

Tertiary Education and Training (Funding and Governance) (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 Tertiary Education and Training (Funding and Governance) (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 57–EN);
 - a Financial Memorandum (SP Bill 57–FM);
 - a Policy Memorandum (SP Bill 57–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 57–LC).
3. This Delegated Powers 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 primary policy objective of the Bill is to enable tertiary education provision funding to be more responsive to the needs of learners and the economy. The Bill does this by consolidating responsibility for securing and funding all forms of tertiary education provision, including National Training Programmes ("NTPs"), apprenticeships and work-based learning in a single public body, the Scottish Further and Higher Education Funding Council, established by section 1 of the Further and Higher Education (Scotland) Act 2005 ("the 2005 Act"). This body is more commonly known as the Scottish Funding Council ("the SFC"). These changes will simplify the tertiary education funding landscape by reducing the number of funding bodies.

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5. This Bill is an essential enabling step in reforming the post-school education and skills public body landscape. By bringing responsibility for securing and funding all forms of post-school education and skills provision together at the SFC, the Bill aims to:

- deliver better services for learners and employers;
- simplify the operating environment for colleges, universities and other training providers; and
- ensure best value from our public funds.

6. Part 1 of the Bill expands the functions of the SFC by conferring powers and duties on it in respect of funding and securing the delivery of NTPs, apprenticeships and work-based learning. Part 1 does this by amending the 2005 Act, which established the SFC and set out its functions.

7. Part 1 of the Bill also makes some improvements to the SFC's existing functions in relation to the fundable bodies (broadly speaking colleges, regional strategic bodies and higher education institutions)¹, whilst also integrating the new functions created by Part 1. Part 1 of the Bill makes provision to: ensure a greater focus on protecting and promoting the interests of current and prospective learners; improve the timeliness and efficiency within which financial and other information is provided to the SFC; give the SFC the power to issue guidance to any person or organisation to which it provides funding and to make recommendations to a fundable body following an efficiency study into its performance; and recognise the SFC's role in promoting knowledge exchange and innovation from the research of, and among, the post-16 education bodies (colleges and higher education institutions)².

8. Part 2 of the Bill makes improvements to the governance arrangements of the SFC. Part 2 modifies provision at paragraphs 2 and 3 of schedule 1 of the 2005 Act to improve the arrangements for reappointing members of the Council and to adjust the matters to which the Scottish Ministers are to have regard when appointing members to the Council. Part 2 also gives the SFC powers to co-opt additional members to the Council on a limited-term basis. Finally, Part 2 of the Bill requires the SFC establish a new apprenticeship committee which will assist with the administration of the new functions conferred by Part 1.

9. Part 3 of the Bill aims to ensure that Scottish-domiciled students undertaking courses of education with approved private providers based in Scotland, or elsewhere in the UK, can receive student support. These are technical changes to clarify provision in the Education (Scotland) Act 1980 ("the 1980 Act").

¹ The term "fundable body" is defined at section 6(1) of the 2005 Act and includes the colleges and higher education institutions set out in schedule 2 of the 2005 Act and any regional strategic body listed in schedule 2A.

² The term "post-16 education body" is defined at section 35 of the 2005 Act; it means the fundable bodies who are not regional strategic bodies and colleges of further education which are assigned to regional strategic bodies.

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10. Part 4 of the Bill includes provision on the interpretation, short title and commencement of the Bill. An amendment to the 2005 Act is made in order to apply the appropriate parliamentary procedure to regulations made under provisions inserted by the Bill.

Terminology

11. In this Delegated Powers Memorandum, terms and abbreviations are explained briefly where they first appear. For further information, see the Policy Memorandum, which explains the terminology in more detail, and the Financial Memorandum, which includes a glossary of terms.

Rationale for subordinate legislation

12. There are a number of delegated powers contained in the Bill. These are described in more detail below, with an explanation of: who the power is conferred on; whether it is exercisable by guidance, regulations or direction; what each power allows; why the power has been taken in the Bill; and why the selected form of parliamentary procedure is considered appropriate.

13. The Scottish Government, in considering the appropriateness of dealing with matters by subordinate legislation rather than on the face of the Bill, had due regard to:

- the need to make appropriate use of valuable parliamentary time;
- the need to deal with the unexpected, which might otherwise frustrate the purpose of provisions passed by Parliament; and
- the need to provide flexibility to responding to emerging and changing circumstances.

