

Scottish Languages Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Purpose

1. This Supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Scottish Languages Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction ("the DPM").
2. The contents of this Delegated Powers Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provision conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a brief explanation of what each power allows, why the power has been taken in the Bill and why the selected form of the Parliamentary procedure has been considered appropriate.

Delegated powers

Section 4(2): Guidance to Bòrd na Gàidhlig and local authorities on requests to consider designation of Areas of Linguistic Significance

Power conferred on: Scottish Ministers
Power exercisable by: Guidance
Parliamentary procedure: None
Revised or new power: New

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Provision

4. Section 4(2) of the Bill inserts new sections 1A and 1B into the Gaelic Language (Scotland) Act 2005 (“2005 Act”). These give local authorities powers to designate Areas of Linguistic Significance, where the area to be designated meets the condition in section 1A(1)(a), or any of the conditions in section 1A(1)(b)(i), (ii) or (iii).

5. Section 4(2) was amended at Stage 2. New section 1C is inserted into the 2005 Act, empowering Bòrd na Gàidhlig to request a local authority to consider the designation of an Area of Linguistic Significance, obliging Bòrd na Gàidhlig to do so if they consider that there is evidence of demand for such designation, and obliging local authorities to publicise their reasons for not making a designation following a request. New section 1C(4) provides a power for Scottish Ministers to give guidance to Bòrd na Gàidhlig and local authorities relating to their functions under new section 1C. By virtue of section 1C(5), Bòrd na Gàidhlig and local authorities must have regard to such guidance.

Reason for taking power

6. It is considered that it would be helpful to Bòrd na Gàidhlig and local authorities that the exercise of their new functions relating to requests to consider designation of Areas of Linguistic Significance will be supported by guidance given by the Scottish Ministers. Guidance may further explain the requirements of those provisions in their wider context and set out the Scottish Government’s expectations relating to the exercise of those functions.

Choice of procedure

7. A statutory guidance power is considered appropriate to support the implementation of these new provisions of law. It is not considered appropriate for a parliamentary procedure to attach to a power to give guidance.

Section 6(2): Duty of Scottish Ministers to set Gaelic language standards

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised

Provision

8. Section 6(2) inserts new section 2C into the 2005 Act, providing a power to Scottish Ministers to specify in regulations standards relating to promoting, facilitating, and supporting the use of the Gaelic language, applying to relevant public authorities.

9. Section 2C(1) was amended at Stage 2, converting the power of Scottish Ministers to specify standards in regulations to a duty to do so, and imposing a duty on Scottish Ministers to publish a draft of the standards and requirements to be specified, before laying a Scottish statutory instrument specifying them. A new subsection (3A)

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was added to section 2C to require the Scottish Ministers to publish the results of the consultation undertaken under section 2C(3)(b).

Reason for taking power

10. The reasons for taking this power remain as set out in the DPM.

Choice of procedure

11. The reasons for using this parliamentary procedure applying to this power, remain as set out in the DPM.

Section 7: Functions of Relevant public authorities

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Revised or new power: Revised

Provision

12. A new subsection (2A) was added to section 2E to require the Scottish Ministers to publish the results of the consultation undertaken under section 2E(2). This consultation requirement relates to the power of the Scottish Government to issue guidance to relevant public authorities relating to their duties under section 2D. The power has been revised to require that results of the consultation are published.

Reason for taking power

13. The reasons for taking this power remain as set out in the DPM.

Choice of procedure

14. The reasons for using this parliamentary procedure applying to this power, remain as set out in the DPM.

Section 9(5): Gaelic language plans: directions to public authorities

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Revised or new: Revised

Provision

15. Section 9 makes various amendments to the provisions of the 2005 Act relating to the preparation, approval, and implementation of Gaelic language plans by relevant public authorities. Section 9(5) was amended at Stage 2 to substitute section 6(5) of the 2005 Act. The substituted section 6(5) converts the power of Scottish Ministers to direct

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a public authority to implement measures in its Gaelic language plan, on receipt of a report by the Bòrd, to a duty to do so. The duty arises where the Scottish Ministers accept the conclusion of the Bòrd as set out in the report.

Reasons for taking the power

16. The power for the Scottish Ministers to direct a public authority to implement measures in its Gaelic language plan was included in the 2005 Act as approved by Parliament. The reasons for having this power remain as set out at the time that Parliament considered that power. However the current change of the power to a duty has been brought forward so that on receipt of a report by Bòrd na Gàidhlig, if Scottish Ministers accept the conclusion of the report that a public authority has failed to implement measures in its Gaelic language plan, Ministers are then under a duty to take action to ensure that those measures are implemented.

Choice of procedure

17. A direction making power was considered to be appropriate here to enable the Scottish Ministers to take steps to require implementation of measures in Gaelic language plan. Scottish Ministers will now be under a duty to act where they accept the conclusion of the report. No parliamentary procedure attaches to a direction-making power.

