FURTHER AND HIGHER EDUCATION (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Further and Higher Education (Scotland) Bill introduced in the Scottish Parliament on 30 September 2004. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 26–EN.

POLICY OBJECTIVES OF THE BILL

Overview

2. This Bill seeks to merge the Scottish Further Education Funding Council (SFEFC) and the Scottish Higher Education Funding Council (SHEFC), creating the Scottish Further and Higher Education Funding Council. In doing so, the vision of the Scottish Executive is to achieve the best possible match between the learning opportunities open to people and what is needed to strengthen Scotland’s economy and society (Life through Learning; Learning through Life, February 2003). The Executive recognises that a critical element in achieving this vision is a coherent and relevant system of high quality further and higher education, responsive both to the needs of learners and the needs of the Scottish economy.

3. The Bill also recognises that further and higher education are different from one another in character and purpose, but closely linked. Taken together, further and higher education provide a wide and comprehensive range of opportunities for publicly funded formal and informal learning beyond primary and secondary education in school, and so provide learners with a distinctive, tertiary component of lifelong learning in Scotland.

4. Colleges and higher education institutions (HEIs) are the main providers of further and higher education and Scotland benefits from a broad range of institutions. Colleges and HEIs have essential roles to play in supporting Scotland’s society, culture and economy. The important contribution of both sectors has been recognised by the Executive and the Scottish Parliament through a number of documents, including: the report of the Parliament’s Enterprise and Lifelong Learning Committee inquiry into lifelong learning; Life Through Learning; Learning Through Life; A Framework for Higher Education in Scotland; A Science Strategy for Scotland; the Cultural Policy Statement; and A Smart, Successful Scotland.
Colleges and HEIs

5. In making available local provision up to Higher National Diploma level, colleges have proven to be successful in closing the opportunity gap and creating learning opportunities for those from the most deprived areas of the country, while at the same time working closely with other stakeholders to develop courses that are relevant and valuable for employers and students alike.

6. Meanwhile, our universities and other HEIs focus on education to degree level and beyond. They have maintained and developed their world-class reputation for basic research, while developing stronger links with business and realising the commercial benefits of research. The excellent reputation of Scotland’s HE sector strongly benefits Scotland’s image abroad and helps to attract talented individuals from around the world. The Executive strongly believes that the different and distinctive varieties of education and environments for learning offered by the different types of institution are a benefit to learners.

7. Under the current arrangements it has proved possible to build strong links between further and higher education. Opportunities are growing for learners to move between further education colleges and HEIs through articulation routes. Work is being taken forward by the Scottish Advisory Committee on Credit and Access (SACCA), through its Mapping, Tracking and Bridging project, to increase progression between colleges and HEIs by mapping available routes and making information available to learners in a coherent way. The Scottish Credit and Qualifications Framework (SCQF) is also adding value to articulation by creating a clear picture of how different qualifications can be compared. The importance of a credit and qualification framework is reflected in sections 7 and 14 of the Bill.

8. It has also been possible to take forward projects such as the establishment of the UHI Millennium Institute, a higher education institution whose HE is provided through a network of partner colleges. The Councils have a shared staff, including at the level of the Chief Executive, and have this year produced a joint corporate plan for the first time.

Funding the sectors – roles and responsibilities

9. However, in its consideration of lifelong learning in Scotland, the Enterprise and Lifelong Learning Committee of the Scottish Parliament found that “lifelong learning does not operate as a single system in Scotland and that vocational training, higher and further education and community and voluntary education are currently treated as separate sectors. Despite recent improvements, there needs to be more cohesion between the sectors to create a more responsive lifelong learning system, characterised by ease of movement and equality of treatment amongst the many areas of activity.” (9th Report, 2002).

10. Funding decisions in relation to higher education, for instance, are currently split between the two Councils, SHEFC in relation to HE in HEIs and SFEFC for Higher National level provision within colleges. The responsibility for taking important strategic decisions relating to further and higher education remains split between two constitutionally separate bodies. Below the level of Ministers, there is no single organisation with an overview of further and higher education in Scotland or higher education as a whole. While Ministers can use guidance to each Council to encourage coherent and complementary decision-making, in practice the achievement
of this is still heavily dependent on how the Councils choose to interpret their respective roles and relative priorities.

11. The Executive believes that moving to a single funding body, as the Committee recommended should be considered, provides a much stronger guarantee that there will be coherent strategic decision making at national level in relation to further and higher education in the decades ahead. It believes that this will have particular benefits for learners and will help increase knowledge transfer from the further and higher education sectors into the wider economy.

12. Planning further and higher education at an institutional level is, rightly, the responsibility of the autonomous governing body of each institution. The Funding Councils have each been proactive in recent years in moving towards a strategic overview of each sector and developing a joint corporate plan. However, there is currently no statutory duty on the Funding Councils to take a strategic overview of the two existing sectors as part of a whole continuum of further and higher education for Scotland and make funding decisions accordingly. There is also no duty on either Council, as part of its strategic decision making, to engage with other bodies with related responsibilities for the achievement of Scotland’s goals for further and higher education such as local authorities, the enterprise networks and the Sector Skills Councils.

Further and higher education working together

13. In 1985, the Scottish Tertiary Education Advisory Council in its review of higher education in Scotland identified a range of functions critical to the delivery of coherent higher education provision which it did not believe could be carried out by two separate bodies. These included: review of demand for places in all of higher education; integrated statistical information; having regard to the needs of individuals, society, employers and professions; and consideration of demand and supply of qualified manpower outwith Scotland. Important also in the view of the Council was the role of a single body in ensuring the cost-effectiveness of higher education as a whole system (Cmnd.9676, Paras 8.4 – 8.7).

14. The time was not right in 1985 to make the step change of establishing a single body. Parliament decided to establish the Scottish Higher Education Funding Council in 1992 and its sister body, with a shared executive, the Scottish Further Education Funding Council in 1999. This position was endorsed by the Garrick Committee (in the Report of the Scottish Committee of the National Committee of Inquiry into Higher Education, July 1997) which took the view that although there was “merit in a single body which could have the widest, fullest picture of further and higher education funding across the two sectors and which would allow for a more holistic consideration of higher education provision……the two sectors are very different…” (Para 5.54), and so concluded that two bodies were necessary.

15. The Scottish Further Education Funding Council has now been in operation for five years, and in this time the joint Executive serving both Councils has proven to be effective. However, as the level of overlap between further and higher education increases and as more new cross-sectoral initiatives and models of institution develop, the need for a single decision-making body becomes more apparent.

16. Significant progress has been made in many of the areas identified above, but the Executive believes that there is further scope for Scotland to maximise the opportunity of being a relatively
small country and improve the coherence of its tertiary education provision. It is the view of the Executive that current structures, roles and responsibilities of Ministers and the Funding Councils have taken Scotland as far along the path of continuous improvement in provision that they can.

17. A single funding body is the logical next step and will provide the strategic overview and financial input to achieve the greatest possible coherence within all higher education, within all further education, and across these different levels and types of provision.

18. A single body will allow the unitary Council to plan funding for a range of activities and future developments which do not, or cannot, currently happen or are difficult to fund under current arrangements. Examples might include:

- cross sectoral provision such as access summer schools or joint programmes of articulation between colleges and universities;
- cross sectoral institutional developments such as UHI Millennium Institute;
- different types of provision such as the nursing contract or cross sectoral institutional collaborations;
- knowledge transfer projects linking the colleges’ relationships with local businesses and the Continuing Professional Development (CPD) expertise of the HEIs;
- enhanced scholarship and opportunities for research programme development through sharing of expertise and specialist or costly facilities;
- new buildings with functions and facilities accessible to students and staff of colleges and HEIs where geographically possible and desirable.

