



The Scottish  
Parliament

**Subordinate Legislation Committee**

**Schools (Consultation) (Scotland)  
Bill**

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## **Subordinate Legislation Committee**

### **Schools (Consultation) (Scotland) Bill**

The Committee reports to the lead committee as follows—

#### **Introduction**

1. At its meetings on 31 March,<sup>1</sup> 5 May<sup>2</sup>, 12 May<sup>3</sup> and 19 May 2009<sup>4</sup> the Subordinate Legislation Committee considered the delegated powers provisions in the Schools (Consultation) (Scotland) Bill at Stage 1. The Committee submits this report to the Education, Culture and Lifelong Learning Committee as the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill (DPM).<sup>5</sup>
3. The Committee's correspondence with the Scottish Government is reproduced in the Annex.

#### **Delegated Powers Provisions**

4. The Committee considered each of the three delegated powers provisions in the Bill.
5. The Committee found the proposed power in section 20(2), to modify schedule 1 and 2, to be acceptable in principle, and that it is subject to affirmative procedure. The Committee determined that it did not need to draw the attention of the Parliament to the delegated power in section 20(2).

#### **Section 20(1) - Ancillary provisions etc.**

6. The Committee sought clarification as to why specific provision to 'elaborate' on any aspect of the procedure or to make provision as to functions had been sought, i.e. in addition to what might be regarded as a relatively 'standard' power

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<sup>1</sup> [Official Report 31 March](#)

<sup>2</sup> [Official Report 5 May](#)

<sup>3</sup> [Official Report 12 May](#)

<sup>4</sup> [Official Report 19 May](#)

<sup>5</sup> [Delegated Powers Memorandum](#)

under section 20(1) to make ancillary provision (although itself in slightly wider terms than seen in other Bills). The Committee also asked, specifically, for further explanation as to how, and also in what circumstances, the provision contained in subsections (3) and (4), so far as it relates to the power conferred under section 20(1), might be used.

7. The Committee was of the view, having considered the Government's response, that the provision made at section 20(1), taken also with subsections (3) and (4) does undoubtedly differ to an extent from the approach taken to ancillary powers within other Bills, and the particular drafting approach taken here is not wholly explained. However, the justification provided within the Government's response is sufficient for the Committee's satisfaction, having regard also to the fairly narrow and clearly defined purpose of this Bill, which necessarily acts as a restriction on the exercise of any powers under it. It was useful also to have obtained, within the reply, some further examples of how the Scottish Government considered the provisions might be used, and these being consistent with how the Committee anticipated the provisions concerned being operated.

8. In terms of procedure, the Committee concluded that the use of negative procedure for non-textual modification is justified, and that affirmative procedure is justified in the context of textual amendment of an Act.

**9. The Committee finds the Scottish Government's response satisfactory and considers the proposed power under section 20(1), and the related provision contained in subsections (3) and (4) acceptable. The Committee is content with reference to procedure being by negative resolution of the Scottish Parliament unless the instrument amends an Act, in which case affirmative.**

### **Section 22(2) - Commencement and short title**

10. Section 22(2) confers a power on the Scottish Ministers to commence the provisions of the Bill (other than sections 19 to 21, which are to come into force on the day after Royal Assent) on the day that the Scottish Ministers by order appoint. Section 22(3) provides that an order under section 22(2) can appoint different days for different provisions.

11. In addition, section 22(4)(a) provides that an order under section 22(2) can include such transitional, transitory or savings provisions as the Scottish Ministers consider necessary or expedient *in connection with commencement*. It can also make different provision for different purposes (section 22(4)(b)). No procedure is attached to the exercise of this commencement power under section 22.

12. At the evidence session on 12th May, Scottish Government officials were asked a number of questions in relation to the provision contained in section 22(4)(a). This was with a view to ascertaining firstly whether the Scottish Government considered that the provision concerned could be used to amend enactments. And if so, and whether or not there was any intention *actually* to use the provision for such purpose, whether clarification of the position should be provided on the face of the Bill. The Committee considered this should be clarified given that the power was not subject to Parliamentary procedure.

13. Government officials acknowledged that, in theory, a commencement power of the nature provided at section 22 could be used to amend other enactments. However, they stated that there was no intention of using the power for that purpose, and nothing was in contemplation.

14. Reference was made to the transitional and savings provisions which have, already, been included in Schedule 3 to the Bill, none of which transitional or savings provisions amend enactments. It was stated that if there had been any intention or need to amend enactments under a commencement power (as contained in section 22) then the opportunity would have been taken to deal with this in Schedule 3.

15. The Scottish Government officials did not consider that it would be appropriate to make specific provision in the Bill to the effect that it would not be used to amend enactments. They stated that Bills are usually concerned with setting out rights and duties. They argued that it would not be usual to set out, on the face of the Bill, what would effectively amount to a statement of what a particular provision would *not* be used for.

16. The evidence session assisted the Committee in clarifying the Scottish Government's position in relation to section 22(4). The Committee was content with the reassurance provided by officials. The Committee noted in particular that there was no intention to use, and no apparent need to use, the commencement power for the purpose of amending any enactments.

17. That said, while it might not be usual or common to amend primary legislation using a transitional or saving power, it was noted that it would be possible to do so. An amendment of this nature could have significant implications for persons affected by it. The Committee is of the view that should this to be done, as officials indicated is possible, albeit unlikely, then it is at least arguable that such amendment should be subject to parliamentary scrutiny. However, the Committee takes reassurance from remarks made by officials that the power could not be used for wider purposes, such as amending other areas of education legislation, and would need to be sharply focused on the commencement of this Bill and on the provision that is necessary for its commencement.

