CREATIVE 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 Creative Scotland Bill. It describes the purpose 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.

OUTLINE OF THE BILL

2. The Creative Scotland Bill establishes a national cultural development body, Creative Scotland, to promote understanding, appreciation and enjoyment of the arts and culture; to identify, support and develop talent and excellence in the arts and culture; to realise, as far as reasonably practicable to do so, the value and benefits of the arts and culture; and to support activities which involve the application of creative skills to the development of products and processes. The Bill will also dissolve the Scottish Arts Council.

3. The Bill comprises 10 sections and 2 schedules:
   - Section 1: Establishment of Creative Scotland
   - Section 2: General functions of Creative Scotland
   - Section 3: Advisory and other functions
   - Section 4: Grants and loans
   - Section 5: Directions and guidance
   - Section 6: Dissolution of the Scottish Arts Council
   - Section 7: Transfer of Scottish Arts Council staff etc.
   - Section 8: Modifications of enactments
   - Section 9: Ancillary provision
   - Section 10: Short title, commencement and interpretation
   - Schedule 1: Creative Scotland
This document relates to the Creative Scotland Bill (SP Bill 7) as introduced in the Scottish Parliament on 12 March 2008

- Schedule 2: Modifications of enactments

SUBORDINATE LEGISLATION POWERS – OUTLINE

4. The Bill contains a number of delegated power provisions which are explained in detail below. 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.

5. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Ministers have considered which matters of overall structure and policy require detailed scrutiny through the full Parliamentary process against the need to—
   - Ensure sufficient 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. 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 LEGISLATIVE POWERS – DETAIL

Section 9 Ancillary provision

Power conferred on: Scottish Ministers
Power exercisable: Order made by Statutory Instrument
Parliamentary procedure: Negative resolution procedure unless modifying an Act in which case affirmative resolution procedure.

7. Section 9(1) enables Scottish Ministers to make ancillary provisions by order, namely transitional, transitory or saving provisions and also incidental and consequential provisions which may be required in connection with the coming into force of any provision of the Bill and throughout the life of the Bill when it is in force. Subsection (2) provides that such an order may modify any enactment.

8. An order under this section is subject to negative resolution except where it adds to, replaces or omits any part of the text of an Act, in which case the order is subject to affirmative procedure. It is considered appropriate that where the order changes primary legislation that it
should be subject to full Parliamentary scrutiny and formal approval. Negative resolution procedure is considered to be appropriate and offer a sufficient degree of scrutiny for other cases for the following reasons: first, that the power in such cases is limited to matters arising in consequence of the Bill, and as regards legislation it is restricted to amending subordinate legislation; and second, that the power cannot be used to alter the pith and substance of the new arts and culture body, as set out in the Bill, and therefore it is not significant enough to justify affirmative procedure (which is not to suggest that an order amending primary legislation could alter the pith and substance of the new body either).

Reason for taking incidental and consequential powers

9. It is not possible to predict the precise incidental, consequential or other arrangements that will be needed as a result of the proposals made by this Bill. The powers in section 9(1) will enable unforeseen situations to be addressed as Scottish Ministers consider necessary for the purposes of or in consequence of provision made by the Bill. The powers can only be used to deal with technical and other minor matters directly connected or related to the Bill. It would not be an effective use of either the Parliament’s or the Government’s resources to deal with such matters through subsequent primary legislation.

10. For example, these powers may be required to support a smooth transfer of staff, assets and liabilities of the Scottish Arts Council to Creative Scotland. It is also possible that textual amendments to legislation other than those set out in schedule 2 to the Bill will be necessary to delete redundant references to the Scottish Arts Council and to Scottish Screen. While the Bill itself sets out the overall structure for the new arts and culture body in Scotland, it is considered that matters of minor detail such as these can be best addressed and fleshed out through subordinate legislation.

Reason for taking transitional, transitory and saving powers

11. These powers have been taken as the Bill is making significant changes to the legislative framework on arts and culture in Scotland by establishing a new body, Creative Scotland, and dissolving the Scottish Arts Council. Scottish Screen will be dissolved at around the same time as the Scottish Arts Council by non-legislative means. The Scottish Ministers consider that transitional, transitory and savings powers are essential for ensuring that the move from the existing regimes to the new regime of Creative Scotland is managed properly and effectively.

12. For example, there may be pending grant agreements to which the Scottish Arts Council is a party or applications for grants to the Scottish Arts Council which are not decided upon. For these situations transitional powers may be used to transfer pending cases to Creative Scotland. Further, transitional powers may be required to support any transitional arrangements in the transfer of the staff, assets and liabilities of the Scottish Arts Council to Creative Scotland in addition to the block transfer set out in section 7(1). Again, while the Bill itself sets out the overall structure for the new arts and culture body in Scotland, it is considered that matters of technical detail such as these can be best addressed and fleshed out through subordinate legislation. The principles of the Bill will have been debated and agreed to by the Parliament; the minor operational detail should not soak up more Parliamentary time than is necessary.
Section 10  Short title, commencement and interpretation

Power conferred on:  Scottish Ministers
Power exercisable:  Order made by Statutory Instrument
Parliamentary procedure:  No procedure.

13. Subsection (3) of this section provides for the provision of the Bill, save for section 10 itself, to come into force on such days as the Scottish Ministers may by order appoint.

Reason for taking power

14. Section 10(3) provides for the Scottish Ministers to determine when the provisions of the Bill (other than section 10 which comes into force on Royal Assent) are to come into force. This power recognises the need to control commencement. It is the usual practice for commencement provisions not to be subject to parliamentary procedure. Whilst the order is not subject to parliamentary procedure as such, the Subordinate Legislation Committee will, in terms of its remit, have the opportunity to consider the order.

Schedule 1 – Creative Scotland

Power conferred on:  Scottish Ministers
Power exercisable:  Order made by Statutory Instrument

15. Paragraph 2(2) of schedule 1 provides the Scottish Ministers with power, by order, to vary the minimum or maximum number of members of Creative Scotland set out in paragraph 2(1)(b) of schedule 1. Negative procedure has been chosen in this case as the power only allows for alteration of the number of Creative Scotland members without changing the structure or functions of Creative Scotland, as agreed by the Parliament, in any way.

Reason for taking power

16. The provision provides flexibility to vary the size of Creative Scotland should the situation arise where the work of Creative Scotland would benefit from increasing or decreasing its size. At present it is felt that a Creative Scotland membership of between 8 and 14 members, plus a chairperson, would be sufficient to enable Creative Scotland to discharge its business effectively. However, circumstances could change and it is felt that this matter is of a character which requires a flexible approach without using up Parliamentary time unnecessarily.
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