

SCHOOLS (CONSULTATION) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

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 Schools (Consultation) (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.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Bill brings in new requirements for local authorities when consulting on closures and other proposals relating to all schools managed by local authorities. It makes special provision for proposals to close a rural school requiring authorities to consider alternatives to closure, the impact on the community including its use of the building, facilities and premises and the environmental impact of new travel patterns resulting from the closure before proceeding with the proposal. It also creates a ministerial call-in process for closure decisions to replace the current system which requires certain local authority proposals to be referred automatically to the Scottish Ministers for their consent.
4. In making such provision the Bill will repeal sections 22A and 22B of the Education (Scotland) Act 1980 in their entirety with the effect that the regulations made thereunder, the Education (Publication and Consultation Etc.) (Scotland) Regulations 1981¹ ("the 1981 Regulations") will fall. These are the provisions which set out the current framework for consultations by local authorities (in their role as education authorities) for changes to schools and other educational matters.

SUBORDINATE LEGISLATION POWERS - OUTLINE

5. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Ministers have carefully considered which matters of overall

¹ S.I. 1981/1558

structure and policy require detailed scrutiny through the full Parliamentary process against the need to:-

- ensure future 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.

6. The Bill confers a total of three powers to make subordinate legislation on the Scottish Ministers. The existing consultation procedures are set out in detail in the 1981 Regulations. The new system of consultation and ministerial call-in procedures will be provided on the face of the Bill rather than in regulations. Regulations will however be required to make provision for some of the procedural detail where that is more appropriately placed in subordinate legislation. Powers have also been taken to make modifications to the Bill to allow the list of prescribed proposals and consultees to be adjusted (explained in more detail below) as well as powers to make transitional, transitory and savings provision. 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.

7. 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 20(1) Ancillary provisions etc.

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

8. Section 20(1) confers powers on the Scottish Ministers by order to make supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of the Bill. This provision includes a power to make different provision for different purposes (section 20(5)). It may also be used to elaborate on any aspect of the process provided for in sections 1 to 17 of the Bill (section 20(3)) and include provision as to the functions of education authorities or the Scottish Ministers (section 20(4)).

Reason for taking power

9. It is intended that this power will be used to make provision for supplemental detail on the procedural process - for instance the detail of how education authorities should notify consultees when a proposal paper is published under section 6. It is considered appropriate to delegate this power to subordinate legislation as such provision may require amendment from time to time to allow for changes in practice.

10. Schedule 3 of the Bill makes provision for the transition from the current law to the new law in the Bill when fully in force to deal with consultations and referrals to the Scottish Ministers which are underway when the new law is commenced. The power at section 20(1) would also allow further provision to be made through transitional, transitory or saving provisions. Such a power is considered appropriate to allow the Scottish Ministers to address any specific circumstances related to commencement which have not been anticipated.

11. The power also allows the legislation to address any other issues which arise after implementation but which are not apparent at the moment. The power is limited to the extent that it may only be exercised where the Scottish Ministers consider it necessary or expedient for the purposes of or in connection with the Bill.

Choice of procedure

12. In terms of section 20(6)(b), regulations made under section 20(1) will be subject to affirmative resolution procedure, where they amend or repeal primary legislation. Otherwise they will be subject to negative resolution procedure. It is considered that affirmative procedure is appropriate where regulations change primary legislation as such an amendment or repeal should be subject to full scrutiny and debate by the Parliament. For any other use of the power the negative procedure is considered appropriate.

Section 20(2) Modifications to schedules 1 and 2

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

13. Section 20(2) confers powers on the Scottish Ministers to add, remove or alter the terms of an entry in schedules 1 and 2 of the Bill. Schedule 1 prescribes the relevant proposals which will trigger the new consultation process. Schedule 2 prescribes the relevant consultees. The regulation making power includes a power to make different provision for different purposes (section 20(5)). It may also elaborate on any aspect of the process provided for in sections 1 to 17 of the Bill (section 20(3)) and include provision as to the functions of education authorities or the Scottish Ministers (section 20(4)).

Reason for taking power

14. A power to allow the Scottish Ministers to change the list of relevant proposals is considered appropriate to ensure that the legislation may respond to any future changes should the need arise - for example the discontinuance of a further education centre managed by an education authority is a relevant proposal by virtue of paragraph 10 of schedule 1 to the Bill; if

those further education centres ceased to be so managed then an amendment to schedule 1 would be required.

15. It is also considered appropriate to delegate to subordinate legislation a power allowing the Scottish Ministers to change the relevant consultees. The list at schedule 2 is currently a comprehensive one. However, when the new consultation process is implemented and practice develops, it may be desirable to include others who are not currently on the list but who can be regarded as having a relevant interest in the proposal or proposals. Such a power will also be required to allow adjustment to the list if a consultee were to change its name or cease to exist.

16. Without this power it would be necessary to make the required changes through primary legislation. As such matters are clearly within the scope and policy intentions of the original Bill this would not be an effective use of the Parliament's resources.

Choice of procedure

17. It is considered that this is an appropriate matter for affirmative resolution under section 20(6)(b) because it would amend or repeal primary legislation.

Section 22(2) Commencement and short title

Power conferred on: Scottish Ministers
Power exercisable by: order made by statutory instrument
Parliamentary procedure: no parliamentary procedure

18. Section 22(2) gives the Scottish Ministers the power to commence provisions of the Act by order. The order may appoint different days for different provisions (subsection (3)) allowing a phased approach to introduction if required. The power in section 22(2) recognises the need for the Scottish Ministers to control commencement.

19. Subsection (4) permits an order made under section 22(2) to include such transitional, transitory or saving provisions as the Scottish Ministers consider necessary or expedient in connection with commencement. Schedule 3 to the Bill makes provision for transitional, transitory and savings provision. However it is recognised that the process of giving effect to the Bill's provisions may give rise to a need to supplement such provision to take account of matters which were not anticipated at this time.

20. As is the usual practice for commencement provisions no form of parliamentary procedure is required. The Subordinate Legislation Committee will, in terms of its remit², have the opportunity to consider the order.

² Rule 6.11 of the Standing Orders

This document relates to the Schools (Consultation) (Scotland) Bill (SP Bill 23) as introduced in the Scottish Parliament on 2 March 2009

SCHOOLS (CONSULTATION) (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM