

Stuart McMillan MSP  
Convener of the  
Delegated Powers and  
Law Reform Committee

19 March 2024

## Scottish Languages Bill at Stage 1 – Delegated Powers

Dear Convener

Thank you for your letter of 12 March in relation to delegated powers contained within the Bill. This letter responds to each of the Committee's queries in turn.

### Use of guidance in the Bill

In relation to the following sections, which give the Scottish Government powers to issue guidance:

- Section 4(2) - Areas of linguistic significance
- Section 7(2): Power for Scottish Ministers to give guidance to relevant public authorities
- Section 9(6): Gaelic language plans
- Section 13: Guidance to public authorities relating to Gaelic education
- Section 30: Power for Scottish Ministers to give guidance - Scots language
- Section 32(1): Guidance on Scots language education

The Committee asks the Scottish Government:

1. To clarify the nature of the guidance proposed under these sections, and in particular, whether the guidance is intended to assist or direct local authorities. In other words, is the guidance administrative or legislative in nature?
  - If it is administrative, why is it considered necessary to place a duty on local authorities to have regard to it?
  - If it is legislative, why it is not subject to any parliamentary procedure?

### Response:

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*The guidance proposed under each of the sections referred to above is intended to assist local authorities (in the case of provisions relating to Areas of Linguistic Significance) or public authorities (in the case of the other sections mentioned) in complying with their duties. The essential characteristic of guidance is that it is advisory rather than directory and does not impose legally binding duties. The guidance will therefore not be of legislative character and as such it would not be appropriate to attach parliamentary procedure to the powers to issue guidance. However, failure to comply with guidance may be relevant in determining whether an authority has complied with the duties created by the Bill. We consider it appropriate for authorities to be required have regard to the guidance when making a relevant decision, in order to consider how that guidance may be relevant to the exercise of their functions. There are many legislative examples of a duty to have regard to guidance.*

2. In relation to Section 4(2): whether, as drafted, the requirement to have regard to the guidance might be capable of changing a matter for local authorities' discretion into something mandatory? For example, a situation in which a local authority is considering whether to designate an area of linguistic significance (a matter of discretion) and is minded not to, but strict adherence to guidance directs the local authority to designate.

**Response:**

*The power to issue guidance under section 1B(11) (inserted by section 4(2)) will not convert the power to designate under inserted section 1B(1) into a duty to do so. As indicated above guidance is not something which must be complied with but something which a local authority must have regard to when making its decision, along with other relevant factors. For example one of the routes to designation could be through an historical connection to Gaelic and guidance may helpfully signpost organisations such as Ainmean- Aite na h-Alba which has information on Scottish place names in Gaelic. [Ainmean-Àite na h-Alba \(AAA\) – Gaelic Place-names of Scotland \(ainmean-aite.scot\).](http://Ainmean-Àite na h-Alba (AAA) – Gaelic Place-names of Scotland (ainmean-aite.scot).)*

*Another route to designation could be through being an area in which there is significant activity relating to Gaelic language or Gaelic culture and the guidance could give examples of such activity and details of organisations involved in Gaelic activity.*

3. In relation to Section 7(2): the combined effect of proposed new sections 2D and 2E is to subject relevant public authorities to a dual “must have regard to” requirement. In effect, they must have regard to guidance which directs them as to how they can fulfil the duty that they “must have regard to” the desirability of promoting Gaelic, and so forth when exercising their functions. Does the Scottish Government consider that this drafting approach makes it clear to public authorities what is required of them under section 2D?

**Response:**

*We agree with the description of the effect of the new proposed sections 2D and 2E as summarised above and do not consider that this raises an issue. Section 2D places a duty on relevant public authorities to consider their functions and consider how they exercise them and, in that context, to have regard to those things set out in sections 2D(a) and (b). As part of that process, where there is guidance under section 2E an authority must have regard to it. Consistent with the position set out above, such guidance is not something which must be complied with but is something which a public authority must have regard to along with other factors in making decisions. There are several other examples of this relationship*

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between duties in legislation: see for example [section 5\(4\) of the Heat Networks \(Scotland\) Act 2021](#) read with section 15 of that Act, and [section 21 of the Consumer Scotland Act 2020](#) read with section 20 of that Act.

