

POST-16 EDUCATION (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Post-16 Education (Scotland) Bill as amended at Stage 2.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

4. The Bill makes provision in relation to some aspects of the Scottish Government's post-16 education reform programme. The Bill contains provisions covering six areas:

- **University governance:** to allow Ministers, when providing funding to the Scottish Further and Higher Education Funding Council ("SFC"), to impose conditions relating to the need for higher education institutions to adhere to good practice in governance. **(Section 2)**
- **Widening access:** to allow Ministers, when providing funding to the SFC, to impose conditions relating to access to higher education institutions for under-represented socio-economic groups. **(Section 3)**
- **Tuition fees cap:** to allow Ministers :
 - to set an upper limit on the level of higher education tuition fees which post-16 education bodies can charge UK students and certain others who are not entitled to be charged tuition fees at the level set by the Scottish Government; and
 - when providing funding to the SFC, to impose conditions with a view to ensuring that post-16 education bodies adhere to such an upper limit. **(Section 4)**

- **College regionalisation:**
 - to provide for two types of incorporated colleges with different duties, composition and appointment provisions, depending on whether they are in single-college or multi-college regions;
 - to establish new regional strategic bodies for colleges in multi-college regions to support a regional approach to the planning and funding of college provision; and
 - to introduce Ministerial powers to remove chairs and other members of incorporated colleges and regional boards for reasons of failure (in addition to mismanagement). (**Sections 5 – 13**)
- **Review of fundable further and higher education:** to allow the SFC to review the provision of fundable further and higher education with a view to ensuring that such education is being provided by post-16 education bodies in a coherent manner. (**Section 14**)
- **Data sharing:** to allow Ministers to make secondary legislation to impose a legal duty on relevant bodies to share data with Skills Development Scotland on all young people between the ages of 16 and 24 moving through the learning system to identify those who have disengaged with, or may be at risk of, disengaging with, learning or training. (**Section 15**)

5. The majority of the Bill makes amendments to the Further and Higher Education (Scotland) Act 1992 and the Further and Higher Education (Scotland) Act 2005.

6. Throughout these Explanatory Notes various terms are used. The most important terms are as follows:

“the 1992 Act” means the Further and Higher Education (Scotland) Act 1992 [“the 1992 Act” has the same meaning in the Bill (see section 1 of the Bill)];

“the 2005 Act” means the Further and Higher Education (Scotland) Act 2005 [“the 2005 Act” has the same meaning in the Bill (see section 1 of the Bill)];

“fundable post-16 education body” means a body specified in schedule 2 to the 2005 Act [this is what is provided for in section 6(2) of the 2005 Act as amended by paragraph 6(4)(b) of the schedule to the Bill; in practice ‘fundable post-16 education bodies’ are colleges or higher education institutions];

“higher education institution” means a university or any designated institution (within the meaning of section 44(2) of the 1992 Act) [paragraph 6(21)(a)(iii) of the schedule to the Bill inserts a definition in these terms into section 35(interpretation) of the 2005 Act];

“incorporated college” means a college of further education which has a board of management established under the 1992 Act;

“post-16 education body” means any fundable post-16 education body, and any college which is assigned to a regional strategic body under section 7C(1) of the 2005 Act (inserted by section 8(3) of the Bill) [paragraph 6(21)(a)(iv) of the schedule to the Bill inserts a definition in these terms into section 35(interpretation) of the 2005 Act];

“regional board” means a body specified in part 1 of schedule 2A to the 2005 Act [this reflects the definition of “regional board” inserted into section 35(interpretation) of the

2005 Act by paragraph 6(21)(a)(iv) of the Bill; new schedule 2A to the 2005 Act is inserted by section 8(2) of the Bill];

“regional college” means an incorporated college which the Scottish Ministers designate as a regional college by an order made under section 7A(1) of the 2005 Act [section 7A(1) of the 2005 Act is inserted by section 5(1) of the Bill; see also the definition of “regional college” inserted into section 35 (interpretation) of the 2005 Act by paragraph 6(21)(a)(iv) of the Bill];

“regional strategic body” means a body specified in schedule 2A to the 2005 Act [this reflects the definition of “regional strategic body” inserted into section 35 (interpretation) of the 2005 Act by paragraph 6(21)(a)(iv) of the Bill; new schedule 2A to the 2005 Act is inserted by section 8(2) of the Bill]; and

“SFC” means the Scottish Further and Higher Education Funding Council established under section 1 of the 2005 Act.

INTRODUCTORY

Section 1: Interpretation

7. Section 1 of the Bill provides that in the Bill “the 1992 Act” means the Further and Higher Education (Scotland) Act 1992 and that “the 2005 Act” means the Further and Higher Education (Scotland) Act 2005.

TERMS AND CONDITIONS OF HIGHER EDUCATION FUNDING

Section 2: Higher education institutions: good governance

8. Section 9(1) of the 2005 Act gives the Scottish Ministers powers to make grants to the SFC and under section 9(2) the Scottish Ministers are able to attach terms and conditions to such grants. Section 2 of the Bill amends the 2005 Act by introducing new section 9A. New section 9A provides that terms and conditions of grant under section 9(2) may include a condition that the SFC must, when making a payment to a higher education institution under section 12(1) of the 2005 Act (SFC’s power to make grants, loans or other payments) impose on that institution a condition that it must comply with any principles of governance which the SFC consider to constitute good practice in relation to higher education institutions.

9. Certain consequential amendments to section 9 of the 2005 Act in connection with new section 9A (and new sections 9B and 9C) are made by paragraph 6(6) of the schedule to the Bill.

10. There is similar provision for further education institutions in new section 9AA of the 2005 Act, inserted by section 13A of the Bill (see paragraph 102 below).

