

# **POST-16 EDUCATION (SCOTLAND) BILL**

## **SUPPLEMENTARY 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. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.
3. 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;.

### **PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2**

#### **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:** Affirmative and negative procedure, depending on the circumstances

#### *Provision*

4. 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 Scottish Funding Council (“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.

*Amendment at Stage 2*

5. In response to a recommendation from the Subordinate Legislation Committee an amendment was made to the procedure which applies to an order made under section 9C(2). This amendment was made to paragraph 6(20)(c) of the schedule to the Bill which amends section 34(4) of the 2005 Act by inserting a new sub-paragraph (bba) to provide for both affirmative and negative procedure depending on the circumstances.

*Reason for taking power*

6. The original Delegated Powers Memorandum explained the background to the reason for taking this power. For students commencing courses of education in the 2012/13 or later academic years the tuition fee arrangements have their basis in section 9 of the 2005 Act and they ensure 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'. Under the current legislative arrangements institutions are free to charge students with a connection with another part of the United Kingdom higher fees. 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 and new section 9C of the 2005 Act therefore gives Scottish Ministers a power to impose a condition on the SFC to require institutions to charge fees at a level which does not exceed a particular upper limit (or 'cap').

*Choice of procedure*

7. Following an amendment at stage 2, an order under section 9C(2) is now subject to the affirmative procedure, unless it is an order which does no more than increase the amount specified by a previous order by an amount which is no greater than the amount which Scottish Ministers, having had regard to any retail price index, consider is required to maintain the value of the previously specified amount in real terms. In all other cases the order will be subject to the negative procedure. Having reflected on the comments from the Subordinate Legislation Committee, Scottish Ministers consider that it is appropriate for there to be a higher level of parliamentary scrutiny in circumstances where the fee cap is being increased by an amount which represents more than a increase in the cap in real terms or where there is a reduction in the fee cap. Ministers are content that, where there is no increase in real terms, the negative procedure is appropriate and 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*

8. 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 7A(2) requires consultation with certain persons before such an order can be made under section 7A(1).

*Amendment at Stage 2*

9. At stage 2, the provision was amended to require wider consultation before Ministers can exercise their power to designate a regional college under section 7A(1). Section 7A(2) now also requires consultation with representatives of relevant students' associations and with trade unions representing college staff. Amendment was also made at Stage 2 to paragraph 6(5) of the schedule to the Bill which inserts section 7D into the 2005 Act. Section 7D makes supplemental provisions in relation to orders made under section 7A(1) of the 2005 Act. Section 7D(3)(a) was changed to allow an order to authorise Scottish Ministers to make arrangements for the continuation in office or removal from office of persons who were board members immediately before an order under section 7A(1) to designate a regional college. Section 7D (3A) was also inserted to ensure that any order which makes provision for appointment of new board members of a regional college can only make provision for those members who could be appointed under paragraph 3(2)(a) or (e) of Schedule 2 to the 1992 Act (i.e. the chairing member or ordinary members).

*Reason for taking power*

10. 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*

11. The power remains 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.

**Section 7 – Colleges: mismanagement**

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

*Provision*

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

*Amendment at Stage 2*

13. The new section 24(1)(a) of the 1992 Act (as in section 7 of the Bill at introduction) set out the circumstances Ministers would be able to exercise their power to remove board members. The new section 24(1)(a)(iv) specified as one such circumstance when it appeared to Ministers that the board of management had failed, or were failing, to exercise any of their functions properly. This has been amended so that it is more restricted and now provides that the circumstance is one where the board has failed, or is failing, to discharge any of its duties properly. This was prompted by the report of the Subordinate Legislation Committee which found that there was a 'substantial expansion' of the grounds for removal.

14. The new section 24(3)(a) of the 1992 Act (as in section 7 of the Bill at introduction) gave Ministers the power to remove any or all of the members of an incorporated college's board. At stage 2 this provision was modified to prevent Ministers from removing the principal from an incorporated college's board. Other amendments made at stage 2 provided for the principal to be an *ex officio* member of the board and it was therefore necessary to prevent the removal of the principal under the new section 24 of the 1992 Act.

15. These amendments serve to restrict the exercise of the power in section 24(3)(a).

*Reason for taking power*

16. Existing section 24 of the 1992 Act enables Ministers to remove board members for reasons of mismanagement, but the substituted section 24 specifies additional circumstances where Ministers can remove board members of an incorporated college. However, it is considered appropriate to restrict the removal under section 24(1)(a)(iv) to circumstances where boards are failing to discharge their duties properly, rather than to exercise their functions properly.

