These documents relate to the Further and Higher Education (Scotland) Bill (SP Bill 26) as introduced in the Scottish Parliament on 30 September 2004

FURTHER AND HIGHER EDUCATION (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Further and Higher Education (Scotland) Bill introduced in the Scottish Parliament on 30 September 2004:

   - Explanatory Notes;
   - a Financial Memorandum;
   - an Executive Statement on legislative competence; and
   - the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 26–PM.
INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

BACKGROUND

4. The Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”), set up the Scottish Higher Education Funding Council (SHEFC), and made provision for the Scottish Further Education Funding Council (SFEFC) which came into being in 1999. The main purpose of this Bill is to dissolve the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council, and create a new body, to be called the Scottish Further and Higher Education Funding Council (“the Council”). In creating this new body, the Bill sets out the powers and duties on Ministers and the Council, which are addressed in more detail below. The Bill also makes provision to bring colleges and higher education institutions (the fundable bodies as detailed in the Bill), and the Scottish Agricultural College, within the remit of the Scottish Public Services Ombudsman.

5. In general terms, the Bill amends the 1992 Act to achieve this, and contains new provisions. Many provisions are drawn from those in the 1992 Act, which apply to either or both the further education sector (colleges) and the higher education sector (higher education institutions). The provisions of this Bill, however, apply equally to both sectors. Whereas the Scottish Further Education Funding Council operated in relation to the funding of colleges, and the Scottish Higher Education Funding Council operated in relation to higher education institutions, the Council will operate to fund both sectors, and the Bill specifies its funding functions, and additional functions. Also in general terms, many provisions of the 1992 Act, as it relates to the colleges and higher education institutions themselves, will remain in force.

6. The Bill follows upon two rounds of consultation. The first, held in October/November 2003 consisted of a discussion paper, and a series of one to one meetings with key stakeholders. The second was full public consultation and comprised a three month consultation, from April 2003, which included a consultation paper and a draft Bill. Copies of these documents can be found at http://www.scotland.gov.uk/consultations/education/cltes-00.asp. A separate consultation paper was issued in December 2003, on the matter of bringing colleges and higher education institutions under the remit of the Scottish Public Services Ombudsman (“the Ombudsman”). The responses received on all of these consultations have been considered in redrafting the Bill.
THE BILL

7. The main provisions of this Bill are as follows:

- **Part 1**
  - Creates the new Scottish Further and Higher Education Funding Council and dissolves the current Scottish Further Education Funding Council and Scottish Higher Education Funding Council (Sections 1 and 2);
  - Sets out duties on Ministers and the Council with regard to further and higher education in Scotland (Sections 3 to 7);
  - Sets out further powers of Ministers and the Council in relation to funding (Sections 8 to 12);
  - Sets out the functions of the Council (sections 13 to 23);
  - Sets out the powers of Ministers in relation to the functions of the Council (sections 24 to 25);
  - Details other miscellaneous provisions (sections 26 to 29).

- **Part 2** – makes miscellaneous and general provisions including amending enactments, ancillary provision, regulation and order making powers and interpretation (sections 30 to 34).

- **Schedule 1** – contains further provisions detailing the status, membership, structure and proceedings of the Council. It also provides for the terms on which the chief executive of the Council is appointed, and staff, property and liabilities transferred to the new Council.

- **Schedule 2** – lists the institutions which are fundable bodies for the purposes of the Bill. There is provision for variation of this list in section 7.

- **Schedule 3** – contains amendments in consequence of the Bill.

THE BILL – SECTION BY SECTION

PART 1 - FURTHER AND HIGHER EDUCATION ETC.

**Establishment of the Scottish Further and Higher Education Funding Council**

**Section 1 Scottish Further and Higher Education Funding Council**

8. This section creates the Scottish Further and Higher Education Funding Council (“the Council”) which will replace the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council.
Section 2  Dissolution of other funding bodies

9. This section allows for the dissolution of the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council.

Provision of further and higher education, etc.

