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

Delegated powers in the Education (Scotland) Bill at Stage 1



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Contents

Introduction	1
Delegated Powers	2
Review of relevant powers	4

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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Tim Eagle
Scottish Conservative
and Unionist Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Daniel Johnson
Scottish Labour

Introduction

1. At its meetings on 10 September and 1 October 2024, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Education (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. The Bill was introduced by the Scottish Government on 4 June 2024. The lead committee is the Education, Children and Young People Committee.
4. The Bill comprises 58 sections in 3 parts together with 4 schedules. 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 3 parts of the Bill is outlined below.
5. Part 1 establishes a new body, Qualifications Scotland ("QS"). It sets out its functions; requires the establishment of a Strategic Advisory Council ("the SAC"); provides for QS to prepare and publish a learner charter and a teacher and practitioner charter; requires it to publish a corporate plan, annual report and accounts. Schedule 1 makes further administrative provisions about QS. Provision is also made for various committees of QS, particularly the Accreditation Committee ("the AccCom"), which is subject to its own reporting provisions.
6. Part 2 establishes a new office holder, the Chief Inspector of Education ("the CIE"). It sets out the functions and powers of the CIE; makes provision for supporting roles; requires the establishment of an Advisory Council ("the AC"); requires the CIE to publish an inspection plan, reports on inspections and annual reports; requires educational establishments to cooperate with inspections; and makes provision for enforcement measures that can follow an inspection. The CIE will also be required to lay an inspection plan before Parliament which sets out the frequency with which different types of educational establishment will be inspected, the inspection standards that will apply and to keep that plan under review. Schedule 2 makes further administrative provision about the CIE.
7. Part 3 contains the general and miscellaneous provisions applying to the Bill, including the transitional provisions for the transfer of staff and property from the Scottish Qualifications Authority ("the SQA"), the current accreditation and awarding body for education in Scotland, to QS, and the dissolution of the SQA. Schedule 3 makes further provision about the transfers and schedule 4 modifies other enactments in consequence of the Bill.

Delegated Powers

8. The Bill confers 14 powers to make subordinate legislation, issue guidance and directions on the Scottish Ministers.
9. It is not unusual for a Bill to confer powers to Scottish Ministers to issue guidance about how something under the Bill, or connected with its subject matter, is to be done or to issue directions to a specified body about how particular functions are to be exercised. This Bill contains a number of 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.
10. The Scottish Government has produced a [Delegated Powers Memorandum](#) (“DPM”) which sets out its reasons for taking the delegated powers in the Bill and for the procedure chosen.
11. At its meeting on 10 September 2024, the Committee was content with the following 8 delegated powers:
 - Section 9(1): Duty to establish the Strategic Advisory Council
 - Schedule 3, paragraph 5(2): power to appoint initial board members to Qualifications Scotland
 - Section 30(4): power to specify the intervals at which establishments are to be inspected
 - Section 31(6): power to modify the meaning of “relevant educational establishment” or “excepted establishment”
 - Section 36(5): power to make provision about the frequency with which the Chief Inspector of Education must review the inspection plan
 - Section 48(1): power to give an enforcement direction
 - Section 56: Ancillary Provision
 - Section 57: Commencement
12. However, the Committee agreed to write to the Scottish Government to raise questions in relation to the following 6 delegated powers:
 - Section 8(2): Power to issue guidance to Qualifications Scotland on consultation with the Strategic Advisory Council
 - Section 9(3)(b)(iii): Power to issue guidance to the Strategic Advisory Council
 - Section 17: Scottish Ministers’ power to direct Qualifications Scotland
 - Section 21: Scottish Ministers’ power to direct the Accreditation Committee

- Schedule 1, paragraph 2(2): power to alter the number of members of Qualifications Scotland
 - Schedule 1, paragraph 13(6): power to regulate the procedure of Qualifications Scotland and its committees.
13. Correspondence was sent from the Committee to the Scottish Government on [12 September 2024](#) and a response was received on [23 September 2024](#).
 14. The Committee's consideration of the Scottish Government's response, and the other delegated powers contained in the Bill, are set out in the next section of the report.

Review of relevant powers

15. Before considering each of the powers, the Committee draws to the attention of the lead committee that that while it has received assurances from the Scottish Government about how it intends to use the powers in the Bill, these assurances do not and cannot bind any future governments.