*Choice of procedure*

17. We note that in its report the Subordinate Legislation Committee stated that "given the substantial expansion of the grounds upon which members of a college's board of management may be removed, the Committee draws the power in section 7 (substituting section 24 of the 1992 Act) to the attention of the lead Committee. It is otherwise content that the exercise of the power be subject to the negative procedure". The power remains subject to the negative procedure. Existing section 24 of the 1992 Act already provided that the power to remove board members was exercisable by order subject to the negative procedure.

**Section 8(1) – Regional strategic 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*

18. 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.

*Amendment at Stage 2*

19. In response to a recommendation from the Subordinate Legislation Committee, an amendment was made to the procedure which applies to orders made under the new section 7B(2) of the 2005 Act. This amendment was made to paragraph 6(20) of the schedule to the Bill which amends section 34(4) of the 2005 Act. Paragraph 6(20)(c) inserts new sub-paragraphs (baa) and (bab) into section 34(4) to provide for both affirmative and negative procedure depending on the circumstances.

*Reason for taking power*

20. Flexibility is required to enable the list of bodies in schedule 2A 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*

21. The power in section 7B(2)(a) is now subject to affirmative procedure when the order establishes a new regional board. The power in section 7B(2)(b) is now subject to affirmative procedure when the order adds or removes an entry from part 2 of schedule 2A to the 2005 Act, unless the order is removing the entry simply because the body has closed, been wound up or otherwise ceased to exist. It is considered that more detailed parliamentary scrutiny is required where Scottish Ministers wish to set up a new regional board under section 7B(2)(a) or when an order adds a body to or removes a body (for reasons other than closure or winding up) from part 2 of schedule 2A as these orders would raise issues about whether or not the bodies concerned should be receiving public funding by the SFC. These powers in relation to regional strategic bodies are similar to the current power 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. The procedure which applies to the exercise of the power in section 7(1) was already modified by paragraph 6(20)(c). Scottish Ministers consider it appropriate that the same levels of parliamentary scrutiny apply to the exercise of the powers in section 7(1) and section 7B(2) and the same principles have therefore been applied in relation to the powers in section 7B(2) so that they are consistent with modified approach under section 7(1) of the 2005 Act.

#### **Section 8(3) – Regional strategic bodies**

<b>Power conferred on:</b>	<b>The Scottish Ministers</b>
<b>Power exercised by:</b>	<b>Order made by Scottish Statutory Instrument</b>
<b>Parliamentary procedure:</b>	<b>Affirmative or negative procedure, depending on the circumstances</b>

#### *Provision*

22. Section 8(3) inserts new section 7C(1) into the 2005 Act which 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. The new section 7C(5) requires consultation with certain specified persons before an order can be made under section 7C(1).

#### *Amendment at Stage 2*

23. At stage 2, the provision was amended to require wider consultation before Ministers can exercise their power to make an assignment of a college to a regional strategic body. Section 7C(5) now also requires consultation with every college affected by an order (only if that college already exists) as well as consultation with representatives of relevant students' associations and with trade unions representing college staff. An amendment was also made to the new section 7C(2) to transfer the function of proposing or approving an assignment before such an order can be made from the regional strategic body to the SFC (where such a proposal or approval is required because the college to be assigned is not already a fundable post-16 education body or has not already been assigned to a regional strategic body). Amendment was also made at stage 2 to paragraph 6(5) of the schedule to the Bill which inserts section 7D into the 2005 Act. Section 7D makes supplemental provisions in relation to orders made under section 7C(1) of the 2005 Act. Section 7D(3)(a) was changed to allow an order to authorise Scottish Ministers to make arrangements for the continuation in office or removal from office of persons who were board members immediately before an order under section 7C(1) to assign a college. Section 7D (3A) was also inserted to ensure that any order which makes provision for appointment of new board members of an assigned

college can only make provision for those members who could be appointed under paragraph 3A(2)(a) or (d) of Schedule 2 to the 1992 Act (i.e. the chairing member or ordinary members)

*Reason for taking power*

24. 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*

25. There has been no change in the procedure which applies to the exercise of the power in section 7C(1). Where exercise of this power involves adding new bodies to the list of bodies which are entitled to receive public funding, in this case through a regional strategic body, it remains subject to the affirmative procedure. However, where the exercise of this power results in the assignation of a body which is already funded by either the SFC or by a regional strategic body, Scottish Ministers consider it remains appropriate that such assignations should be subject to the negative procedure.

**Section 11(2) – Regional boards: constitution**

**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*

26. 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.

*Amendment at Stage 2*

27. In response to a recommendation from the Subordinate Legislation Committee an amendment was made to the procedure which applies to an order made under paragraph 18(1) of the new schedule 2B to the 2005 Act. This amendment was made by paragraph 6(20)(d) in the schedule to the Bill which amends to section 34(4) of the 2005 Act by inserting a new sub-paragraph (ca) to provide for both affirmative and negative procedure depending on the circumstances.

