

EDUCATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Education (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 BILL PROVISIONS

2. In its Programme for Government the Scottish Government set out a commitment to tackle poverty and inequality and to improve education and attainment for all. A programme for action has been designed to build on existing activity and is supported by additional funding targeted at some of Scotland's most deprived communities.

3. New legislative provision in the Education (Scotland) Bill ("the Bill") will place additional responsibilities on the Scottish Government and local authorities to exercise their functions with regard to the need to reduce inequalities of outcomes – arising out of socio-economic disadvantage or otherwise.

4. The Bill will also ensure that children have rights to question any support needs they may have in order to make the most of their learning while at school. It will ensure that all children and young people have appropriately qualified teachers and that local authorities have a qualified and experienced Chief Education Officer with responsibility for delivering their education functions. The Bill will also introduce a power which will ensure that there is a clear process for parents to make complaints to Ministers with regard to the delivery of educational duties by local authorities and a clear process for requesting that a local authority assess the need to provide Gaelic medium education.

5. Specifically, the Bill aims to:

- Promote equity of attainment for disadvantaged children by imposing duties on education authorities and the Scottish Ministers in relation to reducing pupils' inequalities of educational outcome together with a duty to report on progress;
- Place a duty on education authorities both to assess the need for Gaelic medium primary education (GMPE) following a parental request and to actively promote and support Gaelic medium education (GME) and Gaelic learner education (GLE); the

Bill will also place a duty on Bòrd na Gàidhlig to prepare guidance on how GME should operate in Scotland;

- Extend rights under the Education (Additional Support for Learning) (Scotland) Act 2004 (as amended) (“the 2004 Act”) to children aged 12 and over with capacity;
- Restate section 53 of the Education (Scotland) Act 1980 (“the 1980 Act”) which sets out the provision for school food in Scotland. This section has been amended a number of times since enactment and it is considered that the section would benefit from restatement;
- Modify the types of complaints which may be made to the Scottish Ministers under section 70 of the 1980 Act and introduce a power to make regulations about the procedure to be followed in relation to investigations and the determination of complaints;
- Legislate for the role of Chief Education Officer in local authorities in Scotland;
- Modify the powers of the Scottish Ministers to make regulations in relation to independent schools and grant-aided schools in Scotland so they are exercisable in such a way as to ensure all teaching staff are registered with the General Teaching Council for Scotland; and
- Amend section 47(3) of the Children and Young People (Scotland) Act 2014 (“the 2014 Act”) as it currently unintentionally excludes a small group of children from the early learning and childcare provisions.

RATIONALE FOR SUBORDINATE LEGISLATION

6. The Bill contains a number of delegated powers provisions which are explained in more detail below. In deciding whether these provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered carefully the importance of each matter 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;
- Anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament;
- Make proper use of valuable Parliamentary time;
- Allow detailed administrative arrangements to be kept up to date with the basic structures and principles set out in the primary legislation; and
- Consider the likely frequency of amendment.

DELEGATED POWERS

PART 1: Inequalities of Outcome

Section 1 – Pupils experiencing inequalities of outcome

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Affirmative**

Provision

7. Section 1 places duties on the Scottish Ministers and education authorities to plan and deliver education services in a way that promotes a reduction in the inequalities of outcome experienced by pupils which result from socio-economic disadvantage.

8. Subsection (3)(b) enables the Scottish Ministers, by regulations, to extend the scope of the duties set out in subsection (1) and subsection (2) with a view to ensuring that the planning and delivery of education policy and services is undertaken in such a way as to promote a reduction in inequalities of outcome for other groups of children in addition to those specified in subsection (3)(a).

Reason for taking power

9. The reason for taking this power is to allow the Scottish Ministers to broaden the focus of the duties placed on the Scottish Ministers and education authorities so as to require that education policy and services be directed not only towards the reduction in inequalities of outcome experienced by those children impacted by socio-economic disadvantage but also to other specific groups of children who have particularly poor outcomes. This flexibility will allow the Scottish Ministers to respond in instances where it is identified that those other groups of children should benefit from the duties at subsection (1) and subsection (2).