Section 3  The Council: general duty

10. This section sets out the primary duty on the new Council, which will be to exercise its functions to secure the coherent provision by fundable bodies (as a whole) of high quality fundable further education and fundable higher education (as these terms are defined in the Bill). This section also gives the Council a duty to exercise its functions to secure the undertaking of research among the fundable bodies, as these are defined in the Bill.

Section 4  The Scottish Ministers: general duty

11. The Scottish Ministers will be required to provide support for further and higher education, primarily by making grants to the Council but also through such other means as they determine, financial and non-financial. A recent example of an activity which might in future fall under this power to support through other means is the hosting of an international seminar as part of the Bologna process for higher education reform in Europe.

Section 5  Fundable further and higher education

12. This provides definitions of fundable further and higher education for the purposes of this Bill, updating where necessary to reflect changes to some school qualifications. The definitions in the Bill therefore differ from those for ‘further education’ and ‘higher education’ in the 1992 Act, (which remain for the purposes of that Act and references elsewhere to them).

Section 6  Fundable bodies

13. This refers to schedule 2 which lists the fundable bodies. All institutions currently funded by the Scottish Further Education Funding Council or the Scottish Higher Education Funding Council will become fundable bodies once the new Council is created.

Section 7  Fundable Bodies: further provision

14. The listing of bodies in schedule 2 can only be modified by Order of the Scottish Ministers following a recommendation, or approval of, the Council. This section outlines the criteria that the Council must have regard to the desirability of ensuring are met, before the Council recommends or approves that a new body is added to, or removed from, the list of fundable bodies in schedule 2. These criteria include various provisions, procedures and arrangements.

15. When proposing or approving a modification to the effect that any new fundable body should be added to schedule 2 by such an order, subsection (3) requires the Council to recommend to Ministers whether, and to what extent, the new body should come under the remit of the Scottish Public Services Ombudsman.
16. The matters which the Council must have regard to do not apply where the modification of schedule 2 is required by reason of a change of name of, or closure of, a fundable body (subsection (5)).

Funding of further and higher education etc.

Section 8 Funding of the Council

17. This section defines the funding that Scottish Ministers can provide to the Council. Ministers have discretion to impose terms and conditions on funding. Subsections (3) to (9) set out particular matters to which the terms and conditions may relate. Subsections (3), (5) to (10), (12) and (13) describe the way in which Ministers may use conditions of grant to control tuition fee levels. This section will allow Ministers, as part of the terms and conditions on the Council, to require the Council to secure that a set fee is paid by specified persons to fundable bodies if attending specified courses or programmes. Ministers will set the fee level by subordinate legislation, which is subject to the affirmative procedure.

18. Subsections (5) to (7) are excluded from subsection (12) which prevents Ministers from framing terms and conditions around the allocation of funding in reference to particular programmes of learning, courses of education or research. Subsection (12) follows the similar terms of section 42(3) of the 1992 Act in regard to Scottish Higher Education Funding Council, and extends this element of academic freedom from higher education institutions to all fundable bodies.

Section 9 Funding of the Council: additional grants

19. This section allows Ministers to make additional grants to the Council for specific purposes, for example, to explore collaboration and restructuring of provision and, in limited circumstances, to specify to which fundable bodies these grants should be made.

Section 10 Administration of funds

20. Section 10 sets out the purposes for which the Council can administer its funds.

Section 11 Funding of fundable bodies

21. This section sets out the terms and conditions under which the Council can make grants to fundable bodies for the provision of fundable further and higher education and the undertaking of research. This section also allows the Council to allocate funds to fundable bodies, or other persons to support these activities. Subsection (3) sets out conditions that may be imposed in relation to recovery of grant. Subsection (4) directs that terms and conditions may only be imposed in relation to the application by the fundable body of sums derived from the Scottish Ministers.