We also draw your attention to what is currently section 8(9) of the Gaelic Language (Scotland) Act 2005 (which will become section 1(3A) by virtue of section 2(2)(c) of the Bill), which provides that advice from Bòrd na Gàidhlig is available to public authorities free of charge in relation to the application of the 2005 Act to them. This could inform a public authority about how the exercise of their functions interrelates to and impacts on Gaelic language and culture. Much of the work that Bòrd na Gàidhlig engages in around the development of Gaelic Language Plans at the current time is around providing a Gaelic perspective and awareness raising which then helps to inform decision makers about how their area of operation can incorporate or act positively or negative for the minority language.

#### 4. In relation to Section 9(6): **the Committee asks why this guidance is not subject to a publication requirement?**

##### **Response:**

*A publication requirement has been included for guidance powers which are of general interest and application, and which relate to overarching duties. Publication has not been provided as a requirement for narrower more technical areas where publication may not be of wider interest (for example, because it relates to only a particular public authority or authorities) and therefore the publication requirement could add an unnecessary administrative burden and cost. Not all of the existing guidance making powers in the Gaelic Language (Scotland) Act 2005 require the guidance to be published: for example, guidance by Scottish Ministers to Bòrd na Gàidhlig under section 1(4). However, we will consider again whether a publication requirement would be appropriate here.*

##### **Use of directions in the Bill**

Four provisions of the Bill would confer power on the Scottish Ministers to give “directions” to public and local authorities (sections 7(2), 9(6), 12(5) and 14(2)). The Committee asks the following questions about these powers.

In relation to Section 7(2): Power for Scottish Ministers to give directions to relevant public authorities:

1. Can the Scottish Government please provide some practical examples to illustrate how it envisages using this power.

##### **Response:**

*An example would be where a public body is operating with a bilingual Gaelic English logo or branding and in error when refreshing or redesigning that branding the Gaelic element has been dropped or forgotten. Ministers may consider that the relevant public body is of sufficient significance on a national level or in respect of Gaelic community interests to ensure that the branding is reconsidered as a matter of urgency. In such circumstances a direction making power may be an appropriate route to ensure there is a clear direction of the need to rectify the situation and the speed with which it should be achieved. It may not*

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*be considered appropriate for the re-introduction of bilingual branding to have to wait until a future iteration and it may also be of assistance to the public authority to have a direction in place to authorise and require the rectification at pace.*

2. What consideration has the Scottish Government given to the proportionality of taking a direction-making power, given that a relevant public authority will already have to comply with its duties under section 2D to “have regard to the desirability of (a) promoting, facilitating and supporting the use of the Gaelic language, and (b) developing Gaelic culture”, and have regard to any guidance relating to that duty?

**Response:**

*It is considered that the inclusion of a direction making power is proportionate. It is appropriate for Scottish Ministers to have the power to make limited interventions. It should be noted that, under section 2F(1), prior consultation is required with the relevant public authority in advance of exercise of any direction making power. The power is consistent with the existing direction-making power in section 6(5)(b) of the Gaelic Language (Scotland) Act 2005 relating to the implementation of Gaelic language plans and ensures that the duties in section 2D can be treated coherently with Gaelic language plan implementation as part of the overall landscape of public authority duties relating to Gaelic.*

3. Can the Scottish Government please clarify whether it will be open to a relevant public authority, under section 2D, to decide that it is not desirable, in the context of exercising one or more of its functions, to promote, facilitate and support the use of Gaelic or to develop and encourage Gaelic culture? In that event, would this power allow Scottish Ministers to compel a course of action to the contrary?
4. The duty in section 2D on a relevant public authority is to “have regard to the desirability of (a) promoting, facilitating and supporting the use of the Gaelic language and (b) developing and encouraging Gaelic culture”. If section 2D does not compel a particular course of action, can the Scottish Government please explain how, in practical terms, it can use a direction-making power?