Delegated powers

Scottish apprenticeships

14. The Bill establishes for the first time a statutory framework for apprenticeships in Scotland. Section 4 of the Bill modifies the 2005 Act to include new sections 12E to 12H to define Scottish apprenticeships.

New section 12E(1)(d) of the 2005 Act: Power to set out criteria for Scottish apprenticeships

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

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Provision

15. New section 12E(1) provides a definition of a Scottish apprenticeship, which is an arrangement where:

- an apprentice works for another person for reward in an occupation or activity included in a Scottish apprenticeship framework;
- the apprentice receives training to meet the relevant requirements specified in a Scottish apprenticeship framework;
- there is an apprenticeship agreement between the apprentice and the employer; and
- any other criteria set out in regulations made by the Scottish Ministers are satisfied.

16. New section 12E(1)(d) is a power for the Scottish Ministers to set out additional criteria which a Scottish apprenticeship must fulfil in regulations.

17. Section 34 of the 2005 Act (orders and regulations) applies to this regulation-making power (and the others in sections inserted into that Act set out in this Delegated Powers Memorandum). Section 34(2)(b) provides that powers to make regulations include the power to make different provision for different purposes. In this case, it means that regulations made under new section 12E(1)(d) can set different criteria for different occupations or activities.

Reason for taking power

18. The power gives the Scottish Ministers the ability to set additional criteria to respond to developments in apprenticeship policy in Scotland, or observed elsewhere in the UK. There are two common issues where stakeholders have mixed views on the criteria for apprenticeships: firstly, around the appropriate duration for an apprenticeship; secondly, the proportion of the training which should be off-the-job.

19. These matters are not suitable for primary legislation, not least as they are unlikely to be the same across all apprenticeships. Any requirements like these require the ability to be flexible and targeted as necessary. For example, off-the-job training requirements vary significantly between occupations or activities. Furthermore, regulations could be used to set criteria around residency or location of work for some apprenticeships. This might be needed in some cases to ensure that Scottish public funding was used to benefit the Scottish people and economy. Regulations allow for a more nuanced approach across different occupations or activities than primary legislation does.

20. Finally, there may be new types of apprenticeship arrangement which emerge in future and for which additional criteria are important.

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21. As these regulations would exclude some arrangements from being a Scottish apprenticeship (thereby potentially excluding some would-be apprentices and forms of employment), it is considered appropriate that this process is set out in subordinate legislation. These regulations are also likely to need to be adjusted from time to time to respond to the practical operation of different types of apprenticeships under apprenticeship frameworks made by the SFC, adding or changing technical requirements when necessary and appropriate.

Choice of procedure

22. This power is exercisable by negative procedure. This is considered appropriate because the regulations will only provide further refinement to the core definition of a Scottish apprenticeship set out in new the primary legislation.

New section 12E(2) of the 2005 Act: Power to modify definition of Scottish apprenticeships

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

23. New section 12E(2) gives the Scottish Ministers a regulation-making power to modify the definition of a Scottish apprenticeship set out in new section 12E(1).

Reason for taking power

24. This power allows the Scottish Ministers to change the definition of a Scottish apprenticeship. This is needed to allow for the possibility of new types of apprenticeship arrangement which emerge in future and for which the current criteria might be unduly restrictive. For example, it would allow a future administration to expand apprenticeships to include self-employed individuals or voluntary work by amending new section 12E(1)(a). The Policy Memorandum sets out the reasons why the provision in the Bill does not extend to these types of work but evolution in the way people work or the way their work is regulated or overseen may change the balance of the argument in future.

25. To take a different example, it might be necessary to amend the provision to reflect changing patterns of employment, if it became common to work for several employers simultaneously.

26. It may also be necessary to amend the terminology of “occupation or activity” section 12E(1)(a) in response to changes in the way employment or professions are classified or regulated.

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27. Finally, it may be helpful or necessary to respond to policy and legislative changes in England, Wales or Northern Ireland.

Choice of procedure

28. This power is exercisable by affirmative procedure. This is considered appropriate because these regulations can modify primary legislation and could have the effect of significantly changing the core definition of a Scottish apprenticeship. Affirmative procedure means that such changes would be subject to more extensive Parliamentary scrutiny and approval.