19. A single council will have more flexibility to think creatively about how it can fund activities which involve both FE and HE providers, such as articulation, or joint campuses such as the Crichton Campus in Dumfries, in ways which are as simple as possible for providers. It will mean that issues common to both sectors are always discussed in a single place, with the experience of both sectors informing any decisions. It will increase the likelihood of good practice and resources being shared across the two sectors. This should mean that the public and the Parliament can be more confident that the national investment of public funding in further and higher education, taken together, is effectively and coherently administered.

Distinctive roles

20. Greater coherence at the level of the national funding body is compatible with preserving the distinctive roles of the further and higher education sectors in Scotland. In exercising its responsibilities, the Council will be expected to ensure that both further and higher education are each properly supported. The two sectors have distinct missions and different strengths, but the success of each sector is equally important to Scotland’s success as a nation in terms of growing the economy, supporting our culture and creating an inclusive society where all can contribute.

21. Most institutions derive their funds from a variety of sources: no institution is wholly dependent on Executive funding. However, through the Councils and (for HE) SAAS, the Executive is the single largest investor in both higher and further education in Scotland. For colleges, on average, 69% of income is provided through the Funding Council (ranging from 88% to 43%). In HEIs, the average is 44% (ranging from 60% to 32%). These figures for HEIs do not include public funding from the UK Research Councils, the Enterprise Networks or the
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Student Awards Agency for Scotland (SAAS) for student support, while the figures for colleges do include student support grants.

22. The Council plays the role of steward for this public investment and we expect it to work in partnership with the institutions it funds to ensure the proper accountability for these funds in a way which recognises the need for institutions to have the necessary freedom to innovate and respond to changing circumstances.

What the Bill will do

23. The Bill sets out the duties of Ministers and distinguishes these from those of the Council. This makes it clear that Ministers have high level responsibilities to set the policy context for further and higher education. In doing so they will determine relative priorities at a general level and provide appropriate support to the Council.

24. The Bill puts a separate set of specific powers and duties on the Council.

25. The Council will operate at a strategic level, and will have the detailed responsibility for administering the funds made available for this purpose in an appropriate way and with appropriate safeguards.

26. The Council will have specific new duties including those around collaboration and the promotion of a credit and qualifications framework. These new powers and duties on the Council are intended to allow it to fulfil its strategic role in overseeing both sectors.

27. The Bill does not seek to alter the fundamental basis on which individual institutions are established. The legal framework in this area remains unchanged. It will continue to be the case that colleges and higher education institutions are independent organisations, responsible for making their own decisions about what activities they will and will not undertake, whose governing bodies are responsible for setting the direction for each institution and balancing the accountability of the institution to a range of funders and constituencies. Scottish Ministers believe that the independence of institutions has served Scotland well in terms of nurturing creativity, protecting academic freedom and allowing responsiveness to local needs.

28. Importantly, the Executive believes that the Bill does not place any further burdens on institutions. The provisions in the Bill, will extend the principle of academic freedom and autonomy across both sectors and allow all fundable bodies to plan provision themselves in a way which supports the broad policy goals of Ministers and provides the best opportunities for learners.

29. Other regulatory mechanisms will continue to be used to achieve what is required from the Council and our institutions, for example, Financial Memoranda between the Council and institutions and the annual guidance from the Executive to the Council. The Bill sets out the fundamental safeguards which the Executive believes are needed in order to protect in statute the public interest on the one hand and the interests of institutions on the other.

30. One example of this is the inclusion at section 16 of a new power which gives the Council the right to attend, and be heard at, a meeting of a governing body to discuss issues around the financial support which a fundable body receives. Given the autonomy of governing bodies,
which Ministers fully support, this power is not intended to be exercised regularly by the Council. We are aware that the Council currently has a number of avenues open to it to communicate with the bodies it funds and would expect these to remain the main levers for the Council.

31. However, we believe that this is an essential power for the Council to retain and intend that it would only be used in the extreme, and unlikely, event that there is evidence of serious concerns around the use of public funds and relations between the Council and the fundable body have broken down.

**Funding**

32. The merger will allow some changes in the way that funding is allocated to the body by the Parliament. The Parliament currently votes funds to SFEFC and SHEFC for allocation to colleges and HEIs respectively. In future, the formation of the new Council could see the Parliament vote one budget for both sectors. This could be seen as a slight reduction in Parliamentary control as the Parliament currently votes on separate budgets for SFEFC and SHEFC. In order to address this, the Council will be required to produce an annual report on its activities. This report will be laid before Parliament to allow for appropriate Parliamentary scrutiny.

33. Where funding is allocated in this way, Ministers will provide Guidance to the Council on how funds should be split at a high level (for example to higher education institutions and colleges, or to non-advanced learning, advanced learning and research). Ministers will also agree the final allocations at this high level. The allocation of funds to individual fundable bodies will remain a matter for the Council to determine.

**Specific issues in the Bill**

34. The explanatory notes which accompany the Bill explain section by section, the function of each part of the Bill. In most cases the purpose of these sections is clear, but there are some areas where it is considered useful to explain, in greater detail, the policy intentions behind sections.

35. One example of this is the new provision on fees which is included in section 8 of the Bill. Section 8 sets out the terms and condition which Ministers can impose on funding allocated to the Council. In particular subsections (5)-(10) outline the way in which Ministers can use a condition of grant to set maximum fee levels. More detail on this is set out in paragraphs 17 and 18 of the Explanatory Notes. On 24 June 2004, the Deputy First Minister made a statement to Parliament, outlining the Executive’s policy to increase fee levels in order to control demand for places in the Scottish HE system from English/Welsh/Northern Irish students once variable fees are introduced in England and Wales. This plan also raises the possibility that in specific areas such as medicine, where demand is especially high, fees could be raised to a higher level again.

36. In order to implement this policy, Ministers will now use an affirmative order if they wish to stipulate a maximum fee level.

37. It is important to be clear that this power if used, is only intended to be used sparingly. Its purpose is to allow Ministers the flexibility to act in situations where Scottish students may be
disadvantaged in specific subject areas by an increasing flow of students from elsewhere in the UK. At the moment, the only area this might apply to is medicine. Ministers believe it is essential that any further differentiation is carefully focussed and has the approval of Parliament.

38. In framing section 8, we have had to exclude fee setting from subsection (12) which protects the ‘academic freedom’ of institutions by preventing Scottish Ministers from framing terms and conditions in reference to programmes of learning or courses of education or research. However, this provision will still apply to all the core funding allocated to the Council and, importantly, this will be extended from higher education institutions to cover colleges as well.

39. Extending this provision to colleges recognises the maturity of the sector and emphasises the Executive’s belief that well-run, autonomous and independent institutions are best placed to respond to the needs of learners and others to deliver Ministerial priorities.

40. Further and Higher Education play an essential part in supporting a number of portfolio areas across the Executive such as Health and Education. As such, Ministers may occasionally wish to transfer funds from other departmental budgets to support certain policies. For example, in recent years the Education Department has transferred funds to secure additional initial teacher training places. Section 9 in the Bill creates a new power for Ministers to enable such transfers should they be required. Although funds will be derived from these existing Departmental budgets, from the perspective of the Council such funds will be distinct from, and in addition to, the block grant it will receive under section 8. This power will also allow Ministers to support collaboration, up to and including merger, restructuring and the development of new models of provision.

41. This new power allows Ministers to attach terms and conditions to grants made under section 9. However, this new power is not intended to become a new route for Ministers to attach more specific terms and conditions to the allocation of existing portfolio funds. It is therefore intended that this funding will only be a marginal component of Ministers’ overall level of support to the Council. Whilst such investment could be made under section 8, it is considered that section 9 offers a useful means of routing, through the Council, certain particular funding which has been allocated for a specific purpose.

