

POST-16 EDUCATION (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 Post-16 Education (Scotland) Bill. It describes the purpose of each 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.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline of Bill provisions

3. The Bill is intended to provide a technical and administrative underpinning to aspects of the wider post-16 education reform programme. It contains provisions in six areas of policy: good practice in university governance; widening access to universities; a mechanism to limit the level of higher education tuition fees for students from the rest of the UK; college regionalisation, including new regional strategic bodies; a power for the Scottish Funding Council (SFC) to review further and higher education; and data sharing to help identify young people at risk of disengaging from learning or training.
4. Further information on the Bill is contained in the Explanatory Notes, Financial Memorandum and Policy Memorandum published separately as SP Bill 18.

Rationale for subordinate legislation

5. The Bill contains a number of provisions which delegate powers to Scottish Ministers. The Scottish Government has considered whether each provision is best managed on the face of the Bill or through subordinate legislation. In consideration of this, and in determining the appropriate level of scrutiny, the Scottish Government has had regard to:
 - the need to achieve the appropriate balance between the importance of the issue and the need to ensure sufficient flexibility to respond to changing circumstances without having to resort to primary legislation;

- the need to make proper use of Parliamentary time;
- the likely frequency of amendment; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by Parliament.

6. The delegated powers relating to the Bill are listed below. These detail what the power does, why the power was taken and the reason for the Parliamentary procedure used.

In this memorandum

- “the 1992 Act” means the Further and Higher Education (Scotland) Act 1992,
- “the 2005 Act” means the Further and Higher Education (Scotland) Act 2005;
- “the SFC” means the Scottish Further and Higher Education Funding Council.

Delegated powers

Section 4 – Fee cap: students liable for higher education fees

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Negative procedure

Provision

7. Section 4 of the Bill inserts new section 9C into the 2005 Act. For the purposes of any condition imposed by the Scottish Ministers on the SFC in pursuance of new section 9C(1), new section 9C(2) would allow the Scottish Ministers, by order, to set an upper limit (or ‘cap’) on the amount of fees payable to a post-16 education body by a person in respect of whom such body is authorised or required to charge higher fees by virtue of Regulations made under section 1 of the Education (Fees) Act 1983 (“the 1983 Act”) or to such class of such persons as the Scottish Ministers may in the order specify.

8. Scottish Ministers are also empowered to specify in the order the courses of higher education to which the cap set by the order will apply. Section 9C(3) constrains the section 9C(2) order making power by providing that in exercising it the Scottish Ministers must seek to ensure that, subject to any exceptions which they consider to be appropriate, the order applies only to students who have a connection with the United Kingdom. It also provides that Scottish Ministers must seek to ensure that the cap provided for in the order will not result in the students to whom the order applies being charged fees per academic year at a post-16 education body which are higher than a maximum amount. That maximum amount is the amount of fees (set by legislation elsewhere in the UK) which a student would be charged to undertake a higher education course at an institution in a part of the United Kingdom other than Scotland.

Reason for taking power

9. By way of relevant background, section 9 of the 2005 Act makes provision for how the SFC is funded. Section 9(1) provides that the Scottish Ministers may make grants to the SFC and section 9(2) allows that those grants may be subject to terms and conditions. So far as relevant for present purposes, among the terms and conditions which the Scottish Ministers may impose are certain conditions which, once passed on to institutions, require those institutions to charge certain classes of students, and in connection with them attending certain courses of higher education, fees at a level equal to that specified by the Scottish Ministers. Scottish Ministers powers to specify these 'set' fee levels, and the classes of student and courses to which they apply, are all powers exercisable by order. The relevant provisions are contained in section 9(3) and (5) to (7) of the 2005 Act. By virtue of section 9(9) of the 2005 Act these 'set fees' only apply to students prescribed by Regulations made under section 1 of the 1983 Act. Section 1 of the 1983 Act allows the Scottish Ministers to make Regulations requiring or authorising the charging of higher fees in the case of students not having a relevant connection with the United Kingdom or any part of it (and any other excepted categories of student) than in the case of students having such a connection.

10. Reflecting Scottish Ministers' policy, in relation to students commencing courses of education in the 2012/13 or later academic years the tuition fee arrangements which have their basis in section 9 of the 2005 Act are such that only those students with a connection with Scotland - and not those with a connection with another part of the United Kingdom - are entitled to be charged 'set fees'. Institutions are free to charge students with a connection with another part of the United Kingdom higher fees. This is a change in policy from previous academic years (when all students with a UK connection were entitled to be charged set fees). The change in policy was prompted by changes to tuition fee arrangements in other parts of the United Kingdom, particularly England, which saw a significant increase in the upper limit on the level of fees which institutions there could charge such students and was intended to address concerns about the cross-border flow of students from other parts of the United Kingdom and to protect places at institutions in Scotland for students normally resident here. But Scottish Ministers wish institutions to be obliged to limit the level of higher fees which they charge students having a connection with another part of the UK. Specifically, Scottish Ministers do not wish institutions to be able to charge such students fees at a higher level than the highest amount of fees per academic year, as set by legislation elsewhere in the UK, that such students would be charged if they chose to pursue any course of higher education in a part of the United Kingdom other than Scotland. New section 9C of the 2005 Act seeks to meet this policy aim by giving Scottish Ministers a power (see section 9C(1)) to impose a condition on the SFC which, once passed on to institutions, will oblige them to charge fees at a level which does not exceed a particular upper limit (or 'cap'). As detailed above, the section 9C(2) order making power allows Scottish Ministers to set the amount of the cap and to specify the class of students and types of courses of higher education to which it is to apply.

Choice of procedure

11. The Order is subject to the negative procedure. This is considered appropriate, particularly in light of the constraint on the power provided for in section 9C(3), particularly that in exercising the power the Scottish Ministers must seek to ensure that the amount provided for in the order will not result in the students to whom the order applies being charged fees per academic year at a post-16 education body which are higher than a maximum amount. That

maximum amount is the amount of fees (set by legislation elsewhere in the UK) which a student would be charged to undertake a higher education course at an institution in a part of the United Kingdom other than Scotland. In these circumstances it is considered that the negative procedure would provide sufficient opportunity for scrutiny.

Section 5(1) – Regional colleges

Power conferred on: **The Scottish Ministers**
Power exercised by: **Order made by Scottish Statutory Instrument**
Parliamentary procedure: **Negative procedure**

Provision

12. Section 5(1) of the Bill inserts a new section 7A into the 2005 Act. Section 7A(1) gives Scottish Ministers a power, by order, to designate any college of further education with a board of management under Part 1 of the 1992 Act (known as an “incorporated college”) as a regional college. New section 7D(2) of the 2005 Act (as inserted by paragraph 6(5) of the schedule to the Bill) provides that orders made under section 7A may make provision concerning the college board’s membership and such other provision as is considered appropriate. Under new section 7D(5), Scottish Ministers must seek to ensure that an incorporated college is either designated as a regional college or assigned to a regional strategic body, and that at least two colleges are assigned to a regional board.

Reason for taking power

13. One of the key aims of the Bill is to enable the existence of two types of incorporated colleges with different duties, composition and appointment provisions, depending on whether they are in single-college or multi-college regions. Scottish Ministers intend to designate incorporated colleges in single-college regions as regional colleges. The power to designate gives Scottish Ministers flexibility to be able to do so and also in future to respond to changes if there is future restructuring.

Choice of procedure

14. The power is subject to negative procedure. If Parliament has already approved the principle of having colleges designated as regional colleges, it is considered appropriate that an order to designate a regional college is subject to negative procedure. It should be noted that an order to create, merge or close an incorporated college under section 3(1) of the 1992 Act is currently subject to a negative procedure. Scottish Ministers consider the power to designate a college as a regional college is analogous and have therefore adopted a consistent approach in relation to changing the status of an incorporated college.

Section 5(2) – Regional colleges

Power conferred on: **The Scottish Ministers**
Power exercised by: **Order made by Scottish Statutory Instrument**
Parliamentary procedure: **Negative procedure**

Provision

15. Section 5(2) of the Bill inserts a new section 23B into the 2005 Act. Section 23B(3) places a duty on a regional college to consult specified persons where the college considers it appropriate to do so in the exercise of its functions. In addition, section 23B(5) places a duty on a regional college to seek to secure the collaboration of certain specified persons with the regional college where consistent with the proper exercise of its functions. Section 23B(6) gives Scottish Ministers the power, by order, to amend the lists of specified persons that a regional college must consult (in section 23B(3)) or seek to collaborate with (in section 23B(5)). The power in section 23B(6) is constrained by section 23B(7) which provides that Scottish Ministers cannot modify the entries for trade union representatives (section 23B(3)(a)) or students' associations (section 23B(3)(b)).