Choice of procedure

10. The regulations are subject to affirmative procedure in accordance with section 25(2). The power will be used to widen the scope of the section 1 duties which will have potentially significant implications for education authorities in terms of how they exercise their duties and for the Scottish Ministers in terms of how they exercise their powers. As such it is considered that Parliament would take a keen interest in this power to extend the scope of those duties to certain children and therefore affirmative procedure provides a more appropriate level of Parliamentary scrutiny.

Section 4 – Reports

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

11. Section 4 requires education authorities and the Scottish Ministers to prepare and publish reports every two years setting out the steps they have taken in the previous two years to fulfil their respective duties in section 1 and section 2(2) and to detail the educational benefits realised as a result of taking those steps. Further, it requires that education authorities and the Scottish Ministers use that report to set out the proposed steps and anticipated educational benefits to be delivered in the coming 2 year period with a view to fulfilling their respective duties at section 1 and section 2(2).

12. Subsection (4) allows the Scottish Ministers to vary the interval between reports, currently set at two years.

Reason for taking power

13. The power provides the Scottish Ministers with the flexibility to shorten or extend the two year interval between reports should it be considered in the light of implementation of the new duties that more or less frequent reporting would be desirable.

Choice of procedure

14. The regulations are subject to negative procedure in terms of section 25(4). The power could not be used to change any of the requirements to report but only the regularity within which that reporting requires to take place and therefore it is considered that the level of Parliamentary scrutiny afforded by negative procedure is sufficient. The negative procedure is considered to offer an appropriate balance between, on the one hand, expedition and convenience and, on the other, the need for scrutiny for a provision of this nature.

PART 2: Gaelic medium education

Section 5 – Assessment requests

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

15. Section 5 makes provision about parental requests for an education authority to assess the need for Gaelic medium primary education (“GMPE”). Subsection (5) states that the Scottish Ministers may, by regulations, make further provision about parental requests under subsection (1). Subsection (6) states that regulations under subsection (5) may include provision about the

form of the request and how it should be made, information to be included in or to accompany the request and evidence for the purposes of subsections (2) and (3) i.e. evidence that there is a demand for GMPE from parents of other children under school age who are resident in the same education authority area.

Reason for taking power

16. The power would enable the Scottish Ministers to make more detailed provision about the form of, and manner in which, a parental request for an assessment of the need for GMPE must be made. This power would allow the Scottish Ministers to prescribe a template request form which will encourage consistency in the provision of evidence in support of a parental request. Given that a parental request can only be made in relation to one child and that education authorities are only under a duty to consider evidence of demand from parents of children who are under school age and resident in the same GMPE assessment area as the specified child, it is important that these details are clearly set out and readily apparent from the parental request. It is not considered appropriate to include this level of detail in primary legislation.

Choice of procedure

17. The regulations are subject to negative procedure in accordance with section 25(4). These regulations would not alter the nature of the duty on education authorities but would provide clarity on the form of a parental request and how it is to be made as well as the nature of the information and evidence that should accompany a parental request. It is considered that negative procedure affords a sufficient level of parliamentary scrutiny given that the regulations contain this type of administrative detail.

Section 7 – Initial assessments

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

18. Section 7 sets out the initial assessment process that applies when an education authority has received a parental request under section 5 of the Bill. Following an initial assessment, an education authority must decide whether or not there is a potential need for GMPE depending on whether or not it is satisfied that both the conditions in subsection (6) are met. Whichever determination an education authority makes, it will fall under further duties in section 8. The first condition in subsection (6) is that the child specified in the request and the children resident in that GMPE assessment area who are in the same year group as the specified child and in respect of whose parents the authority holds information about demand, total five or more in number. The second condition is that the demand for GMPE in respect of children in a different year group is at, or is likely to increase to, a level that the authority considers to be reasonable. Subsection (7) gives the Scottish Ministers the power to amend the first condition in subsection (6) by regulations so as to substitute a different total number of children. The Scottish Ministers may exercise this power so that a different number applies in different education authority areas.

Reason for taking power

19. It is considered that the existence of demand for GMPE from the parents of five or more children in the same year group and resident in the same GMPE assessment area represents the point that it becomes viable to deliver GMPE in that area. That viability test is then the trigger for a fuller, more sensitive, assessment of whether to secure the provision of GMPE. However, in practice, some education authorities have been willing to establish GMPE provision for class sizes below five and experience may demonstrate that what is viable in one education authority area may not represent viability in another education authority area with a different geography and population. In order to retain the flexibility to adapt to developments in practice and movements in population, it is considered that the Bill should contain a power for Scottish Ministers, by regulations, to change the numerical threshold of five or more children and also to prescribe a different figure for different education authorities. It is considered appropriate to provide for this power by regulations as it may only require to be exercised in certain circumstances and at certain stages.