New section 12F(4) of the 2005 Act: Power to make provision about apprenticeship frameworks

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

29. New section 12F gives the SFC the power to prepare and publish Scottish apprenticeship frameworks (along with power to amend or revoke such frameworks). The frameworks set out the requirements for a Scottish apprenticeship in particular occupations or activities and include the required standards of attainment or qualifications by apprentices and the required types or amount of training.

30. The apprenticeship framework is a central document in identifying what criteria must be met in order to complete an apprenticeship for a particular occupation or activity. The Scottish Ministers will set out the policy objectives for Scottish apprenticeships generally when allocating grant funding to the SFC, which should be reflected in the range of, and content of, Scottish apprenticeships frameworks prepared by the SFC.

31. Scottish apprenticeships frameworks will set out the competency and professional standards for those involved in the delivery, assessment, verification, quality assurance and scrutiny of apprenticeship programmes. The role of employers and industry can be set out in these frameworks and supporting guidance documentation.

32. New section 12F(4) gives the Scottish Ministers a regulation-making power to make further provision about what requirements are to be specified in an apprenticeship framework and the process to be followed by the SFC in preparing, publishing, amending, and revoking the frameworks.

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Reason for taking power

33. It is intended that the Scottish Ministers would use this power to specify more about the requirements for Scottish apprenticeships. These regulations could, for example, require apprenticeship frameworks to include:

- the duration of the apprenticeship;
- the mandatory and optional outcomes (including specific qualifications) to be attained;
- the core skills to be attained (and any related qualifications); or
- any mandatory or optional enhancements (e.g. emergency first aid, food hygiene, use of specialist equipment).

34. It is intended that the Scottish Ministers will also set out the process to be followed by the SFC in preparing, publishing, amending and revoking frameworks. Firstly, this is to ensure that apprentices, employers and others are properly consulted in the development of frameworks and that they reflect the needs of the relevant sector or occupation. Secondly, this is to help apprentices, employers and others to know which frameworks are live, which are in development and to give appropriate notice of revoking any frameworks. This process itself needs to be developed with input from the SFC, apprentices, employers and others, before being set out in regulations.

35. These regulations may to be adjusted from time to time as the apprenticeship programme evolves. This evolution may include changes to what is considered to be the relevant requirements in order to be an apprentice and therefore affect what is to be set out in frameworks. Requirements for Scottish apprenticeships may also need to respond to changes in curricula, qualifications and awarding bodies.

Choice of procedure

36. These powers are exercisable by negative procedure. This is considered appropriate because these regulations will be used to provide additional detail about what Scottish apprenticeship frameworks are to include and to set out procedural matters for the SFC to follow in making, amending or revoking such frameworks.

New section 12G(5) of the 2005 Act: Power to make provision on requests for apprenticeship frameworks

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

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Provision

37. New section 12G(1) of the 2005 Act allows persons to request that the SFC prepares an apprenticeship framework, or amends an existing one. It is expected that the requester will normally be an employer, or group of employers. The purpose of this provision is to enable employers to identify a need and request a framework where one otherwise would not exist. The SFC must consider such requests for frameworks but the SFC is not obliged to agree them.

38. New section 12G(3) gives the SFC the power to charge a reasonable fee to cover the cost of preparing or amending a framework as requested. The purpose of this is to allow the SFC to recoup their costs in doing so, especially in the case that there is significant demand for this.

39. New section 12G(5) gives the Scottish Ministers the power to make regulations governing the process to be followed by the SFC in responding to requests for a framework (or amended framework) and the amount of fee that may be charged and circumstances in which it is to be waived.

Reason for taking power

40. The power is needed to set out the process to be followed by the SFC, the reasonable fees that may be charged, and the circumstances in which a fee may not be charged, in a clear and transparent manner. As the decisions made by the SFC in this regard could determine whether some employers can deliver Scottish apprenticeships, it is considered appropriate that this process is set out in subordinate legislation.

41. Under the power in new section 12G(5)(a), regulations might, for example, require the SFC to consider any request in terms of: the purposes of the SFC; the Scottish Government's priorities; existing frameworks; and any other means of achieving a similar end. After following the process set out in the regulations, the SFC might refuse the request, for example, where the SFC considers it unnecessary or to run contrary to the SFC's (and the Scottish Ministers') objectives.

