EXPLANATORY MEMORANDUM TO

THE EDUCATION (SCOTLAND) ACT 2025 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2025

2025 No. [XXXX]

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Douglas Alexander, Secretary of State for Scotland at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Rachel Irvine, Deputy Director for Constitutional Policy, at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Anthony Gilliland at the Scotland Office can be contacted by email at the following address with any queries regarding the instrument: anthony.gilliland@ukgovscotland.gov.uk

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Education (Scotland) Act 2025 (Consequential Provisions and Modifications) Order 2025 ("the Order") will make provision in consequence of the Education (Scotland) Act 2025 ("the 2025 Act"). The 2025 Act will establish and confer functions on Qualifications Scotland, a new qualifications body to replace the Scottish Qualifications Authority ("SQA"), and establish and confer functions on His Majesty's Chief Inspector of Education in Scotland ("the Chief Inspector").

4.2 The Order will do three things:

4.3 First, it will make provision relating to such functions of Qualifications Scotland that may be exercised otherwise than in or as regards Scotland, and repeals the connected functions of the SQA.

4.4 Second, it makes limited amendments to primary legislation, and numerous amendments to secondary legislation, in reserved areas and in the law of England, Wales and Northern Ireland. These amendments are largely updates to statutory references designed to ensure that existing law which refers to the SQA will refer to Qualifications Scotland.

4.5 Third, the Order will provide that the Chief Inspector is to be treated as a non-ministerial officeholder in the Scottish Administration to support the delivery model for the new education inspectorate in Scotland.

Where does the legislation extend to, and apply?

4.6 The extent of this instrument is England, Wales, Scotland and Northern Ireland subject to the proviso that any modification made by this instrument has the same extent as the provision modified.

4.7 The territorial application of this instrument is the same as its extent.

5. Policy Context

What is being done and why?

5.1 In 2022 the Scottish Government committed to establishing a new qualifications body, Qualifications Scotland, to replace Scotland's existing national qualifications body, the SQA. It also committed to removing the education inspection function from the national education agency, Education Scotland, and setting up an independent education inspectorate, the office of the Chief Inspector for Education in Scotland. This was in response to the reviews, reports and consultation set out at paragraph 7 below.

Provisions relating to the functions of Qualifications Scotland and the repeal of relevant SQA functions

5.2 As a consequence of establishing Qualifications Scotland, the SQA is to be dissolved. The SQA was set up under the Education (Scotland) Act 1996 ("the 1996 Act"), a pre-devolution Act of Parliament which provides the SQA with a set of general functions that enables it to devise, assess and award qualifications. These are known as the "awarding functions". It also provides the SQA with a set of functions relating to the accreditation of qualifications. These are known as "accreditation functions". Under section 8 of the 1996 Act the SQA has power to deliver these awarding and accreditation functions within Scotland or anywhere else outside of Scotland.

5.3 It is the Scottish Government's policy objective that Qualifications Scotland can fulfil the same functions and remit as the SQA. The 2025 Act confers on Qualifications Scotland general functions which broadly mirror the SQA's current awarding and accreditation functions. Section 6 of the 2025 Act will also provide Qualifications Scotland with the power to provide services in respect of matters to which these functions relate within or outside of Scotland. However, as the 2025 Act is an Act of the Scottish Parliament, section 6 is subject to the restriction at section 29(2)(a) of the Scotland Act 1998 that it may not "confer or remove functions exercisable other than in or as regards Scotland". The purpose of this provision is to ensure all services and products currently delivered by the SQA can be transferred and delivered by Qualifications Scotland when it is established, and for Qualifications Scotland to be able to deliver services and products with the same functional and geographical scope as the SQA does at present.

5.4 This policy objective is achieved by the 2025 Act and this Order working in tandem. Article 2 of this Order seeks to maintain the status quo of the SQA's scope of services being delivered outside of Scotland by providing that functions conferred on Qualifications Scotland by section 6 are exercisable in or as regards places outwith Scotland.

Statutory references to Qualifications Scotland

5.5 As discussed above, the SQA provides and delivers services in Scotland and across the rest of the UK. The qualifications the SQA awards are recognised by a range of higher and further education organisations across the UK, skills and industry bodies, and employers. To ensure this, a range of provisions across primary and secondary legislation in reserved areas and the law of England, Wales and Northern Ireland make reference to the SQA or their qualifications.

5.6 In order for Qualifications Scotland's qualifications to be recognised in the same way, the Order seeks to make amendments to these references to ensure that existing law referring to the SQA will now refer to Qualifications Scotland (or include both references where required) so that the provisions work as intended.

