



The Scottish Parliament
Pàrlamaid na h-Alba

1 February 2017
SP Paper 79
7th Report (Session 5)

Delegated Powers and Law Reform Committee

Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on:

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 31 January, the Committee agreed to draw the attention of the Parliament to the following instrument-

Schools (Consultation) (Scotland) Act 2010 (Modification) Regulations 2017
[draft]

2. The Committee's recommendation in relation to the above instrument is set out below.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments that are set out at the end of this report.

Points raised: Instruments subject to affirmative procedure

[Schools \(Consultation\) \(Scotland\) Act 2010 \(Modification\) Regulations 2017 \[draft\]](#) (Education and Skills)

1. The Regulations amend paragraphs 2 and 3 of schedule 1 of the Schools (Consultation) (Scotland) Act 2010 ("the 2010 Act").
2. On 1st August 2014, the Children and Young People (Scotland) Act 2014 introduced a requirement on education authorities to ensure that 600 hours of early learning and childcare in each year was made available for all eligible pre-school children. For education authorities to comply with this requirement, the statutory consultation requirements under the 2010 Act were suspended from 1 August 2014 until 31 March 2017, for the establishment of new nursery schools and new nursery classes. This was achieved by the Children and Young People (Scotland) Act 2014 (Ancillary Provision) Order 2014 (SSI 2014/132). The suspension of requirements is therefore due to expire on 31st March 2017.
3. The Regulations come into force from 31 March 2017 and only apply to the establishment or relocation of nursery education provision. The Regulations implement a policy objective of the Scottish Government to extend the suspension of the consultation requirements for new nursery schools and nursery classes, as described above.
4. The Policy Note which accompanies the instrument explains that further suspension of the 2010 Act consultation requirements beyond 31 March 2017 is required, as fully-developed and costed procurement strategies at local levels will not be in place until late 2017, with construction not commencing until the first half of 2018. It would be from that point that education authorities could begin consultation requirements under the 2010 Act on what they propose to build and where, thereby delaying the onset of construction by up to another year.
5. The Policy Note also explains that without the provision in these Regulations, there is a risk that insufficient new infrastructure would be completed in time to meet the Scottish Government commitment of increasing the early learning and childcare entitlement for eligible pre-school children from 600 to 1140 hours by the end of the next Parliament (2020).
6. At the point of laying the draft Regulations for consideration by the Parliament and their publication by the National Archives, neither the Regulations nor the 2010 Act (by virtue of which they would be made) have included a definition of "nursery school".
7. The Committee sought an explanation in writing from the Scottish Government, as to why the term "nursery school" is not defined in the draft instrument or in the 2010 Act under which the instrument would be made, and what the effect of this isⁱ. (See Annex A for full details of correspondence).

8. The Scottish Government responded that the definition of “nursery school” will apply for the purposes of the Regulations, as a consequence of section 21(3) of the 2010 Act, read together with section 135(1) of the Education (Scotland) Act 1980. The Scottish Government explained that section 21(3) provides that “any undefined expression used in this Act (but defined in section 135(1) ⁱⁱ of the 1980 Act) is to be constructed in accordance with section 135(1) of the 1980 Act”.
9. The Committee accepts that the combined effect of those two statutory provisions is that the definition of “nursery school” would apply to the Regulations, as and when they are approved by the Parliament and made. The Committee accepts that there is no defective drafting, or lack of clarity.

The Committee however draws the Regulations to the attention of the Parliament on the general reporting ground.

Regulation 2(2)(a) and (3)(a) amend paragraphs 2 and 3 of schedule 1 of the Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”), to exclude proposals to establish a “nursery school” and proposals to relocate a “nursery school” from being relevant proposals for the purposes of the 2010 Act.

At the point of laying this draft instrument for consideration by the Parliament and its publication by the National Archives, neither the instrument nor the 2010 Act by virtue of which it is made include the definition of “nursery school”, which is contained in section 135(1) of the Education (Scotland) Act 1980. That definition will only have effect once the instrument is approved by the Parliament and made on behalf of the Scottish Ministers (by virtue of section 21(3) of the 2010 Act read with section 135(1) of the 1980 Act).

In these circumstances where an instrument is laid which inserts a new term or expression into an Act, and the term or expression is considered to properly obtain its definition as a consequence of provisions which are not explained in the instrument, the Committee will expect a footnote to be added to the instrument to explain how the term or expression obtains its definition.

This could assist the Parliament in the scrutiny of the instrument, and readers of the instrument generally, in understanding the provisions. In this short instrument, the definition of “nursery school” is integral to the provisions.

ⁱ The Committee did not consider it necessary to query the definition of a “nursery class” as its definition is contained in the 2010 Act.

ⁱⁱ Section 135(1) includes a definition of “nursery schools” which provide early learning and childcare.

No points raised

10. At its meeting on 31 January 2017, the Committee considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit.

Health and Sport

Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) (Scotland) Amendment Regulations 2017 [draft]

Sale of Nicotine Vapour Products (Prescribed Documents) (Scotland) Regulations 2017 (SSI 2017/13)

Rural Economy and Connectivity

National Bus Travel Concession Scheme for Older and Disabled Persons (Scotland) Amendment Order 2017 [draft]

Land Reform (Scotland) Act 2016 (Commencement No. 5 and Transitory Provisions) Regulations 2017 (SSI 2017/20 (C.3))

Annex A

Schools (Consultation) (Scotland) Act 2010 (Modification) Regulations 2017 [draft]

On 18 January 2017, the Scottish Government was asked:

1. Regulation 2(2)(a) and (3)(a) amend paragraphs 2 and 3 of schedule 1 of the Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”) to exclude proposals to establish a “nursery school” and proposals to relocate a “nursery school” from being relevant proposals for the purposes of the 2010 Act. “Nursery schools” are defined by section 135(1) of the Education (Scotland) Act 1980 as schools which provide early learning and childcare, but this definition is not referred to in this instrument.
2. In the apparent absence of a definition of “nursery school” in this instrument or in the 2010 Act, how is the meaning of this term properly to be arrived at and is any corrective action proposed?

The Scottish Government responded as follows:

1. Once made, the draft Schools (Consultation) (Scotland) Act 2010 (Modification) Regulations 2017 (“the Regulations”) will amend paragraphs 2 and 3 of schedule 1 of the Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”). The effect of the amendments to these paragraphs is that education authority proposals to establish or relocate a “nursery school” or a “nursery class” will no longer be relevant proposals for the purposes of the 2010 Act. As such, education authorities, will not be required to comply with the consultation requirements in the 2010 Act in relation to these types of proposal.
2. Following the coming into force of the Regulations, paragraphs 2 and 3 of schedule 1 of the 2010 Act will be textually amended by the Regulations to include a reference to the term “nursery school”. This term will therefore form part of the 2010 Act and it is the Scottish Government's view that it will be defined by reference to section 135(1) of the Education (Scotland) Act 1980 (“the 1980 Act”) by virtue of section 21(3) of the 2010 Act. Section 21(3) of the 2010 Act is “always speaking” so that it operates in relation to terms used in the 2010 Act for the time being.
3. Section 21(3) provides that:

“Unless the context otherwise requires, any undefined expression used in this Act (but defined in section 135(1) of the 1980 Act) is to be construed in accordance with section 135(1) of the 1980 Act.”

As the 2010 Act (as amended) will attract the definition of “nursery school” given in section 135(1) of the 1980 Act, no corrective action is necessary or proposed by the Scottish Government.