22. This includes the requirement for the Council to consult with the fundable body, and if it considers appropriate, such persons as represent fundable bodies, before framing terms or conditions of grant (subsection (5)). When allocating its funds, subsection (6) sets out the requirement for the Council to have regard to encouraging fundable bodies to maintain and develop funding from other sources, and to preserve the distinctive characteristics of particular fundable bodies.
Section 12 Persons with learning difficulties
23. The Council must have regard, in exercising its functions, to the requirements of persons with learning disabilities. For this purpose, “learning disabilities” are defined in subsection (2), and will cover persons of school age and over.

The Council: functions

Section 13 Quality of fundable further and higher education
24. This section puts a duty on the Council to secure provision for the assessment and enhancement of quality in the activities it funds. This extends the existing duty to assess quality in higher education institutions to cover colleges and introduces a new statutory duty to enhance quality for both sectors.

25. Quality is assessed in colleges by Her Majesty’s Inspectorate of Education and in higher education institutions by the Quality Assurance Agency for Higher Education.

Section 14 Credit and qualification framework
26. This section places a duty on the Council to promote a credit and qualification framework for use by the fundable bodies. This section is linked to the provision made in section 7(2)(f) which will require all fundable bodies to make use of whichever framework the Council promotes.

27. It is not intended that the Council will be responsible for devising or implementing such a framework, but that it should consult with fundable bodies and other representatives to adopt the framework which is most relevant.

Section 15 Efficiency studies
28. This extends the provision in section 51 of the 1992 Act which gave the Scottish Higher Education Funding Council the power to carry out or commission efficiency studies, to the new Council, to cover all fundable bodies.

Section 16 Council’s right to address meetings
29. This is a new section which will give the Council a power to attend any meeting of the governing body of a fundable body where the Council has concerns over any aspect relating to funding provided by the Council, and address the meeting on these matters.

Section 17 Advisory functions
30. Section 17 provides for the duty on the Council to provide information, advice and assistance to Ministers, as they require. This has been extended from existing provisions for Scottish Higher Education Funding Council and Scottish Further Education Funding Council, in sections 8 and 43 of the 1992 Act.
Section 18 Functions regarding certain property

31. This extends existing provisions for the Scottish Higher Education Funding Council from section 43 of the 1992 Act, to all fundable bodies. This allows Ministers to delegate their functions in respect of rights which Ministers may have in land and property that is used or held for the purposes of a fundable body to the Council.

Section 19 Administration of certain support

32. The Scottish Further Education Funding Council currently allocates money to colleges for them to allocate to students as student support. This section makes further provision as to the powers under which Ministers and the Council are able to do this.

33. This section amends the Education (Scotland) Act 1980, (“the 1980 Act”) by inserting a new section 73ZA to permit the Scottish Ministers to direct the Council or any other body or person to administer forms of student support, where such support is granted under section 73(a), (c) or (f) of the 1980 Act. (These sections provide for the powers of the Scottish Ministers, in accordance with regulations, to pay grants to education authorities or the managers of education establishments, and for the payment of allowances or loans to persons undertaking courses of education.) This section also amends section 73A of the 1980 Act to allow the delegation of Ministers’ functions under section 73(a) and (c) of the 1980 Act. These provisions will apply only insofar as relating to support for students undertaking or who have undertaken courses of education at fundable bodies as such bodies are defined in the Bill. The purpose of this provision is to allow, through direction or delegation, the administration of forms of student support on behalf of the Scottish Ministers by the Council or other bodies or persons.

The Council: exercise of functions

Section 20 Council to have regard to particular matters

34. This section details a number of matters that the Council should have regard to in the exercise of its various functions. In particular this section requires the Council to have regard to the skills needs of Scotland, while at the same time considering wider economic, social and cultural needs, insofar as these needs can be met by the provision of fundable further or higher education.

