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Reform Committee

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Dear Convener

Thank you for your letter of 12 September regarding the Delegated Powers and Law Reform Committee's consideration of and questions around the powers contained within the Education (Scotland) Bill. This letter responds to each of the Committee's questions in turn.

### **1. Section 8(2): Power to issue guidance on consultation with the Strategic Advisory Council**

#### **Section 9(3)(b)(iii): Power to issue guidance to the Strategic Advisory Council**

#### **DPLR Committee Query:**

In relation to the 'powers to issue guidance' in sections 8(2) and 9(3)(b)(iii), the [Delegated Powers Memorandum](#) ("DPM") explains that requiring the Scottish Parliament to scrutinise guidance would not be the best use of parliamentary time, as it does not have the force of law. However, Qualifications Scotland ("QS") and the Strategic Advisory Council ("SAC"), "must have regard to" such guidance and will be expected to follow it. Such guidance will inform QS and the SAC as to how they will be expected to meet their consultation duties and there may be consequences for a failure to have regard to the guidance without good reason. Guidance issued under these sections would not be subject to any parliamentary procedure.

As such, in relation to sections 8(2) and 9(3)(b)(iii), the Committee asks the Scottish Government (in responding, it would be helpful if the Scottish Government could respond with an individual answer for each power):

- a) to clarify the nature of the guidance proposed, and in particular, whether it is intended to assist or direct Qualifications Scotland and the Strategic Advisory Council, i.e. is it administrative or legislative?**

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- b) **If it is administrative, why is it considered necessary to place a duty on Qualifications Scotland and the Strategic Advisory Council to have regard to it?**
- c) **If it is legislative, why it is not subject to any parliamentary procedure?**

**Scottish Government Response:**

- a) *Power to issue guidance on consultation with Strategic Advisory Council.*

The essential characteristic of guidance is that it is advisory rather than directory and does not impose legally binding duties. The guidance will therefore by definition not be of legislative character.

This power is intended to assist Qualifications Scotland in the process of discharging its functions. It will also assist the Strategic Advisory Council, as it will give it an indication of how consultation with it may occur. It is not considered that guidance can direct those to whom it is addressed; a direction-giving power would be required for that purpose.

*Power to issue guidance on consultation to the Strategic Advisory Council*

As an initial point, to clarify the description of the power in section 9(3)(b)(iii), the Scottish Ministers' power to issue guidance to the Strategic Advisory Council is limited to the consultation the council undertakes regarding its functions.

As noted above, the essential characteristic of guidance is that it is advisory rather than directory and does not impose legally binding duties. The guidance will therefore by definition not be of legislative character.

This power is intended to assist the Strategic Advisory Council and Qualifications Scotland in the process of discharging their functions and purpose, respectively. As noted above, it is not considered that guidance can direct those to whom it is addressed; a direction-giving power would be required for that purpose.

- b) *Power to issue guidance on consultation with Strategic Advisory Council.*

The provision made in the Bill is considered necessary to ensure that the purpose of the Strategic Advisory Council is duly discharged. Under section 9 of the Bill, the purpose of the council is to provide a forum for system and organisational stakeholders to scrutinise and advise Qualifications Scotland on its activities. The issuing of guidance on consultation, and regard being had to it, is necessary to ensure Ministers can make suggestions which will be given due consideration as to how Qualifications Scotland can best use the Strategic Advisory Council and ensure the effective scrutiny takes place.

*Power to issue guidance on consultation to the Strategic Advisory Council*

This provision made in section 9(3)(b)(iii) is, insofar as it relates to sub-paragraph (ii), the other half of the provision made in section 8(2). Together the provisions ensure that regard will be had by recipients to guidance issued by Ministers about the consultation

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that is to occur between Qualifications Scotland and the Strategic Advisory Council. The comments above are therefore relevant here too.

The provision made in the Bill is considered necessary to ensure that the purpose of the Strategic Advisory Council is duly discharged. Section 9 of the Bill will enable the Strategic Advisory Council to advise the Scottish Ministers directly in relation to Qualifications Scotland's activities. The ability to issue guidance on consultation, to which regard must be had, is necessary to provide Ministers with a role in ensuring the Strategic Advisory Council's advice to Qualifications Scotland is informed by effective consultation. This provision is necessary for shaping how this transfer of information takes place throughout the system and into Qualifications Scotland.

### *Interpretation of "have regard to"*

The requirement for Qualifications Scotland and the Strategic Advisory Council to have regard to guidance issued by the Scottish Ministers in relation to how they carry out their consultation duties is considered appropriate as a means to give the Scottish Ministers an opportunity to set out their expectations on consultation in a way that reflects the specific qualifications, or wider education and skills, context, and which ensures that those expectations are given due consideration. The Delegated Powers Memorandum sets out examples of when guidance might be issued, notes the existing precedent which exists in relation to the SQA, and notes the general practice which is routinely adopted in relation to guidance. As such, this response is confined to commenting upon the questions raised about the duty to have regard to such guidance.

The Scottish Government does not agree with the suggestion that Qualifications Scotland and the Strategic Advisory Council will be "expected to follow" such guidance. As noted above, guidance is advisory and does not impose legally binding duties. Any guidance issued under this provision will not be of legislative character (which is why it would not be appropriate to attach parliamentary procedure to it). A duty to have regard to guidance certainly requires those on whom the duty is imposed to consider the guidance, but it does not require it to be considered as the only or top priority. However, failure to have regard to guidance may be relevant in determining whether an authority has complied with the duties created by the Bill. We consider it appropriate for both Qualifications Scotland and the Strategic Advisory Council to "*have regard to*" guidance issued under this provision to ensure that any guidance is included in all considerations as to how Qualifications Scotland and the Strategic Advisory Council deliver their respective consultation duties.

c) N/A

## **2. Section 17: Scottish Ministers' power to direct Qualifications Scotland**

### **DPLR Committee Query:**

Part 1 of the Bill lays out the functions and duties of QS over 25 sections. Section 17 proposes that Scottish Ministers should also have a power to give directions to QS relating to these functions and duties and QS "must comply" with any such directions, while remaining operationally independent. Mechanisms are already built into the Bill for Scottish Ministers to consider the strategy of QS through the SAC and for QS to consult with and provide advice

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and information to Scottish Ministers; as well as to hold QS accountable through its corporate plan, annual report and accounts. Section 24 also provides for QS to do “anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the performance of its functions,” allowing it to react to priority, crucial, unforeseen matters.

As such, the Committee asks the Scottish Government:

- a) **what consideration it has given to the need for this direction making power in the circumstances, given Scottish Ministers’ input to the Strategic Advisory Council, and given that Qualifications Scotland will already have to comply with its duties and consultation requirements under part 1 of the Bill?**
- b) **how it envisages using this direction making power, including practical examples of the circumstances, and the types of direction it has in mind?**

### **Scottish Government Response:**

- a) We wish to clarify the Committee’s understanding of this particular power by providing more information on the interaction between Scottish Ministers, Qualifications Scotland, and the Strategic Advisory Council, and their respective purposes.

The Bill seeks to establish Qualifications Scotland as a Non-Departmental Public Body. This ensures the body is strategically accountable to Scottish Ministers whilst being operationally independent from the Scottish Government. The ability for Scottish Ministers to direct Qualifications Scotland is important to ensure the strategic direction of Qualifications Scotland aligns with the Scottish Government’s objectives and priorities. It also enables Scottish Ministers to issue directions in relation to the delivery of functions. An explanation of how both types of direction making under this power may be used is set out in answer to question b) in this section.

The Bill requires Scottish Ministers to establish a Strategic Advisory Council for the purposes of advising Qualifications Scotland on its functions and procedures and providing advice on those matters to Ministers. The Strategic Advisory Council membership will be made up of Qualifications Scotland stakeholders. It will therefore provide strategic advice to Qualifications Scotland from their perspectives and wider networks. This advice will naturally differ from the type of advice, guidance or indeed strategic direction that Scottish Ministers may give Qualifications Scotland.

Furthermore, the Scottish Ministers have oversight of the wider education, skills and qualifications system. It is important that the Scottish Ministers can utilise the expertise of the Strategic Advisory Council to consider specific system-wide matters that relate to Qualifications Scotland’s functions rather than Qualifications Scotland or the Strategic Advisory Council being the sole determinants of what they provide advice on. For example, Scottish Ministers may wish the Strategic Advisory Council to consider specific aspects of the Post-School Education Reform programme in relation to how it impacts Qualifications Scotland from the perspective of their respective organisations and networks.

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As well as the existing precedent for this power in relation to the SQA (see section 9 of the Education (Scotland) Act 1996), the committee may wish to note that other recent examples of similar powers of direction include section 17 of the South of Scotland Enterprise Act 2019 and section 37 of the Scottish Crown Estate Act 2019.

- b) The Scottish Government envisages the Scottish Ministers using this power in different ways depending on what is required. It is important to note that Scottish Ministers have used direction making powers historically in relation to directing the Scottish Qualifications Authority (SQA), which Qualifications Scotland will replace. However these have been used sparingly since the SQA was established and we would expect that to continue being the case. It is not the intention for Ministers to use these powers to manage the organisation on a day-to-day basis.

For example, Scottish Ministers may need to direct Qualifications Scotland to take a particular course of action relating to its awarding functions. The Scottish Ministers have used this power previously when they issued a direction to the SQA in 2020 regarding the Alternative Certification Model for awarding qualifications during the Covid-19 pandemic. Scottish Ministers should be able to issue the same type of direction to Qualifications Scotland should it be needed.

### **3. Section 21: Scottish Ministers' power to direct the Accreditation Committee**

#### **DPLR Committee Query:**

Section 21 of the Bill provides that the Accreditation Committee ("the AccCom") must comply with any written direction issued to it by Scottish Ministers, while remaining operationally independent. The AccCom and its functions are established by paragraph 12 of schedule 1 to the Bill and it must publish a corporate plan as to how the committee intends to exercise its functions and an annual report on its activities.

As such, the Committee asks the Scottish Government:

- a) **what consideration it has given to the need for this direction making power in the circumstances, given that the Accreditation Committee will already have to comply with its duties in the exercise of its functions under part 1/schedule 1 of the Bill?**
- b) **how it envisages using this direction making power, including practical examples of the circumstances, and the types of direction it has in mind?**

#### **Scottish Government Response:**

- a) The need for this power has been considered under two specific requirements.

The first consideration was regarding governance, specifically in relation to accountability of the accreditation function and its separation and independence from Qualifications Scotland's other functions (labelled as "awarding" functions).

The Bill contains provision for the oversight of the accreditation functions to ensure decisions taken to fulfil the delivery of these functions are made without undue influence from decisions taken on the awarding functions. This includes provisions to the effect that

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the Accreditation Committee is not subject to the direction or control of Qualifications Scotland, and that it is required to make decisions independently of Qualifications Scotland, in the exercise of its functions. Without the ability for Qualifications Scotland to direct the Accreditation Committee, there must be a separate power for Ministers to direct the Accreditation Committee alongside the power for Ministers to direct Qualifications Scotland.

The second consideration is the need for Scottish Ministers to be able to direct the Accreditation Committee to ensure its objectives align with strategic objectives of the Scottish Government. It also enables the Scottish Ministers to issue a direction in relation to the delivery of function at an operational level should it be needed.

It is considered this direction making power is needed owing to the flexible and broad nature of the accreditation function provision. The Accreditation Committee will have autonomy to set out how it delivers its accreditation function, which is essential for maintaining a responsive and agile approach to qualifications accreditation and supporting the highest standard of qualifications in Scotland. However, there may be aspects that Scottish Ministers wish the Accreditation Committee to focus on which does not form part of its planned activity that will be set out in the Corporate Plan, for example. An example of how this might be used are set out below.

- b) The Scottish Government envisages the Scottish Ministers using this power in different ways depending on what is required, and this may be strategic or operational in nature. However, as with the use of Ministerial direction to Qualifications Scotland, we would expect this power to be used sparingly. Indeed, we are unaware of any previous Ministerial direction to the SQA regarding its current accreditation functions.

The Scottish Ministers may wish to provide specific direction on the focus of the Accreditation Committee's resources or to enact Scottish Government policy change. For example, a new type of qualification may emerge which Scottish Ministers view as requiring the Accreditation Committee to focus more attention on or change approach on how they may be accredited.