Section 9(6): Gaelic language plans: guidance and directions to public authorities

Power conferred on: Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: None
Revised or new: Revised (Removed)

Provision

18. Section 9(6) of the Bill inserted a new section 7A into the 2005 Act, conferring powers on the Scottish Ministers to give guidance to public authorities relating to Gaelic language plans, and to give directions to public authorities relating to the application of standards and requirements specified under new section 2C(1) to the preparation of the plan. The Bill was amended at Stage 2 to remove from section 7A the power to give directions.

Section 12(2): Power 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
Revised or new power: Revised

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Provision

19. Section 12(2) of the Bill inserts a new section 6B into the Education (Scotland) Act 2016 (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. In preparing regulations, the Scottish Ministers must consult the various interested parties listed in subsection (4).

20. Section 12(2) was amended at Stage 2. New section 6B(3) was amended to add the General Teaching Council for Scotland (“GTCS”) to the list of consultees as new paragraph (da). A new subsection (4) was added to section 6B to require the Scottish Ministers to publish the results of the consultation undertaken under section 6B(3).

Reasons for taking the power

21. The amendments agreed at Stage 2 made some procedural changes to the power that was included in the Bill on introduction. The reasons for taking the power are set out in paragraphs 38-40 of the DPM and remain unchanged.

Choice of procedure

22. It is considered that it remains appropriate for Regulations made under section 12(2) as amended at Stage 2 to be subject to the negative procedure. The reasons are set out in paragraph 41 of the DPM.

Section 13(2): Guidance to public authorities relating to Gaelic education

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Revised or new power: Revised

Provision

23. 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 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. Section 6C(1) was amended to change the power to give guidance into a duty to give such guidance.

Reasons for taking the power

24. The reasons for taking the power, which is now a duty imposed on the Scottish Ministers, are explained in paragraphs 47-48 of the DPM and remain unchanged.

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Choice of procedure

25. It is considered that it remains appropriate for no parliamentary procedure to attach to the duty to give guidance. The reasons for the choice of procedure in relation to the provision on introduction are set out in paragraph 49 of the DPM and remain unchanged.

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

Power conferred on: Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: None
Revised or new power: Revised (Removed)

Provision

26. Section 14(2) of the Bill inserted 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 Bill was amended to remove section 14.

Section 22A: All-Gaelic schools: viability of establishment

Power conferred on: Scottish Ministers
Power exercisable by: Direction
Parliamentary procedure: None
Revised or new: New

Provision

27. Section 22A inserts new sections 13A to 13D into the 2016 Act relating to assessments by education authorities of the viability of establishing all-Gaelic schools. Section 13A requires an education authority to assess the viability of establishing an all-Gaelic school in its area following a request by parents, Bòrd na Gàidhlig or Comann nam Pàrant. It requires the authority to consider its provision of, and the demand for, Gaelic medium education in its area and to complete an assessment as to the viability of establishing an all-Gaelic school. It provides at subsection (5) a power for the Scottish Ministers to direct an authority to consider a repeat request within a 2-year period. It provides at subsection (7) that Scottish Ministers may provide guidance to authorities relating to their functions.

28. Section 13B sets out the process for assessment of viability, requiring the authority to consult various bodies and to publicise arrangements for receiving representations from parents, pupils and other persons. When making an assessment an authority must have regard to the factors set out in section 13B(2) and must assess that it would be viable to establish an all-Gaelic school unless, having regard to the matters set out in section 13B(2) it would be unreasonable to do so.

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29. Section 13C sets out the duties of an education authority following an assessment of viability. Those duties include publishing the results of the assessment, evidence considered and reasons for the result. Section 13C(2) provides that where the result is that an all-Gaelic school would be viable, the authority must specify the period within which it considers it would be reasonably practicable to establish the school and take such steps to establish the school as are reasonably practicable. Section 13C(3) provides that where the result is that it would be viable to establish an all-Gaelic school if certain circumstances occur, the authority must include in the assessment how those circumstances will be kept under review and after those circumstances occur, take such steps to establish the school as are reasonably practicable.

30. Section 13A(3) provides that an education authority need not comply with the duty in section 13A(1) to complete an assessment if they have published an assessment following a previous request relating to the same area within the last 2 years. Section 13A(5) provides that, despite subsection (3), Ministers may direct an authority to comply with the duty in subsection (1).

Reasons for taking the power

31. The power for the Scottish Ministers to direct an education authority to make an assessment under section 13A(1) in cases where it would not be required to do so in terms of subsection (3) is considered appropriate because there may be good reasons that such a request ought to be considered despite an earlier assessment within the preceding 2 years. For example, Ministers may have been made aware of a material change in circumstances in that area which would appear to merit fresh consideration of a request by the education authority. Section 13A(6) will require Ministers to consult the education authority before giving a direction.

Choice of procedure

32. A direction making power is considered to be appropriate here to enable the Scottish Ministers to effectively address particular circumstances in which it would be appropriate for an assessment under section 13A(1) to be made within the two-year timeframe. This power would only require an assessment to be undertaken earlier than it may otherwise be. No parliamentary procedure attaches to a direction-making power.

