

EDUCATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament’s Standing Orders in relation to the Education (Scotland) Bill (“the Bill”). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 49–EN);
 - a Financial Memorandum (SP Bill 49–FM);
 - a Policy Memorandum (SP Bill 49–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 49–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

OUTLINE OF BILL PROVISIONS

4. The Bill is in two substantive parts. Part 1 establishes a new qualifications body, to be known as Qualifications Scotland, to replace the Scottish Qualifications Authority (SQA). It will be set up as a Non-departmental Public Body (NDPB), including appropriate governance arrangements and statutory functions. As an operationally independent organisation, Part 1 sets out the framework for how Qualifications Scotland will be able to operate. The operational detail is being developed in parallel as part of the operational design of the new body.
5. Part 2 establishes the office of His Majesty’s Chief Inspector of Education in Scotland. The statutory functions will be conferred on the Chief Inspector. The Chief Inspector will lead a new independent education inspectorate, to take forward the education inspection functions that currently sit within Education Scotland. Part 2 of the Bill sets out the governance arrangements and statutory functions necessary in relation to the full range of educational establishments and services currently inspected, from early years to adult learning.

RATIONALE FOR SUBORDINATE LEGISLATION

6. The Bill contains a number of delegated powers. These are explained in more detail in the sections below with an explanation of who the power is conferred on; whether it is exercisable by guidance, regulations or direction; what each power allows; why the power has been taken in the Bill; and why the selected form of parliamentary procedure is considered appropriate.

7. In deciding whether legislative provisions should be set out in subordinate legislation rather than specified on the face of the Bill, the Scottish Government has had due regard to:

- the need to make proper use of valuable parliamentary time;
- the need to provide the flexibility to respond to changing circumstances and to make changes quickly without the need for further primary legislation; and
- the need to anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

8. This legislation seeks to put in place the appropriate governance arrangements and powers to allow Qualifications Scotland and the Chief Inspector of Education in Scotland to discharge their statutory functions to the benefit of the users of the education system in Scotland while also conferring delegated powers to accommodate flexibility and future changes as both develop.

DELEGATED POWERS

Section 8(2): Power to issue guidance on consultation with Strategic Advisory Council

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance issued by the Scottish Ministers
Parliamentary procedure:	None

Provision

9. Qualifications Scotland is required under section 8(1) of the Bill to consult the Strategic Advisory Council in every case in which it appears to Qualifications Scotland appropriate to do so. The Strategic Advisory Council will be established under regulations made under section 9 of the Bill (see paragraph 15 below).

10. Section 8(2) of the Bill contains an implicit power for the Scottish Ministers to issue guidance. The section provides that Qualifications Scotland must have regard to any guidance issued by the Scottish Ministers as to the fulfilment of the requirement for it, in the exercise of its functions, to consult the Strategic Advisory Council in every case in which it appears to Qualifications Scotland appropriate to do so.

Reason for taking power

11. The reason for giving the Strategic Advisory Council the role of providing advice (as set out above) is to ensure the effects of proposals or decisions by Qualifications Scotland are fully

understood, shaped and guided by system stakeholders to maximise the effectiveness of how Qualifications Scotland delivers its functions.

12. The requirement for Qualifications Scotland to have regard to guidance issued by the Scottish Ministers in relation to how it consults with the Strategic Advisory Council is considered appropriate as a means to give the Scottish Ministers opportunity to set out their expectations on consultation in a way that reflects the specific qualifications or wider education and skills context. For example, the Scottish Ministers may want to provide guidance to Qualifications Scotland on the frequency of consultation with the Strategic Advisory Council or guidance on consulting on a specific matter in relation to Qualifications Scotland's functions. The use of guidance is a softer approach than setting out specifics of how Qualifications Scotland consults with the Strategic Advisory Council in regulations. It also allows the guidance to change more readily depending on the expectations of the Scottish Ministers, Qualifications Scotland or the Strategic Advisory Council.