Choice of procedure

20. The regulations are subject to negative procedure in terms of section 25(4). It is likely that this power will be exercised in the light of experience of the operation of the provisions in practice and therefore in light of informal engagement with stakeholders. These regulations would not alter the nature of the duty on education authorities but give Scottish Ministers a power to adapt the threshold that determines the application of aspects of the duty according to different situations that may affect the point at which it is viable to deliver GMPE in different local authority areas. Therefore, negative procedure is considered to afford a sufficient level of parliamentary scrutiny in the circumstances.

Section 10 – Full assessments

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

21. Section 10 sets out the detail of what a full assessment of the need for GMPE in a GMPE assessment area must consist of. The full assessment process follows an initial assessment and a decision under section 7(5) that there is, or is not, a potential need for GMPE in the area. According to section 8(1), if an education authority decides that there is such a potential need, it must either take steps to secure the provision of GMPE or proceed to a full assessment of the need for GMPE under section 10. According to section 8(2), even if an education authority decides that there is no such potential need, it may still exercise its discretion to proceed to a full assessment of the need for GMPE under section 10. Subsection (8)(a) of section 10 gives the Scottish Ministers the power to modify subsections (3) and (7). Subsection (7) contains the list of matters that an authority must have regard to in undertaking a full assessment of whether or not to secure the provision of GMPE following a parental request to assess the need for GMPE. Subsection (3) contains the list of bodies which an education authority must, during a full

assessment, seek views from on the parental request and initial assessment. Subsection (8)(a) gives the Scottish Ministers the power to modify these lists. Subsection (8)(b) gives the Scottish Ministers the power to make any other modifications to section 10 that they think are necessary or expedient as a result of any modification of subsection (3).

Reason for taking power

22. The powers in subsection (8) will enable the Scottish Ministers to alter the list of bodies whose views should be sought when carrying out a full assessment. These powers provide the flexibility to respond to the creation of new bodies and any change in the name or status of existing bodies. The powers in subsection (8) will also enable the Scottish Ministers to alter the list of matters at subsection (7) which an education authority must have regard to in undertaking a full assessment. This list is deliberately wide but it is considered helpful for the Scottish Ministers to have the power to modify this list in case unforeseen difficulties arise in its operation or it emerges (for example through the operation of the provisions in practice) that education authorities should be obliged to have regard to other matters.

Choice of procedure

23. The regulations are subject to negative procedure in accordance with section 25(4). These regulations would not alter significantly the nature of the duty on authorities but give Scottish Ministers a power to modify the matters that authorities have to consider in carrying out a full assessment and the bodies that should be notified of a request and from whom views must be sought during a full assessment. The regulations would not modify the duty on education authorities to have regard to any other matters that they consider relevant during a full assessment. It is likely that this power will be exercised in response to either changes in the law or in light of the operation of the provisions in practice and therefore after informal engagement with stakeholders and therefore it is considered that negative procedure affords a sufficient level of parliamentary scrutiny in the circumstances.

Section 12 – Power to extend Part to early learning and childcare

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Generally negative but affirmative procedure where making textual changes to an Act

Provision

24. Section 12(1) gives the Scottish Ministers the power, by regulations, to make such provision as they consider necessary or expedient to enable an education authority to treat a parental request made under section 5(1) as a request to assess the need for GME at the level of early learning and childcare provided under sections 1(1) and 1(1A) of the 1980 Act i.e. the mandatory amount of early learning and childcare. Section 12(4)(a) provides that such regulations may do so by modifying Part 2 of the Bill or any other enactment. Section 12(4)(b) provides that such regulations may do so by providing that the Bill or any other enactment applies with such modifications as stated in the regulations.

