

EDUCATION (ADDITIONAL SUPPORT FOR LEARNING) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government to assist the Subordinate Legislation Committee in its consideration of the Education (Additional Support for Learning) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

OUTLINE OF THE BILL

2. The Bill amends the 2004 Act to permit out of area placing requests to be made in relation to children and young persons with additional support needs, including those where a co-ordinated support plan (CSP) is being processed by the home education authority, and for refusals of such requests to be referred to an Additional Support Needs Tribunal for Scotland (“the Tribunal”) where a CSP is being considered. The Bill makes available to parents and young persons in relation to out of area placing requests the same rights of access to mediation and dispute resolution as are presently available in relation to internal placing requests. It will be for the host education authority to make available such mediation and dispute resolution services under the 2004 Act (and they will not be able to recover the cost of these services from the home authority). The Bill also amends the 2004 Act to extend the circumstances in which references can be made to the Tribunal consequent on certain procedural failures by the education authority and enables the Scottish Ministers to make rules to enable certain matters to be determined by a convener sitting alone and to allow the Tribunal to review its own decisions in certain circumstances.

SUBORDINATE LEGISLATION POWERS – OUTLINE

3. The Bill contains a number of delegated power provisions which are explained in detail below. This memorandum sets out—

- the person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;

- why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

4. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Ministers have considered which matters of overall structure and policy require detailed scrutiny through the full Parliamentary process against the need to—

- ensure sufficient flexibility to respond to changing circumstances and to make changes quickly in the light of experience without the need for primary legislation; and
- allow detailed administrative arrangements to be made or kept up to date within the basic structures and principles set out in the primary legislation.

5. For the decision on negative or affirmative resolution procedure, the Scottish Ministers have considered carefully the degree of Parliamentary scrutiny that is thought to be required for the orders, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily.

SUBORDINATE LEGISLATION POWERS – DETAIL

Section 7 Power to make rules in respect of Tribunal practice and procedure

Section 7(a):

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

6. Section 7(a) of the Bill amends paragraph 11(2) of schedule 1 to the 2004 Act to insert into the existing rule making power at paragraph 11(2) a reference to enabling specified matters relating to the failure by an education authority to comply with time limits required by virtue of the 2004 Act to be determined by the convenor of a Tribunal alone. Section 6 of the Bill amends section 18 of the 2004 Act to allow references to be made to the Tribunal in respect of certain procedural failures by an education authority. Where an authority fail, within a specified time limit, in response to a request to establish whether a child requires a CSP, to inform the parent of their proposal to establish whether a CSP is required; or where having issued such a proposal, they fail so to establish within a specified time limit, such a failure is to be treated as a decision that no CSP is required and can be referred to the Tribunal. The rule making power is required to allow Tribunal rules to be made to expedite the procedure for such references, by allowing them to be determined through a documents based procedure by the convenor of the Tribunal, thereby avoiding the need to convene a full Tribunal hearing.

7. It is considered that this level of procedural detail is more appropriate for subordinate legislation, which is in keeping with the general character of the existing rule making power conferred on the Scottish Ministers in relation to the Tribunal. Section 34(4) of the 2004 Act

provides that rules made under paragraph 11(2) of schedule 1 to that Act are subject to negative procedure in the Scottish Parliament. The amendment made by section 7(a) will be included in that existing provision for Parliamentary procedure and is consistent with the existing position for Tribunal rules.

Section 7(b):

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative resolution of the Scottish Parliament

8. Section 7(b) of the Bill amends paragraph 11(2) of schedule 1 to the 2004 Act to insert into the existing rule making power at paragraph 11(2) a reference to enabling a Tribunal, in specified circumstances, to review, vary or revoke any of its own decisions, orders or awards or those of another Tribunal. The absence of such a provision in the 2004 Act means that parties wishing to appeal a decision of a Tribunal relating to a reference made under section 18 of the 2004 Act can only do so to the Court of Session on a point of law. For both parties this is an expensive and time consuming process, which, in terms of the parent or young person who made the reference to the Tribunal, relies heavily on access to Legal Aid. This amendment would bring the Tribunal into line with other similar tribunals and is recognised in the guidance issued by the Administrative Justice and Tribunals Council. The precise circumstances that may lead to a review have yet to be consulted on, but could include review on account of an error, new evidence becoming available, etc.

9. It is considered that this level of procedural detail is more appropriate for subordinate legislation, which is in keeping with the general character of the existing rule making power conferred on the Scottish Ministers in relation to the Tribunal. Section 34(4) of the 2004 Act provides that rules made under paragraph 11(2) of schedule 1 to that Act are subject to negative procedure in the Scottish Parliament. The amendment made by section 7(b) will be included in that existing provision for Parliamentary procedure and is consistent with the existing position for Tribunal rules.

Section 8 Ancillary provision

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by statutory instrument
Parliamentary procedure: negative/affirmative resolution of the Scottish Parliament

10. Section 8 enables the Scottish Ministers to make ancillary provisions by order, namely transitional, transitory or savings provisions which may be required in connection with the coming into force of any provision of the Bill and throughout the life of the Bill when it is in force. Subsection (2) provides that such an order may modify any enactment, instrument or document.

11. This provision is considered to be necessary for ensuring a smooth transition from the current arrangements to those as amended by the Bill. For example to ensure that existing cases which may straddle the old and new regimes can be dealt with in an appropriate manner.

12. The powers in section 8 can only be used to deal with technical and other minor matters directly connected or related to the Bill. It would not be an effective use of either the Parliament's time or the Government's resources to deal with such matters through subsequent primary legislation. It is considered that matters of technical detail, such as the transitional arrangements for existing cases caught between the two regimes, can be best addressed and fleshed out through subordinate legislation.

13. An order under this section is subject to negative resolution except where it adds to, replaces or omits any part of the text of an Act, in which case the order is subject to affirmative procedure. Negative procedure is thought appropriate given the very limited nature of the ancillary provision (being confined to transitional, transitory and saving provision). It is considered unlikely that such an order would be used to amend the text of primary legislation but if it did, it would be appropriate that the order be subject to affirmative procedure.

Section 10 Short title and commencement

Power conferred on: Scottish Ministers

Power exercisable: Order made by Statutory Instrument

Parliamentary procedure: No procedure

14. Subsection (3) of this section provides for the provisions of the Bill, save for sections 8, 9 and 10, to come into force on such days as the Scottish Ministers may by order appoint.

15. Sections 8, 9 and 10 come into force on Royal Assent. The power in subsection (3) recognises the need for Ministers to control commencement. It is the usual practice for commencement provisions not to be subject to parliamentary procedure. Whilst the order is not subject to parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.

This document relates to the Education (Additional Support for Learning) (Scotland) Bill (SP Bill 16) as introduced in the Scottish Parliament on 6 October 2008

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