42. Regulations might set out timescales for the SFC to respond to requests, both in terms of giving a decision and in terms of undertaking work to establish or amend an operational framework. It is considered appropriate for these timescales to be set out in regulations, rather than on the face of the Bill, as they relate to procedural detail which will require to be worked through and may need to be responsive, not least because the level of demand for new or amended frameworks is hard to predict and, therefore, what might reasonably be expected by way of handling and turnaround times from the SFC.

43. Under the power in new section 12G(5)(b), regulations to set the amount of fee might, for example, distinguish between requests to prepare a framework or amend a framework. The Scottish Ministers retain the power to set the amount of fee which may be charged by the SFC.

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44. Under the power in new section 12G(5)(c), regulations to set out the circumstances in which the fee is to be waived might be used, for example, to allow the Scottish Ministers to fund requested or amended frameworks that align with the Scottish Government's priorities.

45. It is likely that the Scottish Ministers will need to update the regulations from time to time, for example to change the amount of fee payable.

Choice of procedure

46. These powers are exercisable by negative procedure. This is considered appropriate given that the regulations will be procedural in nature, and set out the process to be followed in making administrative decisions around requests to prepare or amend a framework.

New section 12H(4) of the 2005 Act: Power to make provision about the process for requesting and issuing apprenticeship certificates

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

47. New section 12H(1) of the 2005 Act allows an individual who is, or has been an apprentice, or another person on their behalf, to apply to the SFC for an apprenticeship certificate. Apprenticeships may comprise a range of training, experience and qualifications, so it is beneficial to bring the evidence together into a single certificate.

48. New section 12H(3) allows the charging of a reasonable fee by the SFC for issuing a certificate and new section 12H(4) gives a power to the Scottish Ministers to set out in regulations the process for requesting and issuing apprenticeship certificates and the amount of fee that can be charged. Section 34(2)(b) of the 2005 Act means, for example, that different fees could be charged for certificates for different purposes.

Reason for taking power

49. It is intended that regulations made under new section 12H(4)(a) would set out the information which needs to be provided as part of making the request for a certificate. For example, where an application is made on behalf of an apprentice, it will be important that the application evidences the apprentice's consent to the application.

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50. The regulations may also set out the information which is to be included on the certificate. For example, the regulations might state that the certificate must include a list of all qualifications attained by the apprentice as part of the apprenticeship.

51. The regulations under new section 12H(4)(b) would set out the fees that may be charged by the SFC and these may vary, by type of apprenticeship for example.

52. This procedural detail would not be appropriate for the face of the Bill as it is likely to change from time to time, for example to change the amount of fee payable.

Choice of procedure

53. These powers are exercisable by negative procedure. This is considered appropriate given that the regulations will set out the procedural aspects of requesting and issuing apprenticeship certificates.

Funding for Scottish apprenticeships and work-based learning

54. Section 5 of the Bill modifies the 2005 Act to include new sections 12I and 12J. New section 12I(1) gives the Scottish Ministers the power to make grants to the SFC for the purposes of securing the delivery of Scottish apprenticeships and work-based learning. New section 12J(1) places the SFC under a duty to administer these grants for those purposes.

New section 12I(5) of the 2005 Act: Power to make further provision on work-based learning

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

55. New section 12I(1) gives the Scottish Ministers the power to make grants to the SFC for the purposes of securing the delivery of Scottish apprenticeships and work-based learning. New sections 12I(2) and (3) define work-based learning and a work-based learning agreement, respectively. New section 12I(5) gives the Scottish Ministers a power to make regulations to specify further what activities constitute work-based learning and the requirements of work-based learning.

Reason for taking power

56. Work-based learning is defined as training received by an individual in a working environment, and on the basis of a work-based learning agreement which sets out the

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educational and vocational standards to be met by that individual and provides for the individual to receive education and training in order to meet those standards. This will be capable of encompassing a variety of learning circumstances, including school pupils attending college and workplaces in order to gain experience and qualifications. This includes arrangements which are currently known as foundation apprenticeships.

57. This power enables the Scottish Ministers to make further provision about what constitutes work-based learning. One reason for providing this power is to allow for flexibility in the evolution of foundation apprenticeships.

58. Regulations might, for example, require that a certain level of qualification be attained in order for an activity to constitute work-based learning. Regulations would, in effect, further define the boundary between other interactions with employers (for example some types of “work experience”) falling outside of the remit of the SFC and work-based learning. It is useful for this boundary to be capable of evolving with the school curriculum and changes in pre-employment pathways.

