

# **SCHOOLS (HEALTH PROMOTION AND NUTRITION) (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **PURPOSE**

1. As required under Rule 9.4A, this Memorandum has been prepared by the Scottish Executive to accompany the Schools (Health Promotion and Nutrition) (Scotland) Bill introduced in the Scottish Parliament on 8 September 2006. It details the provisions in the Bill that confer powers to make subordinate legislation. It describes the persons upon whom the powers are conferred, the form in which the powers are to be exercised, the Parliamentary procedure to which the powers are to be subject and why it is considered necessary to delegate the powers.
2. The contents of this Memorandum do not form part of the Bill, are entirely the responsibility of the Scottish Executive and have not been endorsed by the Scottish Parliament.

### **POLICY BACKGROUND**

3. The concept of a Health Promoting School arose in response to commitments given by the Scottish Executive in *Towards a Healthier Scotland* (1999) and *Our National Health: a plan for action, a plan for change* (2000). This concept has since been further developed by key national policies, outlined in *Improving Health in Scotland: The Challenge* (2003), the *National Priorities in Education* and *Education for Excellence*. These all give schools, working in close partnership with their communities and key services, an important role in securing the improvements in health and education that Scotland needs and deserves.
4. In 2002 the Expert Panel on School Meals' final report, *Hungry for Success*, recommended national, nutrient-defined standards for school meals in Scotland and a strategy for delivering the standards, improving uptake of school meals and minimising any stigma associated with taking free school meals. It is a whole school approach to school meals and its recommendations were accepted in full by Scottish Ministers. The recommendations now form the core of the Scottish Executive's policy on healthy eating in schools.
5. The Schools (Health Promotion and Nutrition) (Scotland) Bill has been introduced as part of the Scottish Executive's continued commitment to improving the diet and health of Scotland's children and making sure that they have every possible advantage in education. The provisions

of the Bill are aimed at reinforcing and developing the progress to date of the Scottish Executive's *Hungry for Success* policy on healthy eating in schools. However, the Bill has broader focus than the existing policy in that it also extends to placing a duty on Scottish Ministers and education authorities<sup>1</sup> to endeavour to ensure the existence of health promoting schools.

## **OUTLINE OF BILL PROVISIONS**

6. The Bill has two main themes: health promotion in schools (sections 1 and 2) and the provision of food and drink in schools (sections 3 to 8).

7. Sections 1 and 2 make provision imposing duties on the Scottish Ministers, education authorities and managers of grant aided schools to endeavour to ensure that public schools and grant-aided schools are health-promoting. A duty is also placed on Scottish Ministers and education authorities to endeavour to ensure that all hostels provided and maintained by education authorities for pupils attending those public schools are health-promoting.

8. Section 3 inserts new sections into the Education (Scotland) Act 1980 (the "1980 Act") which place duties on education authorities and managers of grant aided schools to ensure that all food and drink provided in schools, unless specifically exempt by the Bill, complies with nutritional requirements, specified by regulations. Section 5 makes provision for education authorities to consider the nutritional requirements in situations where they enter into an arrangement with regard to a pupil's education in an independent school.

9. Through the amendment of section 53 of the 1980 Act and the addition of new subsections to that section, the Bill also amends the powers of education authorities to provide food and drink to pupils other than at lunch time.

10. Specific duties are also placed on education authorities to require the promotion of school lunches and the protection of the identity of those receiving free school lunches.

11. Further information about the Bill's provisions is contained in the Explanatory Notes, Policy Memorandum and Financial Memorandum.

## **APPROACH TO USE OF DELEGATED POWERS**

12. The Bill contains delegated powers provisions which are explained in more detail below. When deciding where and how provision should be set out in subordinate legislation, rather than on the face of the Bill, the Executive has had regard to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time;

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<sup>1</sup> Each local authority in Scotland has been the education authority for its area since the re-organisation of local government under the Local Government etc. (Scotland) Act 1994. "Education authority" is the term used in education legislation relating to Scotland and is defined in section 135 of the 1980 Act as a council constituted under section 2 of that 1994 Act.

- the likely frequency of amendment; and
- the need to anticipate/react swiftly to rapidly changing specialist information, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

13. Where subordinate legislation implements Executive policy then some form of parliamentary procedure is appropriate. Where policy is involved a balance must be struck between the different levels of scrutiny involved in the negative and affirmative resolution procedures. In the Bill, the balance is struck in the way that best reflects the view of the Executive on the importance of the matter delegated by Parliament.

14. The Bill contains only one substantive delegated power as well as a general power to make commencement orders which may include some ancillary provision. These powers are dealt with in detail below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate. It has not been possible to provide the Parliament with a final set of draft regulations. The details of the regulations are being worked on jointly with nutritional and education experts. We anticipate being able to lay a copy of the proposed nutritional requirements and guidelines for food and drink in schools, as set out by the expert group, before the Parliament. This document will form the basis of the first set of regulations. In any case, the first regulations will be subject to the affirmative resolution procedure.

## **DELEGATED POWERS**

### **Section 3: Food and drink: nutritional requirements**

**Power conferred on:** Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Affirmative resolution for the first regulations and negative resolution thereafter

#### *Provision*

15. Section 3 of the Bill inserts new sections 56A to 56D into the Education (Scotland) Act 1980 (c.44). New section 56A(1) confers a power on the Scottish Ministers to specify nutritional requirements by regulations.