**Response:**

*The “have regard” duty in section 2D is a duty to consider these matters along with other relevant factors. It is a procedural duty which cannot mandate any particular result. However, it does require a public authority to give the matter proper consideration. Therefore a public authority could not, for example, decide that it was never going to consider the desirability of promoting Gaelic language. It could, however, find that in a particular instance, other factors outweighed the desirability of promoting Gaelic language and justified exercising the function in a way which did not promote Gaelic language.*

*It is recognised that consideration of functions followed by prioritisation of areas of actions which are most impactful and effective in a language planning sense are likely to be necessary and beneficial, but that there may also be other circumstances in which, having weighed up all relevant factors, a public authority decides not to exercise its functions in a way which achieves the aims set out in section 2D(a) and (b).*

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*Use of the direction-making power need not displace the public authority's discretion to choose a particular course of action. The direction-making power could be used to direct a public authority to consider particular matters: for example, where a tourist or culture strategy is being commissioned relative to an area where Gaelic is spoken that regard is had to facilitating or supporting the use of the Gaelic language as that strategy is implemented.*

*The intention would be to use the direction-making power for specific and targeted action which relates to how the duty in section 2D is fulfilled. The direction making power can only be used after consultation with the public authority and as noted above is intended to create a coherent landscape across the various duties.*

### **In relation to Section 9(6) – Gaelic language plans:**

1. Why does the Scottish Government consider that a direction-making power is proportionate in the circumstances, given that a relevant public authority will require to have regard to any guidance issued under section 7A of the 2005 Act and apply any standards and requirements specified in regulations made by Scottish Ministers under section 2C of the 2005 Act?

#### **Response:**

*As noted above, section 6(5)(b) of the Gaelic Language (Scotland) Act 2005 already provides for a direction making power for Scottish Ministers in order to require performance of measures contained in Gaelic language plans. This existing mechanism requires prior consultation. It is considered proportionate to ensure that the powers for Scottish Ministers to require action where this may have been overlooked to be consistently available across all elements of the language planning structure which is provided through the Bill.*

2. Can the Scottish Government please provide some practical examples of the circumstances in which it envisages this power will be used and examples of the type of directions which it has in mind?
  
  
  
  
  
  
  
  
  
  
3. It would appear that the direction-making power is intended be used to supplement, clarify or amplify the law which is to be contained in the regulations. Does the Scottish Government anticipate that it will not be clear on the face of the regulations what standards or requirements must be met by relevant authorities? If not, why is this power necessary?

#### **Response:**

*Taking points 2 and 3 above together, these have been considered and it is acknowledged that the circumstances in which use of this power is envisaged could be quite remote and limited. We remain open to giving further consideration as to whether direction making power in these circumstances is likely to be necessary or exercised and to consider streamlining the range of direction making powers as the parliamentary stages proceed. An example could be where a standard has been set placing a*

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*requirement on bodies which are publishing documents in defined categories (e.g. documents of national significance) to do so in the Gaelic language - the body does not recognise that it has documents that it publishes that fall within that category and therefore has not considered that area in the preparation of its plan – a direction could be used to ensure that that is considered and provided for in a plan. However given that plans follow approval processes between the relevant body and Bòrd na Gàidhlig it is recognised that the circumstances in which direction may be likely to be used or necessary to address a point in this context could be extremely rare. It is not intended that the direction making power be used to supplement, clarify or amplify the law which is to be contained in the regulations and it would be the intention to ensure that these are clearly drafted and precise. It could be used to encourage consideration of a standard which had been overlooked.*

