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Ur faidhle/Your ref:
Ar faidhle/Our ref:
15 May 2015

Dear Mr Donald,

Thank you for your letter dated 5 May to Chris Nicholson seeking an explanation of a number of delegated powers within the Education (Scotland) Bill. The Scottish Government thanks the Committee for their comments and an opportunity to consider these matters. Please see our response below to each of these matters:

Section 7 – Initial assessments

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

The Committee asks the Scottish Government for further justification of the choice of negative procedure for the exercise of this power, given its apparent significance and the fact that it permits the variation of the threshold figure beyond which an education authority must determine that there is a potential need for GMPE in a particular assessment area?

The Scottish Government agrees that the powers in section 7(7) of the Bill allow the Scottish Ministers to amend the threshold figure which is one limb of the test that prescribes whether an education authority must determine that there is or is not a potential need for GMPE at the culmination of an initial assessment. That figure has been chosen because current provision of GME throughout Scotland suggests that the existence of demand for GMPE from the parents of five or more children in the same year group represents the point that it becomes viable for an education authority to deliver GMPE. However, section 7(7)(a) of the Bill provides a power for Scottish Ministers to vary this figure (with universal application) if, in light of experience of the operation of the provisions (which allow discretionary provision of GMPE even when the threshold is not met) and the promotion of GME and Gaelic language education as required by the Bill, it becomes clear that education authorities consider it viable to deliver GMPE for classes of fewer than five children. Section 7(7)(b) of the Bill also provides a power for the Scottish Ministers to provide that the threshold figure should be read as a different figure in different education authority areas. The reason for taking this power is that we anticipate that the geographic and demographic composition of certain

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education authorities may mean that, contrary to the trend across Scotland, those authorities routinely proceed to exercise their discretion to provide GMPE even when the threshold of five is not met because they consider it viable to deliver GMPE to classes of fewer than five children.

The intention is that the powers in section 7(7) will only be exercised to ensure that the assessment process in the Bill adapts to the evolving concept of ‘viability’ of GMPE delivery (which can only happen in the light of experience) and – in that sense – the power will not be used to change the policy behind section 7(6)(a) which will already have been debated during the passage of the Bill.

When deciding whether affirmative or negative procedure is appropriate for these powers, the Scottish Government has sought to strike a balance between making proper use of valuable Parliamentary time and focussing a more detailed level of Parliamentary scrutiny where appropriate. The Scottish Government’s view is that the exercise of either of the section 7(7) powers would be unlikely to be controversial because it would be in line with the existing policy of the Bill and the operation of the provisions in practice, therefore, it would not be a good use of parliamentary time to initiate a debate on each occasion the powers are used. This is particularly so, given that the intention is to use the powers only to reflect the evolving concept of ‘viability’ (both across Scotland and in particular education authorities where unusual conditions exist). As is standard practice, the Scottish Government would ensure that consultation and engagement with relevant interests preceded the preparation of such regulations. We also note that negative procedure would not prevent debate if members had concerns about a particular set of regulations.

For these reasons, the Scottish Government considers that it is appropriate that the powers in section 7(7) be subject to the negative procedure.

Section 10 – Full assessments

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	negative

The Committee asks the Scottish Government why is it considered appropriate that the power in section 10(8)(b) is subject to the negative procedure, given that it permits modifications to primary legislation, the nature of which is not specified further beyond the requirement that Ministers consider them to be necessary or expedient in consequence of any modification of subsection (3)?

As the Committee have identified, the powers in section 10(8)(a) of the Bill will enable the Scottish Ministers to alter the list of bodies at subsection (3) whose views must be sought by an education authority when carrying out a full assessment as well as the list of matters at subsection (7) which an education authority must have regard to in undertaking a full assessment. The intention is that these powers will provide the flexibility to respond to the creation of new bodies and any change in the name or status of existing bodies as well as enable the Scottish Ministers to react to unforeseen issues in the operation of section 10(7) or matters that practice suggests have been omitted from section 10(7) and that education authorities should be obliged to have regard to in carrying out a full assessment of whether or not to secure the provision of GMPE.