Reason for taking power

25. Currently, the assessment process under the Bill is only in relation to primary school education. GME is most effective when provided from a young age. However, the potential resource implications of extending Part 2 of the Bill beyond primary school education mean that it is considered preferable to take a power to enable the Scottish Ministers to do so via secondary legislation at a future date (if required) rather than to do so on the face of the Bill; this is so particularly when the duty imposed by the 2014 Act to provide 600 hours of mandatory early learning and childcare has only recently been implemented. Therefore, section 12 would give the Scottish Ministers the power, by regulations, to extend Part 2 so that it will apply not only to GMPE but also to the early learning and childcare which an education authority is required to secure under section 47(1) of the 2014 Act.

Choice of procedure

26. These regulations will be subject to affirmative procedure if they contain provisions which make textual changes to an Act in accordance with section 25(3). Otherwise, they will be subject to negative procedure in accordance with section 25(4). This provides the appropriate level of Parliamentary scrutiny for the textual amendment of primary legislation. It is considered that negative procedure is appropriate (where there is no amendment to primary legislation) because Parliament will, through the Bill process, have already approved the principle of potentially applying Part 2 of the Bill to early learning and childcare; the regulations will simply contain provision which gives effect to that principle and therefore does not require a more detailed level of Parliamentary scrutiny than that which is afforded by negative procedure.

PART 3: Miscellaneous modifications of enactments

Section 18 – Provision of school meals

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative (where the power is exercised under section 53(8)(a)(i) and (ii) of the 1980 Act) and affirmative (where the power is exercised under section 53(8)(a)(iii) and (b) of the 1980 Act)

Provision

27. Section 18 restates section 53 of the 1980 Act which deals with the provision of school food in Scotland.

28. New section 53(8) enables the Scottish Ministers by regulations to modify the eligibility criteria for the provision of free school meals defined in new section 53(7). Subsection (7) defines pupils as being eligible for free school lunches where they (or their parents) are in receipt of either income support; an income-based job-seeker's allowance (payable under the Jobseekers Act 1995); an income-related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance); or where the parents of the pupil are in receipt of

support provided under Part 6 of the Immigration and Asylum Act 1999. Paragraph (a) of new section 53(8) enables the Scottish Ministers to modify the criteria in subsection (7) by adding a description of the pupil by reference to any benefit or allowance received by the pupil (or the parents of the pupil); any tax credit (or element of a tax credit) within the meaning of the Tax Credits Act 2002 received by the pupil (or the parents of the pupil); or the yearly stage of primary or secondary education of the pupil. Paragraph (b) of new section 53(8) enables the regulations to prescribe other descriptions of a pupil to be added to subsection (7).

Reason for taking power

29. The reason for retaining this enabling power in the restated new section 53 is to ensure maximum flexibility and the ability to respond to other legislative changes, in relation to a matter, the principle of which Parliament has already agreed. The regulation-making power is likely to be used by the Scottish Ministers to respond to changes in or addition of benefits and/or circumstances, allowance or tax credits imposed by UK legislation, and therefore being able to respond to these changes as and when they arise is important. The regulations would also allow for eligibility to be conferred on entire school years (over and above the current provision to primaries 1-3); and to set out other descriptions of pupils who are entitled to free school meals; therefore it is important that this can be achieved in reasonable timescales via subordinate legislation without having to wait for the next available legislative opportunity (a Bill) to come along.

Choice of procedure

30. The regulation making powers in new section 53(8)(a)(i) and (ii) are subject to negative procedure (in accordance with section 133(2) of the 1980 Act). The power could be used to add a description of pupil by reference to benefits, allowance or tax credits which either they, or their parents, are in receipt of. The power would be exercised in light of changes made to UK benefits legislation; or powers transferred to the Scottish Parliament under the Smith Commission in relation to current benefits or any new benefits or services which might replace them; as such their use is unlikely to be controversial or require the need to take up Parliamentary time with a more detailed level of scrutiny. Further, as this section restates the enabling powers currently contained in section 53(3)(a) and (b) (which are similarly subject to negative procedure in terms of section 133(2) of the 1980 Act), section 18 retains the current form of parliamentary procedure which it is considered does not merit changing.

31. The regulation making powers in new section 53(8)(a)(iii) and (b) are subject to affirmative procedure (in accordance with section 133(2YA) of the 1980 Act as amended by section 18(3) of the Bill). The power could be used to add a description of pupil by reference to their yearly stage of primary or secondary education or such other description as may be prescribed. Given that the power could be exercised, for example, to extend the provision of free school meals to whole school years or to certain other descriptions of children, and given the implications of that for education authorities, this is something which it is considered Parliament is likely to take a keen interest in and therefore a more detailed level of Parliamentary scrutiny is considered appropriate. Further, as this section restates the current enabling powers in section 53(3)(c) (which are similarly subject to affirmative procedure in terms of section 133(2YA) of the 1980 Act), section 18 retains the current form of parliamentary procedure which it is considered does not merit changing.

Section 19 – Enforcement of statutory duties

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

32. This section makes various amendments of section 70 of the 1980 Act. Section 70 allows the Scottish Ministers (following a complaint by an interested party or otherwise) in relation to an alleged failure by an education authority, the managers of a school or educational establishment, or other person to comply with a duty imposed by an education-related enactment, to make an order declaring the authority etc. to be in default and requiring the duty to be discharged before the date specified in the order. Section 19 inserts a new regulation-making power into section 70 (new section 70(5)) which will allow the Scottish Ministers to prescribe a procedure to be followed in relation to the investigation of an alleged failure by an education authority, the managers of a school or educational establishment, or other person to discharge a duty and in relation to the determination of whether to make an order following the investigation. New subsection (6) allows for the regulations made under subsection (5) to make different provision for different purposes and to include transitional, transitory or saving provisions.

Reason for taking power

33. Concerns have been expressed by parents and carers and consequently by the former Cabinet Secretary of Education and Lifelong Learning, Michael Russell, about the section 70 complaints procedure, in particular that it can take a significant length of time for complaints to be investigated and resolved. It is therefore proposed to use the new regulation making power to impose time limits on the various parties involved in a complaint made to the Scottish Ministers under section 70 (for example, the person complained about and Education Scotland) to provide the Scottish Ministers with information, carry out assessments and make certain decisions. Given the proposed use of the power relates to procedural matters alone, given the level of detail which will require to be provided for in specifying the various deadlines which must be met by the various parties concerned, and given that it might be necessary to amend the time limits imposed in the light of practice and experience, it is considered that it is more appropriate for such provision to be included in secondary legislation.

Choice of procedure

34. Such regulations are subject to negative procedure in accordance with section 133(2) of the 1980 Act. As the regulations are about procedural matters it is considered that negative procedure affords an appropriate level of Parliamentary scrutiny. The time limits and other measures included in the regulations will apply to those parties concerned with the complaint (i.e. the complainant, the responsible body about whom the complaint has been made, Education Scotland, and the Scottish Ministers) and will be subject to formal public consultation prior to the regulations being made and laid in Parliament.

Section 20 – Appointment of Chief Education Officer

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

35. Section 20 inserts new section 78 into the 1980 Act. New section 78 requires education authorities to appoint an officer (a “Chief Education Officer”) to advise the authority on the carrying out of the authority’s functions under education-related enactments. New section 78(3)(a) makes provision to enable the Scottish Ministers to set out in regulations the qualifications required of a person to be appointed as a Chief Education Officer.

Reason for taking power

36. This power enables the Scottish Ministers to set out the appointment criteria for a Chief Education Officer in regulations. The Chief Education Officer will require certain qualifications for appointment such as a Graduate or Post-Graduate Education Degree and it is considered that the level of detail required in setting out these relevant qualifications make it appropriate for them to be set out in secondary legislation. Further it is likely that the qualifications prescribed may require to be amended from time to time to account for possible new, relevant qualifications or any new education-related functions which might be imposed on authorities. Providing for qualifications in regulations allows the Scottish Ministers the flexibility to amend the prescribed qualifications as may be required.

Choice of procedure

37. The regulation making power is subject to negative procedure in accordance with section 133(2) of the 1980 Act. This is considered appropriate, as all relevant stakeholders will be fully consulted and engaged to agree the relevant qualifications, and any future amendments or additions, to be prescribed for the role of the Chief Education Officer and therefore this is not considered controversial enough to require a higher level of scrutiny for a provision of this nature.

38. This power is likely to be exercised only after informal engagement and consultation with stakeholders about what the relevant qualifications for a Chief Education Officer ought to be and as such it is considered that the negative procedure affords a sufficient level of parliamentary scrutiny in the circumstances.

