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Dear Convener,

Thank you for your letter of 19 March to the Cabinet Secretary for Education and Skills detailing the Delegated Powers and Law Reform Committee's consideration of the Tertiary Education and Training (Funding and Governance) (Scotland) Bill. I am responding on her behalf.

The Committee has requested further information in regard to a delegated power to issue guidance contained in the Bill. The Committee queried as to why the Scottish Government has not specified the type of content of any guidance to be issued, why there is no parliamentary oversight of such guidance and whether there should be a duty to publish it, given it is to be put on a statutory footing. I will respond to each of the Committee's questions in turn.

Section 10 inserting new section 17A into the Further and Higher Education (Scotland) 2005: power to issue guidance

To explain why the power to issue guidance to which bodies or persons must have regard does not specify the type of content that any guidance might include?

As the Committee has noted, new section 17A in the 2005 Act gives more structure to existing informal guidance arrangements between the Scottish Funding Council (SFC) and fundable bodies; and guidance will also be able to be issued by the SFC to any other person in receipt of funding under the SFC's new functions.

I anticipate that this power will be used by the SFC across the breadth of its functions for a range of purposes. For example, statutory guidance might be issued to support institutions, employers and providers in delivery of activities funded by the SFC or to support the implementation of Scottish Government priorities, such as fair work conditions.

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The Bill does not specify the type of content that the guidance should include to allow the SFC to respond to emerging issues. For example, the SFC might need to issue guidance on particular opportunities or threats from artificial intelligence. The SFC needs to be able to respond to needs it identifies and to the specific issues or concerns raised by institutions, employers and providers.

As guidance is to be put on a statutory basis to which bodies or persons must have regard why it considers it is not appropriate that there is any parliamentary oversight of this guidance?

The duty on those to whom the guidance is addressed is to “have regard” to the guidance, rather than a stricter “must” follow the guidance. This means that an organisation need not follow the guidance, provided that they have considered it and have good reason not to do so. The duty on organisations is not unduly onerous.

The SFC must consult the Scottish Ministers and the bodies or persons to whom the guidance relates, under new section 17A(3) of the 2005 Act. Where appropriate, the SFC might consult a wider group of persons, including members and committees of the Scottish Parliament, either directly or through a public consultation. This is more likely to be the case where there is a wider public interest in the topic, perhaps because the guidance has wide application. In my view, it is right to allow for consultation and engagement with the Scottish Parliament to be considered on a case-by-case basis.

A blanket requirement for every piece of guidance to go through a Scottish Parliamentary process could be a poor use of parliamentary time.

As noted in the Policy Memorandum, consideration was given as to whether the SFC should have the power to issue codes of conduct (which would go a lot further than this guidance power) but this was not taken forward. I believe we have struck the right level of obligation.

As guidance is to be put on a statutory basis to which bodies or persons must have regard is it appropriate that, as well as a duty to consult before issuing guidance and for reasons of transparency and accessibility, that there should also be a duty to publish the guidance rather than publishing being a choice?

The Committee raises an important consideration on transparency and accessibility of information. I anticipate that some of the guidance that the SFC will produce will relate to sensitive matters that will not be suitable for publication. These could, for example, be issues relating to matters such as fraud or cyberattack that will require careful handling and engagement between the SFC and institutions. For these reasons, I do not think that requiring the SFC to publish all guidance would be in the best interests of the sector, learners or the wider public. However, I would expect the SFC to consider whether guidance should be published on a case-by-case basis.

I hope the Committee finds this response helpful.

Yours sincerely,

GRAEME DEY

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