13. There is a precedent for taking this power in the existing legislation for the Scottish Qualifications Authority ("SQA") and its Advisory Council, an equivalent council to the one that will advise Qualifications Scotland. This is set out in section 4 of the Scottish Qualifications Authority Act 2002.

Choice of procedure

14. The approach to the Scottish Ministers issuing guidance in relation to consultation is taken to recognise that this guidance may change at various points in time depending on the expectations of the Scottish Ministers and the needs and expectations of Qualifications Scotland and the Strategic Advisory Council. As guidance does not have the force of law, requiring the Parliament to scrutinise guidance would not be the best use of parliamentary time.

Section 9(1): Duty to establish the Strategic Advisory Council

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

Provision

15. Subsection (1) of section 9 of the Bill places a duty on the Scottish Ministers to establish an advisory council by regulations for the purposes of considering matters relating to Qualifications Scotland qualifications, and the functions and procedure of Qualifications Scotland, as well as providing advice on these to Qualifications Scotland and the Scottish Ministers. It will enable the Scottish Ministers to make provision via regulations on a range of matters including member appointments, tenure and payment, procedures, Ministerial representation, and the manner in which advice is provided and responded to. Subsection (3) requires regulations to include provision about members to be appointed as convenors, and requiring the council to consult persons with an interest and Qualifications Scotland before providing advice.

Reason for taking power

16. This provision is considered appropriate to enable the Scottish Ministers to establish a Strategic Advisory Council that is separate to and independent from the statutory governance arrangements for Qualifications Scotland. This section will give the Scottish Ministers flexibility in terms of setting out and amending what is provided to ensure the governance and procedures of the Strategic Advisory Council can reflect the needs of Qualifications Scotland, the Scottish Ministers and interested persons (such as those within the education and skills sector) in a responsive manner. The level of administrative detail required for this, and the flexibility to amend it, is at a level not deemed appropriate for primary legislation.

17. There is precedent for taking this power in the existing legislation for the SQA and its Advisory Council, an equivalent council to the one that will advise Qualifications Scotland. This is set out in section 3 of the Scottish Qualifications Authority Act 2002.

Choice of procedure

18. This section will be subject to negative parliamentary procedure. The power enables the Scottish Ministers to set up the procedural framework for the Strategic Advisory Council, whose role will be limited to advising the Scottish Ministers and Qualifications Scotland.

19. The governance and procedural framework of the Strategic Advisory Council is expected to consist of a significant amount of administrative and process related detail. For example, this might include setting out what quorum is or the procedures in the event of member vacancies. Where certain governance and procedures can be guaranteed for the Strategic Advisory Council, such as the need for two members to be appointed as conveners (section 9(3)), this is set out in the requirements of any regulations made under this section. This ensures there is not a completely free role in making a range of different regulations under this section.

20. As noted in paragraph 17, there is precedent for this power which includes the use of the negative parliamentary procedure for these types of regulations – see section 3 of the Scottish Qualifications Authority Act 2002 which relates to the Advisory Council of the SQA, an equivalent council to the one that will advise Qualifications Scotland.

Section 9(3)(b)(iii): Power to issue guidance to the Strategic Advisory Council

Power conferred on:	Scottish Ministers
Power exercisable by:	Guidance by Scottish Ministers
Parliamentary procedure:	None

Provision

21. Paragraph 15 above provides the context in relation to the establishment of the Strategic Advisory Council. Section 9(3)(b)(iii) of the Bill provides an implicit power for the Scottish Ministers to issue guidance to the Strategic Advisory Council, to which the council must have regard, in relation to its consultation duties (as set out in section 9(3)(b)(i) and (ii)).

Reason for taking power

22. The power to issue guidance, to which regard must be had, ensures the Scottish Ministers can give guidance to the Strategic Advisory Council regarding who and how it consults, to ensure it remains effective in its advisory role and reflects the views of the wider education and skills system.