42. We have also taken the opportunity to set out, in legislation, the basic criteria we expect any body eligible for funding from the Council to comply with. These high level criteria are set out in section 7. The Council must satisfy itself that any institution seeking to achieve and maintain fundable body status is in compliance with these criteria before making a recommendation to Scottish Ministers on the addition or removal of a body from Schedule 2. All institutions currently eligible for funding by the Scottish Further Education Funding Council or the Scottish Higher Education Funding Council will become fundable bodies once the new Council is created.

43. The conditions listed are at a high level, and the Council will supplement these with more detail through other mechanisms such as the financial memorandum and conditions of grant.
44. Achieving fundable body status will not provide any guarantee of funding. It is the intention that the Council will continue to fund the existing colleges and HEIs and only provide funding to new fundable bodies where provision cannot be met by the existing colleges and HEIs.

45. Bodies can only be added to or removed from the list by order, for example over time, the Scottish Agricultural College might become a fundable body. Ministers may only make such an order on a recommendation of the Council.

46. The Bill will extend the remit of the Scottish Public Services Ombudsman to the actions of the further and higher education establishments. Initially this will include all fundable bodies, with the exception of the Open University (as the OU is a UK-wide institution, with its main base in England) and the Scottish Agricultural College which is funded directly by the Executive. The jurisdiction of the Ombudsman will extend to all persons ‘aggrieved by’ a decision of the body, but will not apply to complaints about matters relating to academic judgement.

47. It is expected that any new institutions becoming fundable bodies would come under the Ombudsman’s remit. Such decisions will be taken by Ministers, who will look to the Council for advice. There may be some cases where this would not be appropriate and an exclusion (such as the one for the Open University) would be made.

ALTERNATIVE APPROACHES

48. When the concept of merging the Councils was raised during the Scottish Parliament’s inquiry into lifelong learning, the Executive did consider the benefits and risks of such a move against a number of other options, including maintaining the status quo, or encouraging more and closer collaboration between the Councils.

49. The decision was taken to adopt the commitment to merge as it was seen as important that a single body was created that would be able to take a coherent view of, and make strategic decision for, both sectors. While much has been achieved to date by both the Councils and the sectors, it was clear that the rigid structures which created SFEFC and SHEFC were at a stage where it was becoming difficult for both Councils to make coherent decisions and share good practice in areas where there was cross-over between both sectors.

50. The possibility of repeal and replacement of the 1992 Act was considered, but it was felt that the approach of leaving the sections of the 1992 Act which operate satisfactorily, and adding new provisions, was preferable. Particularly, it was considered that the parts of the 1992 Act relating to the constitution, structure etc. of colleges and higher education institutions operate satisfactorily.

51. In the parts of the 1992 Act which are being repealed and brought into the new Bill, the Executive has attempted to adopt the same framework for all fundable bodies. In the majority of cases, this involves adapting the existing HE provisions to cover all fundable bodies, for example, section 8 (12) of the Bill which protects academic freedom is extended to colleges for the first time.
52. The provisions set out in the 1992 Act give far more flexibility and autonomy to the Higher Education institutions, and we believe that the time is now right to adapt a more flexible framework for colleges as well, while at the same time ensuring that appropriate accountability structures are in place.

53. In creating this new framework, our intention is to achieve this in a manner which will not increase the levels of bureaucracy for institutions, or introduce new and unnecessary regulation, but will in many cases give the Council flexibility to reduce it.

CONSULTATION

54. The Enterprise, Transport and Lifelong Learning Department has undertaken a comprehensive programme of consultation on these proposals. In November and December 2003 the Department held individual meetings with key stakeholders to discuss the broad concepts that should support the Bill.

55. On 30 April 2004 a formal consultation was launched on these proposals and the draft legislation, with a closing date of 31 July 2004. As well as taking written responses the Department held five open meetings in Aberdeen, Dundee, Edinburgh, Glasgow and Inverness and held another round of one-to-one meetings with key stakeholders to discuss the Bill and the proposals in greater depth. During the consultation period the Higher Education sector has been vocal in its objections to parts of the Bill. However, the support from other stakeholders in some of these aspects has been equally strong.