Reason for taking power

16. The power to amend the list by order gives Scottish Ministers flexibility to specify additional persons or to change the list to reflect changed circumstances, or to reflect changes in the nature or status of the specified persons.

Choice of procedure

17. The power is subject to negative procedure. This is considered appropriate, particularly given the constraint that Scottish Ministers cannot modify the entries in relation to trade union representatives and students' associations since these types of bodies are likely to be most affected by a regional college complying with its duties under section 23B. It should be noted that the provision is similar to a requirement on the SFC to consult specified persons under section 22 of the 2005 Act. It is likely that Scottish Ministers would make changes to the lists under section 22 and 23B at the same time and therefore it is considered appropriate to have consistent approach in relation to the order-making power. (A similar approach is also taken in similar provisions in the new section 23J).

Section 7 – Colleges: mismanagement

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Negative procedure

Provision

18. Section 24 of the 1992 Act, as substituted by section 7 of the Bill, gives Scottish Ministers a power, by order, to remove any or all of the members of an incorporated college's board in specified circumstances and to appoint new members in their place.

Reason for taking power

19. Existing section 24 of the 1992 Act enables Ministers to remove board members for reasons of mismanagement. The Further Education Review of Governance recommended that board members should be removed if boards fail to deliver agreed outcomes in order to improve the public accountability of colleges. The substituted section 24 specifies additional circumstances where Ministers can remove board members of an incorporated college. Scottish Ministers

consider that this extended power of removal is necessary in order to ensure that colleges are accountable for agreed outcomes and to safeguard educational opportunities provided at the colleges.

Choice of procedure

20. The power is subject to negative procedure. Existing section 24 of the 1992 Act already provides that the power to remove board members is exercisable by order subject to negative procedure.

Section 8(1) – Regional governing bodies

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative procedure

Provision

21. Section 8(1) of the Bill inserts a new section 7B into the 2005 Act. Section 7B(1) establishes, as regional strategic bodies, certain bodies specified in the new schedule 2A to the 2005 Act. Section 7B(2) gives Scottish Ministers a power, by order, to modify part 1 of schedule 2A so as to establish, abolish or rename a regional board (a category of regional strategic body) and to modify part 2 of schedule 2A by adding, removing or varying any entry in part 2 of schedule 2A. Once listed in schedule 2A bodies can be funded by the SFC by virtue of section 12(1)(c) of the 2005 Act, as amended by section 9(1) of the Bill.

Reason for taking power

22. A key aim of the Bill is to enable the SFC to fund regional strategic bodies and for functions to be conferred on these new bodies. Flexibility is required to enable the list of relevant bodies to be amended to take account of future restructuring, such as the merger of colleges to form colleges which are then designated as regional colleges, which could then involve the abolition of a regional board. New regional boards might require to be created or other regional strategic bodies designated as a result of future decisions about the number and coverage of college regions.

Choice of procedure

23. The power is subject to affirmative procedure. It is considered that more detailed parliamentary scrutiny is required where Scottish Ministers wish to set up new regional strategic bodies which would be funded by the SFC. It should be noted that currently under section 7(1) of the 2005 Act an order to add, remove or vary the list of fundable bodies in schedule 2 to the 2005 Act is subject to affirmative procedure. Since similar principles apply given that new bodies are to be created to receive public funding, Scottish Ministers consider it appropriate to be consistent with current approach under section 7(1) of the 2005 Act.

Section 8(3) – Regional governing bodies

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative or Negative procedure, depending on the circumstances

Provision

24. Section 8(3) inserts new section 7C into the 2005 Act. Section 7C(1) gives Scottish Ministers the power, by order, to assign colleges of further education to a regional strategic body. Assignment of colleges to a regional strategic body will give that body certain functions in respect of those colleges, including the power to fund them. New section 7D(2) of the 2005 Act (as inserted by paragraph 6(5) of the schedule to the Bill) provides that orders made under new section 7C(1) may make provision concerning the college boards' membership and such other provision as is considered appropriate. Under new section 7D(5), Scottish Ministers must seek to ensure that an incorporated college is either designated as a regional college or assigned to a regional strategic body, and that at least two colleges are assigned to a regional board.

