

# **HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Higher Education Governance (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

### **OUTLINE OF BILL PROVISIONS**

3. The Scottish Government is committed to excellence in higher education in Scotland and aims to strengthen governance arrangements across the higher education sector. A key aim of the Scottish Government is to create an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance.

4. The principal objective of the Higher Education Governance (Scotland) Bill ("the Bill") is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.

5. Specifically, the Bill:

- Requires higher education institutions ("HEIs") to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers.
- Requires HEIs to include within the membership of their governing bodies the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students' association, and two graduates of the HEI nominated by the graduates' association.

*This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015*

- Requires HEIs to ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending ex officio; a majority of elected members representing staff and students; and a minimum of 10% student representation. The Bill also ensures that all board members appointed under the Bill's election process for staff and students are elected by the constituency that they represent.
- Replaces the current definition of academic freedom in section 26 of the Further and Higher Education (Scotland) Act 2005, with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals.

6. Further information on the Bill is contained in the Explanatory Notes, Financial Memorandum and Policy Memorandum published separately as SP Bill 74-EN and SP Bill 74-PM.

## **RATIONALE FOR SUBORDINATE LEGISLATION**

7. The Bill contains delegated power provisions which are explained in more detail below. In deciding whether the provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered carefully the importance of each matter against the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances without having to resort to primary legislation;
- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament; and
- make proper use of valuable parliamentary time.

## **DELEGATED POWERS**

### **Part 1 of the Bill**

#### **Chapter 1: Governing Bodies**

##### **Section 1 – Appointment as chairing member**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish Statutory Instrument  
**Parliamentary procedure:** Affirmative

##### *Provision*

8. Section 1(1) confers on the Scottish Ministers the power to set out in regulations the process by which an HEI must appoint the chairing member of its governing body. By virtue of section 1(2)(a) and (b) the regulations may, in particular, include provision about the length of term an appointed chair can serve and whether reappointment is possible as well as provision about the means of selection for appointment including, for example, through public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment. Section 1(2)(c) allows the regulations to make provision for reimbursement of candidates' expenses incurred in any process set out by the Scottish Ministers.

##### *Reason for taking power*

9. The Bill aims to establish a required minimum level of inclusivity, transparency and consistency across all HEIs. While the Scottish Ministers consider that it is crucial that the Bill includes a minimum requirement to have a chairing member of the governing body of an HEI appointed in accordance with a process set out in regulations made by them, it is not considered necessary to set out the detailed process of appointment of the chairing member in primary legislation and therefore the regulation-making power is required. As will be seen from section 1(2), the regulations could potentially include a considerable level of detail about the process and it is thought that this could be better provided for in secondary legislation rather than in primary legislation. The regulations could include details regarding the length of term an appointed chair can serve (and whether reappointment is possible) and provision about the means of selection for appointment including, for example, through public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment. In making provision in regulations about selection of candidates by election, the Scottish Ministers might include a requirement that candidates are to be interviewed first to assess suitability for election and might also include provision as to the electorate. Regulations under section 1 could also include provision about reimbursement of candidates' expenses. So the regulations could include a substantial amount of detail.

10. In making any regulations under section 1, Scottish Ministers are, however, required (under section 3 of the Bill) to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate. Those might be any

groups or persons appearing to represent the interests of staff, unions, current students and alumni of institutions, as well as any wider stakeholder group considered appropriate. Therefore there will be significant consultation about the process for appointment of the chairing member before the power is exercised. The power will also allow the Scottish Ministers the flexibility to modify any process regarding the appointment of chairing members to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

### ***Choice of procedure***

11. The regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill. Section 14(1) applies the affirmative procedure to any regulations that are made under those provisions of the Bill that precede section 14 (which in practice means Chapters 1 and 2 of Part 1 of the Bill). It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a higher level of scrutiny of these regulations which will set out the process for appointing the chairing members of HEIs' governing bodies. This will be a key process for HEIs and therefore it is important that adequate parliamentary scrutiny is ensured.

### **Section 2 - Remuneration to be payable**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish Statutory Instrument  
**Parliamentary procedure:** Affirmative

### ***Provision***

12. Section 2(1) confers on the Scottish Ministers a power to provide by regulations that remuneration and allowances are payable to chairing members of governing bodies of HEIs. Under section 2(2)(a) and (b) the Scottish Ministers may specify or limit the circumstances in which sums must be offered or require those sums to be reasonable, given the responsibilities of the chairing member. Under section 2(2)(c) the Scottish Ministers are given the power to delegate, to another person, the function of establishing the level of any sums payable to chairing members.