23. The requirement for the Strategic Advisory Council to have regard to guidance issued by the Scottish Ministers in relation to how it carries out its consultation duties is considered appropriate as a means to give the Scottish Ministers opportunity to set out their expectations on consultation in a way that reflects the specific qualifications, or wider education and skills, context. For example, the Scottish Ministers may wish the Strategic Advisory Council to undertake more specific consultation with certain skills or industry sectors to better frame specific advice in relation to Qualifications Scotland's qualifications or related functions. This approach recognises that guidance on these matters is likely to change at various points in time.

Choice of procedure

24. The approach to the Scottish Ministers issuing guidance in relation to the Strategic Advisory Council's consultation duties is taken to recognise that any guidance on this may change at various points in time depending on the expectations of the Scottish Ministers and the needs and expectations of Qualifications Scotland, the Strategic Advisory Council and the needs of the education and skills system. As guidance does not have the force of law, requiring the Parliament to scrutinise guidance would not be the best use of parliamentary time.

Section 17: Scottish Ministers' power to direct Qualifications Scotland

Power conferred on:	Scottish Ministers
Power exercisable by:	Direction
Parliamentary procedure:	None

Provision

25. Section 17 of the Bill provides that Qualifications Scotland must comply with any written direction issued to it by the Scottish Ministers. A direction issued may be general or relate to a particular function or matter. Directions can be varied or revoked, and must be published by the Scottish Ministers as soon as reasonably practicable after being communicated to Qualifications Scotland. Before issuing a direction (other than a direction revoking an earlier direction), the Scottish Ministers must consult Qualifications Scotland about it.

Reason for taking power

26. Qualifications Scotland will be accountable to the Scottish Ministers and therefore the Scottish Ministers must be able to direct its strategic activity. While Qualifications Scotland will make operationally independent decisions, there is a need to ensure the Scottish Ministers can direct it. The principle of direction is to ensure Qualifications Scotland acts on priority, crucial, unforeseen matters that the Scottish Ministers require. This may be to ensure alignment with wider government strategies or address a specific risk within the system.

Choice of procedure

27. As is usual for direction-issuing powers, the Bill does not make these subject to any parliamentary procedure. It is a standard provision for the Scottish Ministers to be able to direct public bodies that are accountable to them. These directions are a mechanism to ensure Qualifications Scotland can be managed appropriately by the Scottish Ministers. Recognising the requirement for transparency and opportunity for public scrutiny in how the Scottish Ministers manage public bodies, the Scottish Ministers will be legally required to consult with Qualifications Scotland before issuing a direction and any direction must be published.

Section 21: Scottish Ministers' power to direct the Accreditation Committee

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Provision

28. Section 21 of the Bill provides that the Accreditation Committee must comply with any written direction issued to it by the Scottish Ministers. A direction issued may be general or relate to a particular function or matter. Directions can be varied or revoked, and must be published by the Scottish Ministers as soon as reasonably practicable after being communicated to the committee. Before issuing such a direction (other than a direction revoking an earlier direction), the Scottish Ministers must consult the Accreditation Committee about it.

Reason for taking power

29. This power is needed as a separate power to the one in section 17 due to the separation and independence of the Accreditation Committee from the decision-making of the rest of Qualifications Scotland (see paragraph 12(3)(a) of schedule 1). While the Accreditation Committee will make operationally independent decisions, there is a need to ensure Scottish Ministers can direct it for the same reason that there is a need for Ministers to be able to direct Qualifications Scotland. The principle of direction is to ensure the Accreditation Committee acts on priority, crucial, unforeseen matters that the Scottish Ministers require. This may be to ensure alignment with wider government strategies or address a specific risk within the system.

Choice of procedure

30. This power is not subject to any parliamentary procedure. It is a standard provision for the Scottish Ministers to be able to direct public bodies that are accountable to them. While the Accreditation Committee is not a public body itself, the principle that the Scottish Ministers can direct it applies in this instance due to its independence and separation from the rest of Qualifications Scotland. Provisions in the Bill do not enable Qualifications Scotland to direct the Accreditation Committee and therefore any directions which the Scottish Ministers require to issue in respect of the Accreditation Committee will need to be issued directly to it. The Scottish Ministers will be legally required to consult with the Accreditation Committee before issuing a direction, and any direction must be published to ensure this power is used with full transparency.

