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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Tertiary Education and Training (Funding and Governance) (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 18 Marchⁱ and 29 Aprilⁱⁱ 2025, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers in the Tertiary Education and Training (Funding and Governance) (Scotland) Bill ("the Bill") at Stage 1.
2. The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.
3. This Bill was introduced by the Scottish Government on 5 February 2025. The lead committee is the Education, Children and Young People Committee.

Overview of the Bill

4. Currently, there are three principal public bodies which help to run Scotland's tertiary (post-school) education and skills system. These are the Scottish Further and Higher Education Funding Council ("the SFC"), Skills Development Scotland ("SDS") and the Student Awards Agency Scotland ("the SAAS").
5. The Policy Memorandum states that:
 - ” the primary policy objective of the Bill is to enable funding for tertiary education and training provision to be more responsive to the needs of learners and the economy. The Bill does this by consolidating responsibility for securing and funding all forms of tertiary education and training provision, including National Training Programmes ("NTPs"), apprenticeships and work-based learning in a single public body, the SFC. This will simplify the funding landscape by reducing the number of bodies involved in tertiary education and training.
6. The SFC currently has statutory functions for the securing and funding of further and higher education provision and research. This Bill will extend SFC's statutory functions to include those functions currently exercised by SDS with regard to the provision and funding of NTPs, apprenticeships and work-based learning.
7. The Bill consists of 25 sections in 4 parts. The detail of the sections/paragraphs conferring powers to Scottish Ministers are detailed in the delegated powers section of this paper. A summary of the 4 parts of the Bill is outlined below.
8. Part 1 amends the Further and Higher Education (Scotland) Act 2005 ("the 2005 Act"), which established the SFC, by conferring new functions on the SFC to secure and fund the delivery of NTPs, apprenticeships and work-based learning. This part also amends several of the SFC's supporting functions in relation to the fundable bodies.
9. Part 2 reforms the governance arrangements of the SFC to improve the arrangements for reappointing members of the SFC and to adjust the matters to

ⁱ Roz McCall MSP submitted her apologies for this meeting.

ⁱⁱ Bill Kidd MSP submitted his apologies for this meeting; Rona MacKay MSP attended in his place.

which the Scottish Ministers are to have regard when appointing members to the SFC. This part also gives the SFC powers to co-opt additional members to provide advice or challenge on particular topics on a limited-term basis; and requires that the SFC establishes a new apprenticeship committee to assist with the administration of its new functions.

10. Part 3 provides for Scottish Ministers to designate private providers of further and higher education for the purposes of providing student financial support. A number of students undertake further and higher education courses run by approved private providers based in Scotland or elsewhere in the UK. These are education providers that are not colleges or higher education institutions receiving public funding in terms of the 2005 Act. This provides for Scottish Ministers to designate private providers as providing a course of education so that students at that private provider can be considered for student support.
11. Part 4 contains the final and general provisions for the Bill – interpretation, ancillary provision, regulation-making powers, commencement and short title.

Delegated Powers

12. The Bill confers 13 powers to make subordinate legislation on the Scottish Ministers.
13. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and for the procedure chosen.
14. This Bill contains 2 powers to issue guidance and directions, which have a legal effect, but which are not enshrined in legislation and are not subject to parliamentary oversight. Such devices are sometimes known as “quasi-legislation” because they do not have the status of law however legal consequences may follow if breached.

Guidance

15. It is not unusual for a Bill to confer a power to Scottish Ministers to issue guidance about how something under the Bill, or connected with its subject matter, is to be done. Further it is not unusual to require that a body performing a function under the Bill must have regard to guidance issued by Scottish Ministers in the performance of that function.
16. Guidance of this kind can have legal effect because of the provisions of the statute that authorises its issue and because of the application by the courts of the ordinary principles of administrative law.
17. Guidance takes three principal forms: pure guidance (guidance which simply assists but does not direct), guidance that those to whom it is directed “must have regard to”, and mandatory guidance (guidance which must be complied with). The second and third of these may be said to have legislative effect.
18. The Bill contains one power to issue guidance, to which the fundable bodies and any other person in receipt of funding under the new functions conferred by the Bill (NTPs, apprenticeships and work-based learning) “must have regard to” (section 10 inserting section 17A into the 2005 Act).