His Majesty's Chief Inspector of Education in Scotland – Non-Ministerial Office Holder in the Scottish Administration

5.7 The office of HM Chief Inspector of Education in Scotland is being established by the 2025 Act. It was decided that the Chief Inspector be designated as a non-ministerial office-holder within the Scottish Administration. As such, this is to be a civil service position. The Chief Inspector will lead an independent education inspectorate, to take forward the education inspection functions that currently sit within Education Scotland (an executive agency of the Scottish Ministers).

5.8 The office holder will hold primary responsibility for initiating inspection of educational establishments and setting the schedule, frequency and focus for inspections, with a limited number of matters remaining under the control of Scottish Ministers. The objective is to create an education inspectorate in Scotland which functions independently of Ministers, while retaining widely supported features of the current setup, including that inspectors are civil servants appointed to their office by His Majesty. This approach aligns with the model adopted for the successful operation of other HM inspectorates in Scotland.

5.9 The new inspectorate, which the Chief Inspector will head, is to continue to be staffed by civil servants, consistent with the employment of current staff as part of Education Scotland. Historically, prior to moving into Education Scotland in 2011, the function of education inspections was held by a separate executive agency. It is believed that prior to that, inspectors and support staff operated out of 'core' central government (including the Scottish Education Department).

5.10 In the current system HM Inspectors are answerable to Scottish Ministers for the running of the inspectorate and the whole inspection system. Inspection functions are set out in section 66 to 66D of the Education (Scotland) Act 1980 and sections 9 to 10C of the Standards in Scotland's Schools etc. Act 2000. It is believed that HM Inspectors of Education/Schools have been in existence in Scotland since the 1840s, with inspection being under the control of the Secretary of State since at least 1945.

5.11 The review of the system led by Professor Muir included a view that having an inspection function within the same body charged with supporting improvement (Education Scotland) created potential conflicts of interest and compromised the organisation's ability to perform both roles well.

5.12 As part of a wider review, the Scottish Government consulted on various options for taking a new approach to education inspection, including creating a separate

Executive Agency or by establishing the role of HM Chief Inspector of Education in Scotland as an office-holder in legislation.

5.13 The options considered a status quo scenario (no organisational changes i.e. structure, governance and role of Education Scotland remain the same); minimal change scenario (establishment of a separate inspections agency without legislation); Professor Muir's recommendations scenario (establishment of the inspectorate through legislation); and a maximum change scenario (the inspectorate and the registrar for independent schools combine into one body). Maintaining the status quo was discounted as it would result in a single body remaining responsible for the improvement of education in schools and also being accountable for assuring education standards in a range of establishments. Similarly, a new separate executive agency was considered an unsuitable approach as it would not provide the independence being sought.

5.14 Professor Muir's recommendation that the Inspectorate be "funded by the Scottish Parliament, staffed by civil servants" was also considered. However, there are a small number of existing bodies directly funded by the Scottish Parliament (e.g. the Scottish Human Rights Commission, the Scottish Public Services Ombudsman, and the Children and Young People's Commissioner) but none of these are staffed by civil servants. Establishing an inspectorate using this model would therefore be anomalous in comparison with other inspectorate bodies and the Scottish Government found there is no strong evidence to support the benefits of such a move. Given these considerations, the Inspectorate will be funded by the Scottish Government, in line with other HM inspectorates in Scotland, and will be required to lay its reports directly before the Scottish Parliament with the Chief Inspector to be a non-ministerial office holder.

What was the previous policy, how is this different?

5.15 As noted in the paragraphs 5.2 to 5.4 above, the existing policy enables the SQA to deliver its services outside of Scotland without being restricted by provisions applying to Acts of the Scottish Parliament requiring functions to be exercisable only "in or as regards Scotland" set out in the Scotland Act 1998. This Order, in combination with the 2025 Act, will ensure this is unchanged and no different for Qualifications Scotland when it replaces the SQA.

5.16 As noted above, there are many references to the SQA in reserved areas of law. This Order will update those references in consequence of the SQA being replaced by Qualifications Scotland. It makes no change to existing policy.

5.17 Provision is being made in this by way Order to ensure that the new office of His Majesty's Chief Inspector of Education in Scotland will be treated as an non-ministerial officeholder in the Scottish Administration for the purposes of the Scotland Act 1998 and all other purposes.

5.18 This change is necessary to implement the Scottish Government's policy to create an education inspectorate which operates independently of Ministers, while retaining widely supported features of the current setup, including that inspectors are civil servants appointed to their office by His Majesty. This approach aligns with the model adopted for the successful operation of other HM inspectorates in Scotland.

6. Legislative and Legal Context

How has the law changed?