#### **4. Schedule 1, paragraph 2(2): power to alter the number of members of Qualifications Scotland**

##### **DPLR Committee Query:**

In relation to this power, the Committee asks the Scottish Government:

- a) why the flexibility already provided for in the Bill – between 6 and 10 other members - is not sufficient to meet changing circumstances?**
- b) to provide some practical examples as to what changing circumstances are envisaged that would require more than 10, or fewer than six other members?**
- c) whether it envisages that there would be a cap on the number of other members altered under this power?**

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- d) whether the negative procedure provides an appropriate level of parliamentary scrutiny given this is a change to primary legislation; and whether this gives the parliament sufficient opportunity to scrutinise why an increase in other members is considered necessary and the impact on areas such as public finances should membership increase?

### Scottish Government Response:

- a) 6-10 members is the range of additional members (beyond those specified in paragraph 2(1)(a) to (c) of the schedule) we expect to be sufficient for the current Board model, and objectives of Qualifications Scotland, as set out in the Bill. Six is the minimum to ensure the Board has sufficient oversight, and 10 is the maximum we expect based on the expected range of expertise needed on Qualifications Scotland's Board. We would expect the current maximum to be the desired number of Board members, alongside the Chairing Member, Accreditation Committee Convener and Chief Executive. However, this flexibility in range does not enable an increase (or decrease) beyond the current numbers to meet changing requirements of the body.
- b) A practical example would be Qualifications Scotland's objectives expanding in order to deliver on decisions taken in relation to current, or future, education, qualifications and skills reform. The current Board model is determined as required to ensure there is specialist expertise on the Board in relation to qualifications and related aspects, whilst also ensuring there is sufficient space for members with corporate governance skills such as finance, audit, commercial etc. There could be decisions taken on education, qualifications or skills reform that require Qualifications Scotland to change its objectives due to an expanded focus on something new whilst also retaining the current model and mix of skills on the Board. For example, the use of Artificial Intelligence in the system and the impact on the functions of Qualifications Scotland may require a permanent increase in membership to bring in members with specific skills and experience, whilst not losing members who have other essential skills to support the delivery of the functions of Qualifications Scotland.

Beyond this potential example specific to Qualifications Scotland, the power itself and the negative parliamentary procedure are consistent features seen among legislation for public bodies and public boards (including in cases where a range is already provided for). See the following table for examples:

Act	Procedure	Range in Act
<a href="#">Consumer Scotland Act 2020 (paragraph 2(6), schedule 1)</a>	Negative	2 to 4
<a href="#">Child Poverty (Scotland) Act 2017 (paragraph 1(5) of the schedule)</a>	Negative	4 to 8
<a href="#">Scottish Fiscal Commission Act 2016 (section 15(4))</a>	Negative	2 to 4
<a href="#">Community Justice (Scotland) Act 2016 (paragraph 3(5), schedule 1)</a>	Negative	5 to 8
<a href="#">Historic Environment Scotland Act 2014 (paragraph 2(8), schedule 1)</a>	Negative	10 to 15
<a href="#">Revenue Scotland and Tax Powers Act 2014 (paragraph 1(3), schedule 1)</a>	Negative	5 to 9

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<a href="#"><u>Police and Fire Reform (Scotland) Act 2012 (paragraph 2(3), schedule 1)</u></a>	Negative	10 to 14
<a href="#"><u>Crofting Reform (Scotland) Act 2010 (paragraph 3(6), schedule 1)</u></a>	Negative	5 to 9
<a href="#"><u>Fire (Scotland) Act 2005 (paragraph 2(3), schedule 1A)</u></a>	Negative	10 to 14

Furthermore, there are also instances where membership maximum can be increased without requiring any subordinate legislation:

<b>Act</b>	<b>Procedure</b>	<b>Range in Act</b>
<a href="#"><u>Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 (paragraph 1(1), schedule 1)</u></a>	n/a	At least 5
<a href="#"><u>Housing (Scotland) Act 2010 (section 8(1))</u></a>	n/a	At least 3
<a href="#"><u>Charities and Trustee Investment (Scotland) Act 2005 (paragraph 1(1), schedule 1)</u></a>	n/a	At least 4

- c) While there is not a cap set out in the Bill's provisions, we would expect there to be a limit to the number of members wanted on the Board. For example, the SQA previously had up to 24 members on its Board before it was reformed to the current model via the Scottish Qualifications Authority Act 2002. There would be no expectation that the Board of Qualifications Scotland should return to these levels. However, the Scottish Government does not wish to impose a legislative cap in case there is a future need to significantly increase Board membership as a form of unforeseen contingency.
- d) As set in answer to question b), we have identified nine examples of legislation which includes a power to modify the range of number of members of a public body, made over a sustained period of time, and where the choice of negative procedure was agreed to by the Scottish Parliament. We believe the negative procedure is the appropriate level of scrutiny required given that an exercise of the power would have no effect on the underlying principles of the Bill.