Reason for taking power

25. A key aim of the Bill is to allow Scottish Ministers to make the necessary provisions to ensure that in each college region there is a single regional body that will be held to account for the delivery of college education in that region. In regions where there is more than one college of further education (a multi-college region) that necessitates identifying which colleges are to be assigned to which regional strategic body. Flexibility is required to enable further colleges to be assigned to a regional strategic body or for colleges to be assigned to different regional strategic bodies, which might occur as a result of future decisions about the number and coverage of college regions.

Choice of procedure

26. Exercise of this power could involve adding new bodies to the list of bodies which are entitled to receive public funding, in this case through a regional strategic body. Where this occurs, Scottish Ministers consider it appropriate that this would be subject to the affirmative procedure. This would be consistent with the approach taken in section 7(1) of the 2005 Act where a body is added to the list of fundable bodies and in section 7B(2) where regional strategic bodies become eligible for funding from the SFC. However, where the exercise of this power results in the assignment of a body which is already funded by either the SFC or by a regional strategic body, then assignment would not involve any decision on whether it should be publicly funded. Accordingly, Scottish Ministers consider it appropriate that such assignments should be subject to the negative procedure as they require less Parliamentary scrutiny since they in effect relate to a change in the status of a body which is already in receipt of funding.

Section 10(1) – Regional governing bodies: functions

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Negative procedure

Provision

27. Section 10(1) of the Bill inserts a new section 23J into the 2005 Act. Section 23J(1) places a duty on a regional strategic body to consult specified persons where the regional strategic body considers it appropriate to do so in the exercise of its functions. In addition, section 23J(3) places a duty on a regional strategic body to seek to secure the collaboration of certain specified persons with the regional strategic body where consistent with the proper exercise of its functions. Section 23J(4) gives Scottish Ministers the power, by order, to amend the lists of specified persons that a regional strategic body must consult (in section 23J(1)) or seek to collaborate with (in section 23J(3)). The power in section 23J(4) is constrained by section 23J(5) which provides that Scottish Ministers cannot modify the entries for the regional strategic body's colleges (in section 23J(1)(a) or 23J(3)(a)), or for trade union representatives (section 23J(1)(b)) or students' associations (section 23J(1)(c)).

Reason for taking power

28. The power to amend the list by order gives Scottish Ministers the flexibility to specify additional persons or to change the list to reflect changed circumstances, or to reflect changes in the nature or status of the specified persons.

Choice of procedure

29. The power is subject to negative procedure. This is considered appropriate, particularly given the constraint that Scottish Ministers cannot modify the entries in relation to a regional strategic body's colleges, trade union representatives and students' associations since these types of bodies are likely to be most affected by a regional strategic body complying with its duties under section 23J. It should be noted that the provision is similar to a requirement on the SFC to consult specified persons under section 22 of the 2005 Act. It is likely that Scottish Ministers would make changes to the lists under section 22 and 23J at the same time and therefore it is considered appropriate to have consistent approach in relation to the order-making power. (A similar approach is also taken in similar provisions in the new section 23B).

Section 11(2) – Regional boards

Power conferred on: **The Scottish Ministers**
Power exercised by: **Order made by Scottish Statutory Instrument**
Parliamentary procedure: **Negative procedure**

Provision

30. Paragraph 18(1) of the new schedule 2B to the 2005 Act, as inserted by section 11(2) of the Bill, gives Scottish Ministers a power, by order, to vary, add or remove any provision relating to a regional board's constitution, functions or administrative arrangements.

Reason for taking power

31. Scottish Ministers consider it appropriate that they have flexibility to amend provisions regarding a regional board's constitution, functions or administrative arrangements. The Bill would create boards of a novel nature, new to the post-16 education system. Scottish Ministers would consider it helpful to be able to respond to any new demands on these boards by enabling such provisions to be amended. It should be noted that section 3(5) and section 12(8) of the 1992

Act currently give Scottish Ministers the power, by order, to amend comparable provisions for incorporated colleges in relation to the constitution and proceedings of incorporated college boards (section 3(5)) and powers of incorporated college boards (section 12(8)). Scottish Ministers consider that similar provision is necessary in relation to regional boards in order to allow consistency of approach in the provisions applying to incorporated colleges and regional boards.