59. The regulations are likely to need to be adjusted from time to time to stay in step with further evolution of policy or practice.

Choice of procedure

60. These powers are exercisable by negative procedure. This is considered appropriate because the regulations allow for the flexibility to provide supplementary detail as to what constitutes work-based learning beyond that set out in new section 12I. The effect of these regulations would be to refine the scope of work-based learning.

New section 12J(3)(b) of the 2005 Act: Power to set out criteria for training providers for the purposes of funding

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

61. New section 12J(3) defines the term “training provider” for the purposes of the Bill. The definition is deliberately broad, tied only to what the person does, rather than the type of person. This means that a training provider could be any of the following, for example: a post-school education body; a local authority; a public body or service provider, such as police, fire or health services; a private sector or third sector employer; or any organisation more commonly understood to be a training provider. New section 12J(3)(b) gives the Scottish Ministers the power to set out further criteria in regulations.

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Reason for taking power

62. The SFC may decide to grant-fund training providers or procure training through contract award. Both grant award letters and contracts can require training providers to work to certain standards and impose conditions on them; these might vary by class of provider or other circumstances. The Scottish Ministers could use the regulation-making power to ensure that all training providers met certain standards or requirements. Standards might, for example, relate to fair work, the qualifications or competency of providers themselves or the accessibility of training.

63. The regulations may require to be adjusted from time to time reflect further evolution of policy or practice, which may affect the types or standards of training provider required.

Choice of procedure

64. This power is exercisable by negative procedure. This is considered appropriate because the regulations would add requirements beyond those set out section 12J(3)(a), potentially making it more onerous to become a training provider. There is a potential need for additional criteria which are better suited to regulations, not least because of potential changes to the way in which the SFC might secure training provision. The type and extent of additional criteria may depend on whether the SFC secures training provision by grant or procurement or hybrid, with variation by type of provider (public and private sector).

Notifications to the Council

65. Section 7 of the Bill modifies the 2005 Act to include new section 14B to give the Scottish Ministers the power to require post-16 education bodies to notify the SFC of certain matters.

New section 14B(1) of the 2005 Act: Power to set out matters for notification by post-16 education bodies to the SFC

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

66. It is important that post-16 education bodies proactively notify the SFC of certain developments of which the SFC might otherwise be unaware (and therefore might not enquire about under separate powers).

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67. Section 7 of the Bill modifies the 2005 Act to include new section 14B which places a duty on post-16 education bodies to notify the SFC of certain matters. The Bill does not specify what those matters are; new section 14B(1)(a) gives the Scottish Ministers a power to specify those matters in regulations.

68. New section 14B(1)(b) gives the Scottish Ministers the power to specify the form and manner in which notification is to be made to the SFC, including time periods within in which the SFC is to be notified.

Reason for taking power

69. The Scottish Ministers intend to prescribe situations where there is potentially serious jeopardy to post-16 education bodies or to the SFC's ability to perform its functions. These situations may relate to something happening to the body (some kind of external threat); a material change in its circumstances; or an action that the body proposes to take itself (such as a significant scaling back of its operations). In these situations, the SFC would be better positioned to provide assistance to the body, or sector as appropriate, with earlier engagement.

70. Examples of the types of situations that might be prescribed include where a body:

- has experienced a major data breach through a cyberattack (external threat);
- has reached a certain threshold in a rapidly worsening financial viability situation (material change in its circumstances); or
- is planning voluntary or compulsory severance (action).

71. The intention is that the time periods for notification are sufficient to allow the SFC to take meaningful action to avert further, or unnecessary, cost or harm. For example, regulations might require notification of a major data breach through a cyberattack within one working day of its occurrence, so that rapid action could be taken to alert other post-16 education bodies and other potentially affected parties. Another example might be a requirement to provide the SFC with one month's advance notice before commencing any redundancy scheme, so as to give the SFC the chance to discuss this with the body.

Choice of procedure

72. The regulations are to be made under the affirmative procedure, given that they could potentially place significant obligations on post-16 education bodies. For this reason too, new section 14B(2) places the Scottish Ministers under a duty to consult with the SFC and the post-16 education bodies (and any other persons considered appropriate) as part of developing the regulations. It is important to get the framing of any such duties right so as to maximise the usefulness to the sector, minimise bureaucracy and avoid unintended consequences.