16. The Committee also suggests that the lead committee may wish to consider the impact of the direction-issuing powers in the Bill on the independence of Qualifications Scotland and the Strategic Advisory Council, which will be subject to them, and whether it considers that to be appropriate in the context.

Section 8(2): Power to issue guidance to Qualifications Scotland on consultation with the Strategic Advisory Council; and

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

Power conferred on: Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

Provision

17. The Bill establishes the SAC, with which QS is required to consult where it is appropriate to do so. Section 8(2) of the Bill confers a power on Scottish Ministers to issue guidance, to which QS must have regard in fulfilling its requirement to consult with the SAC.
18. Section 9(3)(b)(iii) of the Bill requires regulations made under section 9(1) to include a provision which provides a power for Scottish Ministers to issue guidance to the SAC, to which it must have regard, in relation to its consultation duties. These duties are that before providing advice on any matter which it is considering, to consult such persons having an interest in that matter as it considers appropriate, and in the exercise of its functions, consult QS in every case in which it appears to the council appropriate to do so.
19. Guidance issued under these powers would not be subject to any parliamentary procedure.

Committee consideration

20. In relation to the ‘powers to issue guidance’ in sections 8(2) and 9(3)(b)(iii), the DPM explains that requiring the Scottish Parliament to scrutinise guidance would not be the best use of parliamentary time, as it does not have the force of law. However, QS and the SAC “must have regard to” such guidance and will be expected to follow it. Such guidance will inform QS and the SAC as to how they will

be expected to meet their consultation duties and there may be consequences for a failure to have regard to the guidance without good reason.

21. In relation to sections 8(2) and 9(3)(b)(iii), the Committee asked the Scottish Government:

1. to clarify the nature of the guidance proposed, and in particular, whether it is intended to assist or direct QS and the SAC, i.e. is it administrative or legislative?
2. If it is administrative, why is it considered necessary to place a duty on QS and the SAC to have regard to it?
3. If it is legislative, why it is not subject to any parliamentary procedure?

22. The Scottish Government responded that:

1. In its view, the essential characteristic of guidance is that it is advisory rather than directory and does not impose legally binding duties; and therefore, by definition, is not of a legislative character. That these guidance making powers are intended to assist QS and the SAC in the process of discharging their functions and purpose; and will also give the SAC an indication of how consultation with it may occur. The Scottish Government does not consider that guidance can direct those to whom the guidance is addressed as a direction-giving power would be required for that purpose.
2. The Scottish Government considers that the issuing of guidance on consultation, and regard being had to it, is necessary to ensure Ministers can make suggestions which will be given due consideration as to how QS can best use the SAC and ensure effective scrutiny takes place; and is necessary to provide Ministers with a role in ensuring the SAC's advice to QS is informed by effective consultation. It does not agree with the suggestion that QS and the SAC will be "expected to follow" such guidance as it is advisory and does not impose legally binding duties. It is the Scottish Government's view that any guidance issued under this provision will not be of a legislative character, which is why, in its view, it would not be appropriate to attach a parliamentary procedure to it. It states that a duty to have regard to guidance certainly requires those on whom the duty is imposed to consider the guidance, but it does not require it to be considered as the only or top priority. However, the Scottish Government is also of the view that a failure to have regard to guidance may be relevant in determining whether an authority has complied with the duties created by the Bill. It therefore considers it appropriate for both QS and the SAC to "have regard to" guidance issued under this provision to ensure that any guidance is included in all considerations as to how QS and the SAC deliver their respective consultation duties.
3. The Scottish Government has responded that an answer to this question is non-applicable.

23. The Committee considers that the Scottish Government has clarified that the guidance proposed is to assist QS and the SAC rather than to direct them. Further, that the Scottish Government does not agree that QS and the SAC will be expected to follow such guidance however, it acknowledges that legal consequences may flow from non-compliance (i.e. "failure to have regard to guidance may be relevant

in determining whether an authority has complied with the duties created by the Bill”).

24. Further, the Committee considers that given the Scottish Government's responses to questions (1) and (2) above, the Scottish Government does not consider that this guidance is legislative in nature and therefore it would not, in its view, be appropriate to attach any parliamentary procedure to it (question (3)).