Section 22A: All-Gaelic schools: viability of establishment

Power conferred on: Scottish Ministers

Power exercisable by: Guidance to be issued by Scottish Ministers

Parliamentary procedure: None

Revised or new: New

Provision

33. New section 13A(7), inserted by section 22A and discussed above, provides a power for the Scottish Ministers to give guidance to education authorities relating to their functions under sections 13A, 13B and 13C. By virtue of section 13A(8), an education authority must have regard to such guidance.

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Reasons for taking the power

34. It is considered that it would be helpful to education authorities that the exercise of their new functions relating to All-Gaelic schools under sections 13A to 13C will be supported by guidance given by the Scottish Ministers. Guidance may further explain the requirements of those provisions in their wider context and set out the Scottish Government's expectations relating to the exercise of those functions. It may also point to useful resources etc., which assist education authorities in assessment and decision-making in relation to all-Gaelic schools.

Choice of procedure

35. A statutory guidance power is considered appropriate to support the implementation of these new provisions of law. It is not considered appropriate for a parliamentary procedure to attach to a power to give guidance.

Section 22A: All-Gaelic schools: viability of establishment

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new: New

Provision

36. New section 13B, inserted by section 22A and discussed above, provides a power for Ministers to make regulations to amend section 13B(1) and (2). Regulations may modify section 13B(1) to amend, remove or add to the persons whose advice the education authority must seek or the arrangement for receiving representations from the persons mentioned in that provision. Regulations may also modify section 13B(2) to amend, remove or add to the matters mentioned in that subsection.

Reasons for taking the power

37. It is considered appropriate for there to be some flexibility to adjust the lists or persons in section 13B(1) and the list of matters to be taken into consideration in section 13B(2) from time to time in order to ensure that they remain relevant and appropriate for their intended purpose. This is best achieved by conferring a power to do so by regulations, as an alternative means to make such changes (such as a suitable vehicle for primary legislation) will not always be available.

Choice of procedure

38. The negative procedure is considered appropriate for this regulation-making power because, having regard to the purpose and scope of the power, it strikes the right balance between subjecting any regulations to parliamentary scrutiny while protecting parliamentary time.

Section 22A: All-Gaelic schools: viability of establishment

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Revised or new: New

Provision

39. New section 13D, inserted by section 22A and discussed above, provides that Scottish Ministers may direct an authority that has failed to take a step required by section 13C(2)(b) or (3)(c) to take that step. Before giving a direction, Ministers must seek advice from Bòrd na Gàidhlig and His Majesty's Inspectors ("HMI") of schools and must consult the authority.

Reasons for taking the power

40. This direction-making power is considered appropriate to ensure that effective action can be taken by the Scottish Ministers where that is necessary to ensure that an education authority takes the necessary steps to establish an all-Gaelic school following an assessment to the effect that such a school is viable. Before any direction is made, Ministers must seek relevant advice and consult the authority, which will help ensure that any direction which may be given is appropriate in the particular circumstances.

Choice of procedure

41. A direction-making power is considered appropriate to ensure that Ministers can effectively support the operation of the statutory scheme this Bill establishes for the establishment of all-Gaelic schools. No parliamentary procedure attaches to a direction making power.

Section 25C: Power to enforce duties of public authorities

Power conferred on: Scottish Ministers

Power exercisable by: Order

Parliamentary procedure: None

Revised or new: New

Provision

42. Section 25C inserts new section 9A into the 2005 Act, providing that the Scottish Ministers may make an order declaring a public authority to be in default in respect of any duty imposed on them by or for the purposes of the 2005 Act and requiring the authority to discharge that duty by a specified date.

Reasons for taking the power

43. The power to make orders requiring relevant public authorities to discharge their duties under the 2005 Act is considered appropriate to enhance the enforcement mechanisms available to Scottish Ministers to reinforce those duties, in cases where other mechanisms have been unsuccessful.

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Choice of procedure

44. An order-making power is considered appropriate to ensure that Ministers can more effectively enforce the duties imposed on relevant public authorities under the 2005 Act. No parliamentary procedure attaches to such an order-making power. The power in section 25C is similar to the power in section 70 of the Education (Scotland) Act 1980, which is also not subject to any parliamentary procedure.

Section 30: Power for Scottish Ministers to issue guidance – Scots

Power conferred on: Scottish Ministers

Power exercisable by: Guidance to be issued by Scottish Ministers

Parliamentary procedure: None

Revised or new: Revised

Provision

45. 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 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.

46. Section 30 has been amended to insert the words “including the different dialects of the Scots language used in different parts of Scotland” after the reference to the Scots language in subsection (1)(a), in order to make clear that guidance relating to the Scots language, and public authorities’ duty to have regard to such guidance, may relate to all forms of the Scots language used in Scotland.

Reason for taking power

47. The reasons for taking this power remain as set out in the DPM.

Choice of procedure

48. The reasons for using this parliamentary procedure applying to this power, remain as set out in the DPM.

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