56. Seventy eight written responses to the consultation paper were received, only one of which opposed the merger of the Funding Councils. There was minimal comment in relation to the fundamental proposals for the powers and duties of the new Council. However, comment was made in relation to the powers of Ministers and as a result of these and other written responses, and follow up discussions with stakeholders, a variety of changes have been made to the draft Bill.

57. One of the most immediately apparent changes to the Bill is the new title and the decision to drop the use of the term ‘tertiary education’. From the consultation responses it was clear that there was a significant degree of opposition and uncertainty around the use of this term, particularly among a majority of respondents in the HE sector. However, some respondents made clear their strong support for the concept of tertiary education.

58. Similarly, the term Specified Tertiary Education Provider (STEP) was roundly condemned and has been replaced with the term “fundable body”. Section 7 which lists the criteria for fundable body status has been amended following comments during consultation relating to planning, and the local focus.

59. There were concerns about the relative powers and duties of Ministers, the Council and institutions. The Bill has been amended to set out the different duties and powers of Scottish Ministers and Council, which better describe their respective roles.
60. There were also some concerns about ordering and the relative priority this inferred. The ordering of the Bill has therefore been changed.

61. A further concern for some respondents was the proposal to allow the Council to require the governing body of an institution to convene a meeting in the case of Council concerns about financial or other mismanagement. This proposal has been dropped and substituted with the proposal to allow the Council to address the board of a governing body.

62. The section on addressing the skills needs was also felt by some respondents to underplay the role of colleges and universities in addressing wider social and cultural aspects. This has been addressed in an extended section 20 which lists matters to which the Council should have regard in exercising its functions.

63. The section on mergers also caused some concern because it was seen as being too interventionist by some, and too focussed by others. Instead of having that section, section 9 has been amended to allow (among other things) Ministers to allocate additional funds to support restructuring, innovation or collaboration among fundable bodies.

64. The section on Ministers powers to issue directions to the Council has been amended to a power exercisable by order, and the section relating to Financial Mismanagement has introduced the requirement to consult before giving direction.

65. Many of the respondents were disappointed that the Consultation draft had not included any reference to the Scottish Credit and Qualification Framework. As a result of this, the draft bill has been amended to include a requirement on the Council to promote, and fundable bodies to use a credit and qualification framework.

66. A separate consultation was issued on the matter of bringing colleges and HEIs under the remit of the Scottish Public Services Ombudsman. This consultation issued on 30 December 2003 and closed on 1 April 2004, with 66 written responses being received.

67. The majority of respondents thought that there would be value in giving the Ombudsman a role in ensuring consistency across institutions, and that the Ombudsman would add value in investigating complaints about colleges and higher education institutions.

**EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

**Equal opportunities**

68. This Bill is compliant with equal opportunities legislation. In particular, the new Council must carry out its functions in a way that encourages equal opportunities requirements and observes equal opportunities legislation.

**Island communities**

69. The fundable bodies in Orkney, Shetland, Skye and the Western Islands, along with the UHIMI will be covered by the Bill, and the Scottish Public Services Ombudsman’s remit will also cover these bodies.
Human rights

70. This Bill raises no human rights issues.

Local government

71. The Bill requires local authorities to consult and work with the Council. These new procedures are consistent with Community Planning, and do not raise any new expectations on local authorities.

72. The Bill also requires fundable bodies to provide local authorities with information on recorded children.

Sustainable development

73. The fundamental aim of sustainable development is to secure the future, and this Bill recognises the important role that colleges and HEIs have to play in working toward a more sustainable Scotland. The Bill ensures that individual fundable bodies continue to make decisions at the appropriate level. In some cases this will be at a local community level, in others this will be at a Scottish, UK or even international basis. At this same time, the Council will take a strategic overview, ensuring that the provision of further and higher education is coherent and of high quality.
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