Section 21 – Registration of independent schools

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

39. Section 21 amends section 133 of the 1980 Act (regulations) to provide Scottish Ministers with the power to make ancillary provision connected to the exercise of the power in section 98A(6) to make regulations defining “prescribed persons”. Part 5 of the 1980 Act provides the legal framework for the registration and regulation of independent schools. Section 98 of the 1980 Act provides for the Scottish Ministers to consider applications for registration as independent schools. Section 98A(5) sets out the grounds by which the Scottish Ministers may not be satisfied in relation to certain matters. These grounds include that a teacher (or proposed teacher) is not a proper person to be a teacher in any school in that she or he is disqualified in terms of Part 5, is barred from regulated work with children in accordance with the Protection of Vulnerable Groups (Scotland) Act 2007 or is a “prescribed person”. Section 98A(6) enables the Scottish Ministers by regulations (subject to affirmative procedure in accordance with section 133(2C) of the 1980 Act) to set out what a prescribed person is.

40. The power in new subsection (2D) of section 133 will allow the Scottish Ministers, when exercising the power in section 98A(6) of the 1980 Act to also make different provisions for different purposes and supplementary, incidental, consequential, transitional, transitory or saving provisions. It also includes power to modify any enactment (as defined in new subsection (2E)).

Reason for taking power

41. The Scottish Ministers intend to introduce compulsory registration for all proposed teachers and teachers who work in independent schools through the exercise of the section 98A(6) power to define “prescribed persons”. The reason for taking the power to make ancillary provision is in order to allow for transitional arrangements to be made, where necessary, in respect of those teaching in schools who are not yet registered with the General Teaching Council for Scotland (“GTCS”) and if necessary make exceptions to the requirement to be GTCS registered. The regulation making power will also allow for any amendments which require to be made in consequence of these changes: for example, to Part 5 of the 1980 Act.

Choice of procedure

42. Regulations made under section 98A(6) of the 1980 Act are currently subject to affirmative procedure (together with a requirement to consult on a draft of the regulations) in terms of section 133(2C) of the 1980 Act; the new ancillary powers added by section 21 will similarly be subject to that procedure. It is considered that this level of parliamentary scrutiny for the ancillary powers is also appropriate.

Section 22 – Employment of teachers in grant aided schools

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

43. Section 22 amends section 90(1) of the 1980 Act (employment of teachers). Section 90(1) currently enables the Scottish Ministers in regulations made under section 2 (Scottish Ministers may prescribe standards etc. for education authorities) or 74(1) (payment of grants to be subject to conditions) to prescribe that only registered teachers (defined in section 135(1) of the 1980 Act as a teacher registered under the Public Services Reform (General Teaching Council for Scotland) Order 2011 (i.e. registered with the GTCS)) shall be employed or continue to be employed as teachers by education authorities in the educational establishments to which the regulations apply. Section 22 extends section 90(1) to cover managers of grant-aided schools with the effect that regulations under section 2 or 74(1) of the 1980 Act can prescribe that only teachers registered with the GTCS shall be employed as teachers in grant-aided schools. Section 90(1) of the 1980 Act enables regulations to make exceptions, thereby retaining flexibility (similar to independent schools) to make exceptions to the requirement that teachers in grant-aided schools must be GTCS registered which will support a phased implementation of the requirement.

Reason for taking power

44. Section 74(1) of the 1980 Act provides a power to make regulations prescribing conditions which may be attached to the payment of grant by the Scottish Ministers under the 1980 Act. However, section 90(1) of the 1980 Act provides that such regulations may provide that only GTCS registered teachers may be employed by education authorities in the educational establishments to which the regulations apply (ie in public schools). This places doubt on whether the power in section 74(1) includes the power to prescribe as a condition of grant that a grant-aided school employ only GTCS registered teachers. Therefore, section 22 makes clear that regulations under section 74(1) can prescribe as a condition of grant that all grant aided schools must only employ registered teachers.

Choice of procedure

45. The regulations are subject to negative procedure in accordance with section 133(2) of the 1980 Act. Regulations made pursuant to this additional power will prescribe that teachers employed in grant-aided schools require to be GTCS registered as a condition of grant; as Parliament will already have considered the general principle of this policy during debate on the Bill, it is considered that negative procedure affords an appropriate level of parliamentary scrutiny for the implementation of that policy. Further, the current enabling powers (which section 22 is amending) are also subject to negative procedure. Finally, the regulations are about the administrative workings of grant-aided schools as opposed to anything more substantive which might require a higher level of Parliamentary scrutiny.