Section 10(8)(b) provides the power to “make such other modifications of [section 10] as the Scottish Ministers think necessary or expedient in consequence of any modification of subsection (3)”. This power is intended to provide the flexibility to modify section 10 should tweaks be necessary or expedient and the only permitted modifications are those that are in consequence of the modification of section 10(3) (a further limitation on the power). The Scottish Government considers that, if the power to modify subsection (3) is exercised (to change the list of bodies that must be consulted during a full assessment), consequential changes might be required to subsection (4) to impose an obligation on the additional/alternative bodies to provide their views and potentially elsewhere e.g. to subsection (2) to ensure that the nature of the consultation duty continues to operate effectively and subsection (7) to ensure that both compulsory and voluntary views continue to be mandatory considerations in a full assessment.

Although this power permits modification of primary legislation, it will not be used to alter the basic duty on education authorities to request views from relevant bodies and have regard to those views if provided or the duty on certain relevant bodies to provide those views within a specified time. As such, the exercise of these powers would be consistent with the existing policy of the Bill and the Scottish Government considers it unlikely that use of these powers would be controversial.

Additionally, the power in section 10(8)(b) is not capable of being used to modify primary legislation in general; it is, as noted, exercisable only so as to modify section 10 for limited, consequential purposes. It is therefore not comparable to say, section 12, which may be used more broadly to alter any Act (in which case, the instrument would be subject to affirmative procedure).

Once again, the Scottish Government has sought to strike a balance between making proper use of valuable Parliamentary time and focussing a more detailed level of Parliamentary scrutiny where appropriate. The Scottish Government’s view is that it would not be a good use of parliamentary time to initiate a debate on each occasion this power is used. This is particularly so, given that the Scottish Government would ensure that consultation and engagement with relevant interests (as is standard practice) preceded the preparation of such regulations and if any concerns did arise it would still be possible for these matters to be debated in Parliament under negative procedure.

For these reasons, the Scottish Government considers that it is appropriate that the power in section 10(8)(b) be subject to the negative procedure.

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

Power conferred on:	the Scottish Ministers
Power exercisable by:	regulations
Parliamentary procedure:	affirmative where textual amendments made to primary legislation; otherwise negative

The Committee asks the Scottish Government for further explanation why this power is not subject to the affirmative procedure in its entirety, rather than to the negative procedure where regulations made in its exercise do not make textual amendments to primary legislation?

The Scottish Government agrees that Part 2 of the Bill currently applies only in respect of primary school education. However, the Scottish Government does not agree that extension of Part 2 to early learning and childcare (“ELC”) would represent a significant departure from the policy behind the Bill. The policy rationale for restriction of Part 2 to primary school education is that 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 at this stage means that the Scottish Government has taken a power to enable them to do so via secondary legislation at a future date, if and when the time is right, rather than to do so in the Bill.

It is envisaged that the power in section 12 would be exercised when a combination of circumstances exist: when the ELC sector is more settled as a result of the Children and Young People (Scotland) Act 2014 being more fully embedded and where the experience of the operation of Part 2 demonstrates that parents should be able to request GME at ELC level.

The policy intention is clear from the existence of section 12 in the Bill and this policy will be debated thoroughly during the Bill's Parliamentary progress. Parliament will, through the Bill process, have already approved the principle of potentially applying Part 2 of the Bill to ELC; the regulations would simply contain provision to give effect to that principle.

As such, the Scottish Government does not consider that it would be a good use of Parliamentary time to initiate a debate on regulations under section 12 under the affirmative procedure (unless the regulations are making textual amendments to primary legislation). This is particularly so because, given the effect of such regulations, they could not operate without first carrying out extensive consultation and engagement with relevant interests prior to their preparation. If any concerns did arise in relation to regulations under section 12, it would still be possible for these matters to be debated in Parliament under the negative procedure.

One way the power to modify primary legislation under section 12 may be used is to make provision that is linked to, or consequential on, the principal provisions of the regulations that enable the purpose mentioned in section 12(2) to be achieved. Such linked provision would be of the kind mentioned in section 26 of the Bill, ie, ancillary to the purposes of the regulations. The Scottish Government considers it would be inconsistent to make instruments under section 12 that textually amend primary legislation subject to negative procedure, while ancillary provision under section 26 that textually amends primary legislation is subject to affirmative procedure. So while the power in section 12 is, in general, subject to the negative procedure for the reasons stated, its being subject to affirmative procedure where it amends primary legislation ensures consistency in the approach to parliamentary procedure within the Bill.

Yours sincerely



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