Act, giving the Scottish Ministers the power to make regulations to specify standards and requirements relating to promoting, facilitating and supporting the use of the Gaelic language which are to apply to relevant public authorities in exercising their functions.

19. Regulations may in particular make provision about how functions are to be exercised in areas of linguistic significance, and otherwise make different provision for different areas (including different parts of the area in which the authority exercises its functions, for example different parts of a local authority area) and make different provision for different purposes.

20. Regulations under section 2C(1) are subject to the affirmative procedure and the Scottish Ministers must consult interested parties before laying a draft before the Scottish Parliament.

### Reason for taking power

21. In order to promote, facilitate and support the use of the Gaelic language, it is important that the Scottish Ministers have powers to set standards for relevant public authorities to adhere to in order to contribute to those efforts. An ability to set regulations which apply generally is important to allow these to keep pace with academic research and practice concerning minority language planning and revitalisation. The power would ensure there is flexibility to allow the range of measures to be introduced for different bodies, different circumstances and different areas as appropriate. The power will allow standards to be evolved proportionately to adapt to changing circumstances over time.

### Choice of procedure

22. The affirmative procedure will allow for a higher level of scrutiny by Parliament: this is considered appropriate given the potential impact of the power on the statutory functions of public authorities. Use of the affirmative procedure here mirrors the approach taken in the Bill in relation to Scots Language Standards.

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## Section 7(2): Power for Scottish Ministers to give guidance to relevant public authorities.

Power conferred on: Scottish Ministers

Power exercisable by: Guidance to be given by Scottish Ministers

Parliamentary procedure: none

### Provision

23. Section 7(2) of the Bill inserts a new section 2E into the 2005 Act which gives a power for Scottish Ministers to give guidance to relevant public authorities relating to their duties under the newly inserted section 2D (duties of relevant public authorities relating to the Gaelic language.) In preparing guidance, the Scottish Ministers must consult with Bòrd na Gàidhlig and such other persons as the Scottish Ministers consider appropriate. Guidance given under this power must be published.

### Reason for taking power

24. The power for the Scottish Ministers to give guidance to relevant public authorities relating to their functions under this section is to allow guidance to be provided on how consideration of Gaelic can be incorporated into exercise of functions. For example, guidance could set out examples of how organisations have used Gaelic language and culture within their organisation, in their activities or in relation to their operations in particular areas.

25. Guidance can sign post a range of bodies that are already operational and are funded to record place names in Gaelic or maintain cultural and historic records relating to language or culture. Guidance can set out how these may be accessed and used and where these may be most relevant to consider.

### Choice of procedure

26. Guidance is considered to be the most appropriate method for signposting resources and contacts some of which operate nationally, some locally and with varying level of profile. Guidance is also considered an appropriate method for highlighting examples of approaches which relevant authorities use to incorporate Gaelic into their work and their ways of working. The information envisaged for setting out in guidance would not be suitable for a regulation-making power or for further detailing on the face of the Bill. However, guidance should provide the relevant authority with information to allow it to consider how best to satisfy the duty in section 2D.

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## Section 7(2): Power for Scottish Ministers to give directions to relevant public authorities

Power conferred on: Scottish Ministers

Power exercisable by: Directions to be given by Scottish Government

Parliamentary procedure: none

### Provision

27. Section 7(2) of the Bill inserts a new section 2F into the 2005 Act which gives a power for the Scottish Ministers to give a direction to a relevant public authority relating to its duties under the newly inserted section 2D (duties of relevant public authorities relating to the Gaelic language). In advance of issuing any direction the Scottish Ministers must consult the relevant public authority.

### Reason for taking power

28. The power to give a direction to a relevant public authority in relation to exercise of its functions under section 2D will ensure that on a case-by-case basis, and as a matter of last resort, the Scottish Ministers can direct a relevant authority to take action or refrain from taking action to ensure that they are exercising their functions in a way that satisfies the duty in section 2D. The power cannot be exercised without prior consultation with the relevant authority, which will ensure that appropriate discussion and dialogue must take place around the issue under consideration, the reasoning and any potential constraints or limitations under which the relevant authority is operating. A direction may also be used to provide authorisation for a relevant authority to take supportive action which they would otherwise be uncertain about pursuing.