Section 30(4): power to specify the intervals at which establishments are to be inspected

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

31. Section 30(2)(a) of the Bill imposes a duty on the HM Chief Inspector of Education to secure the inspection of relevant educational establishments, other than excepted establishments, at such intervals and to such extent as the Chief Inspector considers appropriate. This is subject to subsection (4), which enables the Scottish Ministers to, by regulations, specify the intervals at which such establishments are to be inspected.

Reason for taking power

32. The Scottish Government has not found direct evidence pointing towards an optimum frequency of inspection for schools. However, in his report Professor Ken Muir broadly indicated value in continuity of the core purposes of inspection: namely, providing evaluative reports for parents/carers and the public; providing assurance nationally, locally and at school level about the quality of education being provided; and promoting improvement and building capacity either through direct engagement or through the provision of evidence and advice to inform policy and practice.

33. Additionally, the Scottish Ministers hold statutory responsibility to endeavour to secure improvement in the quality of school education. Therefore, the Scottish Government believes there remains a strong rationale for the Scottish Ministers to have flexibility to put in place requirements on the interval over which inspections are carried out, if and when necessary.

34. The power of the Scottish Ministers to specify the intervals at which establishments are to be inspected is considered necessary as it enables the Scottish Ministers to ensure that such establishments are inspected frequently enough to ensure the quality of education provision.

Choice of procedure

35. Regulations under this section will be subject to the affirmative parliamentary procedure. The Scottish Government recognises there will be significant public interest in any regulations which may be made under this provision and therefore believes in ensuring a higher degree of parliamentary scrutiny, which the affirmative procedure will provide.

Section 31(6): power to modify the meaning of “relevant educational establishment” or “excepted establishment”

Power conferred on: Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

Provision

36. Section 31 of the Bill sets out the meaning of “relevant educational establishment” and “excepted establishment”. Under section 30 of the Bill, the Chief Inspector is responsible for securing the inspection of relevant educational establishments, and must also secure the inspection of excepted establishments on the request of the Scottish Ministers. Subsection (6) of section 31 enables the Scottish Ministers to, by regulations, modify the meaning of “relevant educational establishment” or “excepted establishment”. Subsection (7) requires the Scottish Ministers to consult the Chief Inspector, the Advisory Council established under section 35, and such other persons as the Scottish Ministers consider appropriate before making any regulations under this power.

Reason for taking power

37. This section is considered necessary to allow the Scottish Ministers to amend the definitions of either “relevant educational establishment” or “excepted establishment” to reflect changes in where education provision may take place. In particular, this section will give the Scottish Ministers the flexibility to include any establishments that may not currently be described in section 31(1), and allow the evaluation of education provision in those establishments.

Choice of procedure

38. Given the power to alter the scope of the Chief Inspector’s powers to inspect educational establishments may have significant implications for education providers, regulations under this section will be subject to the affirmative parliamentary procedure ensuring a higher degree of parliamentary scrutiny.

Section 36(5): power to make provision about the frequency with which the Chief Inspector must review the inspection plan (including any revised inspection plan)

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

39. Subsection (1) of section 36 of the Bill requires the Chief Inspector to prepare and publish an inspection plan as soon as reasonably practicable after the day this section comes into force, and to lay the inspection plan before the Scottish Parliament. Subsection (3) requires the Chief Inspector to keep the inspection plan under review and allows the Chief Inspector to prepare a new plan at any time but requires any such new plan to be published and laid before the Parliament. The Chief Inspector must consult the Scottish Ministers, the Advisory Council and such other persons as the Chief Inspector considers appropriate when preparing the inspection plan.

40. Subsection (5) enables the Scottish Ministers by regulations to modify this section to specify the frequency at which the Chief Inspector is to review the inspection plan. If taken forward, this will allow the Scottish Ministers to impose a lifespan for each plan, so that a new plan has to be proactively put in place. Subsection (6) requires the Scottish Ministers to consult

the Chief Inspector, the Advisory Council established under section 35, and such other persons as the Scottish Ministers consider appropriate before making any regulations under this power.

