

Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Children (Withdrawal from Religious Education and Amendment of UNCRC Compatibility Duty) (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 66–EN);
 - a Financial Memorandum (SP Bill 66–FM);
 - a Policy Memorandum (SP Bill 66–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 66–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Scottish Government is committed to upholding the rule of law by ensuring that the Scottish Government's laws are clear, accessible and effective. It is also committed to fully realising the human rights of all people in Scotland, including complying with international human rights obligations.
5. This Bill therefore contains targeted and technical measures aimed at enhancing the coherence and clarity of the processes for withdrawal from Religious Observance (RO) and Religious and Moral Education (RME) in schools, as well as the operation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act

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2024 (“the UNCRC Act”), in line with the Scottish Government’s commitment to children’s rights and the UN Convention on the Rights of the Child.

6. Specifically, the Bill will amend both the UNCRC Act and the Education (Scotland) Act 1980 (“the 1980 Act”) to provide clarity to public authorities on how they should interpret and apply their duties, and improve the clarity of the Scottish statute book, thus strengthening the legal framework for the rights of children and young people in Scotland. As well as ensuring consideration of pupils’ views, the changes to RO/RME will put beyond doubt the position in Scotland in relation to UNCRC obligations in this context.

7. The Bill has 3 Parts which are summarised in the Policy Memorandum which accompanies the Bill. Further information about the background and the policy intention behind the Bill is set out in the Policy Memorandum.

Rationale for subordinate legislation

8. The Bill contains delegated powers which are explained in more detail below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.

9. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the importance of each matter has been considered against:

- The need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- The need to ensure proper use of parliamentary time;
- The possible frequency of amendment; and
- The need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

10. The delegated powers provisions are listed below, with a short explanation of what each power allows and why subordinate legislation, including also guidance making powers, are considered appropriate. For the decision on negative or affirmative procedure, the degree of Parliamentary scrutiny that is thought to be required for the instrument has been carefully considered, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views on the importance of the matters being delegated by the Parliament.

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Delegated powers

Section 1(3) (inserting new section 9B into the Education (Scotland) Act 1980): Guidance to operators on section 9A

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: No procedure

Provision

11. Section 9 of the 1980 Act gives parents of pupils in public schools and grant-aided schools the right to withdraw the pupil from religious instruction or religious observance. A parent might seek to withdraw a pupil from both religious instruction and religious observance or from either of them or from only certain aspects of either of them. Section 1 of the Bill sets out a new process for taking account of the pupil's views when a request to withdraw a pupil is made, inserting a new section 9A into the 1980 Act.

12. The new section 9B of the 1980 Act, inserted by section 1(3) of the Bill, provides a power for the Scottish Ministers to issue guidance for education authorities and managers of grant-aided schools about carrying out their functions under the new section 9A.

Reason for taking power

13. The purpose of providing guidance will be to support education authorities and managers of grant-aided schools to carry out the process for involving a pupil in a decision about their withdrawal from religious instruction or religious observance in a consistent and robust manner, ensuring that there is an inclusive and objective approach to how this process is undertaken. Local authorities and grant-aided schools must have regard to such guidance.

Choice of procedure

14. Guidance issued by the Scottish Ministers is not subject to any parliamentary procedure. This is consistent with the approach taken to guidance for education authorities on similar matters such as sex education¹ and home education².

¹ Section 56 of the Standards in Scotland's Schools etc. Act 2000.

² Section 14 of the Standards in Scotland's Schools etc. Act 2000.

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Section 3: Power to make ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if making textual amendments to an Act, but otherwise negative

Provision

15. Section 3 gives the Scottish Ministers power to make regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with, or for giving full effect to the Bill.

Reason for taking power

16. The Scottish Ministers consider it to be appropriate for the full range of ancillary powers to be available to facilitate the transition from the current law on withdrawal from RO and RME, and the compatibility duty in the UNCRC Act, to the new arrangements as provided for in the Bill. The power will enable the modification of primary and secondary legislation.

Choice of procedure

17. It is considered that the negative procedure is appropriate given that the Scottish Parliament will have considered the provisions of the Bill and these regulations are concerned with making provision for the purposes of, or in connection with, giving full effect to the Bill. Where primary legislation is amended, the affirmative procedure is considered to be more appropriate.

Section 4: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

18. Part 3 of the Bill will come into force on the day after Royal Assent. Section 4 provides that the Scottish Ministers may, by regulations, appoint days on which other provisions of the Bill come into force. Subsection (4) provides that regulations may include transitional, transitory or saving provision and make different provision for different purposes.

Reason for taking power

19. This power will enable the Scottish Ministers to bring the provisions of the Bill into force and to manage the effects of their commencement.

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Choice of procedure

20. As is usual for commencement regulations, the default laying requirement will apply, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Ministers consider this appropriate because the policy behind the provisions will already have been considered by the Parliament during the passage of the Bill.

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