### Choice of procedure

29. A direction-making power is considered appropriate to allow bespoke consideration of a measure in the specific context, noting that in exercising the power prior consultation would be required, and that all directions would require to be reasonable and proportionate. It is not considered appropriate to provide for Parliamentary process for issuing of directions in relation to this function.

## Section 9(6): Gaelic language plans

Power conferred on: Scottish Ministers

Power exercisable by: Guidance given by Scottish Ministers

Parliamentary procedure: none

### Provision

30. Section 9(6) of the Bill inserts a new section 7A to the 2005 Act allowing the Scottish Ministers to give guidance to relevant public authorities relating to Gaelic

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language plans. This replaces the guidance powers of Bòrd na Gàidhlig in section 8 of the 2005 Act, which is repealed.

### Reason for taking power

31. Bòrd na Gàidhlig were provided with a power to give statutory guidance on Gaelic language plans in the 2005 Act. One set of guidance was given in 2007 and is still in force. Consideration has been given to updating the guidance however this has not yet resulted in updated guidance being completed. Having considered the range of other examples where statutory guidance-making powers are provided in legislation, it is more common for these powers to sit with the Scottish Ministers rather than a non-departmental public body. The Scottish Ministers always had a role in approval of the statutory guidance which Bòrd na Gàidhlig gave. Moving this power from Bòrd na Gàidhlig will allow the Scottish Ministers, in preparing refreshed guidance going forward, to take account of expert advice from Bòrd na Gàidhlig as well as other sources of academic and practical expertise. The Scottish Ministers can consider that advice with input and reflection from a wider range of policy areas, frame guidance accordingly and ensure that it keeps pace with wider policy changes.

### Choice of procedure

32. A statutory guidance making power is considered appropriate as this has been and can continue to be a vehicle for providing examples and options that may be considered by a range of bodies across a range of different circumstances. The existing statutory guidance making power in relation to Gaelic has been useful in making progress since the 2005 Act: however, by being given by the Scottish Ministers this will provide an opportunity to contribute to greater leadership, allow more frequent renewal of the guidance and for that renewal to be as closely aligned as possible with wider developments across policy areas.

## Section 9(6): Gaelic language plans

Power conferred on: Scottish Ministers

Power exercisable by: Directions to be given by Scottish Ministers

Parliamentary procedure: None

### Provision

33. Section 9(2) of the Bill inserts a new section 7A to the 2005 Act allowing the Scottish Ministers to give directions relating to the application of the standards and requirements specified in regulations under section 2C(1) to the preparation of the plan.

### Reason for taking power

34. The power to give a direction to a relevant public authority on the application of standards and requirements specified in regulations under section 2C(1) will ensure that on a case-by-case basis where there is uncertainty about how the relevant public

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authority should address the application of a standard or requirement in the preparation of their plan, the Scottish Ministers can clarify that through the direction-making power.

## Choice of procedure

35. A direction-making power is considered appropriate here to allow bespoke consideration of standards and requirements in specific contexts, noting that in preparing Gaelic language plans a relevant public authority will be considering how its new activity and ambitions will be delivered and how Gaelic language considerations should be addressed within that. A power to give directions on a case-by-case basis will allow bespoke consideration, discussion and authorisation for the body to take forward certain steps. Prior consultation is required before giving a direction which is considered to be an important prerequisite to exercise of the power.

## Section 12(2): Powers for Scottish Ministers to set standards relating to Gaelic education

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

## Provision

36. Section 12(2) of the Bill inserts a new section 6B into the 2016 Act. This gives the Scottish Ministers power to make regulations to prescribe the standards and requirements to which an education authority must conform in discharging its functions in relation to Gaelic learner education, Gaelic medium education and teaching of Gaelic in its provision of further education.

37. In preparing regulations, the Scottish Ministers must consult the various interested parties listed in subsection (4). Regulations may make different provisions for different purposes and different areas (including different parts of an education authority's area) and are subject to the negative procedure.

## Reason for taking power

38. This power is modelled on section 2 of the 1980 Act which provides the Scottish Ministers with the power to make regulations prescribing the standards and requirements to which every education authority shall conform in discharging their functions under section 1 of the 1980 Act. Regulations made under section 2 of the 1980 Act are subject to the negative procedure.