Choice of procedure

32. The power is subject to negative procedure. Similar provision is made in section 3(5) and section 12(8) of the 1992 Act with respect to incorporated colleges. Scottish Ministers consider it appropriate to take an approach consistent with these provisions. It is considered that this would allow sufficient Parliamentary scrutiny of any amendments made to the new schedule 2B.

Section 12 – Regional boards: mismanagement

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Negative procedure

Provision

33. New section 23N of the 2005 Act, as inserted by section 12 of the Bill, gives Scottish Ministers a power, by order, to remove any or all of the members of a regional board in specified circumstances and to appoint new members in their place.

Reason for taking power

34. Scottish Ministers consider it appropriate to have powers to be able to act if necessary to remove members if the boards are being mismanaged. Scottish Ministers consider that these powers are necessary to ensure that regional boards are accountable for agreed outcomes to safeguard educational opportunities provided by colleges funded by regional boards.

Choice of procedure

35. The power is subject to negative procedure. Section 24 of the 1992 Act provides similar powers to remove board members of incorporated colleges by order subject to negative procedure. Scottish Ministers consider it appropriate to take an approach consistent with these provisions.

Section 15(1) – Duty to provide information to Skills Development Scotland

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Negative procedure

Provision

36. Section 15(1) gives Scottish Ministers the power, by order, to place a duty on any person to provide information which that person holds about a young person to Skills Development

Scotland for the purposes of enabling or assisting Skills Development Scotland to monitor that young person's involvement in education or training, to provide advice or support regarding that young person's involvement in education or training or to exercise any other functions in relation to that young person. By virtue of section 15(2) Scottish Ministers may specify persons who are to provide information, information to be provided and the form and manner in which it is to be provided.

Reason for taking power

37. Scottish Ministers will wish to impose this duty to provide information to Skills Development Scotland on persons who are providing education and training to young persons. It is essential that they have flexibility to make provision regarding the persons on whom the duty should be imposed at any time and to be able to make changes to the list of such persons as and when necessary by means of subordinate legislation. Further, it is considered that the details regarding the information to be provided and the form and manner in which it is to be provided would be largely technical and should therefore be determined in subordinate legislation.

Choice of procedure

38. The power is subject to negative procedure. If Parliament has already approved the principle that persons should be required to share information with Skills Development Scotland for the purposes specified in section 15(1), it is considered appropriate that an order to specify the persons to provide information or to specify the types of information to be provided is subject to negative procedure. It is not thought that it would be necessary for Parliament to affirm the persons on whom the duty is to be imposed, nor the type of information to be provided, nor the form and manner in which it is to be provided. These details ought not to be controversial.

Section 15(5) – Duty to provide information to Skills Development Scotland

Power conferred on:	The Scottish Ministers
Power exercised by:	Order made by Scottish Statutory Instrument
Parliamentary procedure:	Negative procedure, or, where it relates to a change of name the order must be laid before the Parliament under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

39. Section 15(5) gives Scottish Ministers the power, by order, to modify section 15 to replace references to Skills Development Scotland with references to any other person if they consider it appropriate to do so.

Reason for taking power

40. As explained above, section 15(1) of the Bill enables Scottish Ministers to place a duty on any person to share information with Skills Development Scotland. It is conceivable that Scottish Ministers might reconsider the role of Skills Development Scotland in future and, as part of that, whether it remains the most appropriate organisation to be provided with information in relation to a young person's education and training. In addition, it may be that in

future there is a change to the name of Skills Development Scotland and this power gives Scottish Ministers the flexibility to deal with such a change of name.

Choice of procedure

41. This power is subject to negative procedure. This is considered to be appropriate given that a change to the person to whom any information about a young person is to be provided would be largely technical. If the power is used to reflect a change to the name of Skills Development Scotland, the exercise of the power would be subject to no procedure and would require under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 to be laid before the Parliament as soon as possible after it is made.