### ***Reason for taking power***

13. The regulation-making power seeks to allow the Scottish Ministers to make provision for remuneration and allowances to be payable to the chairing member of the governing body of an HEI. At the moment most, if not all, governing bodies do not pay any remuneration to their chairing members. The Scottish Ministers consider that remuneration and allowances should be available to chairing members in order to increase the potential range of candidates applying for such positions. This power is very closely related to the power in section 1 which allows the Scottish Ministers to set out a process by which a chairing member is to be elected. As with that power, it is considered important to empower the Scottish Ministers to make provision for remuneration and allowances of chairing members when that is considered appropriate, but that it would not be necessary to set out the details in relation to remuneration and allowances for chairing members in primary legislation. Such detail is considered to be more appropriate for secondary legislation and therefore the regulation-making power is required. It will also allow Scottish Ministers the flexibility to change the provisions on remuneration and allowances to reflect changing practices within the higher education sector without having to resort to primary

legislation. The power also provides Ministers with a specific power to delegate to any other person the function of determining the sums payable in particular cases. This power is necessary in case Ministers wish, for example, to allow each governing body of an HEI to determine the sums payable to its chairing member.

14. As with regulations under section 1, in making regulations under section 2 the Scottish Ministers are also required (under section 3 of the Bill) to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

#### ***Choice of procedure***

15. As above, the regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill which specifies the relevant regulation making procedure for Chapters 1 and 2 of Part 1 of the Bill. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a higher level of scrutiny, given the potential impact that the exercise of the power could have on HEIs. This will be an important issue for HEIs and therefore it is important that adequate parliamentary scrutiny is ensured. Given that the exercise of this power is likely to be closely related to the exercise of the power under section 1, it is also considered appropriate that both powers are subject to the same level of parliamentary scrutiny.

#### **Section 8 – Power to modify section 4**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish Statutory Instrument  
**Parliamentary procedure:** Affirmative

#### ***Provision***

16. Section 8 confers on the Scottish Ministers a power to modify, by regulations, the categories of governing body membership set out in section 4(1) (composition of governing body) and the number of persons to be appointed under a particular category in that section.

#### ***Reason for taking power***

17. The regulation-making power seeks to allow for prompt and effective change to be made to the categories of governing body members and the number of persons to be appointed under a particular category in order to respond to any changes in future practice in the higher education sector and to any relevant developments in good governance principles which lead the Scottish Ministers to conclude that the provisions in section 4 are no longer appropriate in their present form.

#### ***Choice of procedure***

18. The regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a high level of scrutiny, given that the power is a power to amend significantly the

effect of primary legislation and given also the potential impact that the exercise of the power could have on HEIs and their governing bodies.

## **Chapter 2: Academic Boards**

### **Section 13 – Power to modify sections 9 and 10**

**Power conferred on:**           **The Scottish Ministers**  
**Power exercisable by:**       **Regulations made by Scottish Statutory Instrument**  
**Parliamentary procedure:** **Affirmative**

#### ***Provision***

19. Section 13(1) confers on the Scottish Ministers a power to amend, by regulations, the number of members of the academic board specified in section 9. Section 13(2) confers on the Scottish Ministers a power to amend, by regulations, the categories of membership of the academic board set out in section 10(1) and to amend the number or percentage of members to be appointed under a particular category. By virtue of section 13(3), regulations made under section 13(1) or 13(2) can amend the number of members in section 9 or the number or percentage of persons to be appointed under a particular category in section 10(1) by specifying a fixed number or percentage, or a maximum or a minimum (or both).

#### ***Reason for taking power***

20. The regulation-making power seeks to allow for a prompt and effective change to be made to the categories of academic board members and the number and percentage of persons to be appointed under a particular category in order to respond to any changes in future practice in the higher education sector and to relevant developments in good governance principles.

#### ***Choice of procedure***

21. The regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a high level of scrutiny, given that the power is a power to amend significantly the effect of primary legislation and given also the potential impact that the exercise of the power could have on HEIs and their academic boards.

### **Chapter 3: Regulations and definitions**

#### **Section 15 – Meaning of higher education institution**

**Power conferred on:**            **The Scottish Ministers**  
**Power exercisable by:**       **Regulations made by Scottish Statutory Instrument**  
**Parliamentary procedure:** **Negative**

#### ***Provision***

22. Section 15(2) confers on the Scottish Ministers a power to modify by regulations the definition of “higher education institution” in section 15(1). This definition applies to Part 1 of the Bill only (which means that the definition is not relevant to the section on academic freedom, as section 19 forms Part 2 of the Bill). Such modifications may include a particular HEI in that definition or may exclude a particular HEI from that definition.