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Guidance by the Council

73. Section 10 of the Bill modifies the 2005 Act to include new section 17A to give the SFC the power to issue guidance.

New section 17A of the 2005 Act: Power to issue guidance

Power conferred on: Scottish Funding Council

Power exercisable by: Guidance

Parliamentary procedure: None

Provision

74. The SFC already issues guidance to fundable bodies on a range of matters. For example, the SFC has consulted and developed guidance on the implementation of the Tertiary Quality Enhancement Framework. This Framework was developed with the sector and creates a consistent framework for assessing the quality of learning and teaching across colleges and higher education institutions. The SFC also advises and engages with the fundable bodies (under provision in the 2005 Act) on a range of matters which may not be codified in a guidance document.

75. At present, the SFC guidance issued to fundable bodies is purely administrative (i.e. it has no statutory basis). Section 10 of the Bill inserts new section 17A into the 2005 Act to give the SFC the power to issue guidance to the fundable bodies and any other person in receipt of funding under the new functions conferred by the Bill (NTPs, apprenticeships and work-based learning). These bodies and persons must have regard to it in the carrying out of their particular funded activities.

76. The SFC must consult the Scottish Ministers and the bodies or persons to whom the guidance relates, under new section 17A(3). The SFC could choose to issue guidance covering all bodies and persons in receipt of SFC funding or to issue guidance targeted at particular types of organisation, such as fundable bodies providing fundable further education.

Reason for taking power

77. This power gives more structure to existing informal guidance arrangements in respect of fundable bodies. It also makes clear that the SFC has power to issue guidance to other persons, such as employers and training providers, who receive funding under the new functions. This will assist with the integration of these new persons and functions with the SFC's existing functions with respect to fundable bodies. For example, the SFC might issue guidance on an aspect of apprenticeship delivery which is equally relevant to colleges and other training providers. Colleges will be used to receiving guidance from the SFC, whereas training providers will be less familiar. This provision places fundable bodies and other training providers under a duty to have regard to the guidance.

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Choice of procedure

78. There is no Parliamentary procedure. This is considered appropriate as it is guidance and not of a regulatory nature; the duty on the bodies and persons to whom the guidance applies is that they have regard to it. Furthermore, it allows for guidance to be issued and updated quickly. Given that guidance might be extensive, detailed and non-regulatory, requiring parliamentary scrutiny might not be the best use of parliamentary time.

Student support

79. Section 18 of the Bill modifies the Education (Scotland) Act 1980 (“the 1980 Act”) to include new section 74A to make further provision on the designation of private providers. Section 19 of the Bill modifies section 73ZA of the 1980 Act to extend the direction-making power to designations made under new section 74A. Section 20 of the Bill modifies section 73A of the 1980 Act to extend the determination-making power at section 73A(1) and the power of delegation at section 73A(3) to designations made under new section 74A.

New section 74A(4) of the 1980 Act: Power make further provision on the designation process for higher and further education providers

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

80. Section 18 of the Bill gives the Scottish Ministers a power to designate a private provider of further or higher education on application from that provider through a new section 74A in the 1980 Act. The effect of a designation is that the private provider is then treated in the same way as a fundable body for the purposes of considering the eligibility of students at that private provider for student support. The Bill puts existing custom and practice around private higher education provider designation effected by SAAS onto a clearer legislative footing. New section 74A(4) gives the Scottish Ministers powers to set out the process of applying for designation and the process of designating providers and withdrawing designations in regulations. New section 74A(4) also gives the Scottish Ministers a power to charge private providers a fee to apply for designation to cover the cost of administering the processing of their application.

Reason for taking power

81. The 2005 Act lists the fundable bodies in schedule 2. This is possible because there is a manageable number of fundable bodies and changes are relatively infrequent. It is desirable because they receive substantial public funding through teaching grant (or

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provision funding) from the SFC and are subject to the governance requirements of the 2005 Act.

82. By contrast, private providers do not receive teaching grant, and they are not subject to the governance requirements of the 2005 Act. It would not be desirable to list approved (designated) private providers on the face of primary (or subordinate) legislation. This is because there are too many private providers and they are subject to significant changes on a regular basis (new providers, providers changing name, mergers, providers ceasing to offer particular courses). Instead, it is practical and appropriate for the Scottish Ministers to designate private providers administratively. However, it helps to make the process followed by the Scottish Ministers transparent, fair and accountable for that designation process, and any charging regime, to be set out clearly in regulations.