39. Section 2 regulations have been made covering a wide variety of topics in school education, however regulations under section 2 must apply to "every education authority." Currently reliance is made on section 133(4) of the 1980 Act to provide variation or relief from compliance with a given provision. Section 133(4) provides a mechanism for an education authority to make an application to the Scottish

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Ministers. If the Scottish Ministers consider it is “unreasonable” that any provision under section 2 regulations should apply in relation to an education authority, or to a specified establishment or specified establishments under their management, then the Scottish Ministers can direct that the provision does not apply or applies with modification. The existing direction-making power under section 133(4) enables directions to be given unconditionally or subject to conditions. This procedure is regularly used for exceptional closures of schools where the authority will not be able to adhere to the 190-day opening rule, for example for decant purposes where school building works are being conducted and impact on delivery of education.

40. This power will allow for standards and requirements to reflect the different local authority areas where Gaelic education is provided, the nature of that provision and the capacity at a given time to conform with the relevant provision. The ability to make different provision for different parts of the area of an education authority ensure that the power could be used to align with areas of linguistic significance depending on how they are designed and their interaction with a given standard or requirement.

### Choice of procedure

41. As indicated above this power is modelled on section 2 of the 1980 Act. Regulations made under section 2 are subject to the negative procedure. It is considered appropriate to keep a consistent level of Parliamentary scrutiny for regulations in relation to Gaelic education. The use of the negative procedure will allow for flexibility for adjustments to take place whilst providing scrutiny by the Scottish Parliament. To provide for a more onerous power would not be in keeping with the existing framework. In addition, any failure to comply with regulations made under section 2 could be considered under the default power in section 70 of the 1980 Act. The new power should be considered in that context and consistency as to the procedure required maintained. Section 70 allows the Scottish Ministers to intervene where there has been a failure by an education authority to discharge a statutory duty relating to school education, and to make arrangements for the discharge of the duty or to apply for a court order requiring specific performance.

## Section 12(5): Powers for Scottish Ministers to give directions in relation to standards for Gaelic education

Power conferred on: Scottish Ministers

Power exercisable by: Directions

Parliamentary procedure: none

### Provision

42. Section 12(5) of the Bill modifies section 7A of the 2005 Act as inserted by section 9(6) of the Bill, so that the Scottish Ministers may give directions to an education authority relating to the application of the standards and requirements relating to Gaelic education specified in regulations made under inserted section 6B to the preparation of the plan. A direction may be varied or revoked at any time.

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## Reason for taking power

43. The power to give directions will ensure that on a case-by-case basis where there is uncertainty about how the relevant public authority should address the application of a standard or requirement made under inserted section 6B of the 2016 Act (see above) the relevant power in the preparation of their plan, the Scottish Ministers can clarify that through a direction. Prior consultation is required, and any exercise of the power would require to be reasonable and proportionate.

## Choice of procedure

44. A direction-making power is considered appropriate to allow bespoke consideration of standards and requirements in specific contexts, noting that in preparing plans, a relevant public authority will be considering how its new activity and ambitions will be delivered and how Gaelic language considerations should be addressed within that. A power to give a direction on a case-by-case basis will allow bespoke consideration, discussion and authorisation for the body to take forward certain steps. There is no Parliamentary procedure attached to a direction-making power.

## Section 13: Guidance to public authorities relating to Gaelic education

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: none

## Provision

45. Section 13 of the Bill inserts a new section 6C into the 2016 Act giving the Scottish Ministers a power to give guidance to Scottish public authorities in relation to the provision of Gaelic education. This covers Gaelic learner education, Gaelic medium education and the teaching of the Gaelic language in its provision of further education. The Scottish Ministers must consult interested parties in preparing the guidance.

46. This guidance power replaces section 9(1) to (2A) of the 2005 Act which conferred a guidance-making power on Bòrd na Gàidhlig. Those provisions (and section 16 of the 2016 Act which inserted them into the 2005 Act) are repealed.

## Reason for taking power

47. Bòrd na Gàidhlig were provided with a power to give statutory guidance on Gaelic education in the 2005 Act. That power allowed Bòrd na Gàidhlig to prepare and submit to the Scottish Ministers guidance in relation to the provision of Gaelic education and the development of such provision. Section 16 of the 2016 Act substituted the power to give guidance with a duty to give guidance. One set of guidance on Gaelic Education was given in 2017 and is still in force. Consideration is being given to updating the guidance to reflect changes and updates required since 2017.