PART 4 - General

Section 26 – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Generally negative but affirmative procedure where making textual changes to an Act.

Provision

46. Section 26(1) of the Bill confers on the Scottish Ministers a power to make by regulations such supplementary, incidental, consequential, transitional, transitory or savings as they consider appropriate for the purposes of, in consequence of, or for giving full effect to any provision of the Bill. Section 26(2) allows regulations under section 26(1) to modify any enactment (including any Act resulting from the Bill).

Reason for taking power

47. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. For example, consequential provision may be required in order to make necessary changes to related legislation as may be required. Further, the powers might also be used to make supplementary or incidental provision in order to fill in certain detail consistent with the provisions of the Act but missing from it, which provision might not have been anticipated or identified during the parliamentary passage of the Bill. The regulation making power at section 26(1) is considered necessary to provide that flexibility. It is considered that the power to make such provision should extend to the modification of enactments. The power also enables the making of transitional, transitory or savings provision for the purposes of giving full effect to the Act which is distinct from the narrower power in section 27(4) to make transitional, transitory or savings provision in connection with commencement.

48. Without the power to make such ancillary provision it may be necessary to return to the Parliament through subsequent primary legislation to deal with a matter which is clearly within the scope and policy intentions of the Bill. That would not be an effective use of resources by the Parliament or the Scottish Government. The power, whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so for the purposes of, in consequence of, or for giving full effect to any provision of the Bill. Any such regulations will therefore be closely and directly linked to the substance of this Bill.

Choice of procedure

49. Generally, section 26(1) will be subject to the default negative procedure in terms of section 25(4). However, section 25(3) provides that any regulations made under section 26(1) which contain provisions which add to, replace, or omit any part of the text of the Bill or any other Act are subject to affirmative procedure. It is considered that this will provide the appropriate level of parliamentary scrutiny for when primary legislation is amended. This approach is in line with

the approach taken in most Bills and there are not considered to be any special factors justifying a different approach in this case.

Section 27 – Commencement

Power conferred on: **The Scottish Ministers**

Power exercisable by: **Regulations made by Scottish statutory instrument**

Parliamentary procedure: **No procedure**

Provision

50. Section 27(2) provides that the Scottish Ministers may, by regulations, appoint days on which the provisions in the Bill may come into force (and in terms of subsection (3) different days may be appointed for different purposes). Subsection (1) provides that Part 4 (other than section 24) comes into force the day after Royal Assent. Subsection (4) also enables regulations about commencement to include transitional, transitory or saving provision.

Reason for taking power

51. The reason for taking this power is to give the Scottish Ministers the flexibility to bring certain provisions into force as and when required. The Bill contains provisions across a number of policy areas (albeit that they generally relate to education) and other action may for example require to be taken in order to pave the way for commencement (for example the preparation of subordinate legislation or guidance); therefore the Scottish Ministers require flexibility to bring the provisions into force on a phased basis, where necessary, and this power (which is usual in a Bill) enables that. Regulations relating to commencement may also contain transitional, transitory or savings provisions by virtue of section 27(4), which is also usual practice for a Bill. The power in section 27(4) is narrower and distinct from the power to make equivalent provision in section 26(2), and must be related to commencement.

Choice of procedure

52. Section 25(5) has the effect that any such commencement regulations will not be subject to parliamentary procedure. It is normal practice for commencement regulations to be laid before Parliament and not subject to additional procedure. Commencement regulations bring into force provisions, the policy behind which has already been considered by the Parliament during the passage of the Bill. It is considered to be sufficient that any regulations made under this section are laid before Parliament as soon as practicable after they are made (and before they come into force). This is provided for by virtue of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

SCHEDULE – Modifications of the Education (Additional Support for Learning) (Scotland) Act 2004 - as introduced by section 17 of the Bill

Schedule – paragraph 16

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative

Provision

53. The schedule to the Bill makes various amendments to the 2004 Act to extend the rights of children aged 12 or over with capacity. Paragraph 16 of the schedule amends an existing regulation making power under section 16 of the 2004 Act which allows Scottish Ministers to make provision about the resolution of disputes between education authorities and other parties concerning the exercise by the authority of any of their functions under the 2004 Act in relation to the child or young person.

