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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Scottish Languages Bill (as amended at Stage 2)



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 18 February 2025ⁱ, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers contained in the Scottish Languages Bill ("the Bill") as amended at Stage 2.
2. This Scottish Government Bill was introduced on 29 November 2023. The lead committee was the Education, Children and Young People Committee.
3. The delegated powers in the Bill at Stage 1 were previously considered by the Committee at its meetings on 5 March and 16 April 2024. The Committee's discussions focused on the nature of the proposed guidance, and the proportionality and anticipated use of the proposed direction-issuing powers. The Committee's [Report](#) on the delegated powers in the Bill at Stage 1 was subsequently published on 23 April 2024.
4. The Bill completed Stage 2 on 11 December 2024. The Scottish Government has lodged a [Supplementary Delegated Powers Memorandum](#) ("Supplementary DPM") covering the delegated powers in the Bill as amended at Stage 2.

ⁱ Stuart McMillan MSP and Katy Clark MSP submitted their apologies for this meeting.

Review of 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

Provision

5. Section 4 of the Bill provides that a local authority may designate all or parts of its area as an “area of linguistic significance” if it considers that the area: contains a significant number of people with Gaelic language skills, is historically connected with the use of Gaelic, is one in which teaching and learning by means of the Gaelic language is provided or it is one in which significant activity relating to the Gaelic language or Gaelic culture takes place.
6. Section 4(2) was amended at Stage 2. New section 1C is inserted into the Gaelic Language (Scotland) Act 2005 (“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.
7. 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.

Committee consideration

8. This Bill contains a significant number of powers to issue guidance, all of which direct those to whom it applies must “have regard to it”. Whilst it is not uncommon for guidance to be subject to a “must have regard to” requirement, whether that is appropriate will depend on the circumstances and the nature of the guidance proposed. In its Stage 1 Report the Committee drew all of the guidance-making powers to the attention of the lead committee to consider whether, in the circumstances, it was appropriate and necessary to give the guidance to be issued legal force by making it subject to a “must have regard to” requirement. No further recommendations were made by the lead committee on this point.
9. The comments made by the Committee in its Stage 1 Report regarding the guidance-issuing powers in the Bill apply also to this new power.

10. The Committee notes that another power to issue guidance has been added to the Bill.

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

11. Section 6(2) inserts a new section 2C into the 2005 Act, which gives 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.
12. 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.

Committee consideration

13. The Committee was content with this power at Stage 1. The reasons for taking this power, and the parliamentary procedure applying to this power, remain as set out in the DPM.

14. **The Committee notes the adjustments to this power.**

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

15. Section 7(2) of the Bill inserts a new section 2E into the 2005 Act, which confers a power on the 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.) Relevant public authorities must have regard to such guidance. In preparing guidance, the Scottish Ministers must consult with Bòrd na Gàidhlig and such other persons as the Scottish Ministers consider appropriate. A new subsection (2A) was added to section 2E to require the Scottish Ministers to publish the results of the consultation.

Committee consideration

16. The power has been revised to require Scottish Ministers to publish the results of the consultation undertaken when preparing the guidance. The comments made by the Committee in its Stage 1 Report regarding the guidance-issuing powers in the Bill remain unchanged.

17. The Committee notes the minor adjustment to this power.

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: New (but revision to existing power in 2005 Act)

Provision

18. 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 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.

Committee consideration

19. 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. The power has been revised so that Scottish Ministers will now be under a duty to act where they accept the conclusion of the Bòrd as set out in the report.

20. The Committee is content with the adjustment to the power in section 6(5) of the Gaelic Language (Scotland) Act 2005.

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

Provision

21. Section 9(6) of the Bill inserted a new section 7A into the 2005 Act, conferring

power 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 the power to give directions from section 7A.

Committee consideration

22. The Committee wrote to the Scottish Government at Stage 1, seeking further explanation and justification for taking the direction-making power in section 7A. In its Stage 1 Report the Committee recorded its doubts as to the necessity of taking this power and highlighted its exchange with the Scottish Government to the lead committee.
23. At paragraph 451 of its Stage 1 Report on the Bill, the lead committee asked the Scottish Government to set out whether it intended to streamline the range of direction-making powers in the Bill and, if so, to set out details of how this will be done.
24. In the SPDM, the Scottish Government does not explain why it has omitted this direction-making power. However, it would appear that it was intended to give effect to the recommendation of the lead committee in its Stage 1 report. In any event, the Committee notes that the removal of this power gives effect to the lead Committee's Stage 1 recommendation regarding the direction-making powers in the Bill.
25. **The Committee notes that the removal of this power gives effect to the lead committee's Stage 1 recommendation regarding the direction-making powers in the Bill.**

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

Provision

26. Section 12(2) of the Bill inserts a new section 6B into the Education (Scotland) Act 2016 ("the 2016 Act"). This new section confers power on the Scottish Ministers 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 (3).
27. At Stage 2, new section 6B was amended to add the General Teaching Council for Scotland to the list of consultees and to require the Scottish Ministers to publish the

results of the consultation undertaken under section 6B(3).

Committee consideration

28. The Committee was content with this power at Stage 1. The amendments constitute minor procedural changes.

29. **The Committee notes the minor adjustments to this power.**

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

30. Section 13 of the Bill inserts a new section 6C into the 2016 Act which gives 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.

Committee consideration

31. In its Stage 1 Report, the Committee drew all of the guidance-making powers to the attention of the lead committee to consider whether, in the circumstances, it is appropriate and necessary to give the guidance to be issued legal force by making it subject to a “must have regard to” requirement. The lead committee did not make any recommendations in this regard and the guidance-making powers remain substantively the same as they were at introduction.