16. New section 56B of the 1980 Act sets out some of the particular things that may be covered by the regulations specifying the nutritional requirements. In subsection (1), paragraph (a) provides that the regulations can specify or list foods or drinks which are nutritional and specify those which are not. Paragraph (b) provides that the regulations may set out circumstances where the nutritional requirements might not need to be adhered to. Paragraph (c) states that the regulations may require education authority schools or hostels to provide drinking water to all pupils free of charge. Subsection (2) provides that the regulations might set out different requirements in different circumstances.

17. New section 56D of the 1980 Act provides for sections 56A to 56C to apply to grant-aided schools in the same way as they apply to public schools. Subsection (3) of section 56D provides a modified version of section 56A(1) which relates to grant-aided schools including a power for the Scottish Ministers to specify nutritional requirements by regulations. This is effectively the same power as in section 56A(1) and it is intended to make regulations specifying nutritional requirements which will apply to both public schools and grant-aided schools. Therefore the following discussion of the power in section 56A(1) also relates to the exercise of the modified version of that power under section 56D(3).

*Reason for taking power*

18. Nutritional requirements will need to be considered by an expert panel from the fields of nutrition and health before Ministers are able to make a fully informed decision on what should constitute suitable nutritional requirements. The power under the new section 56A(1) gives Ministers flexibility in assessing and deciding on the nutritional requirements that should be maintained by education authorities. The views of experts in the fields of health and nutrition have altered over time, and this power enables Scottish Ministers to adjust the requirements as and when circumstances change. If primary legislation were required to implement such a change, this could frustrate the intention of the Bill and significantly delay any necessary alterations to the nutritional requirements.

19. With specific reference to the new section 56B, subsection (1) paragraph (a) provides for the Scottish Ministers to be able to draw up a list of foods and drinks which they feel are unsuitable for pupils and a parallel list of foods and drinks which they regard as conforming to the nutritional requirements. This is necessary as it allows for a much simpler and practical way of achieving desired results than having to formulate specific content based nutritional requirements which encompass all foods and drinks to be included and, at the same time, exclude all those which are seen as unacceptable. Nevertheless, the power in new section 56A(1) can be used to specify content based requirements and, where appropriate, it will be used to do so. Subsection (1) paragraph (b) allows the Scottish Ministers to specify circumstances where food and/or drink can be provided which would not normally be within the nutritional requirements. This covers any possible health, cultural or faith-based reasons where certain pupils may require to be provided with certain food and/or drink.

20. Subsection (2) allows, for example, the nutritional requirements to be different for pupils of different ages. This is important as it again allows Ministers the flexibility they need to react to possible changing medical knowledge.

21. The Executive's view is that, given the level of detail involved, it is appropriate to introduce nutritional requirements by way of regulations rather than on the face of the Bill. Having regard to the bullet points highlighted in paragraph 12 above, the Executive believes that this will afford Ministers the flexibility they need to be able to respond swiftly to future changes to the knowledge of food and health experts. Further, due to the fact that the frequency of future change is unknown, the power to set nutritional requirements by regulation will ensure that valuable Parliamentary time is not taken up implementing new primary legislation every time a change occurs. Likewise, the aims of the Bill may be frustrated if necessary changes were delayed as a result of the process of implementing new primary legislation.

*Choice of procedure*

22. The first regulations made under section 56A(1) of the 1980 Act will be subject to affirmative resolution of the Scottish Parliament. The first regulations setting up nutritional requirements are considered to be of some importance and will attract a high degree of interest from stakeholders. In light of that it is considered that the additional scrutiny afforded by the affirmative resolution procedure is appropriate. Thereafter regulations will be subject to annulment in pursuance of a resolution of the Scottish Parliament. After the first set of regulations, subsequent regulations may only contain minor amendments to the existing requirements. The negative resolution procedure is therefore considered to offer an appropriate balance between, on the one hand, speed and flexibility and, on the other, the need for scrutiny for a provision of this nature.

**Section 10: Short title and commencement**

**Power conferred on: Scottish Ministers**  
**Power exercisable by: Order by made by statutory instrument**  
**Parliamentary procedure: No parliamentary procedure**

23. Subsection (2) of section 10 gives the Scottish Ministers power to commence provisions of the Act by order. Provision is made for different days being appointed for different provisions or for different purposes. This would allow a phased approach to commencement, for example by reference to different provisions in the Bill. No commencement date is specified in the Bill as Ministers are yet to determine when it would be appropriate to bring the substantive provisions of the Bill into force.

24. Subsection (4) of the Bill contains a general subordinate legislation provision in relation to any commencement orders made for the Bill. It permits consequential, transitional or transitory provisions to be included in a commencement order under subsection (2). This is also to allow for the phased approach to commencing the provisions of the Bill. For example it may be used to ensure that any existing arrangements which do not fit with the provisions of the Bill can be phased out over a period of time. Other than some minor amendments to existing subordinate legislation, no substantial consequential amendments to other legislation are thought to be necessary. It is therefore considered appropriate to attach these ancillary powers to commencement orders.

25. As is normal with commencement orders, no form of parliamentary procedure is required.

*This document relates to the Schools (Health Promotion and Nutrition) (Scotland) Bill (SP Bill 68) as introduced in the Scottish Parliament on 8 September 2006*

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