35. In addition, this section makes provision for the Council to take account of the fact that many fundable bodies operate in UK and often global systems and therefore their activity should not be defined only in Scottish terms.

36. Subsection (3) requires the Council to have regard to the education, and related, needs of learners, and those who may wish to become learners, of a fundable body.

Section 21 Equal opportunities

37. This section imposes a duty on the Council to carry out its functions in a way that promotes and observes equal opportunities legislation.
Section 22 Consultation and collaboration

38. Section 22 sets out the key bodies with which the Council must work and share information. It also puts a duty on these bodies to provide information as the Council reasonably requires to properly carry out its functions.

39. In addition to this, subsection (5) places a requirement on the Council to ensure that there is appropriate collaboration among the fundable bodies in relation to the provision of further and higher education. This will apply within and across both of the sectors.

Section 23 General powers

40. This section details other powers given to the Council in relation to property, contracts, borrowing money etc.

The Scottish Ministers: requirements and directions

Section 24 Requirements as to Council’s functions

41. This section allows Scottish Ministers to impose requirements of a general or specific nature on the Council. Such requirements will require an order, and cannot relate to an individual fundable body or to information, advice or assistance provided by the Council under section 17.

Section 25 Directions where financial mismanagement

42. This brings together two separate provisions from the 1992 Act which related to colleges (section 21) and higher education institutions (section 54(3)). This adopts the higher education formulation, which requires Scottish Ministers to consult with the Council and the body in question before issuing directions, and covers all fundable bodies.

Fundable bodies: miscellaneous

Section 26 Application of the Scottish Public Services Ombudsman Act 2002

43. This extends the remit of the Ombudsman to include those bodies which are fundable bodies under schedule 2 of the Bill, (with the exception of the Open University) and the Scottish Agricultural College (which is currently funded directly by Scottish Ministers and not through either of the existing Councils). The remit of the Ombudsman, however, does not apply to matters concerning academic judgement.

Section 27 Inspection of accounts

44. This makes provision for the Auditor General for Scotland to inspect the accounts and accounting records of any fundable body, provided this relates to a financial year in which expenditure has been funded by payments made to the Council under the powers to fund the Council in section 11 of the Bill.

Section 28 Change of name by certain bodies

45. This section amends section 3(4) of the 1992 Act so that colleges only require Ministerial consent to change name, in place of the power of Ministers to change name by order.
Section 29  Information about recorded children

46. This provides for the duty of fundable bodies to provide information to local authorities on recorded children, as required under the Education (Scotland) Act 1980. This section has been extended from section 23 of 1992 Act, and is extended from colleges to all fundable bodies.

PART 2 - GENERAL

Section 30  Amendment of enactments

47. This section refers to schedule 3, which sets out the consequential amendments which will be required as a result of this Bill.

Section 31  Ancillary provision

48. This gives Ministers powers to make incidental, consequential, transitional etc. provisions, by order.

Section 32  Orders and regulations

49. This section sets out the power to make orders or regulations under the Act, and how these orders and regulations can be made.

Section 33  Interpretation

50. This section provides definitions of certain expressions used in the Bill.

Section 34  Short title and commencement

51. This section gives the short title of the Bill and provides for its commencement.

Schedule 1 — The Scottish Further and Higher Education Funding Council

52. This schedule sets outs further details of the status, membership and procedures of the Council. For example, it defines the membership of the Council, the provisions for appointing the chief executive and other staff, provision for committees and accounts, provision for the transfer of staff and properties of the existing Councils. There are requirements to have a statutory research committee and requirements on the Council to lay reports before the Parliament.

Schedule 2 — Fundable bodies

53. This contains the list of all current colleges and higher education institutions eligible for funding by the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council, which will become fundable bodies. This list of bodies may be amended in accordance with the provisions in section 7.