The impact of any change is not expected to be significant in relation to the wider public bodies landscape and public finances, but is expected to have a desired impact on the effective oversight of Qualifications Scotland. The impact on public finances is expected to be minimal as a result of any incremental increase in membership. For example, the expected cost per 'other' member on the Board of Qualifications Scotland is around £5,000 per annum. This estimate is referred to in the total expected costs for the membership of the Board in paragraph 62 of the Financial Memorandum for the Bill.

## **5. Schedule 1, paragraph 13(6): power to regulate the procedure of Qualifications Scotland and its committees**

### **DPLR Committee Query:**

In relation to this power, the DPM explains that the regulations will be subject to the negative procedure as it is the Scottish Government's view that this power will have limited effect in that it can only prescribe the governance procedures of QS. However, this power allows Ministers to make further provision "as Scottish Ministers see fit" in relation to the procedure

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of QS and its committees. As such, it could be seen as a wide power, which could include changes to their memberships, quorums and remits.

The Committee therefore asks the Scottish Government that **given the width of this power for Scottish Ministers to regulate the procedure of Qualifications Scotland and its committees as they see fit, including their memberships, quorums and remits, whether the negative procedure provides an adequate level of scrutiny in the exercise of this power to make regulations?**

### **Scottish Government Response:**

The intention behind this power is to provide a mechanism for Ministers to adapt routine procedural processes for Qualifications Scotland and its committees, should there be concerns or issues with effectiveness of the procedures. This provision is accordingly about things such as how much notice is given of meetings, what format that notice is given in, what procedure is followed when promoting public attendance at meetings, and so forth. See two examples as to how the power may be used if required:

- amending the quorum to ensure the Board of Qualifications Scotland can continue to make decisions in the event of members unexpectedly stepping down;
- making provision about the process by which Qualifications Scotland is to publicise their meetings which are open to the public.

The Scottish Government does not agree that it would be competent to use this power to change the remit of QS or its committees, as the power is limited only to regulating “the procedure” followed by them. The functions of QS or of a committee are separate from the procedures that they follow in carrying out those functions. Similarly, the membership of QS or of a committee is not a matter of procedure. Although paragraph 63 of the Delegated Powers Memorandum refers to the Bill setting out specific provisions relating to the procedures of Qualifications Scotland and its committees, “including membership models and committee remits”, that is not intended to suggest that the power would allow modification of memberships or remits. Rather, it is intended as an explanation of the context within which the power exists, while the power itself is limited to making provision about “procedures”, which is therefore simply about the way things are done and is an administrative matter.

It should also be noted that this power exists just now in relation of the SQA and its committees as a result of section 2 of the Scottish Qualifications Authority Act 2002. While that power has not been used to date, it allows the Scottish Ministers to provide for low-level matters of procedure by regulations in the event that this is required. That power is subject to the negative procedure under section 35 of the Education (Scotland) Act 1996.

It is relatively standard for provision to be made allowing public bodies to regulate their own procedure and that of any committees, without the need for any secondary legislation or oversight of any nature<sup>1</sup>. This power is also given to QS and the Accreditation Committee here, subject to anything that is specified in regulations. Given that the power in paragraph 13(6) is one that allows Ministers to regulate procedure, rather than the organisation itself, it

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<sup>1</sup> See, for example, paragraph 10 of schedule 1 of the Consumer Scotland Act 2020, paragraph 9 of schedule 1 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, or paragraph 5 of the schedule of the Good Food Nation (Scotland) Act 2022.

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was considered on balance that it was appropriate that the power was made subject to some form of parliamentary scrutiny. However, given the nature of the power, it would be considered a poor use of parliamentary time for such a power to be made subject to the affirmative procedure when public bodies making equivalent provision for their own procedure is routinely dealt with purely as an administrative matter.

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