Section 17(1) – Ancillary provision

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative procedure (if it textually amends legislation) otherwise negative procedure

Provision

42. Section 17(1) would allow Scottish Ministers to make such supplementary, incidental, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, in connection with, or for giving full effect to, any provision made by, or by virtue of, this Bill

Reason for taking power

43. The provision would allow flexibility for Scottish Ministers to make any necessary or unforeseen, adjustments to the underpinning components of post-16 education reform and the practical changes that the Bill would effect. Any amendments required would be likely to be technical in nature. Provision may also be needed to ensure a smooth transition from the current law to that enacted by the Bill. The provision would therefore allow the most effective use of Parliamentary time as these matters can be addressed without resort to primary legislation but undertaken within proper and appropriate Parliamentary scrutiny.

Choice of procedure

44. As is consistent with previous practice, an order is subject to the affirmative procedure when any textual amendments to this Bill or other existing Acts are required. In all other situations, the negative procedure would apply.

Section 18 - Commencement

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: The order must be laid before the Parliament under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

45. Section 18(1) provides that sections 17 to 19 come into force on the day after Royal Assent. Section 18(2) provides that all other sections should come into force as appointed by order by Scottish Ministers. Section 18(3) provides that such an order might include transitional, transitory or saving provision.

Reason for taking power

46. It is appropriate for the substantive provisions of the Bill to be commenced at such a time as the Scottish Ministers consider suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation to allow Scottish Ministers to plan commencement appropriately with stakeholders. Sections 17 to 19 are being commenced by the Bill.

Choice of procedure

47. The power is subject to the requirement in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 that the order should be laid as soon as possible after making, as is normal procedure for commencement orders.

Schedule 1 – paragraph 6(20)(c) – Modification of enactment

Power conferred on: The Scottish Ministers
Power exercised by: Order made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative or Negative procedure, depending on circumstances

Provision

48. Section 7(1) of the 2005 Act gives Scottish Ministers a power by order to add, remove or vary the list of fundable bodies in schedule 2 to the 2005 Act. Paragraph 6(20)(c) of the schedule to the Bill amends section 34(4)(b) and inserts new section 34(4)(ba) which provides that an order under section 7(1) is subject to the affirmative procedure, other than where the order is made only in the consequence of a body changing its name or being closed.

Reason for taking power

49. The order-making power in section 7(1) of the 2005 Act, by virtue of section 34(4)(b) of the 2005 Act, is currently subject to the affirmative procedure in all circumstances.

50. Under section 3(4) of the 1992 Act, a governing body of college can change the name of the college with the consent of Scottish Ministers. Under section 49(1) a designated institution can (subject to certain restrictions) change its name with the consent of the Privy Council. However, if either were to happen without a corresponding change to the fundable bodies list, the SFC would be unable to continue to fund the body under its new name. It seems to Ministers to be disproportionate for an affirmative order to be required under section 7(1) in order to ensure that SFC funding can continue following a change of name.

51. Similarly, Scottish Ministers have powers to close a college under section 3(1) of the 1992 Act by order (subject to negative procedure as provided for in section 60(1)). Scottish Ministers

have powers under section 47 of the 1992 Act to close designated institutions by order (again subject to negative procedure, as provided for in section 60(1)). It seems to Scottish Ministers to be disproportionate for an affirmative order to be required under section 7(1) to remove a body from the fundable body list as a consequence of an order to close it, if the order to close it is subject only to the negative procedure.

52. While, the SFC is not required to consider certain matters in proposing or approving a change to the fundable body list because of a change of name or closure of a body (section 7(6) of the 2005 Act refers), Scottish Ministers are still required to make an affirmative order for what are in effect ‘tidying up’ changes to the fundable bodies list.

Choice of procedure

53. Once section 34(4) is amended, an order which changes the list of fundable bodies in schedule 2 to the 2005 Act will be subject to negative procedure where it reflects changes resulting from a fundable body changing its name or being closed. Scottish Ministers consider that the negative resolution is more appropriate as the Parliamentary scrutiny involved in affirmative procedure is not considered to be necessary in such circumstances. Any change to the list of fundable bodies where the modification is not due to a body changing its name or being closed, and where the SFC is consequently required to propose or approve the modification under section 7(2), continues to be subject to the affirmative procedure.

This document relates to the Post-16 Education (Scotland) Bill (SP Bill 18) as introduced in the Scottish Parliament on 27 November 2012

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