“Must have regard to”

19. The duty to “have regard to” guidance requires those to whom it is directed to apply their mind to it. This does not amount to an obligation to comply; persons subject to the duty could consider the guidance and reject its application in a particular set of circumstances. However, if a person to whom such guidance was directed were to disregard it, they would be vulnerable to legal challenge by way of an action for judicial review. If so challenged, they would need to be able to show that they had adequately considered the guidance and that, if they decided not to follow it, they had justifiable reasons for not doing so in the circumstances.
20. Because such guidance has legal effect, careful consideration should be given to whether it should be subject to some form of parliamentary scrutiny. This is because, although there is an element of choice, a requirement “to have regard to” guidance carries with it an expectation that the guidance will be followed unless

there are compelling reasons for not doing so.

21. When drafting a delegated powers memorandum for a bill which includes powers to issue guidance, the Scottish Government must clearly explain and justify the character of the guidance. The DPM describes the guidance which is anticipated under this Bill in terms that those to whom it is directed must have regard to it and therefore gives that guidance a quasi-legislative character.

Directions

22. One provision of this Bill would extend the power for Scottish Ministers to give “directions” to direct the SFC or any other body or person to administer sums provided by Scottish Ministers for student support (section 19 modifying section 73ZA(3) of the Education (Scotland) Act 1980).
23. As with guidance, it is not unusual for Bills to empower Scottish Ministers to give directions to a specified body about how particular functions are to be exercised. Directions are a form of quasi-legislation in that they create legal obligations on parties to whom they are directed, but they are not subject to any parliamentary scrutiny.

Committee consideration of delegated powers

24. At its meeting on Tuesday, 18 March, the Committee was content with the following 12 delegated powers:
- Section 4 inserting new section 12E(1)(d) into the Higher Education (Scotland) Act 2005 (“the 2005 Act”): power to set out criteria for Scottish apprenticeships
 - Section 4 inserting new section 12E(2) into the 2005 Act: power to modify definition of Scottish apprenticeships
 - Section 4 inserting new section 12F(4) into the 2005 Act: power to make provision about apprenticeship frameworks
 - Section 4 inserting new section 12G(5) into the 2005 Act: power to make provision on requests for apprenticeship frameworks
 - Section 4 inserting new section 12H(4) into the 2005 Act: power to make provision about the process for requesting and issuing apprenticeship certificates
 - Section 5 inserting new section 12I(5) into the 2005 Act: power to make further provision on work-based learning
 - Section 5 inserting new section 12J(3)(b) into the 2005 Act: power to set out criteria for training providers for the purposes of funding
 - Section 7 inserting new section 14B(1) into the 2005 Act: power to set out matters for notification by post-16 education bodies to the SFC
 - Section 18 inserting new section 74A(4) into the Education (Scotland) Act 1980 (“the 1980 Act”): power to make further provision on the designation process for higher and further education providers

- Section 19 modifying 73ZA(3) of the 1980 Act: power to make directions
 - Section 22: Ancillary provision
 - Section 24: Commencement.
25. However, the Committee agreed to write to the Scottish Government to raise questions in relation to the following delegated power:
- Section 10 inserting new section 17A into the 2005 Act: power to issue guidance.
26. The Committee [wrote](#) to the Scottish Government on 19 March and received a [response](#) on 1 April 2025.
27. All the powers are discussed further below.