Schedule 3 — Amendment of enactments

54. This schedule makes consequential amendments which will be required to other legislation as a result of this Bill.
FINANCIAL MEMORANDUM

INTRODUCTION

55. The Bill does not give rise to any new costs or savings, since it simply reorganises the structures through which money is paid to fundable bodies. That is, the Bill does not in itself alter the number of fundable bodies or do anything else which will alter the amount of money paid to the tertiary education sector.

COSTS ON THE SCOTTISH ADMINISTRATION

Creation of the new Council

56. There will be no significant costs or savings when the new body is established. Although there are two existing Councils they are supported by a single group of staff, who operate across the full range of further and higher education.

57. The funding made available to the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council will transfer to the Scottish Further and Higher Education Funding Council. Payment of block grants to the Council under section 8 of the Bill (in a broadly similar fashion to block grants presently payable to the existing funding councils) does not in itself involve additional costs.

58. Section 9 of the Bill is an additional, free-standing, power to enable the Executive to channel particular funds to the Council to stimulate developments in areas of importance, such as Health, Education, Culture, the Environment etc. Such funds will be in addition to the funds given to the Council in the block grant but will be within these existing Departmental budgets. This power will also allow Ministers to support collaboration, up to and including merger, restructuring and the development of new models of provision.

59. This additional power will not in itself impose any additional costs, but will allow Ministers to attach greater conditions as to the use of any funding put through this route in the future. For example, the Health Department funding for nursing education which is currently contracted directly with institutions may be allocated in future through this route.

60. Staff are currently employed jointly by the two Councils, on consistent terms and conditions. TUPE will apply for staff transferring to the new body, and there will be minimal disruption to the terms of employment for staff when they transfer. There are no cost implications related to this.

61. There are likely to be savings resulting from the merger of the actual Councils in terms of board membership. Currently there are fourteen members on each Council, including the Chair. These positions attract a salary and expenses. However, these minor savings may be offset by the establishment of additional Committees within the new body, reflecting the broadened range of activity.
62. There are, however, likely to be one-off set-up costs associated with creating the new body. These are not expected to be significant, and can be met from existing Departmental resources.

**Extending the remit of the Scottish Public Services Ombudsman (“the Ombudsman”)**

63. We have, in consultation with the Ombudsman, sought information from educational establishments to estimate the impact on the Ombudsman’s workload. The returns suggest that the Ombudsman could expect around 30 complaints a year from both sectors, though we need to factor in the possibility that extending the remit of the Ombudsman may cause more complaints to be put to the Ombudsman. Initially the Ombudsman will have to devote effort to awareness raising and education about the role of the Ombudsman – that was the Ombudsman’s experience with the Enterprise networks which were brought within the Ombudsman’s jurisdiction. The Ombudsman’s office has calculated the likely cost implications for 2005/06 to be in the order of £50,000-£60,000. This can be met from within existing Departmental budgets.

64. Under the terms of the Scottish Public Services Ombudsman Act 2002, the Scottish Parliament Corporate Body (SPCB) is wholly responsible for funding the SPSO office. Accordingly it will be for the SPCB to determine what level of funding is appropriate for that purpose and linked to activity, taking into account the adoption of any new responsibilities. Resources will be made available from the Department for this purpose.

65. Further and higher education establishments - like all other bodies within the Ombudsman’s jurisdiction - should bear the discipline of meeting their own resource implications from within their own budgets. Given the number of complaints anticipated, this burden is unlikely to be significant.

**COSTS ON LOCAL AUTHORITIES**

66. There are no cost implications on local authorities.

**COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

67. There are no cost implications on other bodies.
EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

68. On 30 September 2004, the Minister for Enterprise (Mr Jim Wallace) made the following statement:

“In my view, the provisions of the Further and Higher Education (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

69. On 28 September 2004, the Presiding Officer (George Reid) made the following statement:

“In my view, the provisions of the Further and Higher Education (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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FURTHER AND HIGHER EDUCATION (SCOTLAND) BILL

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