**In relation to Section 12(5): Power for Scottish Ministers to give directions in relation to standards for Gaelic Education:**

1. Why does the Scottish Government consider it necessary to take a direction-making power, given that education authorities will already require to comply with the various layers of guidance and regulations detailed below (a – d):
  - a) where it is required to prepare a Gaelic language plan, have regard to any guidance given by Scottish Ministers issued under section 7A of the 2005 Act;
  - b) comply with regulations which Scottish Ministers may make setting standards and requirements about Gaelic education made under section 6B of the 2016 Act;
  - c) comply with a direction given by Scottish Ministers relating to the application of the standards and requirements specified in those regulations made under section 6B; and
  - d) have regard to any guidance relating to Gaelic education issued under section 6C of the 2016 Act.

**Response:**

*We think that your question relates to section 7A(6) of the Gaelic Language (Scotland) Act 2005 as inserted by section 12(5), although in asking about this you also list this as something which education authorities are already required to consider. Our answer assumes that you are asking why it is necessary to take the direction making power contained in section 12(5) of the Bill.*

*This provision is equivalent to the direction making power contained in section 9(6) of the Bill for Gaelic language plans generally. There may be particular instances where there are a number of ways in which the standards and requirements for Gaelic education set out in regulations could be applied in compliance with those regulations, but where it is imperative that a particular course of action is taken.*

*Where for example an authority has been providing GME primary education for a number of years and has pupils from its authority area who are reaching the age when they will transition to secondary school yet the authority has not planned for secondary provision and continuity for those pupils, a direction making power may be a helpful intervention to ensure*

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*that the necessary actions are taken in time to make arrangements for the impacted pupils to continue their learning through their chosen medium. A direction in this circumstance could relate to a standard to consider whether posts are Gaelic desirable or Gaelic essential or could relate to a standard on workforce planning to understand the capability of existing workforce in relation to language.*

## **Section 7A**

2. Whether it anticipates that there may be uncertainty on the part of public authorities as to how they should meet the standards provided for in regulations.

### **Response:**

*As noted above, we do not anticipate that there will be uncertainty as to how the standards should be met. However, there may be particular circumstances where there are many ways in which to comply, and where the Scottish Ministers take the view that there is a particular beneficial outcome which can only be achieved by mandating a particular course of action. It would be in that circumstance that the direction making power would be used.*

### **In relation to Section 14(2): Directions to education authorities relating to Gaelic education:**

1. Why the Scottish Government considers it necessary to take a direction-making power, given that education authorities will already have to comply with the layers of guidance and regulations detailed below (a – c):
  - a) comply with regulations which Scottish Ministers may make setting standards and requirements about Gaelic education made under section 6B of the 2016 Act;
  - b) have regard to any guidance relating to Gaelic education issued under section 6C of the 2016 Act.
  - c) comply with a direction given by Scottish Ministers relating to Gaelic education given under section 6D.
2. Why the Scottish Government envisages that an education authority would require a direction to authorise a particular course of action.

### **Response:**

*We think that your question relates to section 6D of the Education (Scotland) Act 2016 as inserted by section 14(2) of the Bill, although in asking about this you also list this as something which education authorities are already required to consider. Our answer assumes that you are asking why it is necessary to take the direction making power contained in section 14(2) of the Bill.*

*Taking these two questions together, this direction making power has been considered and it is acknowledged that the circumstances in which this power of direction is envisaged to be used could be quite remote and limited. We remain open to giving further consideration as to whether direction making power in these circumstances is likely to be necessary or exercised and to consider streamlining the range of direction making powers as the*

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*parliamentary stages proceed. An example could be in relation to the way in which an authority provides information and advertising about education available in its area through letters or social media campaigns. A direction could be used to ensure that Gaelic Medium Education options available are appropriately highlighted. However this could be covered by a clear standard or guidance.*

Yours sincerely,

**Jenny Gilruth MSP**

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