Review of relevant powers

Section 4 inserting new section 12E(1)(d) into the 2005 Act: power to set out criteria for Scottish apprenticeships

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

28. New section 12E(1) provides a definition of a Scottish apprenticeship as an arrangement where an apprentice works for another person for reward in an occupation or activity included in a Scottish apprenticeship framework; the apprentice receives training to meet the relevant requirements specified in a Scottish apprenticeship framework; there is an apprenticeship agreement between the apprentice and the employer; and any other criteria set out in regulations made by the Scottish Ministers are satisfied. New section 12E(1)(d) therefore provides a power for Scottish Ministers to set out additional criteria which a Scottish apprenticeship must fulfil.

Committee consideration

29. The Scottish Government sets out in the DPM that the reason for taking this power is to give Scottish Ministers the ability to set additional criteria to respond to developments in apprenticeship policy in Scotland, or elsewhere in the UK. Examples of additional criteria provided could be the appropriate duration for an apprenticeship, the proportion of the training which should be off-the-job, and residency or the location of work to ensure that Scottish public funding is used to benefit the Scottish people and economy.
30. It is the Scottish Government's view that these matters are not suitable for primary legislation, as they are unlikely to be the same across all apprenticeships and Scottish Ministers require the ability to be flexible and targeted as necessary. Regulations also allow for a more nuanced approach across different occupations or activities and there may be new types of apprenticeship arrangement which emerge in future for which additional criteria are important.
31. Further, the Scottish Government considers the negative procedure is appropriate because the regulations will only provide further refinement to the core definition of a Scottish apprenticeship set out in the primary legislation.
32. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure.

33. The Committee finds the power acceptable in principle and is content that it

is subject to the negative procedure.

Section 4 inserting new section 12E(2) into the 2005 Act: Power to modify definition of Scottish apprenticeships

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

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

Committee consideration

35. The Scottish Government sets out in the DPM that the reason for taking this power is to allow Scottish Ministers to change the definition of a Scottish apprenticeship if required. This is to allow for the possibility of new types of apprenticeship arrangement which may emerge in future and for which the current criteria might be restrictive. Examples provided include expanding apprenticeships to include self-employed individuals or voluntary work; the need to amend to reflect changing patterns of employment or the terminology of an occupation or activity; or where it may be helpful or necessary to respond to policy and legislative changes in England, Wales or Northern Ireland.
36. Further, the Scottish Government considers the affirmative procedure is appropriate because these regulations can modify primary legislation and could have the effect of changing the core definition of a Scottish apprenticeship. The affirmative procedure ensures that such changes would be subject to more extensive Parliamentary scrutiny and approval.
37. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the parliamentary scrutiny that the affirmative procedure affords.

38. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 4 inserting new section 12F(4) into the 2005 Act: power to make provision about apprenticeship frameworks

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

39. New section 12F provides for the SFC to prepare and publish Scottish apprenticeship frameworks (which it can also amend or revoke). The frameworks set out the requirements for a Scottish apprenticeship in different occupations or activities and include the required standards or qualifications to be achieved and the required types or amount of training. New section 12F(4) gives Scottish Ministers a power to make further provision about what requirements are to be specified in an apprenticeship framework and the process to be followed by the SFC in preparing, publishing, amending, and revoking the frameworks.

Committee consideration

40. The Scottish Government sets out in the DPM that the reason for taking this power is for Scottish Ministers to specify additional detail about the requirements for Scottish apprenticeships. Examples provided include the duration of the apprenticeship and the outcomes, skills and qualifications to be attained. Scottish Ministers will also set out the process to be followed by the SFC in preparing frameworks to ensure that apprentices, employers and others are properly consulted in their development and that they reflect the needs of the relevant sector or occupation. This process is to be developed with input from the SFC, apprentices, employers and others, before being set out in regulations.
41. It is the Scottish Government's view that this power is also required as frameworks may also need to be adjusted from time to time as the apprenticeship programme evolves and because of changes in relevant requirements, curricula, qualifications and awarding bodies. This will affect what is to be set out in frameworks.
42. Further, the Scottish Government considers the negative procedure is appropriate because these regulations will only be used to provide additional detail about what Scottish apprenticeship frameworks are to include and to set out procedural matters for the SFC to follow in making, amending or revoking such frameworks.
43. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure. The Committee also welcomes that the process to be developed will ensure that apprentices, employers and others are properly consulted in the development of frameworks and that they reflect the needs of the relevant sector or occupation.

44. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.

45. The Committee welcomes that apprentices, employers and others are to be consulted in the development of apprenticeship frameworks.

Section 4 inserting new section 12G(5) into the 2005 Act: power to make provision on requests for apprenticeship frameworks

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

46. New section 12G(1) of the 2005 Act allows persons to request that the SFC prepares an apprenticeship framework or amends an existing one. New section 12G(3) gives the SFC the power to charge a reasonable fee to cover the cost of preparing or amending a framework as requested. New section 12G(5) gives the Scottish Ministers the power to make regulations governing the process to be followed by the SFC in responding to requests and the amount of fee that may be charged and circumstances in which it is to be waived.

Committee consideration

47. The Scottish Government states in the DPM that the power is needed to set out the process to be followed by the SFC, the reasonable fees that may be charged, and the circumstances in which a fee may not be charged, in a clear and transparent manner. The Scottish Government considers it appropriate for these details to be set out in regulations, rather than on the face of the Bill, as they relate to procedural detail which will require to be worked through and may need to be responsive to demand. It is also likely that the Scottish Ministers will need to update the regulations from time to time and to change the amount of fee payable.
48. Further, the Scottish Government considers the negative procedure is appropriate because the regulations will be procedural in nature and set out the process to be followed in making administrative decisions around requests to prepare or amend a framework.
49. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure.

- 50. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 4 inserting new section 12H(4) into the 2005 Act: Power to make provision about the process for requesting and issuing apprenticeship certificates

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

51. New section 12H(1) of the 2005 Act allows an individual who is, or has been an apprentice, or another person on their behalf, to apply to the SFC for an

apprenticeship certificate. New section 12H(3) allows the charging of a reasonable fee by the SFC for issuing a certificate and new section 12H(4) gives a power to the Scottish Ministers to set out in regulations the process for requesting and issuing certificates and the amount of fee that can be charged.

Committee consideration

52. The Scottish Government sets out in the DPM that the power is needed to set out the process to be followed by the SFC and the fees that may be charged. Also, that this procedural detail would not be appropriate for the face of the Bill as it is likely to change from time to time, for example to change the amount of fee payable.
53. Further, the Scottish Government considers the negative procedure is appropriate because the regulations will simply set out the procedural aspects of requesting and issuing apprenticeship certificates.
54. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure.

55. **The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 5 inserting new section 12I(5) into the 2005 Act: power to make further provision on work-based learning

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

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

Committee consideration

57. Work-based learning is defined as training received by an individual in a working environment, and on the basis of a work-based learning agreement which sets out the educational and vocational standards to be met by that individual and provides for the individual to receive education and training in order to meet those standards. This will be capable of encompassing a variety of learning circumstances, including school pupils attending college and workplaces in order to gain experience and qualifications. This also includes arrangements which are currently known as foundation apprenticeships.

58. The Scottish Government sets out in the DPM that the reason for taking this power is to enable Scottish Ministers to make further provision about what constitutes work-based learning to allow for flexibility; and for it to be capable of evolving with the school curriculum and changes in pre-employment pathways. Also, definitions are likely to need to be adjusted from time to time to stay in step with further evolution of policy or practice.
59. Further, the Scottish Government considers the negative procedure is appropriate because this power is simply refining the scope of work-based learning and allows for the flexibility to provide supplementary detail as to what constitutes work-based learning beyond that set out in new section 12I.
60. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure.
- 61. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 5 inserting new section 12J(3)(b) into the 2005 Act: power to set out criteria for training providers for the purposes of funding

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

62. New section 12J(3) defines the term “training provider” broadly for the purposes of the Bill as a person who provides either work-based learning or the training of an apprentice under a Scottish apprenticeship framework. New section 12J(3)(b) gives the Scottish Ministers the power to set out further criteria for providers.

Committee consideration

63. The Scottish Government sets out in the DPM that the reason for taking this power is to enable Scottish Ministers to set out further criteria to ensure that training providers meet certain standards or requirements which may vary by class of provider or other circumstances. There is a potential need for additional criteria which are better suited to regulations, not least because of potential changes to the way in which the SFC might secure training provision. For example, the type and extent of additional criteria may depend on whether the SFC secures training provision by grant or procurement or hybrid, with variation by type of provider: public and private sector.
64. Also, criteria may require to be adjusted from time to time reflect evolving policy or practice, which may affect the types or standards of training provider required.
65. Further, the Scottish Government considers the negative procedure is appropriate

because this power is only adding additional requirements beyond those set out section 12J(3)(a) to ensure certain standards or requirements are met.

66. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure.

- 67. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 7 inserting new section 14B(1) into the 2005 Act: power to set out matters for notification by post-16 education bodies to the SFC

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

68. Section 7 of the Bill modifies the 2005 Act to include new section 14B which places a duty on post-16 education bodies to notify the SFC of certain matters. New section 14B(1) gives the Scottish Ministers a power to specify those matters and to specify the form and manner notification is to be made to the SFC, including time periods within which the SFC is to be notified.

Committee consideration

69. The Scottish Government sets out in the DPM that the reason for taking this power is to enable Scottish Ministers to prescribe situations where there is potentially serious consequences for post-16 education bodies or to the SFC's ability to perform its functions. In these situations, the SFC would be better positioned to provide assistance with earlier engagement; and it is important that post-16 education bodies proactively notify the SFC of certain developments of which the SFC might otherwise be unaware.
70. Examples provided of the types of situations include where a body has experienced a major data breach through a cyberattack, has reached a certain threshold in a financial viability situation or is planning voluntary or compulsory severance. The intention is that the time periods for notification are sufficient to allow the SFC to take meaningful action to avert further, or unnecessary, cost or harm.
71. Further, the Scottish Government considers the affirmative procedure is appropriate given regulations could potentially place significant obligations on post-16 education bodies. For this reason, new section 14B(2) also places the Scottish Ministers under a duty to consult with the SFC, the post-16 education bodies and any other persons considered appropriate as part of developing the regulations.
72. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation

as to why this power has been taken and that it is subject to the affirmative procedure as this provides appropriate parliamentary scrutiny of the duties to be imposed. The Committee also welcomes that there is a statutory duty to consult with the bodies and persons affected in developing the regulations.

73. The Committee finds the power acceptable in principle and is that it is subject to the affirmative procedure.

74. The Committee welcomes that bodies and persons affected are to be consulted in the developing of regulations.

Section 10 inserting new section 17A into the 2005 Act: power to issue guidance

Power conferred on: Scottish Funding Council

Power exercisable by: Guidance

Parliamentary procedure: None

Provision

75. Section 10 of the Bill modifies the 2005 Act to include new section 17A giving the Scottish Funding Council (“the SFC”) the power to issue guidance to fundable bodies and any other person in receipt of funding under the new functions conferred on the SFC by the Bill. The Bill seeks to consolidate responsibility for securing and funding all forms of tertiary education and training provision, including National Training Programmes (“NTPs”), apprenticeships and work-based learning in a single public body, the SFC.
76. These fundable bodies and persons must have regard to guidance issued in the carrying out of their particular funded activities. Before issuing guidance, the SFC must consult the Scottish Ministers, the bodies or persons to whom the guidance relates and such other persons as the SFC considers appropriate.
77. Guidance issued under these powers would not be subject to any parliamentary procedure.

Committee consideration

78. In relation to the above power, the DPM sets out that this power is to give more structure to existing informal guidance for fundable bodies; and to make clear that the SFC can issue guidance to other persons, including employers and training providers, who receive funding under the SFC’s new functions.
79. The DPM also notes that the Scottish Government considers that no parliamentary procedure is appropriate as it is guidance and not of a regulatory nature. Further, it allows for guidance to be issued and updated quickly, and given that it might be extensive, detailed and non-regulatory, requiring parliamentary scrutiny might not be the best use of parliamentary time.
80. However, fundable bodies and other persons “must have regard to” such guidance

and will be expected to follow it. Such guidance will inform them as to how they will be expected to carry out their activities and there may be consequences for a failure to have regard to the guidance without good reason.

81. The Committee therefore asked the Scottish Government three questions. The first of these was to explain why the power to issue guidance to which bodies or persons must have regard does not specify the type of content that any guidance might include.
82. The Scottish Government responded that, as the Committee had noted, new section 17A gives more structure to existing informal guidance arrangements between the SFC and fundable bodies and this will also enable guidance to be issued to any other person in receipt of funding under the SFC's new functions. The Scottish Government anticipates that this power will be used across the breadth of the SFC's functions for a range of purposes. Examples provided are that guidance might be issued to support institutions, employers and providers in delivery of activities funded by the SFC, or to support the implementation of Scottish Government priorities, such as fair work conditions.
83. Further, the Scottish Government states that the Bill does not specify the type of content that the guidance should include to allow for the SFC to respond to emerging issues, such as issuing guidance on opportunities or threats from artificial intelligence. Its view is that the SFC needs to be able to respond to needs it identifies and to the specific issues or concerns raised by institutions, employers and providers.
84. The second question the Committee asked was, as guidance is to be put on a statutory basis to which bodies or persons must have regard, why does the Scottish Government consider it is appropriate that there is no parliamentary oversight of this guidance.
85. The Scottish Government responded that the duty on those to whom the guidance is addressed is to "have regard" to it, rather than a stricter "must" follow it, which means that an organisation need not follow the guidance, provided they have considered it and have good reason not to. The Scottish Government considers that the duty on organisations is not unduly onerous. Further, the SFC must consult the Scottish Ministers, the bodies or persons to whom the guidance relates and where appropriate, the SFC might consult a wider group of persons, including members and committees of the Scottish Parliament, either directly or through a public consultation. This is more likely to be the case where there is a wider public interest in the topic, perhaps because the guidance has wide application.
86. In the Scottish Government's view, it is right to allow for consultation and engagement with the Scottish Parliament to be considered on a case-by-case basis and that a blanket requirement for every piece of guidance to go through a Scottish Parliamentary process could be a poor use of parliamentary time. As it noted in the Policy Memorandum, consideration was given as to whether the SFC should have the power to issue codes of conduct (which would go a lot further than this guidance power) but this was not taken forward. The Scottish Government believes it has struck the right level of obligation.
87. The third question the Committee asked was, as guidance is to be put on a statutory basis to which bodies or persons must have regard, is it appropriate that,

as well as a duty to consult before issuing guidance and for reasons of transparency and accessibility, that there should also be a duty to publish the guidance rather than publishing being a choice.

88. The Scottish Government responded that the Committee raises an important consideration on transparency and accessibility of information. The Scottish Government anticipates that some of the guidance that the SFC will produce will relate to sensitive matters that will not be suitable for publication, for example, issues relating to fraud or cyberattack that will require careful handling and engagement between the SFC and institutions. For these reasons, the Scottish Government does not think that requiring the SFC to publish all guidance would be in the best interests of the sector, learners or the wider public however, it would expect the SFC to consider whether guidance should be published on a case-by-case basis.
89. In relation to the Scottish Government's response to the first question, the Committee considers that while it is appropriate that the SFC is able to respond to emerging issues either it, or the bodies or persons in receipt of funding raise, it might nevertheless assist the SFC to be given greater direction, on the face of the Bill, as to what type of content such guidance might include. It could also assist those bodies or persons in receipt of funding, and particularly those who have not previously been in receipt of guidance, to understand the type of content that such guidance might include if they must have regard to this. Given that informal guidance has already been provided to fundable bodies in the past, it might be reasonably straightforward for the Scottish Government to include further detail on the face of the Bill as to what this guidance might entail.
90. In relation to the Scottish Government's response to the second question, it is understandable that not all guidance need come before the Parliament. However, the Committee considers that including further detail on the face of the Bill about the type of content of guidance, and when guidance might be subject to parliamentary engagement and consultation, might provide further assurance to Parliament.
91. In relation to the Scottish Government's response to the third question, while it is understandable that not all guidance need be published, it might be helpful to include details on the face of the Bill that guidance, other than where this relates to sensitive or security matters, will be published for reasons of transparency and accessibility.
92. As outlined in the previous section of the report, making guidance subject to a "must have regard to" requirement places those to whom it applies under a statutory duty. Whilst this does not amount to an obligation to comply, if a person to whom such guidance was directed were to disregard it and were challenged, they would need to be able to show that they had at least given adequate consideration to the guidance and that, if they decided not to follow it, they had justifiable reasons for not doing so. The guidance therefore has statutory status and legal consequences can flow from that.
93. The requirement that those to whom it is directed must have regard to it gives that guidance a quasi-legislative character. Given that decisions taken by public bodies may be reviewable and that the guidance will likely have influence on their decision making, the Committee wishes to highlight this guidance making power and the response from the Scottish Government to the lead committee for further

consideration.

94. The Committee notes that it is not uncommon for guidance to be subject to a “must have regard to” requirement and that those to whom it is directed will have to show that they have adequately considered the guidance, and where they decide not to follow it, they had justifiable reasons for not doing so in the circumstances. Whether this requirement is appropriate will depend on the circumstances and the nature of the guidance proposed.

95. In this instance, the Committee considers that there is insufficient detail on the face of the Bill, and in the Scottish Government’s response to the Committee’s questions, as to the type of content this guidance is to contain; the type of guidance it is intended that the SFC would engage and consult with Parliament on; and the type of guidance to be published or not.

96. The Committee draws the attention of the lead committee to guidance making powers in this section. As bodies or persons must have regard to this guidance, the Committee recommends further consideration be given to the level of detail on the face of the Bill in relation to:

- the type of content this guidance is to contain;
- the type of guidance it is intended that the SFC would engage and consult with Parliament on; and
- the type of guidance to be published or not published

97. Further, the lead committee may wish to consider whether it is appropriate for the bodies or persons in receipt of funding to be subject to a duty “to have regard to” the guidance. And if it does consider it appropriate, the lead committee may also wish to recommend that a parliamentary procedure is attached to the guidance or to some of the guidance issued under this power, with the negative procedure most likely being appropriate.

Section 18 inserting new section 74A(4) into the Education (Scotland) Act 1980 (“the 1980 Act”): power to make further provision on the designation process for higher and further education providers

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

98. Under new section 74A Scottish Ministers can designate a private provider of further or higher education on application from that provider. The effect of designation is that the private provider is then treated in the same way as a fundable body for the purposes of considering the eligibility of students at that private provider for student support. New section 74A(4) gives the Scottish Ministers powers to set out the process of applying for designation, the process of designating providers and withdrawing designations. New section 74A(4) also gives the Scottish Ministers a power to charge private providers a fee to apply for designation to cover the cost of administering the processing of their application.

Committee consideration

99. The Scottish Government states in the DPM that the reason for taking this power is, as the Bill puts existing custom and practice around private higher education provider designation onto a clearer legislative footing, it is appropriate to make the process followed by Scottish Ministers transparent, fair and accountable and for any charging regime to be set out clearly in regulations.
100. It is also likely that the Scottish Ministers will need to update the regulations from time to time to change the amount of fee payable or to modify the factors which they wish to take into account when deciding whether to make a designation.
101. Further, the Scottish Government considers the negative procedure is appropriate given that the regulations will set out the process to be followed in making administrative decisions around designation. The negative procedure is consistent with the power at section 73(f) of the 1980 Act to make regulations that enable the Scottish Ministers to pay student support.
102. The Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been taken and that it is subject to the negative procedure.

103. **The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 19 modifying 73ZA(3) of the 1980 Act: power to make directions

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Provision

104. Section 73ZA of the 1980 Act permits Scottish Ministers to direct the SFC or any other body or person to administer sums provided by Scottish Ministers for student support. A body or person to whom a direction is given must administer those sums in such manner and to such extent; and subject to such conditions as the Scottish Ministers may in the direction specify.

105. Section 19 of the Bill extends this direction making power to cover student support for those undertaking courses of education provided by private providers designated under the new section 74A of the 1980 Act (inserted by section 18 of the Bill).

Committee consideration

106. The Scottish Government sets out in the DPM that the reason for taking this power allows for flexibility in the future evolution of the responsibilities for the administration of student support. Specifically, the Scottish Ministers could direct that the SFC, or other body, carry out the designation process under any regulations made by them under new section 74A. Without this provision, the Scottish Ministers would not be able to direct the SFC, or any other body or person, to administer student support for students undertaking courses of education at private providers. By taking this power, it is also possible for a direction to encompass all student support as a coherent whole.
107. Further, the Scottish Government considers no parliamentary procedure is appropriate as this reflects the procedure under which directions are currently made in respect of the administration of student support in the 1980 Act; and the existing power is simply being extended to the administration of funds to private providers.
108. The Committee considers that, as the reasons for extending the power and the proposed parliamentary procedure are clear from the DPM, it is content with the explanation as to why this power has been extended and that it is subject to no procedure to mirror the current law.

109. **The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 22: Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if making amendments to an Act but otherwise negative

Provision

110. Section 22 provides that the Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Bill.
111. The Bill, if enacted in this form, will allow regulations made under this section to be subject to the negative procedure, unless they add to, replace or omit any part of the text of an Act in which case they are subject to the affirmative procedure.

Committee consideration

112. The DPM explains that this power is to allow flexibility to make adjustments or to

address any unforeseen issues which may arise with the operation of the Bill.

113. This power is similar in terms to other ancillary powers that the Committee has scrutinised in most Bills. The extent of the power is restricted as it can only be used for the purposes of giving full effect to the Bill as enacted and any provision made under it. The power allows issues of an ancillary nature which may arise to be dealt with effectively by the Scottish Ministers. Without such a power, any changes would require to be made by primary legislation, which the Committee considers would not be an effective use of either the Parliament's time or the Scottish Government's resources.
114. If the power is exercised to make regulations that seek to amend primary legislation, then the affirmative procedure applies. The negative procedure will apply where no modifications to primary legislation are included in the regulations.

115. The Committee finds the power acceptable in principle and is content with the specified parliamentary procedures which are dependent on whether or not the power is exercised to amend primary legislation.

Section 24: Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

116. Section 24 provides that the Scottish Ministers may by regulations appoint days on which provisions of the Bill will come into force other than sections 21 to 25 which come into force on the day after Royal Assent. Regulations under section 24 may include transitional, transitory or saving provision and may make different provision for different purposes.

Committee consideration

117. The DPM explains that the Scottish Ministers consider it appropriate to bring the substantive provisions of the Bill into force at a date that they consider suitable when the appropriate preparatory work is in place and to allow flexibility to address any issues or delays arising during the preparation for commencement.
118. It is standard to take a power at the end of a Bill to commence those sections of the Bill where provision has not been made in the Bill for commencement. This allows the Scottish Ministers to appoint the day on which those sections are to be commenced. The Committee is therefore content with the power in principle.
119. It is also standard that commencement regulations are laid before the Parliament but not subject to further parliamentary procedure.

120. The Committee is content with the power in principle, and that it is not

subject to any parliamentary procedure.