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48. Having considered the range of other examples where guidance making powers are provided in legislation, it is more common for these powers to sit with the Scottish Ministers rather than a non-departmental public body. The Scottish Ministers always had a role in approval of the statutory guidance on education which Bòrd na Gàidhlig gave. Moving this power from Bòrd na Gàidhlig will allow the Scottish Ministers, in preparing refreshed guidance going forward, to take account of expert advice from Bòrd na Gàidhlig as well as other sources of academic and delivery expertise. The Scottish Ministers can consider that advice with input and reflection from a wider range of policy areas and frame guidance accordingly.

### Choice of procedure

49. This statutory guidance making power is considered appropriate as this has been and can continue to be a vehicle for providing examples and options that may be considered by a range of education authorities and other bodies in different locations and across a range of circumstances. The statutory guidance being given by the Scottish Ministers will provide an opportunity to demonstrate greater leadership on this issue and allow more frequent renewal of the guidance and for that renewal to be as closely aligned as possible with wider developments across policy areas. It is not considered appropriate to attach a Parliamentary procedure to the power to give guidance.

## Section 14(2): Directions to education authorities relating to Gaelic education

Power conferred on: Scottish Ministers  
Power exercisable by: Direction  
Parliamentary procedure: none

### Provision

50. Section 14(2) of the Bill inserts a new section 6D into the 2016 Act, conferring power on the Scottish Ministers to give directions to education authorities about the performance of their functions under Part 2 of the 2016 Act relating to Gaelic learner education and Gaelic medium education, and their functions relating to the teaching of the Gaelic language in its provision of further education. The power is subject to a requirement to consult in advance with the relevant education authority and a requirement to publish any direction which is given.

### Reason for taking power

51. This power is considered necessary in recognition of the need for support of the Gaelic language and the importance of the provision of education in the efforts to strengthen the use and learning of the language. There may be circumstances where an education authority finds it helpful to have a direction to ensure that it is fully authorised to take a course of action, or where the Scottish Ministers as a matter of national policy require action at a local level in order to achieve a particular outcome.

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## Choice of procedure

52. A direction-making power is considered appropriate to allow bespoke consideration of specific contexts noting that direction-making powers are by nature of a last resort and likely to be used in circumstances that were unusual and or difficult to predict. A power to give directions on a case-by-case basis will allow bespoke consideration, discussion and a mechanism to provide authorisation for an education authority to take forward certain steps. There is no Parliamentary procedure attached to a direction-making power.

## Section 18: Gaelic education delivery planning

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

## Provision

53. Section 18 modifies section 3 of the 2005 Act which sets out the requirements for Gaelic language plans. Where the authority preparing the plan is an education authority, the plan must set out the authority's plan for the provision of Gaelic education, and the authority must consult interested persons on those elements of the plan. The existing power for the Scottish Ministers to make regulations about the content of Gaelic language plans is expanded by section 18(2)(c) to allow for further provision about the matters which must be included.

## Reason for taking power

54. It is considered appropriate to amend the existing regulation making power in section 3(7) of the 2005 Act to ensure that it is put beyond doubt that the power enables provision to be made about the content of Gaelic language plans where the relevant authority is an education authority and required to prepare an education delivery plan. The section 3(7) power has not yet been exercised by the Scottish Ministers. However, in considering the suite of powers that would be appropriate for Gaelic language, it was identified that exercise of this power could be helpful in assisting to streamline the administration and support the delivery of Gaelic Language Plans, including education delivery plans (where relevant). Therefore, in retaining this power it is necessary to ensure that it reflects the provisions and new terminology elsewhere in the Bill on education delivery plans. The level of detail which may be set out in regulations under this power is not suitable for primary legislation.

## Choice of procedure

55. No change is being made to the procedure for making regulations under this power. The power is still considered to be appropriate to exercise by negative procedure. No amendment is proposed to section 11 of the 2005 Act, which provides for negative procedure to attach to the existing section 3(7) regulation making power. To

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provide for a more onerous procedure for the exercise of this power would not be in keeping with the existing framework.

## Section 22(2)(a): Assessment: Power to make different provision for different areas

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### Provision

56. Section 22(2)(a) modifies the 2016 Act so that the existing power in section 9(7) to vary the number of children which will trigger the requirement for a full assessment of Gaelic medium primary education provision can apply to different areas within an education authority's area.