Reason for taking power

41. Given the duties that Scottish Ministers have in relation to the improvement of Scottish education, it is appropriate for the Scottish Ministers to have flexibility to specify how regularly the inspection plan must be reviewed to give clarity to the system and confidence that there is a regular, planned and systematic approach in place, if this is required.

Choice of procedure

42. As the ability to determine the frequency with which the plan should be reviewed is an important element of the independence of the proposed office of HM Chief Inspector of Education in Scotland, it appears appropriate that this power for the Scottish Ministers will be subject to the affirmative parliamentary procedure ensuring it goes through a higher degree of parliamentary scrutiny. This is also considered appropriate given that the power would entail the modification of primary legislation (so as to ensure that it is clear from the face of the legislation what the position is in relation to when a new plan is prepared).

Section 48(1): power to give an enforcement direction

Power conferred on:	Scottish Ministers
Power exercisable by:	Direction
Parliamentary procedure:	None

Provision

43. Under the Bill, the Chief Inspector must make a referral to the Scottish Ministers where it appears to the Chief Inspector that, following an inspection of a public or grant-aided school or an education authority, satisfactory action has not been taken to secure improvement in education provision despite sufficient opportunity being given to do so. Such action can only be taken where the Chief Inspector considers that the failure is sufficiently serious to merit the giving of an enforcement direction.

44. In such cases, section 48 of the Bill allows the Scottish Ministers to issue an enforcement direction, following the service of a preliminary notice under section 47, though an enforcement direction may only be given once the Scottish Ministers have received a written response to the notice or the specified time period for responding set out in the notice has lapsed. Such a direction may be issued only where the Scottish Ministers continue to consider that the person concerned is failing or has failed to take satisfactory action to address the matter and that, having regard to the seriousness of the failure, action under this section is appropriate. That action may be the issuing of an enforcement direction, or it could be (instead or as well) the giving of recommendations (see subsection (8)).

45. An enforcement direction can be varied by the giving of a further direction (without the need for another preliminary notice) and can also be revoked. Before giving, varying or revoking such a direction, the Scottish Ministers must consult the Chief Inspector. Where any of these

powers are exercised, the Scottish Ministers must lay before the Scottish Parliament a report on their exercise of that power.

Reason for taking power

46. In taking this power, the Bill seeks to mirror the current law (sections 66B to 66D of the Education (Scotland) Act 1980 and sections 10A to 10C of the Standards in Scotland's Schools etc. Act 2000).

47. It is considered appropriate for this power to be restated in the Bill so that matters relating to inspections are dealt with in a single primary piece of legislation rather than the outcome of inspections continuing to be dealt with in other Acts. Replicating this position is considered necessary to allow the Scottish Ministers to continue to be able to place conditions on the carrying out of functions by the person concerned, requiring the taking of steps set out in the direction to address the failure. It will specify a time period for compliance (or in the case of more than one course of action, may specify more than one time period). It must be complied with.

Choice of procedure

48. Directions are not generally subject to parliamentary procedure. Use of directions under this power are a mechanism to ensure that necessary improvements identified by way of inspection are taken forward, in particular given the duties on Scottish Ministers in relation to the improvement of school education.

49. Given these directions will apply at school/education authority level, parliamentary procedure is not considered appropriate. However, every time the Scottish Ministers exercise this power, they must prepare a report on its use and lay it before Parliament (subsection (8)) so that the Parliament is aware of the action that has been taken.

Section 56: Ancillary Provision

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative if modifying primary legislation, otherwise negative

Provision

50. Section 56 of the Bill enables the Scottish Ministers to, 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 the Act or any provision made under it. Regulations under this section may modify any enactment (including the Act resulting from the Bill).

Reason for taking power

51. Section 56 follows the standard model for the power to make ancillary provision. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. Without

the power to make incidental, supplementary and consequential provision it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with minor matters that are necessary to give full effect to the original Bill. This would not be an effective use of either the Parliament's or the Government's resources. In addition, a number of the changes made through the Bill will require transitional, transitory or savings provisions to ensure a smooth change from the current regime to the new approach. It is appropriate for significant such provisions (as opposed to routine provision connected to commencement) to be subject to parliamentary procedure.

Choice of procedure

52. Any regulations made under this section will be subject to the affirmative procedure if they add to, replace or omit any part of the text of primary legislation. Otherwise, they will be subject to the negative procedure. This is a standard procedure for these types of ancillary regulations, as any change to primary legislation will be given sufficient scrutiny due to the use of the affirmative procedure.

Section 57: Commencement

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Laid, no procedure

Provision

53. Sections 54 to 58 of the Bill come into force on the day after Royal Assent. The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint. Regulations under this section may include transitional, transitory or saving provision, and make different provision for different purposes.

Reason for taking power

54. It would not be typical for the substantive provisions in the Bill to be commenced at Royal Assent. The Scottish Ministers need a flexible approach to commencing these provisions. While an appropriate commencement date is known for some provisions in this Bill, this is not the case for all provisions. It is standard practice for the Scottish Ministers to have the power to commence provisions at such time as they consider to be suitable. For example, the Bill will establish a new public body and a new office holder that are assuming responsibilities from existing organisations. It is therefore reasonable for the Scottish Ministers to be able to commence provisions when appropriate to ensure timely, orderly and effective transitions to support the establishment of Qualifications Scotland and the Office of HM Chief Inspector of Education in Scotland.

Choice of procedure

55. As is usual for commencement regulations, the default laying requirement will apply, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government considers this appropriate because the policy behind the provisions will already have been considered by the Parliament during the passage of the Bill.

Schedule 1, paragraph 2(2): power to alter the number of members of Qualifications Scotland

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

Provision

56. The Bill sets out that the membership of Qualifications Scotland will consist of:
- a member appointed by the Scottish Ministers to chair Qualifications Scotland;
 - a member appointed by the Scottish Ministers to be convener of the Accreditation Committee;
 - the chief executive (as an ex-officio member); and
 - at least 6 but not more than 10 others members appointed by the Scottish Ministers.
57. Under paragraph 2(2) of schedule 1 of the Bill, the Scottish Ministers may by regulations amend the number of other members of Qualifications Scotland appointed by the Scottish Ministers (by substituting a different number for any number for the time being specified there). Before making regulations under this sub-paragraph, the Scottish Ministers must consult the chairing member of Qualifications Scotland.

Reason for taking power

58. This is a standard power now seen in Scottish public bodies. It ensures that the number of members on the Board that oversees Qualifications Scotland can be adapted to meet changing circumstances. For example, it may become clear over time that more members are needed to develop different skills mix, in order to support specific corporate or strategic priorities. The power enables the Scottish Ministers to adapt the membership to better support the governance of the organisation, and to do so in a more flexible and quicker manner than would be possible if primary legislation was needed to amend this. The power is restricted to making changes only to the constitution of Qualifications Scotland.
59. Paragraph 2(2) requires that in exercising this power, the Scottish Ministers must consult the chairing member of Qualifications Scotland. This ensures that the decision to change the membership numbers has its impacts fully assessed by both the Scottish Government and individual overseeing the Board of Qualifications Scotland before any changes are put forward.

Choice of procedure

60. These regulations will be subject to the negative parliamentary procedure. While it is generally considered that changes to primary legislation should usually be subject to the affirmative procedure, this power has a limited effect in that it can only change the number of members that can comprise Qualifications Scotland, and has no effect on the underlying principles of the Bill.

61. There is precedent for using the negative procedure to amend small and technical aspects of primary legislation for Scottish public bodies, particularly where it relates only to the substitution of a number. An equivalent provision to amend membership numbers is found in the Historic Environment Scotland Act 2014 and is subject to the negative procedure. More recently, the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 adopted the negative procedure for its power to amend the number of members. The principle for all applications of this procedure is to ensure a flexible approach without using up parliamentary time unnecessarily.

62. For Qualifications Scotland, using the negative procedure enables a quick route to updating membership to reflect the broader needs of Qualifications Scotland into delivering its statutory functions effectively. The appointment of any such members as a consequence of this change remains subject to public appointments and public bodies legislation.

Schedule 1, paragraph 13(6): power to regulate the procedure of Qualifications Scotland and its committees

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

Provision

63. The Bill sets out specific provisions relating to the procedures of Qualifications Scotland and its committees. For example, this includes setting out membership models, committee remits, quorum, and requirements for making proceedings or meetings public. These can be seen in schedule 1.

64. Under paragraph 13(6), the Bill also gives the Scottish Ministers powers via regulations to make further provision as they see fit in relation to the procedure (including quorum) of Qualifications Scotland and that of any of its committees or sub-committees.

Reason for taking power

65. The Scottish Ministers need to be able to easily adapt the procedures of Qualifications Scotland and its committees and sub-committees to provide mechanisms that can ensure Qualifications Scotland is governed in the most effective way. This power also provides the Scottish Ministers with the ability to ensure how Qualifications Scotland is governed and aligns with the expectations of the Scottish Ministers on aspects such as transparency and public participation. These expectations may change in the future and Qualifications Scotland's procedures need to be able to reflect this. Furthermore, it provides the Scottish Ministers with the ability to amend the quorum of Qualifications Scotland, which is important in any future instances where the membership of Qualifications Scotland is changed, either by consequence of the power used in paragraph 2(2), or by any other unforeseen circumstance.

Choice of procedure

66. The power in this paragraph will be subject to the negative procedure. The power will have limited effect in that it can only prescribe the governance procedures of Qualifications Scotland. The choice of the negative procedure is considered appropriate because the core aspects of the procedures of Qualifications Scotland are set out in schedule 1. Any matters with procedures dealt with via regulations will be more administrative, and therefore beyond the level of detail expected in primary legislation. The negative procedure also enables a quicker route to updating the provisions, which is important for any unforeseen circumstances which may arise in relation to procedural aspects of the governance of Qualifications Scotland.

Schedule 3, paragraph 5(2): power to appoint initial board members

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

Provision

67. Under paragraph 5(2) of schedule 3 of the Bill, the Scottish Ministers may by regulations provide for a person who is, immediately before the member appointment date, a member (other than the chairing member) of the Scottish Qualifications Authority to be taken to have been appointed as a member of Qualifications Scotland under paragraph 2(1) of schedule 1.

Reason for taking power

68. The power is needed to support transition from the SQA to Qualifications Scotland. The SQA consists of a current chairing member and other members. They are responsible for overseeing the SQA's delivery of statutory functions. Members have recently been, or will have recently been appointed, under the regulated public appointments process to ensure the SQA remains quorate and can ensure the continued delivery of qualifications and assessment until Qualifications Scotland is established. These recently appointed members have also been appointed under the principle that their expertise and knowledge will also support the transition to Qualifications Scotland and implementing reform. The power is therefore needed to enable the Scottish Ministers, should they need to, to determine members of the SQA who will also become members of Qualifications Scotland to ensure effective corporate and strategic governance of both organisations, until the SQA is dissolved. It is not yet known who these members may or may not be, and therefore the power to specify which members by regulations is needed to ensure flexibility.

Choice of procedure

69. This power in this paragraph will be subject to the negative procedure. The power will have limited effect in that it will appoint members of Qualifications Scotland who are currently members of the SQA, and will not cause effect elsewhere. It is not typical for the Parliament to have a role in determining Ministerial appointments, and therefore the negative procedure is considered appropriate for these regulations. The Parliament will have the opportunity to debate the mechanism for the appointment of these members during the Bill's passage, as the mechanism will be set out in primary legislation.

This document relates to the Education (Scotland) Bill (SP Bill 49) as introduced in the Scottish Parliament on 4 June 2024

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