83. In respect of private providers in the rest of the United Kingdom where Scottish students want to study, it is the policy intention that they would be deemed to be designated if they have been approved to receive public funds by the relevant UK authority. There is no intention to charge a fee to those private providers; this would be set out in the regulations, using powers under new section 74A(5) of the 1980 Act.

84. It is likely that the Scottish Ministers will need to update the regulations from time to time, for example to change the amount of fee payable or to modify the factors which they wish to take into account when deciding whether to make a designation.

Choice of procedure

85. These powers are exercisable by negative procedure. This is considered appropriate given that the regulations will set out the process to be followed in making administrative decisions around designation. Negative procedure is consistent with the power at section 73(f) of the 1980 Act to make regulations that enable the Scottish Ministers to pay student support (allowances or loans to or in respect of persons undertaking or who have undertaken “courses of education”).

Section 73ZA(3) of the 1980 Act: Power to make directions

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Provision

86. Section 73ZA of the 1980 Act permits the Scottish Ministers to direct the SFC or any other body or person to administer sums provided by Scottish Ministers for the purposes referred to in section 73(a), (c) or (f) of the 1980 Act, so long as it is for student support for courses of education provided by post-16 education bodies. Section 19 of the Bill extends this power to cover student support for students

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undertaking courses of education provided by a body designated under the new section 74A of the 1980 Act (inserted by section 18 of the Bill).

Reason for taking power

87. Section 19 allows for flexibility in the future evolution of the responsibilities for the administration of student support. Specifically, the Scottish Ministers could direct that the SFC, or other body, carry out the designation process under any regulations made by them under new section 74A. Without this provision, the Scottish Ministers would not be able to direct the SFC, or any other body or person, to administer student support for students undertaking courses of education at private providers. By taking this power, it is possible for a direction to encompass all student support as a coherent whole.

Choice of procedure

88. None. The Bill does not change the procedure under which directions are made in the 1980 Act.

Final provisions

Section 22: Ancillary Provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative

Provision

89. Section 22 of the Bill enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of or in connection with the Bill, or for giving full effect to it. The regulations may make different provision for different purposes and modify any enactment.

Reason for taking power

90. The Bill may give rise to a need to make ancillary provisions.

91. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues with the operation of the new legislation. Without the power, it may be necessary to make further primary legislation to deal with a technical, operational or implementation matter which is clearly within the scope and policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Scottish Parliament or the Scottish Government.

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Choice of procedure

92. Section 22 follows the standard model for the power to make ancillary provisions and is common in Bills to provide flexibility to make any adjustments that may arise in light of experience in relation to the operation of the Bill as timeously as possible. Regulations that modify primary legislation will be subject to affirmative, otherwise negative procedure applies.

93. This approach is typical for ancillary powers of this type and ensures that the Scottish Parliament is able to closely scrutinise and determine whether to approve any draft regulations that change the text of primary legislation before they can be made. It is considered that these procedures provide for an appropriate level of Parliamentary scrutiny and control in such cases.

Section 24: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

94. Sections 21 to 25 of the Bill come into force on the day after Royal Assent. The other provisions of the Bill come into force on such day as the Scottish Ministers may by regulations appoint. Regulations under this section may include transitional, transitory or saving provision, and make different provision for different purposes.

95. For the purposes of the modelling supporting the Financial Memorandum, it is assumed that the provisions in the Bill would come into force on 1 October 2026 (“the transfer date”) but provisions may be commenced earlier as part of preparation for implementation.

Reason for taking power

96. It is standard practice for the Scottish Ministers to commence provisions in a bill by way of regulations so that they can be brought into force at suitable times, ensuring the provisions take effect when the appropriate preparatory work has been undertaken. The transitional and implementation arrangements will need to be taken forward by the next Scottish administration and it will be for that administration to confirm the date of commencement. It is also necessary to allow flexibility to handle any issues or delays arising during the preparation for commencement.

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Choice of procedure

97. As is usual for commencement regulations, the power is not subject to any parliamentary procedure but is subject to the laying requirements under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010. This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.

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Delegated Powers Memorandum

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