6.1 The Order changes the law only so far as that is necessary to give effect to the 2025 Act. Articles 2 and 3 make provision to support the exercise of Qualifications Scotland's functions otherwise than in or as regards Scotland, and extend the scope of a transitional provision in the 2025 Act, respectively. Article 4 gives effect to the amendments to primary and secondary legislation in the Schedule. The amendments to the House of Commons Disqualifications Act 1975 ensure that restrictions on appointments that are currently in place for the SQA and its Advisory Council apply to Qualifications Scotland and its Strategic Advisory Council. The repeal of section 8 of the Education Scotland Act 1996 (which provides that SQA may provide services both inside and outside Scotland in respect of matters to which its functions relate), dovetails with the repeal of the other functions of the SQA by the 2025 Act. The amendments to secondary legislation ensure that the legislation being amended continues to operate in relation to qualifications awarded or accredited by Scotland's qualifications body by amending references to the SQA so they point to Qualifications Scotland instead. The provisions in articles 5 and 6 are to the effect that the Chief Inspector of Education in Scotland (the new office created by the 2025 Act) will be treated as an officeholder in the Scottish Administration for the purposes of the Scotland Act 1998 and any other enactment.

Why was this approach taken to change the law?

6.2 As the law relating to qualifications in Scotland, in particular, has some reach into the law of other jurisdictions in the UK. An order under the Scotland Act 1998 appears to be the only feasible approach to make amendments in consequence of the 2025 Act in those other jurisdictions. It is also the only feasible approach to make provision regarding the composition of the Scottish Administration and of Parliament, as both matters are outside the competence of the Scottish Parliament. Other types of Scotland Act Order may have been feasible for some provisions of the Order, however, it appeared appropriate and most efficient use of parliamentary time to deal with all matters arising from the 2025 Act in one instrument.

7. Consultation

Summary of consultation outcome and methodology

7.1 No consultation was carried out in relation to this Order, because it makes provision which is consequential on the 2025 Act, on whose policy substantial consultation was undertaken as briefly summarised below.

7.2 In 2020 the Scottish Ministers commissioned a review to be undertaken by the OECD to help better understand how the curriculum is being designed and implemented in schools in Scotland and to identify areas for improvement. The OECD reported in June 2021. It set out twelve recommendations and a number of actions that should be taken to strengthen the Curriculum for Excellence ("CfE") and tackle its ongoing implementation challenges as part of a structured approach to the future of CfE.

7.3 The then Cabinet Secretary for Education and Skills subsequently appointed an independent Advisor, Professor Ken Muir, in August 2021 to engage widely with stakeholders and report findings and recommendations to the Scottish Government on the implementation of the OECD's recommendations. Professor Muir's report, Putting Learning at the Centre: Towards a Future Vision for Scottish Education was published in March 2022. Professor Muir's work was informed by comprehensive consultation

with education system stakeholders which included a public consultation resulting in 764 responses and extensive engagement including 87 meetings and events. In addition, Professor Muir undertook extensive consultation and engagement with children and young people, resulting in 1,210 primary school aged children and 394 secondary school aged children and young people taking part in conversations facilitated by adults known to them. 3,889 12- to 18-year-olds also responded to the online survey. All respondents to the consultation recognised the need for reform and offered various views as to where the weaknesses in the system were and commented generally on where improvements were needed and on the proposals which included removing the inspection function from Education Scotland and replacing the SQA (although there were mixed views regarding whether the SQA should be replaced or reformed, most respondents agreed some form of change was required).

8. Applicable Guidance

8.1 There is no applicable guidance.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because, as noted above in the consultation section, the Order is limited to making provision that is consequential on the 2025 Act. The full range of impact assessments in respect of the policy of the Bill for what is now the 2025 Act was undertaken.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies. In respect of Qualifications Scotland, the Order ensures Qualifications Scotland can continue to deliver the services that the SQA delivered outside of Scotland in England, Wales and Northern Ireland. Without this Order and the specific provisions that will enable the delivery of these services in these settings, there is a risk that those services may no longer be able to be delivered which may negatively impact the businesses, charities and voluntary bodies that use these services. In respect of references to Qualifications Scotland, without updating these references there is a risk that businesses, charities and voluntary bodies who rely on the statutory references or recognise qualifications delivered by the SQA/Qualifications Scotland will be adversely impacted.

9.3 In respect of the office for the Chief Inspector for Education in Scotland, this Order does not impact these organisations because the Chief Inspector will only inspect education provision in Scotland, and this Order makes no changes to that function.

9.4 The legislation does not impact small or micro businesses.

9.5 There is no significant impact on the public sector from the Order.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 Given the nature of this Order as discussed above, no specific monitoring or review arrangements are proposed. The Scottish Government will work with the UK Government, the Welsh Government and the Northern Ireland Executive as and when

any issues arise in relation to the matters covered by the Order, for example when instruments amended by the Order are being reviewed or revised.

10.2 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:
"In my view the provisions of the Education (Scotland) Act 2025 (Consequential Provisions and Modifications) Order 2025 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").