32. The guidance-making power in this section has been amended so that instead of having discretion as to whether they issue guidance or not, the Scottish Ministers are under a duty to do so. The comments made by the Committee in its Stage 1 Report regarding the guidance-issuing powers in the Bill remain unchanged.

33. **The Committee notes the adjustment to this power.**

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

Provision

34. 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 that 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.

Committee consideration

35. The Committee wrote to the Scottish Government at Stage 1, asking why it was considered necessary to take a direction-making power, given the various layers of guidance and regulations which education authorities will already require to comply with.
36. In its Stage 1 Report the Committee reported its doubts as to the necessity of taking this power and highlighted its exchange with the Scottish Government to the lead committee.
37. At paragraph 451 of its Stage 1 Report on the Bill, the lead committee asked the Scottish Government to set out whether it intended to streamline the range of direction-making powers in the Bill and, if so, to set out details of how this would be done.
38. In the SPDM, the Scottish Government does not explain why it has omitted this direction-making power. However, it would appear that the deletion was intended to give effect to the recommendations of the lead committee. In any event, the Committee notes that its removal gives effect to the lead committee's Stage 1 recommendation.

39. **The Committee notes the deletion of the direction-making power gives effect to the Stage 1 recommendation of the lead committee regarding the direction-making powers in the Bill.**

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

40. 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.

41. 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).

Committee consideration

42. The supplementary DPM explains that this direction-making power is considered appropriate because there may be good reasons that a request to carry out an assessment ought to be considered despite an earlier assessment having been made 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.

- 43. The Committee is content with the power in principle and that it will not be subject to any parliamentary procedure.**

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

44. New section 13A(7), inserted by section 22A, 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.

Committee consideration

45. This Bill contains a significant number of powers to issue guidance, all of which direct those to whom it applies must “have regard to it”. Whilst it is not uncommon for guidance to be subject to a “must have regard to” requirement, whether that is appropriate will depend on the circumstances and the nature of the guidance proposed. In its Stage 1 Report the Committee drew all of the guidance-making powers to the attention of the lead committee to consider whether, in the circumstances, it was appropriate and necessary to give the guidance to be issued legal force by making it subject to a “must have regard to” requirement. No further recommendations were made by the lead committee on this point.
46. The comments made by the Committee in its Stage 1 Report regarding the

guidance-issuing powers in the Bill apply also to this new power.

47. The Committee notes that another power to issue guidance has been added to the Bill.

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

48. New section 13B, inserted by section 22A 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.

Committee consideration

49. This is a Henry VIII power, which allows for the modification of primary legislation through secondary legislation. Whilst the Committee would usually expect such powers to be subject to the affirmative procedure, that will not always be necessary. Given that this power only allows for modification of primary legislation in a limited and technical way, the Committee considers that the negative procedure is sufficient in this case.

50. The Committee is content with this power in principle and with the choice of the negative procedure.

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

51. 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.

52. Section 13C sets out the duties of an education authority following an assessment of viability. 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.
53. Section 13D provides that Scottish Ministers may direct an authority that has failed to take steps to establish an all-Gaelic school to do so.

Committee consideration

54. The Supplementary DPM explains that a 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.

55. **The Committee is content with the power in principle and that it is not subject to any parliamentary procedure.**

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

56. 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.

Committee consideration

57. The Scottish Government considers that taking a power to make orders requiring relevant public authorities to discharge their duties under the 2005 Act is appropriate to enhance the enforcement mechanisms available to Scottish Ministers to reinforce those duties, in cases where other mechanisms have been unsuccessful.
58. This power is modelled on the power in section 70 of the Education (Scotland) Act 1980 which provides a mechanism whereby any interested party can make a complaint to the Scottish Ministers that a responsible body (the managers of a school or education establishment, an education authority or other persons) has

failed to discharge a duty imposed on them by, or for the purposes of any enactment relating to education. Following an investigation of the complaint, the Scottish Ministers may make an order declaring the responsible body to be in default in respect of the duty and requiring them to discharge the duty. Section 70 also allows the Scottish Ministers to make such an order, following an investigation, without there first having been a complaint made by any interested person.

59. A more recent precedent for such a power can be found in section 92 of the Public Services Reform (Scotland) Act 2010 which grants default powers to the Scottish Ministers. Specifically, if the Scottish Ministers are satisfied that a local authority providing a registered care service is failing to comply with an improvement notice without reasonable excuse, they can (a) declare the authority to be in default, and (b) direct the authority to take such steps to remedy the matter as may be specified in the direction within such reasonable period as may be so specified.
60. Although relatively rare, there is precedent for Scottish Ministers taking “default powers” of the same nature proposed in the Bill. The Committee is content with a similar order-making power being taken in section 25C to ensure that Ministers can effectively enforce the duties imposed on relevant public authorities under the 2005 Act.

61. The Committee is content with the power in principle and that it is 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

62. 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. 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 the guidance may relate to all forms of the Scots language used in Scotland.

Committee consideration

63. In its Stage 1 Report, the Committee drew all of the guidance-making powers to the attention of the lead committee to consider whether, in the circumstances, it is appropriate and necessary to give the guidance to be issued legal force by making it subject to a “must have regard to” requirement. The lead committee did not make any recommendations in this regard and the guidance-making powers remain substantively the same as they were at introduction.

64. The comments made by the Committee in its Stage 1 Report regarding the guidance-issuing powers in the Bill remain unchanged. The amendment to the guidance-making power in this section is a matter of minor detail.

65. The Committee notes that the power to issue guidance in this section has been revised.

