

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

PURPOSE

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.10 of the Parliament's Standing Orders and aims to assist the Delegated Powers and Law Reform Committee in its consideration of the Higher Education Governance (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The memorandum supplements the Delegated Powers Memorandum for the Bill as introduced.
2. The contents of the memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION REVISED AT STAGE 2

3. The amended delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.

Chapter 3: Key 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
Revised or new power:	Revised

Provision

4. On introduction, section 15 provided the Scottish Ministers with 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. The modification power would have allowed the Scottish Ministers to include a particular HEI in the definition or exclude a particular HEI from that definition.

5. However, the Delegated Powers and Law Reform Committee asked why it was necessary to take a power to include a higher education institution in the definition, since the definition will already catch all universities and designated institutions (other than the Open University) which may receive funding from the Scottish Further and Higher Education Funding Council. Any new institutions will be included automatically by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005. The Scottish Government agreed that the power to include new institutions beyond fundable bodies is not required since the policy intention is that only fundable bodies should be covered by the requirements in Part 1 of the Bill. As such, an amendment was made at Stage 2 to amend the power so that it can only be used to exclude institutions from the definition of “higher education institution”.

Reason for taking power

6. The policy intention is that all publicly funded higher education institutions (“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” enables the Scottish Ministers to exclude a particular HEI from the definition of “higher education institution” in the event of changed circumstances which result in the institution needing to be excluded (for example, if another cross-border HEI similar to the Open University begins operating in Scotland and receives public funding).

Choice of procedure

7. These regulations are subject to the negative procedure by virtue of section 15(3). This is considered to be appropriate on the basis that section 15(2) now empowers the Scottish Ministers only to exclude a particular HEI from the definition, and also does not permit them to give the term an entirely new meaning. The limited way that the regulation making power is framed in section 15(2) means that any regulations which are laid will be of a straightforward nature: they would merely name a particular institution and state that it is excluded. Accordingly, it is thought that the negative procedure allows sufficient Parliamentary scrutiny of any modification of the definition of an HEI and is, therefore, appropriate.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION REMOVED AT STAGE 2

8. The Committee will wish to note that the following regulation making powers were removed by amendment at Stage 2.

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**

9. The power to set out in regulations the process by which an HEI must appoint the chairing member of its governing body has been removed. This process has now been set out in primary legislation on the face of the Bill and is subject to full parliamentary scrutiny.

10. The Delegated Powers and Law Reform Committee asked the Scottish Government to consider whether it would be more appropriate for the key provisions as to the appointment of chairing members to be set out on the face of the Bill and therefore be made subject to full parliamentary scrutiny.

11. In light of this as well as evidence presented to the Education and Culture Committee and lengthy dialogue with stakeholders, the Scottish Government brought forward amendments at Stage 2 to make full provision on the face of the Bill for the appointment and election of the senior lay member on the governing body of all HEIs.

Section 2 – Remuneration to be payable

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

12. The power to set out in regulations provision for remuneration and allowances to be payable to the chairing member of the governing body of an HEI has been removed. This provision has now been set out in primary legislation on the face of the Bill and is subject to full parliamentary scrutiny.

13. The Delegated Powers and Law Reform Committee asked the Scottish Government to consider whether it would be more appropriate for the key provisions on remuneration for chairing members to be set out on the face of the Bill and therefore be made subject to full parliamentary scrutiny.

14. The Scottish Government gave full consideration to the issues and evidence raised by all committees in respect of this provision and brought forward amendments at Stage 2 to make full provision on the face of the Bill to pay the senior lay member of the governing body reasonable remuneration and allowances upon request by that person. As well as reasonable, the remuneration and allowances must be commensurate with the nature and amount of the work done by that person as the senior lay member.

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

15. The power to modify, by regulations, the categories of governing body members and the number of persons to be appointed under a particular category in section 4 (composition of governing body) has been removed. No alternative provision has been made in its place.

16. Despite regulations under this section being subject to affirmative procedure, section 8, along with section 13, attracted criticism during Stage 1 which focussed largely on the potential reclassification of HEIs as public sector bodies by the Office of National Statistics (“ONS”).

17. The Stage 1 Report of the Education and Culture Committee considered this issue and “the various sections of the Bill that would grant Scottish Ministers the powers to make future regulations about governing bodies and the academic board”. The Report recommended that “all reasonable measures should be taken to minimise any risk of reclassification” and welcomed “the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions”.

18. Having given the matter careful consideration it was concluded that, while the Scottish Government does not believe that section 8 would increase the risk of reclassification, the removal of section 8 is necessary to respond to the strong concerns expressed by stakeholders about potential action by ONS.

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

19. The regulation making power to allow a change to be made to the number of members of the academic board specified in section 9 (size of academic board) has been removed in consequence of the removal of section 9. The regulation making power to allow a 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 section 10 (composition of academic board) has also been removed. No alternative provision has been made in its place.

20. Despite regulations under this section being subject to affirmative procedure, section 13, along with section 8, attracted criticism during Stage 1 which focussed largely on the potential reclassification of HEIs as public sector bodies by ONS.

This document relates to the Higher Education Governance (Scotland) Bill as amended at Stage 2 (SP Bill 74A)

21. The Stage 1 Report of the Education and Culture Committee considered this issue and “the various sections of the Bill that would grant Scottish Ministers the powers to make future regulations about governing bodies and the academic board”. The Report recommended that “all reasonable measures should be taken to minimise any risk of reclassification” and welcomed “the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions”.

22. Having given the matter careful consideration it was concluded that, while the Scottish Government does not believe that section 13 would increase the risk of reclassification, the removal of section 13 is necessary to respond to the strong concerns expressed by stakeholders about potential action by ONS.

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