18. The Committee therefore takes the view, after taking account of the evidence provided by officials, that sufficient reassurance has been obtained as to the Government's position in relation to section 22(4). The Committee was satisfied that comprehensive responses have been provided in relation to the points probed, and which are a matter of record. While acknowledging that these have no absolute, binding effect, within the context of what is a Bill with a narrowly defined purpose, and a provision which is concerned with commencement issues, the Committee considers that the position has been reasonably explained and the Government's position clarified to an extent that the Committee is content.

**19. The Committee finds the further clarification provided by the Scottish Government in relation to the proposed power under section 22 to be satisfactory, such that it is content with the power as set out in that section, and that on the understanding that the power in section 22 to amend**

**enactments is to be construed strictly it is not subject to parliamentary procedure.**

## **ANNEX**

### **Points raised in letter to Scottish Government**

#### **Section 20(1) - Ancillary provisions etc.**

The Committee asks the Scottish Government why the power under section 20(1) to make ancillary provision makes specific reference to the ability to “elaborate” on any aspect of the procedure or to make provision as to functions, and in particular to provide further explanation as to how and in what circumstances it is considered that the provision contained in subsections (3) and (4), so far as it relates to the power conferred under section 20(1), might be used.

#### **Section 22(2) - Commencement and short title**

The Committee seeks clarification as to the provision contained in section 22(4)(a), with particular reference to what might be contemplated by the phrase ‘in connection with the commencement of this Act’ and for the Scottish Government to explain whether it is considered that such provision may amend other enactments, and if so, why no procedure is justified for such an order given the approach in section 20(6)(b).

## **Response from Scottish Government**

### **Schools (Consultation) (Scotland) Bill at stage 1**

#### Section 20 (1) - Ancillary provisions etc

The regulation making provision in section 20(1) is confined to matters considered necessary or expedient for the purposes of or in connection with the Bill. Much of the Bill is concerned with establishing a new regime of consultation and decision making processes. The detail of such processes is often left to regulation but in this case, because the Bill is so focused on process, it was considered important that the substantive content of the new processes should be set out on the face of the Bill. Section 20(3) and (4) provide though for regulations to elaborate on any aspect of the processes in the first 17 sections of the Bill, or to include provision as to functions - but only of education authorities or the Scottish Ministers - and only in relation to this Bill. This is in line with the OED meaning of “elaborate” of adding more detail to something already said. These are essentially “future proofing” provisions. The Bill as drafted specifies sufficient detail concerning the new processes as to be self standing and operational without ‘requiring’ the making of regulations. Indeed, there is no immediate intention to make such regulations.

It may be though, either during Parliamentary consideration of the Bill or after commencement (as experience grows of how the new legislation is working in practice), that it is considered appropriate to elaborate on some aspect of the processes, at a level of detail more appropriate to subordinate legislation not least because such provision may require amendment from time to time to allow for changes in practice. Regulations would be likely to place new responsibilities, duties or functions on local authorities or the Scottish Ministers, as to how they are required to handle or conduct aspects of the processes. The Committee asks how and in what circumstances the provision contained in section 20(3) and (4) might be used. An example was given in the Delegated Powers Memorandum of specifying in greater detail how education authorities should notify consultees of proposals under section 6 of the Bill. Other examples might include making further provision elaborating on the detail of the content of proposal papers or consultation reports under sections 4 or 10, or as to their publication and availability under sections 3 or 9, or as to when or where or how public meetings should be held under section 7.

#### Section 22(2) - Commencement and short title

Because consultation and decision making processes under the existing 1981 Regulations can currently span periods of several months it was considered a priority and matter of some importance that the Bill should signal clearly from the outset how it was intended that local authority consultations that straddled or might otherwise be impacted by the Bill's commencement, should be affected and dealt with. Therefore, although Bills often leave all transitional, transitory and saving provisions to be spelt out in a commencement order, in this case explicit such provisions are set out in Schedule 3. The purpose in so doing is to enable authorities to consider how best to plan and schedule consultations and to enable full Parliamentary engagement in the detail of the provisions. The intention was to

ensure that the prospective change in legislation should not result in a period of time during which authorities could in effect not plan and engage in consultations because of uncertainty as to what would happen if the consultation and decision making processes were still under way at the time of the Bill's commencement.

The Committee seeks clarification as to the inclusion also in the Bill of the provision in section 22(4)(a). This is intended to allow for the possibility that as commencement approaches, there may be need to make provision which is additional to the arrangements set out in Schedule 3 in order to ensure that all circumstances which might obtain at the time of commencement are covered. The current 1981 Regulations specify 23 kinds of proposal which must be consulted upon, many of which are only rarely used and so there is little or no experience of what they may in practice entail. If such a rarely-conducted consultation were to be in progress at the time of commencement, that could occasion use of the provision in 22(4)(a), as indeed could some unforeseen aspect of any consultation underway at that time – something which might only become apparent relatively shortly before commencement, and which would warrant being specifically addressed in some form of additional transitional, transitory or saving provision. It is not considered that the 22(4)(a) provision would require direct amendment to the existing 1981 Regulations or other enactments. And it can be noted that the transitional, transitory and saving provision in paragraphs 3 to 6 of schedule 3 do not so amend any enactments.