#### ***Reason for taking power***

23. The policy intention is that all publicly funded HEIs should be subject to the provisions in Part 1 of the Bill. However, the policy intention is also that an HEI operating in more than one jurisdiction (which is primarily based and governed elsewhere) should, even where publicly funded, be excluded from the definition in order to avoid a single institution potentially being made subject to conflicting requirements in different jurisdictions. The definition in section 15(1) achieves this aim. The power to amend the definition of “higher education institution” gives the Scottish Ministers flexibility to include or exclude a particular HEI from that definition in the event of changed circumstances (for example, if another cross-border HEI similar to the Open University begins operating in Scotland and receives public funding).

#### ***Choice of procedure***

24. The regulations are subject to the negative procedure by virtue of section 15(3). This is considered to be appropriate given that section 15(2) empowers the Scottish Ministers only to include or exclude a particular HEI from the definition and does not permit them to give the term an entirely new meaning. It is thought that the negative procedure would therefore allow sufficient parliamentary scrutiny of any modification of the definition of an HEI. The inclusion or exclusion of a particular HEI should not be controversial as it would merely be used to implement the current policy of the Bill and apply it to future cases. Further, the limited way that the regulation making power has been framed in section 15(2) means that any regulations which are laid will be of a very straightforward and non-technical nature: they would merely name a particular institution and state whether it was being included or excluded. Accordingly, no real scrutiny of the detail will be required, and the timescales attached to the negative procedure should also be unproblematic. The negative procedure is therefore considered to be appropriate.

### **Part 3 of the Bill**

#### **General Provisions**

##### **Section 20 – Ancillary and consequential provisions**

|                                 |   |
|---------------------------------|---|
| <b>Power conferred on:</b>      | <b>The Scottish Ministers</b>   |
| <b>Power exercisable by:</b>    | <b>Regulations made by Scottish Statutory Instrument</b>  |
| <b>Parliamentary procedure:</b> | <b>Affirmative procedure if adding to, replacing or omitting text in an Act; otherwise negative procedure</b> |

#### ***Provision***

25. Section 20(1) gives the Scottish Ministers the power, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Bill.

#### ***Reason for taking power***

26. As with any new law, the Bill may give rise to a need for a range of ancillary provisions. The power to make ancillary provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, it is possible that unforeseen issues will arise which require further provision to be made or the further modification of the existing law. This power would allow such provision to be made without the need to make further primary legislation.

27. The Bill already includes a number of consequential amendments to related legislation (see schedule) but the power would allow the Scottish Ministers to make further changes should a need be identified, or change be expedient. It may, however, be that further provision is necessary in order fully and properly to implement the Bill's provisions. The Scottish Government considers that the regulation-making power is necessary to allow for this flexibility. Without this power, it might be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. Scottish Ministers consider that this would not be an effective use of resources by the Parliament or the Scottish Government.

28. This power might be useful for phased implementation along with staged commencement. It is also possible that the need for transitional and savings provisions may be identified after the commencement of particular sections and associated with exercise of other ancillary powers, when the power in section 22 will no longer be available. In addition, it is appropriate for significant transitional, transitory or saving provision (as opposed to routine provision regarding commencement) to be subject to parliamentary procedure.

29. The power, while potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, or in connection with, provision made by the Bill. Any such regulations will therefore be closely and directly linked to the substance of this Bill.

***Choice of procedure***

30. Regulations made under section 20 which add to, replace or omit any part of the text of any Act are subject to the affirmative procedure, as is consistent with previous practice. In all other situations they are subject to the negative procedure and it is considered by the Scottish Government that this would provide an appropriate level of scrutiny.

**Section 22 – Commencement of the Bill**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish Statutory Instrument  
**Parliamentary procedure:** The Order must be laid before the Parliament under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010

***Provision***

31. Section 22(1) brings sections 22 and 23 into force on the day after Royal Assent. Section 22(2) provides that the other provisions in the Act come into force on a day appointed by the Scottish Ministers in regulations. Section 22(3)(a) allows the Scottish Ministers by regulations made under subsection (2) to bring the other provisions of the Bill into force on different days for different purposes and section 23(3)(b) allows the Scottish Ministers to include transitional, transitory or saving provision in those regulations.

***Reason for taking power***

32. Sections 22 and 23 of the Bill are to be commenced on the day after Royal Assent. The Scottish Ministers consider it appropriate for the other provisions of the Bill to be commenced at such a time as they appoint. It is usual practice for such commencement provisions to be dealt with by subordinate legislation to allow the Scottish Ministers to plan commencement appropriately with stakeholders and make appropriate transitional, transitory or saving provision where necessary.

***Choice of procedure***

33. The power is subject to the requirement in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 that the regulations should be laid as soon as practicable after making (and in any event, before they are due to come into force), as is normal procedure for commencement.

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