25. **The Committee notes that it is not uncommon for guidance to be subject to a “must have regard to” requirement. Whether that is appropriate will depend on the circumstances and the nature of the guidance proposed. In this instance, it appears the nature of the guidance is to assist rather than direct.**

26. **The Committee therefore draws the attention of the lead committee to sections 8(2) and 9(3)(iii) which will require that QS and the SAC must have regard to guidance issued by the Scottish Ministers and whether the lead committee considers it is appropriate for QS and the SAC to be subject to that duty.**

27. **If it considers it is appropriate for QS and the SAC to be subject to such a duty, the lead committee may wish to recommend that a parliamentary procedure is attached to any guidance issued under this power, with the negative procedure most likely being appropriate.**

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

28. Section 9(1) places a duty on Scottish Ministers to establish the SAC to consider matters relating to QS qualifications and the functions and procedure of QS, and to provide advice on these to QS and Scottish Ministers. This power enables Scottish Ministers to make provision for member appointments, convenors, tenure and payment, procedures, Ministerial representation, and the way in which advice is provided and responded to. Regulations are also to include provision requiring the SAC to consult persons with an interest and QS before providing advice.

Committee consideration

29. The Scottish Government sets out in the DPM that this power is to enable Scottish Ministers to establish a Council that is separate to and independent from the statutory governance arrangements for QS. The power enables Scottish Ministers to set up the procedural framework for the SAC, whose role will be limited to

advising Scottish Ministers and QS. This power will give Scottish Ministers flexibility in terms of setting out and amending what is provided to ensure the governance and procedures of the SAC can reflect the needs of QS, Scottish Ministers and interested persons. It considers that the level of administrative detail required for this, and the flexibility to amend it is not appropriate for primary legislation.

30. The Scottish Government further explains in the DPM that the power will be subject to the negative procedure as the governance and procedural framework of the SAC is expected to consist of a significant amount of administrative and process related detail. Certain governance and procedures have already been set out in the requirements of any regulations made under this power so there is not a completely free rein in making regulations. This power, which includes the use of the negative parliamentary procedure for these types of regulations, mirrors the existing legislation for the SQA and its Advisory Council (“AC”). This is set out in section 3 of the Scottish Qualifications Authority Act 2002.
31. The Committee considers that as this power mirrors the current arrangements for the SQA and its AC, and that the reasons for the power and the proposed parliamentary procedure are clear from the DPM, the Committee is content with the explanation as to why the power has been taken and that it is subject to the negative procedure.

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

Section 17: Scottish Ministers’ power to direct Qualifications Scotland

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Provision

33. Section 17 of the Bill provides that QS must comply with any written direction issued to it by 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 Scottish Ministers as soon as reasonably practicable after being communicated to QS. Before issuing a direction, Scottish Ministers must consult QS about it. Directions issued under this section would not be subject to any parliamentary procedure.

Committee consideration

34. Part 1 of the Bill lays out the functions and duties of QS over 25 sections. Section 17 proposes that Scottish Ministers should also have a power to give directions to QS relating to these functions and duties and QS “must comply” with any such directions, while remaining operationally independent. Mechanisms are already built into the Bill for Scottish Ministers to consider the strategy of QS through the SAC and for QS to consult with and provide advice and information to Scottish Ministers; as well as to hold QS accountable through its corporate plan, annual report and

accounts. Section 24 also provides for QS to do “anything which appears to it to be necessary or expedient for the purposes of, or in connection with, the performance of its functions,” allowing it to react to priority, crucial, unforeseen matters.

35. The Committee asked the Scottish Government:

1. what consideration it has given to the need for this direction making power in the circumstances, given Scottish Ministers’ input to the SAC, and given that QS will already have to comply with its duties and consultation requirements under part 1 of the Bill?
2. how it envisages using this direction making power, including practical examples of the circumstances, and the types of direction it has in mind?

36. The Scottish Government responded that:

1. It wishes to clarify the Committee’s understanding of this particular power by providing more information on the interaction between Scottish Ministers, QS, and the SAC, and their respective purposes. The Bill seeks to establish QS as a Non-Departmental Public Body. This ensures the body is strategically accountable to Scottish Ministers whilst being operationally independent from the Scottish Government. The ability for Scottish Ministers to direct QS is important to ensure the strategic direction of QS aligns with the Scottish Government’s objectives and priorities. It also enables Scottish Ministers to issue directions in relation to the delivery of functions.

The Bill also requires Scottish Ministers to establish an SAC for the purposes of advising QS on its functions and procedures and to provide advice on those matters to Ministers. The SAC membership will be made up of QS stakeholders and will provide strategic advice to QS from their perspectives and wider networks. This advice will differ from the type of advice, guidance or strategic direction that Scottish Ministers may give QS. Further, as the Scottish Ministers have oversight of the wider education, skills and qualifications system, it is important that the Scottish Ministers can utilise the expertise of the SAC to consider specific system-wide matters that relate to QS’s functions rather than QS or the SAC being the sole determinants of what they provide advice on. For example, Scottish Ministers may wish the SAC to consider specific aspects of the Post-School Education Reform programme in relation to how it impacts QS from the perspective of their respective organisations and networks.

As well as existing precedent for this power (see section 9 of the Education (Scotland) Act 1996) in relation to the Scottish Qualifications Authority (“the SQA”), which Qualifications Scotland will replace, the Committee is asked to note other recent examples of similar powers of direction include section 17 of the South of Scotland Enterprise Act 2019 and section 37 of the Scottish Crown Estate Act 2019.

2. The Scottish Government envisages the Scottish Ministers using this power in different ways depending on what is required. Scottish Ministers have used direction making powers historically in relation to directing the SQA, however these have been used sparingly since the SQA was established and it expects that to continue being the case. It is not the intention for Ministers to use these powers to manage the organisation on a day-to-day basis. For example,

Scottish Ministers may need to direct QS to take a particular course of action relating to its awarding functions. The Scottish Ministers have used this power previously when they issued a direction to the SQA in 2020 regarding the Alternative Certification Model for awarding qualifications during the Covid-19 pandemic. Scottish Ministers want to be able to issue the same type of direction to QS should it be needed.

37. The Committee considers that for the reasons, clarifications and assurances provided in the Scottish Government's response, it is intended that this direction-issuing power is to be used in limited circumstances (in the words of the Scottish Government "sparingly") and that QS will, in the main, be autonomous and operationally independent. Given this response, the Committee finds the direction issuing power acceptable and is content that it is not subject to any parliamentary procedure.

38. The Committee notes the Scottish Government's response and on this basis, is content with the delegation of the direction-issuing power in principle, and that it is not subject to any parliamentary procedure.

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

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Provision

39. On behalf of QS, the AccCom has the functions of accrediting qualifications that meet the requirements specified by it and determining the suitability of the establishments which provide accredited qualifications.
40. Section 21 of the Bill provides that the AccCom must comply with any written direction issued to it by Scottish Ministers. A direction issued may be general or relate to a particular function or matter. Directions must be published by Scottish Ministers as soon as reasonably practicable after being communicated to the AccCom. Before issuing such a direction Scottish Ministers must consult the AccCom and any direction must be published. Directions issued under this section would not be subject to any parliamentary procedure.

Committee consideration

41. Section 21 of the Bill provides that the AccCom must comply with any written direction issued to it by Scottish Ministers, while remaining operationally independent. The AccCom and its functions are established by paragraph 12 of schedule 1 to the Bill and it must publish a corporate plan as to how the committee intends to exercise its functions and an annual report on its activities.
42. The Committee asked the Scottish Government:
1. what consideration it has given to the need for this direction making power in

the circumstances, given that the Accreditation Committee will already have to comply with its duties in the exercise of its functions under part 1/schedule 1 of the Bill?

2. how it envisages using this direction making power, including practical examples of the circumstances, and the types of direction it has in mind?

43. The Scottish Government responded that:

1. The need for this power has been considered under two specific requirements. The first consideration was regarding governance, specifically in relation to accountability of the accreditation function and its separation and independence from QS's other functions (the "awarding" functions). The Bill contains provision for the oversight of the accreditation functions to ensure decisions taken to fulfil the delivery of these functions are made without undue influence from decisions taken on the awarding functions. This includes provisions to the effect that the AccComm is not subject to the direction or control of QS, and that it is required to make decisions independently of QS, in the exercise of its functions. Without the ability for QS to direct the AccComm, it is the Scottish Government's position that there must be a separate power for Ministers to direct the AccComm alongside the power for Ministers to direct QS.

The second consideration is the need for Scottish Ministers to be able to direct the AccComm to ensure its objectives align with strategic objectives of the Scottish Government. It also enables the Scottish Ministers to issue a direction in relation to the delivery of function at an operational level should it be needed. It is considered this direction making power is needed owing to the flexible and broad nature of the accreditation function provision. The AccComm will have autonomy to set out how it delivers its accreditation function, which is essential for maintaining a responsive and agile approach to qualifications accreditation and supporting the highest standard of qualifications in Scotland. However, there may be aspects that Scottish Ministers wish the AccComm to focus on which does not form part of its planned activity that will be set out in the Corporate Plan.

2. The Scottish Government envisages the Scottish Ministers using this power in different ways depending on what is required, and this may be strategic or operational in nature. However, as with the use of Ministerial direction to QS, it would expect this power to be used sparingly and is unaware of any previous Ministerial direction to the SQA regarding its current accreditation functions. The Scottish Ministers may wish to provide specific direction on the focus of the AccComm's resources or to enact Scottish Government policy change. For example, a new type of qualification may emerge which Scottish Ministers view as requiring the AccComm to focus more attention on or change approach on how they may be accredited.

44. The Committee considers that for the reasons, clarifications and assurances provided in the Scottish Government's response it is intended that this direction-issuing power is to be used in limited circumstances (in the words of the Scottish Government "sparingly") and that the AccComm will, in the main, be autonomous and operationally independent. Given this response, the Committee finds the

direction issuing power acceptable and is content that it is not subject to any parliamentary procedure.

45. **The Committee notes the Scottish Government’s response and on this basis, is content with the delegation of the direction-issuing power in principle, and that it is not subject to any parliamentary procedure.**

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

46. The Bill sets out that membership of QS consists of:
- a member appointed by Scottish Ministers to chair QS;
 - a member appointed by Scottish Ministers to be convener of the AC;
 - the chief executive (as an ex-officio member); and
 - at least 6 but not more than 10 other members appointed by Scottish Ministers.
47. Under paragraph 2(2) of schedule 1 of the Bill, Scottish Ministers may by regulations amend the number of other members of QS appointed by Scottish Ministers. Before making regulations under this sub-paragraph, Scottish Ministers must consult the chairing member of QS.

Committee consideration

48. In relation to this power, the Committee asked the Scottish Government:
1. why the flexibility already provided for in the Bill – between 6 and 10 other members - is not sufficient to meet changing circumstances?
 2. to provide some practical examples as to what changing circumstances are envisaged that would require more than 10, or fewer than six other members?
 3. whether it envisages that there would be a cap on the number of other members altered under this power?
 4. whether the negative procedure provides an appropriate level of parliamentary scrutiny given this is a change to primary legislation; and whether this gives the parliament sufficient opportunity to scrutinise why an increase in other members is considered necessary and the impact on areas such as public finances should membership increase?
49. The Scottish Government responded that:

1. 6-10 members is the range of additional members it expects to be sufficient for the current Board model, and objectives of QS, as set out in the Bill. Six is the minimum to ensure the Board has sufficient oversight, and 10 is the maximum it expects based on the expected range of expertise needed on QS's Board. The Scottish Government would expect the current maximum to be the desired number of Board members, alongside the Chairing Member, AccComm Convener and Chief Executive. However, this flexibility in range does not enable an increase (or decrease) beyond the current numbers to meet changing requirements of the body.
2. A practical example would be QS's objectives expanding in order to deliver on decisions taken in relation to current, or future, education, qualifications and skills reform. The current Board model is determined as required to ensure there is specialist expertise on the Board in relation to qualifications and related aspects, whilst also ensuring there is sufficient space for members with corporate governance skills such as finance, audit, commercial etc. There could be decisions taken on education, qualifications or skills reform that require QS to change its objectives due to an expanded focus on something new whilst also retaining the current model and mix of skills on the Board. For example, the use of Artificial Intelligence in the system and the impact on the functions of QS may require a permanent increase in membership to bring in members with specific skills and experience, whilst not losing members who have other essential skills to support the delivery of the functions of QS.