*Reason for taking power*

28. 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.

*Choice of procedure*

29. The power is subject to the affirmative procedure, unless an order does no more than vary the minimum members of regional board or vary the maximum number of members who can be appointed under paragraph 3(2)(e) of the new schedule 2B. If it varies the minimum or maximum board numbers only, then it will be subject to the negative procedure. At the time of introduction of the Bill Ministers considered the procedure should be consistent with the procedure which applies to the similar power in

section 3(5) of the 1992 Act to amend Schedule 2 to the 1992 Act on the constitution of boards. However, having reflected on the comments from the Subordinate Legislation Committee Ministers are content that the affirmative procedure should apply to ensure a higher level of parliamentary scrutiny in circumstances where the order does more than variation of board numbers. A corresponding change is being made to the procedure applying to the power in section 3(5) of the 1992 Act to ensure consistency.

## **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*

30. 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.

### *Amendment at Stage 2*

31. The new section 23N of the 2005 Act (as in section 12 of the Bill at introduction) set out the circumstances Ministers would be able to exercise their power to remove regional board members. The new section 23N(1)(b)(ii) specified as one such circumstance when it appeared to Ministers that the regional board had failed, or were failing, to exercise any of their other functions properly. This has been amended so that it is more restricted and now provides that the circumstance is one where the board has failed, or is failing, to discharge any of its duties properly.

### *Reason for taking power*

32. 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, but it is considered appropriate to restrict the removal under section 23N(1)(b)(ii) to circumstances where boards are failing to discharge their duties properly, rather than to exercise their functions properly. This was prompted by the report of the Subordinate Legislation Committee which commented on the ‘breadth of the grounds’ for removal.

### *Choice of procedure*

33. We note that in its report the Subordinate Legislation Committee stated that “given the breadth of the grounds upon which the members of a regional board may be removed, the Committee draws the power in section 12 (inserting section 23N of the 2005 Act) to the attention of the lead Committee. It is otherwise content that the exercise of the power be subject to the negative procedure”. The power remains subject to negative procedure and therefore remains consistent with the similar provision in section 24 of the 1992 Act.

## **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:** Affirmative procedure

### *Provision*

34. 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.

### *Amendment at Stage 2*

35. In response to a recommendation from the Subordinate Legislation Committee, an amendment was made to the procedure which applies to an order made under section 15(1) of the Bill. Section 15(9) provides that an order under sub-section (1) is subject to the affirmative procedure.

### *Reason for taking power*

36. 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 and they need to have flexibility to make provision regarding the persons on whom the duty should be imposed. It is also 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*

37. The power is now subject to the affirmative procedure. Ministers accept that this is a broad power and are content to follow the recommendation of the Subordinate Legislation Committee that, if the power remains broad, it should be subject to the affirmative procedure to ensure adequate parliamentary scrutiny.

## **Section 15(2A) – 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:** Affirmative procedure

### *Provision*

38. Section 15(2A) gives Scottish Ministers the power, by order, to place a duty Skills Development Scotland to provide information which Skills Development Scotland holds about a young person to persons who provide education and training to young persons as may be specified in the order. By virtue of section 15(2B) Scottish Ministers may specify the information to be provided and the form and manner in which it is to be provided.

### *Amendment at Stage 2*

39. This is a new power which was inserted at stage 2.

*Reason for taking power*

40. Scottish Ministers will wish to impose this duty on Skills Development Scotland to provide information to persons providing education and training and they need to have flexibility to make provision regarding the persons to whom the information should be provided. It is also 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*

41. By virtue of section 15(9) of the Bill, an order under sub-section (2A) is subject to the affirmative procedure. Ministers consider that it is appropriate that this power to impose a duty on Skills Development Scotland to provide information is subject to the same procedure as the power to impose a duty on other persons to provide information to Skills Development Scotland in order to ensure adequate parliamentary scrutiny of the persons to whom Skills Development Scotland is to provide information.

**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*

42. Section 15(5)(a) 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 and section 15(5)(b) gives Ministers power to modify such references if there is a change of name of the person.

*Amendment at Stage 2*

43. In response to a recommendation from the Subordinate Legislation Committee, sub-section (5) was amended at stage 2 to make clear that Ministers have the power to replace references in sub-sections (1), (2A) and (3) to the person to whom information is to be provided under sub-section (1) or the person to who is to provide information under sub-section (2A) with references to such other person as they consider appropriate (sub-section (5)(a)) and that Ministers also have the power to modify references to that person in sub-sections sections (1), (2A) and (3) to reflect a change of name of that person (sub-section (5)(b)). In addition, section 15(7)(b) was removed from the Bill following comments from the Subordinate Legislation Committee that it duplicated the general ancillary powers provision in section 17(1) of the Bill.