### Reason for taking power

57. The existing power in section 9(7) is already capable of being varied by education authority area. However, it is considered that if the power to vary the number of children were ever to be exercised, it would be more flexible for variation to be possible across areas within a local authority area, particularly where an authority has a significant mix of rural and urban areas. This amendment also allows for the futureproofing of the legislation in respect of any areas of linguistic significance which may be designated and to allow that the number of children may be varied along lines which reflect an area of linguistic significance – noting that these may not necessarily conform to local authority boundary lines .

### Choice of procedure

58. The power in section 9(7) is subject to affirmative procedure. This is considered to remain the appropriate procedure for the power as amended and no change is being proposed to the procedure which attaches.

## Section 30: Power for Scottish Ministers to give guidance – Scots

Power conferred on: Scottish Ministers

Power exercisable by: Guidance to be given by Scottish Ministers

Parliamentary procedure: none

### Provision

59. Section 30 gives the Scottish Ministers a power to give guidance to relevant public authorities relating to promoting and supporting the use of the Scots language

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and developing and encouraging Scots culture. The Scottish Ministers must consult interested persons in preparing the guidance. Such persons could include, for example, the Scots Language Centre, Scots Hoose and Yaldi Books.

### Reason for taking power

60. It is considered that a power to give statutory guidance can be helpful in setting out for relevant public bodies resources that are already available for Scots and examples of good practice where relevant bodies are acting positively to promote and support Scots and to facilitate its use. Examples can be provided of how Scots culture can be developed and encouraged through interactions of relevant public authorities with members of the public or in the culture or history which reflects Scots and Scots speakers in Scotland. It is considered that guidance for going forward should be given by the Scottish Ministers.

### Choice of procedure

61. A statutory guidance power is considered appropriate as this has been and continues to be a helpful vehicle for providing examples and options that may be considered by a range of bodies across a range of different circumstances. It is not considered appropriate for a Parliamentary procedure to attach to a guidance-making power.

## Section 32(1): Guidance on Scots language education

Power conferred on: Scottish Ministers

Power exercisable by: Guidance to be given by Scottish Ministers

Parliamentary procedure: none

### Provision

62. Section 32(1) gives the Scottish Ministers the power to give guidance to education authorities about Scots language education in schools. The Scottish Ministers must consult interested persons in preparing the guidance. Such persons could include, for example, the Scots Language Centre, Scots Hoose and Yaldi Books.

### Reason for taking power

63. It is considered that a power to give statutory guidance for education can be helpful in highlighting for education authorities resources that are already available for Scots for pupils and teachers and how these could be incorporated into education settings. Statutory guidance can be used to highlight examples of good practice and previous examples where education authorities have found that incorporating Scots into classrooms has improved the engagement and attainment of pupils. The guidance power can be used to assist education authorities in understanding how best to promote, facilitate and support Scots language education in schools.

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64. This is a new guidance power in respect of Scots and it is intended that guidance will be given before recourse is made to any exercise of the regulation-making powers which are being taken elsewhere in the Bill. The Scottish Ministers will consider and draw on advice from those with an interest in Scots in preparing the guidance .

### Choice of procedure

65. A guidance power is considered appropriate to provide details, advice and illustrations of how an education authority can promote, facilitate and support Scots language education in schools. Guidance can signpost resources and professional learning opportunities. It can provide examples which can draw from practice, and it is a vehicle which is flexible and can be updated flexibly and frequently as practice and materials further develop. It is not considered appropriate for a Parliamentary procedure to attach to a guidance-making power.

## Section 33: Standards relating to Scots language education.

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### Provision

66. Section 33 gives the Scottish Ministers power to make regulations to prescribe the standards and requirements to which an education authority must conform in discharging its functions in relation to Scots language education in the schools under its management.

67. Regulations may make different provision for different purposes and different areas (including different parts of an education authority's area). Regulations are subject to the negative procedure.

### Reason for taking power

68. As with the section 12 power to set standards for Gaelic education, this power is modelled on section 2 of the 1980 Act, which provides the Scottish Ministers with a power to make regulations prescribing the standards and requirements to which every education authority must conform in discharging their functions under section 1 of the 1980 Act. Regulations made under section 2 of the 1980 Act are subject to the negative procedure.