Further the Scottish Government explains that this type of power and the negative parliamentary procedure are consistent features seen in legislation for public bodies and public boards. There are also instances where membership maximum can be increased without requiring any subordinate legislation:

3. While there is not a cap set out in the Bill's provisions, the Scottish Government would expect there to be a limit to the number of members on the Board. For example, the SQA previously had up to 24 members on its Board before it was reformed to the current model via the Scottish Qualifications Authority Act 2002. There would be no expectation that the Board of QS should return to these levels. However, the Scottish Government does not wish to impose a legislative cap in case there is a future need to significantly increase Board membership for an unforeseen contingency.
4. The Scottish Government has identified nine examples of legislation which includes a power to modify the range of number of members of a public body, made over a sustained period of time, and where the choice of negative procedure was agreed to by the Scottish Parliament. It believes the negative procedure is the appropriate level of scrutiny required given that an exercise of the power would have no effect on the underlying principles of the Bill.

The impact of any change is not expected to be significant in relation to the wider public bodies landscape and public finances but is expected to have a desired impact on the effective oversight of QS. The impact on public finances is expected to be minimal as a result of any incremental increase in membership. For example, the expected cost per 'other' member on the Board of QS is around £5,000 per annum. This estimate is referred to in the total expected costs for the membership of the Board in paragraph 62 of the

Financial Memorandum for the Bill.

50. The Committee considers that for the reasons, clarifications and assurances provided in the Scottish Government's response it intends to use this power judiciously to meet an unforeseen need. Given this response, the Committee finds this power acceptable and that the negative procedure would provide an adequate level of scrutiny in the exercise of this power by Scottish Ministers to make regulations.

51. The Committee notes the Scottish Government's response and, on this basis, finds the power acceptable in principle, and is content that it is subject to the negative procedure.

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

Parliamentary procedure: Negative

Provision

52. The Bill sets out in schedule 1 specific provisions relating to the procedures of QS and its committees. This includes setting out membership models, committee remits, quorum, and requirements for making proceedings or meetings public.
53. Under paragraph 13(6) of schedule 1, Scottish Ministers may by regulations make further provision as they see fit in relation to the procedure of QS and that of any of its committees or subcommittees.

Committee consideration

54. In relation to this power, the DPM explains that the regulations will be subject to the negative procedure as it is the Scottish Government's view that this power will have limited effect in that it can only prescribe the governance procedures of QS. However, this power allows Ministers to make further provision "as Scottish Ministers see fit" in relation to the procedure of QS and its committees. As such, it could be seen as a wide power, which could include changes to their memberships, quorums and remits.
55. The Committee asked the Scottish Government:
1. given the width of this power for Scottish Ministers to regulate the procedure of Qualifications Scotland and its committees as they see fit, including their memberships, quorums and remits, whether the negative procedure provides an adequate level of scrutiny in the exercise of this power to make regulations?
56. The Scottish Government responded that:
1. The intention behind this power is to provide a mechanism for Ministers to

adapt routine procedural processes for QS and its committees, should there be concerns or issues with the effectiveness of the procedures. That this provision is about, for example, how much notice is given of meetings and what format that notice is given in; amending the quorum to ensure the Board of QS can continue to make decisions in the event of members unexpectedly stepping down; and making provision about the process by which QS publicises their meetings which are open to the public.

The Scottish Government does not agree that it would be competent to use this power to change the remit of QS or its committees, as the power is limited only to regulating “the procedure” followed by them. Although paragraph 63 of the DPM refers to the Bill setting out specific provisions relating to the procedures of QS and its committees, “including membership models and committee remits”, the Scottish Government provides assurances that this is not intended to suggest that the power would allow modification of memberships or remits. Rather, it is intended as an explanation of the context within which the power exists, while the power itself is limited to making provision about “procedures,” which is therefore simply about the way things are done and is an administrative matter.

The Scottish Government also asks that it be noted that this power already exists in relation to the SQA and its committees (as yet unused) as a result of section 2 of the Scottish Qualifications Authority Act 2002 and that this power is subject to the negative procedure.

Further, the Scottish Government states that it is relatively standard for provision to be made allowing public bodies to regulate their own procedure and that of any committees, without the need for any secondary legislation or oversight of any nature. Therefore, given the nature of the power, it considers that it would be a poor use of parliamentary time for such a power to be made subject to the affirmative procedure when public bodies making equivalent provision for their own procedure is routinely dealt with purely as an administrative matter.

57. The Committee considers that for the reasons, clarifications and assurances provided in the Scottish Government’s response this power is limited to procedural matters. Given this response, the Committee finds this power acceptable and that the negative procedure would provide an adequate level of scrutiny in the exercise of this power by Scottish Ministers to make regulations.

- 58. The Committee notes the Scottish Government’s response and, on this basis, finds the power acceptable in principle, and is content that it is subject to the negative procedure.**

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Negative

Provision

59. Under paragraph 5(2) of schedule 3 of the Bill, Scottish Ministers may by regulations provide for a person who is a member of the SQA to be taken to have been appointed as a member of QS under paragraph 2(1) of schedule 1.

Committee consideration

60. The Scottish Government sets out in the DPM that this power is needed to support the transition from the SQA to QS. Current members 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 QS is established. These recently appointed members have also been appointed under the principle that their expertise and knowledge will support the transition to QS and implementing reform. The power is therefore needed to enable Scottish Ministers to determine the members of the SQA who will also become members of QS 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.
61. The Scottish Government further explains in the DPM that this power will be subject to the negative procedure. It considers that the power will have limited effect in that it will appoint members of QS 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. 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.
62. The Committee considers that the reasons for the power and the proposed parliamentary procedure are clear from the DPM and it is therefore content with the explanation as to why the power has been taken and that it is subject to the negative procedure.

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

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

64. Section 30(2)(a) of the Bill imposes a duty on the CIE to secure the inspection of

relevant educational establishments at such intervals and to such extent as the CIE considers appropriate. This is subject to section 30(4), which enables Scottish Ministers to, by regulations, specify the intervals at which such establishments are to be inspected.

Committee consideration

65. The Scottish Government sets out in the DPM that this power is needed because it has not found evidence pointing towards an optimum frequency of inspection for schools but believes there remains a strong rationale for Scottish Ministers to have flexibility to put in place requirements on the interval over which inspections are carried out. The power to specify the intervals is considered necessary to ensure that such establishments are inspected frequently enough to ensure the quality of education provision and to secure improvement in the quality of school education.
66. The Scottish Government further explains in the DPM that regulations under this section will be subject to the affirmative procedure as it recognises there will be significant public interest in them and it believes in ensuring a higher degree of parliamentary scrutiny.
67. The Committee considers that the reasons for the power and the proposed parliamentary procedure are clear from the DPM and it is therefore content with the explanation as to why the power has been taken and that it is subject to the affirmative procedure.

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

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

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

Committee consideration

70. The Scottish Government sets out in the DPM that this power is considered

necessary to allow Scottish Ministers to amend the definitions of either “relevant educational establishment” or “excepted establishment” to reflect changes in where education provision may take place. This section will give 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.

71. The Scottish Government further explains in the DPM that given the power to alter the scope of the CIE’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 high degree of parliamentary scrutiny.
72. The Committee considers that the reasons for the power and the proposed parliamentary procedure are clear from the DPM and it is therefore content with the explanation as to why the power has been taken and that it is subject to the affirmative procedure. The Committee also notes the statutory consultation requirements.

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

74. The Committee also notes the statutory consultation requirements.

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

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

75. Section 36(1) of the Bill requires the CIE to prepare and publish an inspection plan as soon as reasonably practicable and to lay the inspection plan before the Scottish Parliament. Section 36(3) requires the CIE to keep the inspection plan under review and allows the CIE to prepare a new plan at any time. Any new plan requires to be published and laid before the Parliament. The CIE must consult Scottish Ministers, the Advisory Council and such other persons as the CIE considers appropriate when preparing the inspection plan.
76. Section 36(5) enables Scottish Ministers by regulations to modify section 36 to specify the frequency at which the CIE is to review the inspection plan. This allows Scottish Ministers to impose a lifespan for each plan. Section 36(6) requires Scottish Ministers to consult the CIE, the Advisory Council and such other persons as Scottish Ministers consider appropriate before making any regulations under this power.

Committee consideration

77. The Scottish Government sets out in the DPM that given the duties that Scottish Ministers have in relation to the improvement of Scottish education, it is appropriate for 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.
78. The Scottish Government further explains in the DPM that this power to determine the frequency with which the plan should be reviewed is an important element of the independence of the proposed office of the CIE and it is appropriate that this power is subject to the affirmative parliamentary procedure ensuring it goes through a high degree of parliamentary scrutiny. The affirmative procedure is also considered appropriate as the power would entail the modification of primary legislation.
79. The Committee considers that the reasons for the power and the proposed parliamentary procedure are clear from the DPM and it is therefore content with the explanation as to why the power has been taken and that it is subject to the affirmative procedure. The Committee also notes the statutory consultation requirements.

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

81. The Committee also notes the statutory consultation requirements.

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

Power conferred on: Scottish Ministers

Power exercisable by: Direction

Parliamentary procedure: None

Provision

82. Under the Bill, the CIE must make a referral to Scottish Ministers where it appears 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. In such cases, section 48 of the Bill allows Scottish Ministers to issue an enforcement direction.
83. An enforcement direction can be varied by the giving of a further direction and can also be revoked. Before giving, varying or revoking such a direction, Scottish Ministers must consult the CIE. Where any of these powers are exercised, Scottish Ministers must lay before the Scottish Parliament a report on their exercise of that power. Directions issued under this section would not be subject to any parliamentary procedure.

Committee consideration

84. The Scottish Government sets out in the DPM that 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). It considers it 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.

85. The Scottish Government further explains in the DPM that directions are not generally subject to parliamentary procedure and are being used here to ensure that necessary improvements identified by inspection are taken forward. Also, given these directions will apply at the school/education authority level, parliamentary procedure is not considered appropriate. However, every time Scottish Ministers exercise this power, they must prepare a report on its use and lay it before Parliament so that the Parliament is aware of the action that has been taken.
86. The Committee considers that as this power mirrors the current law, it is content with the explanation as to why the power has been taken and that it is not subject to any parliamentary procedure. The Committee also welcomes that each time the power is exercised, a report will be laid before the Parliament so that it is aware of the action taken.

87. The Committee finds the power acceptable in principle and is content that it is not subject to any parliamentary procedure.

88. The Committee also welcomes that a report will be laid before Parliament each time the power to give an enforcement direction is exercised.

Section 56: Ancillary Provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

**Parliamentary procedure: Affirmative if modifying primary legislation,
otherwise negative**

Provision

89. Section 56 of the Bill confers a power on Scottish Ministers to 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).

Committee consideration

90. The Scottish Government sets out in the DPM that this provision follows the standard model for this type of power and, as with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. It considers that without this power it may be necessary to return to the Parliament, through primary legislation to deal with minor matters that are necessary to give full effect to the original Bill; and that this would not be an effective use of resources. In addition, some of the

changes made through the Bill will require transitional, transitory or savings provisions to ensure a smooth change from the current to the new regime.

91. The Scottish Government further explains in the DPM that 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 with any substantive change being given sufficient scrutiny through the affirmative procedure.
92. The Committee considers that the power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. The power allows issues of an ancillary nature which may arise to be dealt with effectively by Scottish Ministers and without such a power, any changes would require to be made by primary legislation, which would not be an effective use of the Parliament's resources.
93. The approach taken is typical for ancillary powers and recognises the particular interest Parliament has in provisions which modify primary legislation. Whereas ancillary changes to subordinate legislation are likely to be more technical, operational or implementation matters within the scope and policy intention of the Bill and so merit a lesser degree of parliamentary scrutiny. This is standard for an ancillary provision.

94. The Committee finds the power acceptable in principle and is content with the specified parliamentary procedures which are dependent on whether the power is exercised to amend primary legislation.

Section 57: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Laid, no procedure

Provision

95. Sections 54 to 58 of the Bill come into force on the day after Royal Assent. Section 57 provides that the other provisions of this Act come into force on such day as Scottish Ministers may by regulations appoint. Regulations under this section may include transitional, transitory or saving provision, and make different provision for different purposes.

Committee consideration

96. The Scottish Government sets out in the DPM that it is standard practice for Scottish Ministers to have the power to commence provisions at such time as they consider suitable. As the Bill will establish a new public body and a new office holder that are assuming responsibilities from existing organisations, the Scottish

Government considers that it is reasonable to be able to commence provisions when appropriate to ensure a timely, orderly and effective transition.

97. The Scottish Government further explains in the DPM that as is usual for commencement regulations, these will be laid as soon as practicable after being made with no further parliamentary procedure. It considers this appropriate because the policy behind the provisions will already have been considered by the Parliament during the passage of the Bill.
98. The Committee agrees that it is standard to take a power at the end of a Bill to commence those sections where provision has not been made in the Bill for commencement. It is also standard that commencement regulations are laid before the Parliament but are not subject to further parliamentary procedure.
99. **The Committee finds the power acceptable in principle and is content that it is not subject to any parliamentary procedure.**