*Reason for taking power*

44. 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 and section 15(2A) enables Scottish Ministers to place a duty on Skills Development Scotland to share information. 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 provide or 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 the power in sub-section (5)(b) gives Scottish Ministers the flexibility to deal with such a change of name.

*Choice of procedure*

45. The power in section 15(5)(a) is subject to the negative procedure. Ministers still consider that this is appropriate given that a change to the person to whom any information about a young person is to be provided or who is to provide information about a young person would be largely technical. If the power is used to reflect a change to the name of Skills Development Scotland (section 15(5)(b)), 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. (Given the removal from the Bill of what was section 15(7)(b), if any order made under section 15(5) makes ancillary provision in exercise of the powers in section 17, then the procedure applicable to the exercise of the power in section 17 would apply to that order. That would result in affirmative procedure being applicable if the order amended primary legislation.)

**Schedule – paragraph 2(1A) – Modification of enactment**

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

*Provision*

46. Section 3(6) of the 1992 Act gives Ministers the power, by regulations, to impose requirements with which boards of management must comply in discharging their functions under the 1992 Act.

*Amendment at Stage 2*

47. Neither the existing power in section 3(6), nor the applicable negative procedure, has been amended, but an amendment was made at stage 2 to insert a new section 3(7) to the 1992 Act (by paragraph 2(1A) of the schedule to the Bill) to require consultation with a list of specified persons before Ministers make regulations under section 3(6) of the 1992 Act. The list includes college boards of management, regional strategic bodies, students' associations, the SFC and trade unions.

**Schedule – paragraph 2(1B) – Modification of enactment**

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

*Provision*

48. Section 3 of the 1992 Act gives Ministers the power, by order, to establish new colleges of further education or to merge or close existing colleges. Section 44 of the 1992 Act gives Ministers the power, by order, to designate higher education institutions. Where Ministers intend to exercise these powers, section

5(1) of the 1992 requires consultation with the relevant education authority and any other person affected by the proposal.

*Amendment at Stage 2*

49. Neither the existing powers in section 3(2) or section 44(1), nor the applicable negative procedure, has been amended, but an amendment was made at stage 2 to insert a new section 5(1A) to the 1992 Act (by paragraph 2(1B) of the schedule to the Bill) to require consultation with an extended list of persons before Ministers make an order under section 3(2) or section 44(1) of the 1992 Act. The list includes college boards of management, regional strategic bodies, students' associations, the SFC and trade unions.

**Schedule – paragraph 2(3A) – Modification of enactment**

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

*Provision*

50. Section 3(5) of the 1992 Act enables Scottish Ministers, by order, to amend Schedule 2 to the 1992 Act which sets out the constitution and proceedings of boards of management.

*Amendment at Stage 2*

51. Paragraph 2(3A) was inserted into the schedule to the Bill at stage 2. It amends section 60 of the 1992 Act to provide that any order made under section 3(5) of the 1992 Act is subject to either the affirmative and negative procedure depending on the circumstances

*Choice of procedure*

52. As with regional boards, Scottish Ministers consider it appropriate that they have flexibility to amend provisions regarding an incorporated college's constitution or proceedings by subordinate legislation.

53. The choice of procedure for amending the constitution and proceedings of boards of management was prompted by the Subordinate Legislation Committee's comments on similar provisions for regional boards. The power is subject to the affirmative procedure unless it does no more than vary the minimum or maximum numbers of the members of a board of management established under the 1992 Act. If it varies the minimum or maximum board numbers only, then it will be subject to the negative procedure. Having made changes to the procedure which applies to the power to make changes to the new schedule 2B of the 2005 Act in relation to the constitution of regional boards, Ministers considered that it would be appropriate to make changes to the procedure for this similar power for college boards of management. Ministers consider that it is appropriate that the affirmative procedure should apply to ensure a higher level of parliamentary scrutiny in circumstances other than a variation of board numbers.

54. The Delegated Powers and Law Reform Committee may wish to note that Ministers intend at stage 3 to propose a related amendment to the procedure which applies to the exercise of the power in section 12(8) of the 1992 Act which allows Ministers to amend the provisions of section 12(2) of the 1992 Act. The exercise of this power will also be made subject to the affirmative procedure, instead of the negative

*This document relates to the Post-16 Education (Scotland) Bill as amended at stage 2 (SP Bill 18A)*

procedure as currently provided by section 60 of the 1992 Act. This is considered appropriate to ensure consistency with the procedures which apply to regional boards and college boards of management.

*This document relates to the Post-16 Education (Scotland) Bill as amended at stage 2 (SP Bill 18A)*

# **POST-16 EDUCATION (SCOTLAND) BILL**

## **SUPPLEMENTARY DELEGATED POWERS MEMORANDUM**