Reason for taking power

54. It is intended to amend this regulation making power so that regulations can make provision for the resolution of disputes between an education authority and any child aged 12 or over who has capacity to express a view and in whose interests it is to make a decision for the purpose of resolving disputes. This amendment is consequential to the various amendments to the 2004 Act in the schedule to the Bill which extend various rights under the 2004 Act to children aged over 12 with capacity. It was originally considered appropriate for provision in relation to the resolution of disputes between education authorities and parents and young people in the 2004 Act to be provided for in regulations, given the provision would relate to procedural matters (such as the dispute resolution application process and the requirements on authorities to establish various procedures to resolve such disputes) and given the level of detail which would likely be required in this regard. This new provision in relation to the resolution of disputes between an authority and a child aged 12 or over who has capacity, concerning the exercise by the authority of any of their functions under the 2004 Act in relation to the child, will similarly be procedural and detailed in nature (again concerning the application process and procedure for the resolution of disputes). Therefore it remains appropriate for this provision to be made in secondary legislation.

Choice of procedure

55. Regulations made under section 16 of the 2004 Act are currently subject to negative procedure. The amendment made to section 16 of the 2004 Act will extend this regulation-making power to allow provision to be made about the resolution of disputes between an education authority and a child aged 12 or over who has capacity, as opposed to between an authority and a parent or young person as is currently the case. As stated above, given the regulations relate to procedural matters, it is considered appropriate that they remain subject to the negative procedure and not subject to a higher level of scrutiny by the Parliament as would otherwise be required if they concerned anything more substantive.

Schedule – Paragraph 23

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Rules made by Scottish statutory instrument**
Parliamentary procedure: **Negative**

Provision

56. Paragraph 23 of the Schedule amends the existing duty on Scottish Ministers in paragraph 11 of Schedule 1 to the 2004 Act to produce rules for the practice and procedure of the Additional Support Needs Tribunals for Scotland (“ASNTS”) (see section 17 of the 2004 Act). The effect of the amendment is that the rules may include provision enabling specified matters in respect of the decision of an authority as to whether a child aged 12 or over has the capacity to exercise a right under the 2004 Act, or whether it is in their best interests to do so, to be decided by a convener of a Tribunal alone.

Reason for taking power

57. Schedule 1 to the 2004 Act places a duty on the Scottish Ministers to make detailed rules of practice and procedure to be followed by ASNTS in determining referrals made to them under section 18 of the 2004 Act. The amendment to the rule making power in paragraph 11 of schedule 1 to the 2004 Act is being made in consequence of the amendments made to the 2004 Act to extend various rights under that Act to children aged 12 or over with capacity. Children aged 12 or over may exercise various rights under the 2004 Act (such as to request an assessment of their additional support needs) if the authority considers that the child has capacity (as defined in the substituted section 3 of the 2004 Act, inserted by paragraph 2 of the schedule to the Bill, and if it is considered to be in the child’s best interest).

58. Section 18 is being amended by paragraph 17 of the schedule to the Bill to allow children aged 12 or over to make a reference to the ASNTS in relation to the education authority determination of capacity and best interest. It is the policy that these references should be determined by a convener of the Tribunal alone and it is considered appropriate to amend the rule-making power in paragraph 11 of schedule 1 to the 2004 Act to widen the scope of these rules to allow such provision to be made. It is considered that as this is a procedural detail, it is more appropriate for it to be included in 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 in paragraph 11 of the schedule.

Choice of procedure

59. The changes made to the scope of the rules through the Bill are relatively minor and it is considered appropriate that they remain subject to the negative procedure. Rules made under paragraph 11 of schedule 1 to the 2004 Act are currently subject to negative procedure. The amendment made to paragraph 11 will extend this rule-making power to allow specified matters in respect of decisions of an education authority in relation to the capacity and best interests of a child to be determined by a convener of the ASN Tribunal alone, alone with the various other procedural matters referred to in paragraph 11(2). As stated above, given the rules relate to

This document relates to the Education (Scotland) Bill (SP Bill 64) as introduced in the Scottish Parliament on 23 March 2015

procedural matters, it is considered appropriate that they remain subject to the negative procedure and not subject to a higher level of scrutiny by the Parliament as would otherwise be required if they concerned anything more substantive.

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EDUCATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM