



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 14 January 2026  
SP Paper 959  
5th Report, 2026 (Session 6)

# **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 (as amended at Stage 2)**

**Published in Scotland by the Scottish Parliamentary Corporate Body.**

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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. This report considers the delegated powers in the [Tertiary Education and Training \(Funding and Governance\) \(Scotland\) Bill](#) (“the Bill”) as amended at Stage 2.
2. The Committee previously considered the delegated powers in this Bill at Stage 1 and published its [report](#) on 14 May 2025. The Committee was content with 12 of the 13 delegated powers contained in the Bill at that stage; and drew the attention of the lead committee to the remaining power to consider further.
3. The Bill completed Stage 2 on 5 December 2025. At this point, the Bill was amended to include 2 new delegated powers and to revise 3 delegated powers. Therefore, the Committee is required to consider the Bill as amended at Stage 2.

# Overview of the Bill

4. This Bill was introduced by the Scottish Government on 5 February 2025. The lead committee was the Education, Children and Young People Committee. As this report is after Stage 2, it is addressed to the Parliament.
5. 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").
6. 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.
7. 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.
8. The Bill consists of 25 sections in 4 parts. A summary of the 4 parts of the Bill is outlined below.
9. 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.
10. 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 which 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.
11. 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.

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12. Part 4 contains the final and general provisions for the Bill – interpretation, ancillary provision, regulation-making powers, commencement and short title.

# Delegated Powers

13. The amended Bill contains 2 new and 3 revised powers to make subordinate legislation conferred on Scottish Ministers. The Scottish Government has prepared a [Supplementary Delegated Powers Memorandum](#) (“SDPM”) which sets out the new and revised powers and provides an explanation of what the powers allow for, why they have been taken and why the Parliamentary procedures are considered appropriate.

# Review of relevant powers

## New Section 2C inserting new section 9F(3) into the 2005 Act: power to amend the list of registerable interests

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations**

**Parliamentary procedure: Negative**


**Revised or new power: New**

### Provision

14. New section 2C inserts new section 9F into the 2005 Act. This provides that Scottish Ministers must impose a condition that the SFC must, when making a payment to a fundable body, require that the fundable body has in place a conflict of interest policy. This policy requires that each member of the body's governing body and each senior officer declare any registerable interest and that they withdraw from any meeting or decision-making process where they have a conflict. Further, each fundable body is required to have a register of interests that is publicly accessible online.
15. A registrable interest is defined to include financial interests, shareholdings, remunerated consultancies, intellectual property interests, and close family relationships with contractors or commercial partners. Section 9F(3) gives Scottish Ministers the power to amend the list of registerable interests. Regulations would be subject to the negative procedure.

### Committee consideration

16. The Scottish Government explains in the SDPM that the Scottish Code of Good Higher Education Governance and Code of Good Governance for Scotland's Colleges ("the Codes") set out principles for governing bodies in relation to declarations of conflicts of interest. These Codes are updated by the higher education sector, and compliance is monitored through the SFC's terms and conditions for grants. New section 9F provides additional requirements on governing bodies beyond what is already set out in the Codes. Section 9F enables Scottish Ministers to update the list of registrable interests which allows for changes to governance practices.
17. During the Stage 2 debate on the amendments to the Bill, the Minister for Further and Higher Education said that he was happy to support this amendment and he stated that new section 9F:  

 will further transparency and will simply give statutory effect to what is already being done in practice, and it will be useful to make what is expected clear in law.
18. The Scottish Government further explains that it considers that the negative procedure is appropriate because the regulations will only provide further

refinement to the list of registrable interests set out in the primary legislation.

19. The Committee finds this power acceptable. It considers that there is sufficient detail in new section 9F and in the SDPM as to how this power is to be exercised, that this power is limited to refinements to registrable interests and allows for flexibility in the future. The Committee also agrees that the negative procedure is appropriate given the primary list of registrable interests is set out on the face of the Bill

20. **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 the definition of Scottish apprenticeships**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations**

**Parliamentary procedure: Affirmative**

**Revised or new power: Revised**

#### **Provision and Revision**

21. New section 12E(1) of the 2005 Act sets out the definition of a “Scottish apprenticeship” and new section 12E(2) gives Scottish Ministers a power to modify the definition.
22. New section 12E(2A), inserted at Stage 2, requires Scottish Ministers to consult the SFC, employers (including prospective employers) of Scottish apprentices, the post-16 education bodies, training providers to Scottish apprentices, as well as any other persons Scottish Ministers consider appropriate, before laying draft regulations. Regulations would be subject to the affirmative procedure.

#### **Committee consideration**

23. As the Scottish Government explains in the SDPM this new subsection refines the existing power of Scottish Ministers to modify the definition of a Scottish apprenticeship so that there is a duty on Scottish Ministers to consult relevant persons or groups involved in the delivery of Scottish apprenticeships, so that their views are captured and considered when developing any regulations modifying the definition. This consultation is expected to be done through a public consultation exercise which would be capable of including learner representative groups and apprentices themselves, and any other persons with an interest.
24. During the Stage 2 debate on the amendments to the Bill, the Minister for Further and Higher Education stated that his amendment:

” introduces a requirement for Scottish ministers to consult various stakeholders and groups before making regulations that amend the definition of Scottish apprenticeships. From my engagement with employers and business groups, I know that they are keen to be closely involved in any developments in that area, and rightly so. [This] amendment makes provision for a statutory duty to consult those who play a key role in delivering apprenticeships, such as employers and training providers.

25. Further, the Scottish Government explains, and as was discussed in the original DPM for the Bill, that the power for Scottish Ministers to change the definition of a Scottish apprenticeship is needed to allow for the possibility of new types of apprenticeship arrangement which emerge in future and for which additional or different criteria will be important.
26. The Scottish Government also explains in its SDPM that the existing power to modify the definition of a Scottish apprenticeship is exercisable by the affirmative procedure. As set out in the original DPM, this is considered appropriate because these regulations can modify primary legislation and could have the effect of changing the core definition of a Scottish apprenticeship for funding purposes. The affirmative procedure means that such changes would be subject to more extensive Parliamentary scrutiny and approval.
27. In its Stage 1 Report, for the reasons outlined above, this Committee found this power acceptable in principle and was content that it is subject to the affirmative procedure. The Committee therefore welcomes the addition of a statutory consultation requirement.

**28. The Committee welcomes that a statutory requirement to consult the bodies and persons listed in new section 12E(2A) of the amended Bill has been included in this revised power.**

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

## **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**

**Revised or new power: Revised**

### **Provision and Revision**

30. Section 10 of the Bill inserts new section 17A into the 2005 Act to give the SFC the power to issue guidance to the fundable bodies and any other person in receipt of funding under the new functions conferred on the SFC by the Bill (securing and funding all forms of tertiary education and training provision, including NTPs,

apprenticeships and work-based learning). These bodies and persons must have regard to such guidance in the carrying out of their funded activities. Before issuing guidance, the SFC must consult Scottish Ministers, the bodies or persons to whom the guidance relates and such other persons as the SFC considers appropriate. The SFC could choose to issue guidance covering all bodies and persons in receipt of SFC funding or to issue guidance targeted at bodies or persons providing particular types of funded education or training.

31. New section 17A(1A), as inserted at Stage 2, sets out a non-exhaustive list suggesting the types of matters that the guidance issued by the SFC may cover. Guidance could relate to the needs and interests of current and prospective learners, the financial sustainability of post-16 education bodies insofar as it affects their provision of fundable further education and fundable higher education, the form and manner in which information required to be provided to the SFC is to be provided, or the identification of skills needs and skills planning in particular localities. Guidance issued under these powers would not be subject to any parliamentary procedure.

### Committee consideration

32. As the Scottish Government explains in the SDPM, this amendment does not give the SFC any additional powers. It amends the existing power in the Bill for the SFC to issue guidance to fundable bodies and any other persons it funds under the 2005 Act to provide further clarity as to what type of content such guidance might include.
33. The Scottish Government also explains in its SDPM that there is no Parliamentary procedure for the existing power to issue guidance. As set out in its original DPM, the Scottish Government considers this appropriate as it is guidance and not of a regulatory nature and because the duty on the bodies and persons to whom the guidance applies is that they have regard to it. Also, it allows for guidance to be issued and updated quickly and given that guidance might be extensive, detailed and non-regulatory, requiring parliamentary scrutiny might not be the best use of parliamentary time.
34. During the Stage 2 debate on the amendments to the Bill, the Minister for Further and Higher Education stated that his amendment:
- ” will amend the power in the bill as drafted for the SFC to issue guidance to fundable bodies and any other person it funds. That is in response to the recommendations of the Delegated Powers and Law Reform Committee, which in turn informed this Committee’s recommendations in its Stage 1 report on the bill. The Scottish Government agrees that it would be helpful to be clearer about what type of content such guidance might include. [This] amendment therefore sets out an illustrative list of the types of matters that the guidance could cover.
35. The Committee notes, and as alluded to by the Minister, that this Committee and the lead committee recommended that further consideration be given to the level of detail on the face of the Bill. The Committee therefore welcomes that new section 17A(1A) sets out a non-exhaustive list suggesting the types of matters that the guidance issued by the SFC may cover.
36. Further, at Stage 1, the Committee also recommended that 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. The Committee also suggested that, if the lead committee did consider it appropriate, that the lead committee may 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.

37. The lead committee, in its Stage 1 report, considered 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 recommended that the negative parliamentary procedure is attached to the relevant guidance issued under this power.
38. The Committee notes that the Scottish Government maintains that no parliamentary procedure is appropriate for this power. However, the power is still framed in such a way which both the Committee and the lead committee previously suggested would merit the negative procedure being attached. The Committee therefore draws this discrepancy to the attention of the Parliament.

39. **The Committee welcomes that this power was amended to insert an illustrative list at Stage 2 to provide further clarity.**
40. **The Committee also highlights that both this Committee and the lead committee previously recommended that consideration should be given to attaching the negative parliamentary procedure to the use of this power.**

### **New section 12C inserting new section 25B into the 2005 Act: Widening access to fundable further and higher education - power to share information**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations**

**Parliamentary procedure: Affirmative**

**Revised or new power: New**

#### **Provision**

41. New section 12C inserts new section 25B into the 2005 Act. This gives Scottish Ministers the power to make provision requiring the sharing of specified information about individuals between information holders and other relevant bodies so that the specified information is available to a post-16 education body, to whom the SFC makes payments, for the purpose of enabling, encouraging or increasing participation in fundable further education or fundable higher education by persons belonging to any socio-economic group which Scottish Ministers reasonably consider to be under-represented in such education.
42. “Information holder” means a person or a category of person specified as such in the regulations. “Relevant body” means a person or a category of person specified as such in the regulations, which may include a post-16 education body which provides fundable further education or fundable higher education. “Specified information” means information or a category of information specified in the

regulations.

43. Regulations may require information holders to provide the specified information to a relevant body, require a relevant body to provide the specified information to another relevant body, and make provision about the circumstances in which an information holder or a relevant body is not required to provide the specified information.
44. Where the specified information is that a school lunch is or has been provided for a pupil free of charge by virtue of section 53 of the Education Act 1980 Act (“the 1980 Act”), regulations may disapply section 53B - protection of identity of pupils receiving free school lunches - of the 1980 Act in relation to the sharing of that information.
45. Regulations may modify any enactment including this Bill. Before laying draft regulations, Scottish Ministers must consult the SFC, post-16 education bodies appearing to Scottish Ministers as likely to be affected by the regulations, and any other person appearing to Scottish Ministers as likely to be affected by the regulations. Regulations are subject to the affirmative procedure.

### **Committee consideration**

46. The Scottish Government explains in the SDPM that the reason for taking the power is to enable Scottish Ministers to set out the detail of the prescribed information, information holders and bodies involved and process to be followed in data-sharing. The Scottish Government considers that it would not be appropriate to set out this level of detail in the primary legislation as it will be necessary to develop the appropriate process, and adapt as necessary, with the information holders and relevant bodies. Other future changes may also be required, such as to focus on different socio-economic groups, information holders, relevant bodies or types of specific information.
47. A socio-economic group is to be treated as under-represented in fundable further education or fundable higher education if participation in such education by persons in that group is disproportionately low. Scottish Ministers may take into account any social or economic characteristics which they consider appropriate when determining which groups are to constitute socio-economic groups.
48. While Free School Meal data has been the focus of interest in this area of data-sharing to date, new section 25B will enable Scottish Ministers to define which information is to be shared relevant to such socio-economic groups as they consider to be underrepresented in fundable further education and fundable higher education. As different groups could be the subject of focus at different times, or different sources of information required to identify groups, which may not be available at the point at which the Bill is enacted, the provision provides flexibility so that the information, processes and changes can be implemented in regulations.
49. During the Stage 2 debate on the amendments to the Bill, the Minister for Further and Higher Education set out that this power will enable data sharing so that the most disadvantaged learners can be identified. He welcomed the lead committee’s interest in the issue and its recommendation in its Stage 1 report, which is what the Scottish Government is seeking to implement.
50. The lead committee in its Stage 1 report drew the Scottish Government’s attention

to its “Widening access to higher education inquiry” report, in particular, its recommendations that the Scottish Government sets out how it will take forward plans to introduce Free School Meals data as a widening access measure at a national level, including timescales attached to this work and any legislation required; and that it works with the Information Commissioner's Office as a matter of urgency, on the potential data protection challenges of this.

51. During the Stage 2 debate, the Minister for Further and Higher Education further stated that:

” the Scottish index of multiple deprivation has served well as an indicator of deprivation to widen access to university. However, it has its limitations, particularly in providing useful data at a granular level and below postcode level. That indicator has taken us only so far, and we know that there are young people who have grown up in poverty and whose families and households have experienced social and economic disadvantage but who are living outside the 20 per cent most deprived areas. Those learners might not be benefiting from our ambition and commitment to widen access, and it feels appropriate to ensure that all people for whom our policy on widening access might potentially apply get the opportunity to go to university if that is right for them. This amendment will create a power for Scottish ministers, by way of regulations, to set out the information that must be shared and the information holders and relevant bodies that must share it for the stated purpose. The amendment will allow Scottish ministers to require the sharing of information about learners who belong to identified underrepresented socioeconomic groups. The amendment would mean that learners can be given a fair chance to progress and succeed in education in the way that is right for them and that enables them to fulfil their full potential.

52. The Scottish Government further explains in the SDPM that it considers the affirmative procedure is appropriate given the substantive nature of the power, and it will enable the Scottish Parliament to effectively scrutinise the regulations laid before it, following consultation by Scottish Ministers with relevant bodies and persons who will, or are likely to, be affected by the regulations

53. The Committee finds this power to be wide in scope as it is not clear how and what socio-economic groups will be identified. The power also proposes data sharing which will include potentially sensitive data and only Free School Meals data is referred to thus far.

54. However, although this power appears wide and undefined, the Committee accepts that it may be difficult to identify how this power will operate in practice as this will depend on further research and analysis and ensuring compliance with other legislative obligations, including data protection. The Committee also accepts that there is a policy objective as well as a shared objective from the lead committee's discussions to ensure wider access to tertiary education for under-represented socio-economic groups.

**55. The Committee notes the power, and welcomes that the Scottish Government has a statutory duty to consult bodies and persons likely to be affected by the regulations before any regulations can be laid before the**

**Parliament; and that the regulations will be subject to the affirmative procedure providing for more robust parliamentary scrutiny.**

## **Section 18 inserting new section 74A(4) into 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**

**Revised or new power: Revised**

### **Provision and Revision**

56. Under new section 74A Scottish Ministers can designate a private provider, as a 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.
57. New section 74A(4) gives Scottish Ministers a power to set out the process of applying for designation, the process of designating providers and withdrawing designations. It also gives 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.
58. Amendments to the Bill at Stage 2 amend subsection (4)(e) of, and insert a new subsection (4)(f) into, new section 74A of the 1980 Act.
59. Amended section 74A(4)(e) enables Scottish Ministers to make provision for allowances or loans under section 73(f) of the 1980 Act - power of Secretary of State to make grants to education authorities and others - to continue to be payable following the withdrawal of designation from a provider.
60. New section 74A(4)(f) enables Scottish Ministers to make provision for the process of applying for particular courses of education to be approved for the payment of allowances or loans under section 73(f) of the 1980 Act - power of Secretary of State to make grants to education authorities and others - including provision about the factors Scottish Ministers are to take into account when deciding whether to approve courses.

### **Committee consideration**

61. The Scottish Government explains in the SDPM that the original DPM discussed the rationale for taking this power to make further provision on the designation process for higher and further education providers. It explained that private providers do not receive a teaching grant and are not subject to the governance requirements of the 2005 Act. Further, that it would not be desirable to list approved (designated) private providers on the face of primary (or subordinate) legislation because there are too many and they are subject to significant changes on a

regular basis. Instead, the Scottish Government considers it is practical and appropriate for Scottish Ministers to designate private providers administratively. However, the Scottish Government also considers that it helps to make the process followed transparent, fair and accountable and for any charging regime, to be set out clearly in regulations.

62. Additionally, the Scottish Government considers that it is likely that Scottish Ministers will need to update the regulations from time to time, for example to change the amount of fee payable or to modify the factors which they wish to take into account when deciding whether to make a designation, or to update provisions relating to payments following withdrawal or course approval processes.
63. Further, the Scottish Government considers that setting out what provision can be made in regulations under amended subsection 74A(4)(e) regarding the effect of the withdrawal of a designation will ensure that regulations may provide that allowances or loans can continue to be payable following withdrawal of a designation. This would have the effect that, should a provider's designation be withdrawn, Scottish Ministers may still be able to provide support for current students. These powers provide necessary clarification to ensure there can be continuity of student support when designations change and to provide a transparent process for course approval.
64. New subsection 74A(4)(f) allows Scottish Ministers to make supplementary provision about the process of applying for approval, allowing procedural detail to be made by secondary rather than primary legislation.
65. The Scottish Government further explains that it considers that the negative procedure remains the appropriate level of scrutiny over the exercise of what remains a technical and procedural power.
66. As per the original power, the Committee considers that, as the reasons for the power and the proposed parliamentary procedure are clear from the DPM/SDPM, the Committee is content with the explanation for the limited technical amendments at Stage 2 and the revised power; and that it is subject to the negative procedure.

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