Section 3: Widening access to higher education

11. Section 3 of the Bill amends the 2005 Act to insert new section 9B. Section 9B makes provision about the terms and conditions that the Scottish Ministers can impose when making grants to the SFC under section 9(1) of the 2005 Act (described more fully in paragraph 8 above). New section 9B(1) gives the Scottish Ministers powers to set terms and conditions that are aimed at enabling, encouraging or increasing participation in higher education by people

from under-represented socio-economic groups. Subsection (4) describes what is meant by “under-represented” and subsection (4A) provides that Ministers may take into account any social or economic characteristics they consider appropriate when determining which groups constitute a ‘socio-economic group’ for the purposes of the section.

12. New section 9B(2) gives power to the Scottish Ministers to impose a condition on the SFC that the SFC (when making a payment to a higher education institution) is itself to make a requirement that the institution complies with a widening access agreement. And the Scottish Ministers are given power to specify the description of such widening access agreements. Section 9B(2) is framed as a particular example of the things that the Scottish Ministers can do in the context of their more general power to impose terms and conditions under section 9B(1).

13. New section 9B(3) then provides a definition of a “widening access agreement”.

14. As part of that definition, new section 9B(3) provides that in a widening access agreement the SFC can specify actions which a higher education institution is to take. New section 9B(3A) places a duty on the SFC to consult with the institution, trade unions appearing to the SFC to be representative of the institution’s staff and the institution’s students’ association before specifying those actions.

15. The intention is that, in the context of exercising the power to impose terms and conditions under new section 9B so as to require the SFC to then require institutions to comply with widening access agreements, those agreements will provide the detail of the range of activities that institutions will have to undertake in order to improve participation in higher education.

16. Amendments made by paragraph 6(6)(i) of the schedule to the Bill will amend the current restriction in the 2005 Act (in section 9(12)(b)) which would otherwise prevent terms and conditions relating to criteria for admission. However, that restriction is removed only for the limited purposes of new section 9B on widening access.

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

17. Section 4 of the Bill amends the 2005 Act to insert new section 9C. Section 9C makes provision about the terms and conditions that the Scottish Ministers can impose when making grants, loans or other payments to the SFC under section 9(1) of the 2005 Act (described more fully in paragraph 8 above).

18. New section 9C(1) of the 2005 Act provides that terms and conditions of grant under section 9(2) may include a condition that the SFC must:

- (a) when making a payment to a post-16 education body which provides fundable higher education, impose a condition that it must comply with the requirement provided for in section 9C(2);
- (b) when making a payment to a regional strategic body, impose a condition that, when making a payment under new section 12B of the 2005 Act (inserted by section 9 of the Bill) (regional strategic bodies’ powers to make grants, loans or other payments) to any of its colleges which provide fundable higher education, that regional strategic

body must impose a condition that such college must comply with the requirement provided for in section 9C(2).

19. The requirement provided for in new section 9C(2) of the 2005 Act is a requirement that the post-16 education body receiving the payment must ensure that fees charged by it to students in respect of whom the post-16 education body is authorised or required to charge higher fees in terms of section 1 of the Education (Fees and Awards) Act 1983 (or by any class of such students as may be provided for in an order made by the Scottish Ministers) in connection with their attending in an academic year such courses of education as may be provided for in the order, must not exceed the amount set by the Scottish Ministers in the order.

20. New section 9C(3) of the 2005 Act provides that 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 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 higher fees per academic year for studying at a post-16 education body than the highest amount of fees per academic year, as set by legislation elsewhere in the UK, that such student would be charged if they chose to pursue any course of higher education in a part of the United Kingdom other than Scotland.

21. New section 9C(4) of the 2005 Act provides that in making provision in the order for the courses of higher education to which it is to apply, Ministers must not do so in a way which discriminates between different postgraduate teacher training courses on the basis of subject matter.

22. New section 9C(5) of the 2005 Act provides that for the purposes of new section 9C references to the United Kingdom include the Channel Islands and the Isle of Man.

23. Certain consequential amendments to section 9 of the 2005 Act in connection with new section 9C are made by paragraph 6(6) of the schedule to the Bill.

COLLEGE REORGANISATION

Section 5: Regional colleges

24. Section 5 of the Bill inserts new sections 7A, 23A, 23B and 23BA into the 2005 Act. The new section 7A of the 2005 Act enables the Scottish Ministers to designate any incorporated college as a regional college. Before making an order, the Bill requires the Scottish Ministers to consult specified persons.

25. New section 23A(1) of the 2005 Act places a duty on a regional college to exercise its functions with a view to securing high quality “fundable further education” and “fundable higher education” in its locality. These terms are defined in section 5 of the 2005 Act. The duty is framed to recognise that regional colleges are not the sole providers of such education in their localities. The SFC has a similar duty in section 3 of the 2005 Act.

26. Under new section 23A(2) of the 2005 Act, in complying with its duty a regional college must have regard to any fundable further and higher education provided by other post-16 education bodies in the locality of a regional college.

27. New section 23B(1) of the 2005 Act places a duty on a regional college to plan for how it proposes to provide fundable further education and fundable higher education and how it intends to exercise its other functions. When it makes such plans, a regional college must have regard to the importance of ensuring that its funds are used as economically, efficiently and effectively as possible. New section 23B(3) of the 2005 Act places a duty on a regional college to consult specified persons in relation to the exercise of its functions where they consider it appropriate to do so. The list in section 23B(3) can be amended by order made under new section 23B(6) of the 2005 Act. However, the Scottish Ministers cannot modify the entries for trade union representatives (section 23B(3)(a) of the 2005 Act) or students' associations (section 23B(3)(b) of the 2005 Act).

28. New section 23B(5) of the 2005 Act places a duty on a regional college to seek to secure the collaboration of specified persons, so far as is consistent with the proper exercise of the college's functions. Again, Scottish Ministers can amend the list by order made under new section 23B(6) of the 2005 Act.

29. New section 23BA of the 2005 Act sets out certain matters a regional college must have regard to when exercising its functions. Regional strategic bodies have a similar duty in new section 23I of the 2005 Act (inserted by section 10 of the Bill). The SFC has a similar duty in section 20 of the 2005 Act.

Section 6: Colleges: boards of management

30. Section 6(1) of the Bill inserts a new paragraph 3 into Schedule 2 to the 1992 Act to replace the current paragraph 3 which made provision for the constitution and proceedings of boards of management of incorporated colleges (including the appointment of the principal to the board by right of their position).

31. The effect of the provisions in section 6(1) is to make changes to the size and composition of incorporated college boards, depending on whether they are regional colleges or not.

Regional college boards

32. New paragraph 3(1) of Schedule 2 to the 1992 Act determines that the board of a regional college will have a minimum of 15 members and a maximum of 18 members.

33. Under new paragraph 3(2)(a), the chair of a regional college board will be appointed by the Scottish Ministers. Under new paragraph 3(4) the chair cannot be a member of the Scottish Parliament, the House of Lords, the House of Commons, the European Parliament or the principal of the college. Other board members must also include:

- a) the principal of the college
- b) a person elected by the teaching staff of the college;

- c) a person elected by the non-teaching staff of the college; and
- d) two persons nominated by the college students' association.

Other members will be appointed by the board. Under new paragraph 3(3) such other members can only be appointed with the approval of the college chair and Scottish Ministers.

Other college boards

34. New paragraph 3A(1) of Schedule 2 to the 1992 Act determines the size of incorporated college boards that are not regional colleges. Such colleges will have a minimum of 13 members and a maximum of 18 members.

35. Under new paragraph 3A(2)(a) of Schedule 2 to the 1992 Act, the chair of a college board will be appointed by the college's regional strategic body (under new paragraph 3A(3), the college principal cannot be appointed as the chair). Other board members must also include:

- a) the principal of the college
- b) a person elected by the staff of the college; and
- c) two persons nominated by the college students' association.

36. Other members will be appointed to the college board by the regional strategic body.

General provisions: all incorporated colleges

37. New paragraph 3B makes provision for the conduct of elections to appoint board members to represent college staff. Such elections must be conducted in accordance with rules made by the college board. Before making or changing rules, college boards must consult representatives of any trade union recognised by the college or which otherwise appears representative of the staff of the college.

38. New paragraph 3C(1) enables the Scottish Ministers to issue guidance to (a) regional colleges on appointments and extensions of appointments to their boards and (b) to regional strategic bodies on appointments and extensions of appointments to the boards of colleges assigned to them. Guidance on the making of such appointments or the extension of appointments may include guidance on the skills and experience that candidates should possess. New paragraph 3C(1A) specifies the persons Scottish Ministers must first consult before issuing guidance. New paragraph 3C(2) provides that the Scottish Ministers may issue different guidance for different purposes, including to different regional colleges/regional strategic bodies.

39. Further amendments to Schedule 2 to the 1992 Act are made by paragraph 2(4) of the schedule to the Bill and they affect the boards of all incorporated colleges. Given the importance of some of these changes, they are explained in the following paragraphs. Paragraph 2(4)(a) removes paragraph 2 (which determined the size of existing college boards) and paragraph 4 (which made provision for the transfer of board membership when incorporated colleges were transferred from local authorities in 1993) of Schedule 2 to the 1992 Act. Paragraph 4 is no longer required as those transfers have now occurred.

40. Paragraph 2(4)(b) of the schedule to the Bill makes some amendments in relation to the provisions for the length of appointments. Under the 1992 Act, appointments were generally for a fixed period of four years. Amended paragraph 5(2) of schedule 2 to the 1992 Act provides that, subject to sub paragraphs (2A) to (2H) (which make provision in relation to extension of appointments and circumstances in which persons appointed require to vacate office):

- a person elected to represent the staff will hold office for a fixed period of four years;
- student members hold office until 31 August following their appointment (this replicates what is currently provided for in paragraph 5(4) of Schedule 2 to the 1992 Act which is repealed by paragraph 2(4)(b)(iii) of the schedule to the Bill); and
- the chair and other members of the board will hold office for a period of up to four years (to be determined by the person making the appointment).

41. Paragraph 6 of Schedule 2 to the 1992 Act, which imposed minimum and maximum age requirements on board members, is removed by paragraph 2(4)(d) of the schedule to the Bill.

42. Paragraph 2(4)(d) of the schedule to the Bill also removes paragraph 7 of Schedule 2 to the 1992 Act. Paragraph 7 of Schedule 2 to the 1992 Act makes provision for circumstances in which a person will be ineligible for appointment as a board member. Instead paragraph 2(4)(c) of the schedule inserts a new paragraph 5A into Schedule 2 to the 1992 Act to make new provision on the eligibility of board members. The provisions are identical to the provisions which are being introduced in relation to regional boards as it was considered appropriate to align the eligibility requirements. A person is ineligible for appointment if he or she has (within the last five years) been sentenced to imprisonment of longer than three months, is an undischarged bankrupt or has been removed from office under section 24 of the 1992 Act or section 23N of the 2005 Act (inserted by section 12 of the Bill). Paragraph 2(4)(d) of the schedule to the Bill also removes paragraphs 8 and 9 of Schedule 2 to the 1992 Act which make provision for circumstances in which a person falls to be removed from office as board member. Instead paragraph 2(4)(c) of the schedule to the Bill inserts a new paragraph 5B into Schedule 2 to the 1992 Act to make new provision for removal of board members. A person must be removed from office if the person is sentenced to imprisonment for a period of not less than three months or has become an undischarged bankrupt (new paragraph 5B(1)(a) of Schedule 2 to the 1992 Act). A board member must also be removed from office if the person removing them is satisfied that they have been absent for more than six months or are otherwise unfit or unable to discharge their functions (new paragraph 5B(1)(b) of Schedule 2 to the 1992 Act).

43. Paragraph 2(4)(d) of the schedule to the Bill also removes paragraph 10 from Schedule 2 to the 1992 Act (filling of casual vacancies) as it is no longer required since most board appointments are no longer fixed term appointments. Paragraph 2(4)(g) of the schedule to the Bill removes paragraph 12 of Schedule 2 to the 1992 Act, which makes provision for the appointment of the chair of a college. Such provision is now included in amended paragraph 3 of that Schedule (for regional colleges) and new paragraph 3A of that Schedule (for other colleges). The Scottish Ministers would have powers to remove the chair of regional and other colleges under new section 24 of the 1992 Act (section 7 of the Bill substitutes a new section 24 of the 1992 Act).

44. Paragraph 2(4)(i) of the schedule to the Bill inserts new paragraph 16A into Schedule 2 to the 1992 Act which provides that the appointment of principals of colleges that are not regional

by those college boards (and the terms and conditions of those appointments) require the approval of the regional strategic body. This provision does not affect the contracts of existing principals. However, when those contracts become due for renewal, the regional strategic body has to agree the terms and conditions of the principal.

45. Section 6(2) of the Bill allows Scottish Ministers to make arrangements in relation to the boards of management of incorporated colleges in advance of the coming into force of the changes to the composition and structure of boards. Scottish Ministers can appoint persons as board members who will hold office as if appointed under the new paragraph 3(2)(a) or (e) or 3A(2)(a) or (d) of Schedule 2 to the 1992 Act. The Scottish Ministers also have the power to make arrangements for board members who are in office immediately prior to the coming into force of the re-structured boards either to remain in office or to be removed from office.

Section 7: Colleges: mismanagement

46. Existing section 24 of the 1992 Act enables the Scottish Ministers to remove by order members of incorporated college boards if they consider the boards have been or are being mismanaged. By substituting a new section 24, section 7 of the Bill extends the grounds on which Scottish Ministers may remove members.

47. The new section 24 of the 1992 Act enables the Scottish Ministers to remove any or all of the members of an incorporated college's board (except the college principal who, by virtue of paragraph 3(2)(aa) of schedule 2 to the 1992 Act in the case of regional colleges and paragraph 3A(2)(aa) of that schedule in the case of other colleges, must be a member of an incorporated college board) in circumstances where it appears to the Scottish Ministers that such a board:

- a) has committed or is committing a serious breach of any term or condition of grant made to it either by the SFC (in the case of regional colleges) or by its regional strategic body (in case of other colleges). Such a breach may be a one-off breach;
- b) has committed or is committing repeated breaches of such terms or conditions;
- c) has failed or is failing to provide or secure the provision of education of such standard as the Scottish Ministers consider to be appropriate;
- d) has failed, or is failing to discharge any of their duties properly; or
- e) has managed or is mismanaging its financial or other affairs.

48. The Scottish Ministers may also remove members if they receive advice from the SFC that a college fails to meet the criteria set out in section 7(2) of the 2005 to be either a fundable body (in respect of regional colleges) or a college assigned to a regional strategic body (in respect of other colleges).

49. Under new section 24(3), the Scottish Ministers may in such circumstance remove by order any or all board members (except the principal) and where those persons are not the staff or student members, appoint other persons in their place. New section 24(5) provides that such appointments are treated as if they were made under the usual provisions for such appointments. This means that relevant provisions regarding eligibility, length of service etc. apply to them.

REGIONAL STRATEGIC BODIES

Section 8: Regional strategic bodies

50. Section 8 of the Bill makes provision for regional strategic bodies.

51. A regional strategic body is either a regional board set up under this Bill or a body designated by order as such. Three regional boards are established under the Bill, and the University of the Highlands and Islands is specified as a regional strategic body.

52. Section 8(1) inserts a new section 7B into the 2005 Act. New section 7B(1) of the 2005 Act defines a regional strategic body (a body specified in new schedule 2A to the 2005 Act (inserted by section 8(2) of the Bill)) and regional board (a body specified in Part 1 of that schedule).

53. New section 7B(2) of the 2005 Act enables Scottish Ministers to modify new schedule 2A to the 2005 Act by order either to establish, abolish or re-name regional boards, or to add, remove or vary any entries in Part 2 of it. New section 7B(3) of the 2005 Act specifies the persons Scottish Ministers must first consult before making such an order.

54. Section 8(2) of the Bill inserts a new schedule 2A into the 2005 Act. New schedule 2A to the 2005 Act lists regional boards in Part 1 and other regional strategic bodies in Part 2. The University of the Highlands and Islands is the only body listed in Part 2 of that schedule. Three regional boards are established by the Bill:

- Regional Board for Aberdeen and Aberdeenshire Colleges
- Regional Board for Glasgow Colleges
- Regional Board for Lanarkshire Colleges.

55. Section 8(3) of the Bill inserts a new section 7C into the 2005 Act. New section 7C(1) enables the Scottish Ministers to assign colleges of further education to a regional strategic body by order. Paragraph 6(21) of the schedule to the Bill amends section 35 of the 2005 Act (interpretation). A definition of “college of further education” is inserted into section 35 of the 2005 Act. “College of further education” is defined as the governing body of a body (a) by which fundable further education or fundable higher education is provided and (b) which is not a higher education institution. Under new section 7C(4) an order under new section 7C(1) could remove the college from the list of fundable bodies in schedule 2 to the 2005 Act and make such other provision in relation to the college as the Scottish Ministers consider appropriate. New section 7C(5) specifies the persons the Scottish Ministers must first consult before making such an order.

56. New section 7C(2) of the 2005 Act requires the SFC to propose or approve the assignation of a college to a regional strategic body, except where the college concerned is a fundable body, or where the college is assigned to another regional strategic body, immediately before the order. This means that colleges in multi-college regions that are currently fundable bodies (or have previously been assigned to a regional strategic body) can be assigned at the time regional strategic bodies are given their functions.

57. New section 7C(3) of the 2005 Act provides that when proposing or approving the assignment of a college, the SFC should consider the matters set out in section 7(2) of the 2005 Act. These are the same matters the SFC must consider when considering whether to propose or approve the addition of a learning provider to the list of fundable bodies.

58. New section 7C(5A) provides that the SFC may review whether an assigned college continues to satisfy the criteria set out section 7(2) of the 2005 Act. New section 7C(5B) outlines the actions the SFC must take on completing such a review.

59. New section 7C(6) of the 2005 Act provides that any references to a regional strategic body's colleges are references to colleges assigned to the body by order.

Section 9: Funding of and by regional strategic bodies

60. Section 9(1) of the Bill amends section 12 of the 2005 Act (Funding of fundable bodies). The amendments enable the SFC to fund fundable post-16 education bodies and regional strategic bodies. The SFC would be able to fund regional strategic bodies for any purpose. This is, however, constrained in practice by the powers of the regional strategic bodies themselves.

61. Section 9(2) of the Bill confers responsibility on regional strategic bodies to administer funds. The Bill achieves this by inserting new sections 12A and 12B into the 2005 Act.

62. New section 12A of the 2005 Act specifies the funds a regional strategic body is responsible for administering. This is similar to the existing provision made for the SFC in section 11 of the 2005 Act.

63. New section 12B of the 2005 Act confers powers on a regional strategic body to make grants, loans or other payments. This is similar to the existing provision made for the SFC in section 12 of the 2005 Act.

64. New section 12B(1) of the 2005 Act specifies the persons and activities in respect of which regional strategic bodies can support financially. These include the provision of fundable further and fundable higher education by colleges assigned to the regional strategic bodies.

65. Section 12B(2) and (3) of the 2005 Act enables a regional strategic body to impose terms and conditions when it makes a payment under new section 12B(1) of the 2005 Act.

66. Under section 12B(4) a condition imposed under new section 9(5A) of the 2005 Act must make provision that will apply if the colleges fails to comply with the requirement in section 9(6) of the 2005 Act. Paragraph 6(6) of the schedule to the Bill makes various amendments to section 9 of the 2005 Act including inserting new section 9(5A) and amending section 9(6). Section 12B(6) provides that terms and conditions may only be imposed in relation to funds provided to the college by the regional strategic body.

67. Section 12B(7) specifies the persons a regional strategic body must first consult before imposing terms and conditions (unless the body considers that it not expedient to do so).

68. Section 12B(8) specifies certain matters to which a regional strategic body must have regard in making payments.

Section 10: Regional strategic bodies: functions

69. Section 10 of the Bill confers functions on regional strategic bodies. The Bill achieves this by inserting new sections 23C to 23L into the 2005 Act (section 10(1) of the Bill). Some of the duties being conferred are similar to new duties being placed on regional colleges.

70. Under the present 2005 Act, the SFC has certain functions over the bodies which the SFC directly funds. In the main the SFC will not have functions over colleges in multi-college regions, as the SFC will no longer directly fund them (although there are a few exceptions, such as in relation to assessing and enhancing quality of education). One of the intentions behind section 10(1) of the Bill is to confer on regional strategic bodies similar functions over the colleges they will fund.

71. New section 23C of the 2005 Act places a duty on a regional strategic body to exercise its functions with a view to securing high quality “fundable further education” and “fundable higher education” in the localities of its colleges. These terms are defined in section 5 of the 2005 Act. The duty is framed to recognise that colleges are not the sole providers of such education in their localities. New section 23A(1) of the 2005 Act places a similar duty on regional colleges. The SFC has a similar duty in section 3 of the 2005 Act.

72. New section 23D of the 2005 Act places a duty on a regional strategic body to plan for how it proposes its colleges should provide fundable further education and fundable higher education and how it intends to exercise its functions. Colleges assigned to a regional strategic body must have regard to any such plans when exercising their functions. When it makes such plans, a regional strategic body must have regard to the importance of ensuring that its funds are used as economically, efficiently and effectively as possible.

73. New section 23E of the 2005 Act places a duty on a regional strategic body to monitor the performance of its colleges. New section 23E(2) sets out what this may include. New section 23E(2)(a) provides that monitoring performance may include monitoring or assessing the quality of fundable further education and fundable higher education provided by the colleges. This new section is in addition to section 13 of the 2005 Act, which gives the SFC the function of securing that provision is made for assessing and enhancing the quality of further education and fundable higher education provided by post-16 education bodies. The SFC duty would therefore extend to such education provided by colleges assigned to a regional strategic body. In meeting this duty, the SFC currently secures the services of Education Scotland to review colleges. The SFC will retain this function in respect of quality to enable such services to be secured across all of Scotland’s funded colleges (whether funded directly by the SFC or by a regional strategic body). It is expected that the regional strategic body, in fulfilling the section 23E duty, would rely on reports of Education Scotland. The body would also have powers to require information from colleges under new section 23K(1) of the 2005 Act. New section 23E(3) provides that a regional strategic body must, when considering whether to take action to monitor the performance of colleges, seek to avoid unnecessary duplication with any action of Scottish Ministers (Education Scotland is an Executive Agency of the Scottish Government) or the SFC.

74. New section 23F of the 2005 Act requires a regional strategic body to promote the use by colleges assigned to it of the Scottish Credit and Qualification Framework (which has been adopted by the SFC). The SFC has a similar duty in section 14 of the 2005 Act.

75. New section 23G of the 2005 Act enables a regional strategic body to have efficiency studies conducted into the operations of any college assigned to it. The SFC has a similar power in section 15 of the 2005 Act.

76. New section 23H of the 2005 Act gives a regional strategic body a right in certain circumstances to attend and address meetings of the governing body of colleges assigned to it. The SFC has similar rights in section 16 of the 2005 Act.

77. New section 23I of the 2005 Act sets out certain matters a regional strategic body must have regard to when exercising its functions. Regional colleges have a similar duty in new section 23BA of the 2005 Act. The SFC has a similar duty in section 20 of the 2005 Act.

78. New section 23J(1) of the 2005 Act places a duty on a regional strategic body to consult specified persons in relation to the exercise of its functions where the body considers it appropriate to do so. The list can be amended by order made under new section 23J(4). However, new section 23J(5) provides that the Scottish Ministers cannot modify the entries for colleges (section 23J(1)(a)) trade union representatives (section 23J(1)(b)) or students' associations (section 23J(1)(c)). New section 23B(3) of the 2005 Act places a similar duty on regional colleges. The SFC has a similar duty in section 22 of the 2005 Act.

79. New section 23J(3) places a duty on a regional strategic body to seek to secure the collaboration of specified persons, so far as is consistent with the proper exercise of the regional strategic body's functions. New section 23B(5) places a similar duty on regional colleges. The SFC has a similar duty in section 22 of the 2005 Act. The list of persons in section 23J(3) can be amended by the Scottish Ministers by order made under new section 23J(4). However, in terms of section 23J(5) the Scottish Ministers cannot modify the entry for the regional strategic body's colleges (section 23J(3)(a)). New section 23J(6) requires the regional strategic body to promote collaboration between its colleges, and between its colleges and other post-16 education bodies, in relation to the provision of fundable further and fundable higher education.

80. New section 23K(1) of the 2005 Act places a duty on colleges assigned to a regional strategic body to provide that body with such information as the strategic body may reasonably require. Fundable bodies (and others including colleges assigned to regional strategic bodies) are similarly required to provide the SFC with information by virtue of section 22(4) of the 2005 Act.

81. New section 23K(2) to (7) of the 2005 Act enables a regional strategic body to issue directions (of a general or specific nature) to incorporated colleges assigned to it, which the colleges must comply with. New section 23K(4) specifies the persons a regional strategic body must first consult before giving such directions.

82. New section 23L(1) of the 2005 Act enables a regional strategic body to require the transfer of property, rights, liabilities or obligations of an incorporated college assigned to it

either to another of its colleges or to itself. New section 23L(2) outlines the purposes for which such a requirement may be made. It would enable, for example, staff etc to be transferred from one college in a region to another, to consolidate particular programmes of learning in particular colleges and staff etc to be transferred from colleges to the regional strategic body to enable that body to provide services to those colleges (e.g. finance and human resource management). New section 23L(5) specifies the persons a regional strategic body must first consult before making such a requirement.

83. New section 23L(3) enables a regional strategic body to transfer any of its staff etc to any college assigned to it or to a regional college or to another a regional strategic body in circumstances specified in section 23L(2)(b) or (c). Situations in which such a power could be used include the following. Where a regional strategic body was delivering shared services (such as finance and human resource management) to its colleges and one of those colleges was to be designated a regional college, a regional strategic body may wish to transfer staff etc. to the college to enable the college to deliver such services for itself. New section 23L(5) specifies the persons a regional strategic body must first consult before making such an arrangement. A regional strategic body may wish to transfer staff etc to another regional strategic body or a regional college to enable services to be delivered across regions.

84. The provisions of the Bill in relation to the transfer of property by incorporated colleges assigned to a regional strategic body are intended to ensure that such colleges will not be excluded from meeting the charity test set out in section 7 of the Charities and Trustee Investment (Scotland) Act 2005 (“the Charities Act”). In terms of section 7(4)(a) a body is excluded from meeting the charity test where its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose that is not a charitable purpose). While it is not known whether a regional strategic body would seek to become a charitable body, new section 23L(6) ensures that the provisions to transfer property and rights do not adversely affect the ability of colleges to remain as or of regional strategic bodies to become charities, as the subsection requires that any property transferred is to be applied for the purpose of the advancement of education (which is a charitable purpose).

85. New section 23L(8) of the 2005 Act provides that any requirement under section 23L(1) by a regional strategic body to transfer property to a college or to the regional strategic board requires the consent of a non-incorporated college. The consent of an incorporated college is not required.

REGIONAL BOARDS

Section 11: Regional boards: constitution

86. Section 11(1) and (2) of the Bill makes provision for the constitution and general powers of regional boards. The Bill achieves this by inserting a new section 23M and new schedule 2B into the 2005 Act.

87. The new schedule 2B sets out details of the status, membership and procedures of the regional boards. For example, it defines their membership, the provisions for appointing the chief officer and other staff and provision for committees and accounts.

88. The general powers of the regional boards are set out in paragraph 14 of schedule 2B. The SFC has similar powers in section 23 of the 2005 Act.

89. Paragraph 18 of schedule 2B enables the Scottish Ministers to modify the schedule by order. Paragraph 18(2) specifies the persons the Scottish Ministers must first consult before making an order.

Section 12: Regional boards: mismanagement

90. Section 12 of the Bill makes provision for the removal of members of regional boards by inserting a new section 23N into the 2005 Act. New section 23N enables the Scottish Ministers to remove by order any or all of the members of a regional board in circumstances where it appears to the Scottish Ministers that such a board:

- a) has committed or is committing a serious breach of any term or condition of grant made to it either by the SFC. Such a breach may be a one-off breach;
- b) has committed or is committing repeated breaches of such terms or conditions;
- c) has failed, or is failing to properly discharge its responsibility to administer funds or discharge any of its duties properly; or
- d) has managed or is mismanaging its financial or other affairs.

91. As regional boards are not required to meet the criteria to be a fundable post-16 education body (because they are not a learning provider), there is no similar provision in new section 23N along the lines of that in amended section 24(1)(b) of the 1992 Act, which enables the Scottish Ministers to remove board members of regional colleges if those colleges fail to meet such criteria.

92. Under new section 23N(2), the Scottish Ministers may in such circumstances remove by order any or all board members and where those persons are not the staff or student members, appoint other persons in their place. New section 23N(4) provides that such appointments are treated as if they were made under the usual provisions for such appointments. This means that relevant provisions regarding eligibility, length of service etc. apply to them.

Section 13: Establishment and abolition of regional boards: supplemental

93. Section 13 of the Bill inserts new section 23O into the 2005 Act. New section 23O(1) and (2) of the Bill allow Scottish Ministers to make arrangements in relation to the establishment of regional boards either in advance of the coming into force of the provisions in section 8 of the Bill, or in the future before an order is made under section 7B of the 2005 Act. Scottish Ministers may in particular appoint persons as regional board members who are to hold office as if appointed under the new paragraph 3(2)(a) or (e) of the new schedule 2B to the 2005 Act.

94. New section 23O(3) specifies the particular provisions that an order (made under section 7C of the 2005 Act) to abolish a regional board may contain. This includes the transfer of the regional board's staff, property, right, liabilities or obligations.

95. New section 23O(4)(a) ensures any property and rights that were used before the transfer for the advancement of education continue to be used for this purpose. While it is not known whether a regional board would seek to become a charitable body, this provision ensures that the provisions to transfer property and rights do not adversely affect its ability to become a charity.

96. New section 23O(4)(b) ensures that a transfer to a person other than the Scottish Ministers can only occur if the person to whom the transfer is being made has consented to that transfer.

FURTHER EDUCATION INSTITUTIONS: GOOD GOVERNANCE

Section 13A: Further education institutions: good governance

97. Section 9(1) of the 2005 Act gives the Scottish Ministers powers to make grants to the SFC and under section 9(2) the Scottish Ministers are able to attach terms and conditions to such grants. Section 13A of the Bill amends the 2005 Act by introducing new section 9AA.

98. New section 9AA(1) provides that terms and conditions of grant under section 9(2) may include a condition that the SFC must, when making a payment to a college of further education that is a fundable post-16 education body under section 12(1) of the 2005 Act (SFC's power to make grants, loans or other payments) impose on that college a condition that it must comply with any principles of governance which the SFC considers to constitute good practice in relation to colleges of further education. Such colleges are eligible for funding directly by the SFC. These would be regional colleges and other SFC directly funded colleges, e.g. Newbattle Abbey College.

99. New section 9AA(2) provides that terms and conditions of grant under section 9(2) may include a condition that the SFC must, when making a payment to a regional strategic body under section 12(1) of the 2005 Act (SFC's power to make grants, loans or other payments), impose on that regional strategic body a condition that the regional strategic body either: (a) comply with any principles of governance which the SFC considers to constitute good practice in relation to such a body or (b) impose conditions when making a payment under section 12B(1) (regional strategic body's power to make grants, loans or other payments) to a college assigned to it requiring the college to comply with any principles of governance which the SFC considers to constitute good practice in relation colleges of further education.

100. There is similar provision for higher education institutions in new section 9A of the 2005 Act, inserted by section 2 of the Bill (see paragraph 8 above).

101. A consequential amendment to section 9 of the 2005 Act in connection with new section 9AA is made by paragraph 6(6)(h) of the schedule to the Bill.

REVIEW OF FURTHER AND HIGHER EDUCATION

Section 14: Review of further and higher education

102. Section 14 of the Bill amends the 2005 Act to insert new section 14A.

103. New section 14A(1) of the 2005 Act empowers the SFC, subject to Scottish Ministers giving their consent, to review the extent to which fundable further education or fundable higher education is being provided by post-16 education bodies in a coherent manner.

104. New section 14A(2) provides that such a review may relate to any aspect of the funding or provision of fundable further education or fundable higher education (and that aspect can focus on particular areas or be more general), or to any aspect of the legislation or administrative framework governing the funding or provision of fundable further or higher education.

105. New section 14A(3) provides that when the SFC is seeking the consent of the Scottish Ministers to conduct a review it must provide the Scottish Ministers with a case for review setting out the proposed scope of the review which the SFC wishes to carry out. Section 14A(3) also provides that the case for review must explain why the SFC considers that any pre-conditions to the conducting of a review which the Scottish Ministers are empowered to set are met.

106. New section 14A(3A) provides that, when conducting a review under section 14A(1), the SFC must consult and lists the people who must be consulted.

107. New section 14A(4) and (5) provide that post-16 education bodies and regional strategic bodies are required to provide the SFC with such information as the SFC may reasonably require for the purposes of conducting a review. Such bodies are also required to make available to the SFC for inspection such accounts and other documents as the SFC may require for the purposes of conducting a review.

108. New section 14A(6) provides that once the SFC has completed a review it must submit a report to the Scottish Ministers and any post-16 education body and regional strategic body to which the review relates setting out the conclusions it has reached, the reasons for those conclusions and any recommendations it has for action.

109. New section 14A(7) provides that in conducting a review the SFC must have regard to ensuring that public funds provided for fundable further education and fundable higher education are used as economically, efficiently and effectively as possible.

INFORMATION ABOUT YOUNG PEOPLE'S INVOLVEMENT IN EDUCATION AND TRAINING

Section 15: Duty to provide information to Skills Development Scotland

110. Section 15 of the Bill is about the provision of information to and by Skills Development Scotland (SDS). Section 15(1) gives power to the Scottish Ministers, by means of an order, to require a person to provide information held about a young person to SDS for certain purposes. Those purposes are set out in subsection (1) and relate to SDS's functions. Subsection (4) defines "young person" for the purposes of this section, which captures 16 to 24 year olds.

111. Section 15(2) allows an order (under section 15(1)) to set out the detail of the persons who are to be required to give information (and the intention is that this will be used to specify other organisations that have responsibilities for providing learning and training to young

people), the information to be given and the form and manner in which the information is to be given.

112. Section 15(2A) gives power to the Scottish Ministers, by means of an order, to require SDS to provide information it holds about a young person to such persons who provide education or training to young persons as may be specified in the order.

113. Section 15(2B) provides that an order made under section 15(2A) may specify the information, or type of information, which must be provided and the form and manner in which it must be provided.

114. There is a requirement in section 15(3) for SDS, and any person required to give information, to have regard to any guidance that the Scottish Ministers may issue about giving or using that information.

115. Section 15(5) gives a further order making power to the Scottish Ministers. That is a power to modify the references to SDS within section 15. The expectation is that this power would be used where SDS had a change of name or where another organisation took on the functions that are currently carried out by SDS.

116. Section 15(7), (9) and (10) make supplementary provision about the order making powers in section 15.

117. Requirements imposed using the power in section 15(1) will not affect the operation of other legislative requirements relating to the sharing of data such as those contained within the Data Protection Act 1998. However, requirements imposed under this section might provide a legal basis for the sharing or using of data under that Act.

GENERAL

Section 16: Modification of enactments

118. Section 16 of the Bill introduces the schedule to the Bill which sets out minor consequential amendments to, and modifications of, other enactments as a result of the Bill. Some of the amendments, particularly in relation to the changes made by paragraph 2(4) of the schedule in relation to the provisions on boards of management of incorporated colleges, are explained in more detail above.

Paragraph 2(2)(b) of schedule – remuneration of chairs of regional colleges.

119. A regional college board is to pay its chair such remuneration as the Scottish Ministers may determine. There is similar provision for the chairs of regional boards in new paragraph 8(1) of new schedule 2B to the 2005 Act.

Paragraph 6(5) of schedule – orders under sections 7A to 7C: supplemental

120. New section 7D(2) of the 2005 Act allows Scottish Ministers, when making orders under section 7A(1) or 7C(1) of the 2005 Act, to make provisions in relation to the boards of

management of incorporated colleges or to make such additional provision as is considered necessary in relation to the change of status of the college. In such an order the Scottish Ministers can make provision about the continuation in office or removal from office of any existing board members once the college's status changes, or about the appointment by the Scottish Ministers of persons as board members, or about deeming any persons who continue in office or who are appointed to hold office as if appointed under the new paragraph 3 or 3A of Schedule 2 to the 1992 Act.

121. In making orders to designate an incorporated college as regional or in assigning colleges to a regional strategic body these provisions require the Scottish Ministers to seek to ensure that every incorporated college is one or the other. Given that it is necessary for the proper functioning of a board that it is one or the other, provision is made for the possible failure of the Scottish Ministers to discharge this responsibility. In such circumstances an incorporated college is to be treated as being designated as a regional college. There is a proviso which enables the Scottish Ministers to make contrary provision. This is to enable the Scottish Ministers, if necessary, to keep some colleges under existing governance arrangements until such time as they are able to be designated as a regional college (or not), perhaps because merger is imminent.

Paragraph 6(9) of schedule – amendment to section 13 of the 2005 Act

122. The SFC duty in section 13 of the 2005 Act is amended to reflect other changes made by the Bill. The duty is now to secure provision for assessing and enhancing the quality of fundable further and higher education provided by fundable bodies and also colleges assigned to a regional strategic body.

Section 17: Ancillary provisions

123. Section 17 of the Bill gives the Scottish Ministers the power, by order, to make supplemental, incidental, consequential, transitional, transitory or saving provisions for the purpose of giving full effect to the Bill.

Section 18: Commencement

124. Section 18 of the Bill deals with commencement of its provisions. Sections 17 to 19 come into force on the day after Royal Assent. The coming into force of section 17 of the Bill will allow the Scottish Ministers, by order, to make supplemental, incidental, consequential, transitional, transitory or saving provisions for the purpose of giving full effect to the Bill. Other provisions of the Act will be brought into force by order by the Scottish Ministers at different times.

Section 19: Short title

125. Section 19 of the Bill provides that the short title of the Act is the Post-16 Education (Scotland) Act 2013.

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

POST-16 EDUCATION (SCOTLAND) BILL

REVISED EXPLANATORY NOTES

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.uk

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS Group Scotland.

ISBN 978-1-78351-416-8