69. Section 2 regulations have been made covering a wide variety of topics in school education, however regulations under section 2 must apply to "every education authority." Currently reliance is made on section 133(4) of the 1980 Act to provide variation or relief from compliance with a given provision. Section 133(4) provides a mechanism for an education authority to make an application to the Scottish Ministers. If the Scottish Ministers consider it is "unreasonable" that any provision under

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section 2 regulations should apply in relation to an education authority or to specified establishments under their management, then the Scottish Ministers can direct that the provision does not apply or applies with modification. The existing direction-making power under section 133(4) enables directions to be given unconditionally or subject to conditions. This procedure is regularly used for exceptional closures of where the authority will not be able to adhere to the 190 days rule, for example for decant purposes where school building works are being conducted and impact on the delivery of education .

70. While section 2 has been used alone and in conjunction with other powers to make a wide range of regulations, it does not provide the level of flexibility that is anticipated to be required for Scots language education. It is also considered unduly burdensome on education authorities for requirements to be set which the authority may then need to apply to have modified or disapplied to some extent.

71. The new power provided in the Bill allows regulations to prescribe the standards and requirements to which an education authority must conform in discharging its functions relating to Scots language education.

72. In preparing regulations under this power the Scottish Ministers must consult with education authorities and the persons mentioned in section 33(4) who are persons with an interest in the promotion of the Scots language, persons with an interest in the publication of books and other resources in the Scots language and such other persons as they consider appropriate. Regulations under section 33 can make different provisions for different purposes and different areas including different parts of the area of an education authority. This power will allow for standards and requirements to reflect the needs of different local authority areas and the Scots used in that area.

73. This provision mirrors powers being taken in respect of Gaelic and much progress can be made for Scots through exercise of guidance making powers initially. However, it is important that the opportunity of the Bill is taken to delivery on a full structure of powers to promote, facilitate and support both indigenous minority languages.

## Choice of procedure

74. As indicated above this power is modelled on section 2 of the 1980 Act. Regulations made under section 2 are subject to the negative procedure. It is considered appropriate to keep a consistent level of Parliamentary scrutiny for regulations in relation to Scots language education. The use of the negative procedure will allow for flexibility for adjustments to take place whilst providing scrutiny by the Scottish Parliament. To note in this context that any failure to comply with regulations made under section 2 could be considered under default power in section 70 of the 1980 Act. The new power should be considered in that context and consistency as to the procedure required maintained. Section 70 allows the Scottish Ministers to intervene where there has been a failure by an education authority to discharge a statutory duty, and to make arrangements for the discharge of the duty or to apply for a

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court order requiring specific performance. To provide for a more onerous procedure for the exercise of this power would not be in keeping with the existing framework.

## Section 36(1): Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if textually amending primary legislation, otherwise negative procedure

### Provision

75. Section 36(1) provides the Scottish Ministers with the power, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provisions as they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Any such regulations may also make different provision for different purposes and different areas (including different parts of the area of an education authority.) Any such regulations may also modify any enactment, but if so, the affirmative procedure attaches to them.

### Reason for taking power

76. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Several of the Bill's provisions are inserted into or interact with other legislation, particularly the 1980 Act, the 2005 Act and the 2016 Act. While the Scottish Government has given careful consideration to such interactions, the Bill may give rise to a need for ancillary provision to ensure these changes operate as intended. This power will also be important for the exercise of other powers under the Bill, to ensure that appropriate provision can be included to, for example, ensure that regulations made under the Bill will operate effectively alongside the existing law. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible.

77. The Scottish Government considers that it is important to take a power to deal with any ancillary matters that might emerge in the course of implementing the Bill, so that any unexpected issues which require ancillary provisions can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

### Choice of procedure

78. Section 36(3) provides that if regulations are made using the section 36(1) power to modify any primary legislation, then they would be subject to the affirmative procedure. Otherwise, the regulations would be subject to the negative procedure.

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79. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures provide for an appropriate level of Parliamentary scrutiny and control in such cases.

## Section 37(2): Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

### Provision

80. Section 37(2) confers a power on the Scottish Ministers to appoint, by regulations, the day on which each provision of the Bill comes into force (except for the final provisions in Part 3 of the Bill (sections 36, 37 and 38) which come into force on the day after Royal Assent). Section 37(3) provides that the regulations may include transitional, transitory or savings provisions and may make different provisions, and may make different purposes and different areas (including different parts of the area of an education authority).

### Reason for taking power

81. It is standard legislative policy for the Scottish Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes if necessary.

### Choice of procedure

82. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. It is considered that this provides for an appropriate level of Parliamentary scrutiny when Parliament would have agreed to substantive sections in principle.

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# Scottish Languages Bill

## Delegated Powers Memorandum

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