Subordinate Legislation Committee

13th Report, 2005 (Session 2)

Further and Higher Education (Scotland) Bill at stage 2
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Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

   (a) any-

      (i) subordinate legislation laid before the Parliament;

      (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

   and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

   (c) general questions relating to powers to make subordinate legislation; and

   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

   *(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Dr Sylvia Jackson (Convener)
Mr Adam Ingram
Gordon Jackson (Deputy Convener)
Mr Stewart Maxwell
Christine May
Mike Pringle
Murray Tosh
Committee Clerking Team:

Clerk to the Committee
Ruth Cooper

Assistant Clerk
Bruce Adamson

Support Manager
Catherine Fergusson
Introduction

1. At its meeting on 19 April 2005, the Committee considered the inserted or substantially amended delegated powers provisions in the Further and Higher Education (Scotland) Bill as amended at stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.

2. Under Rule 9.7.10, the Executive provided a supplementary subordinate legislation memorandum to the Committee, which is published at Annex A to this report.

Section 5(7) Fundable further and higher education

3. This provision gives the Scottish Ministers the power, by order, to alter the definitions of “fundable further education” and “fundable higher education” in section 5(1) to (6) of the Bill. As such the Committee noted that the provision is a Henry VIII power in that it allows amendment to primary legislation by way of delegated powers. The Committee during its stage 1 consideration expressed its concern about the potential width of this power and recommended that the section should be subject to affirmative rather than the proposed negative procedure.

4. The Scottish Executive has recognised the Committee’s concerns and brought forward an amendment to section 32(4) to provide that orders made under section 5(7) will be subject to affirmative procedure. The Committee therefore welcomes the Executive’s amendment and reports to Parliament that this addresses its concerns in connection with this provision.

Section 7(1) Fundable Bodies: further provision

5. This provision confers on the Scottish Ministers the power, by order, to amend schedule 2 to the Bill which contains the list of fundable bodies. The Committee
at stage 1 expressed concern at the width of this power, as with section 5(7), and recommended that it ought to be subject to affirmative procedure.

6. In line with its undertaking to the Committee, the Executive has brought forward an amendment to section 32(4) of the Bill to ensure that orders made under section 7(1) are subject to affirmative procedure. Again, the Committee welcomes the amendment and is satisfied that it addresses its concerns.

Sections 8(6) and 8(7) Funding of the Council

7. Section 8 provides for the funding of the Scottish Further and Higher Education Funding Council (“the Council”) by grants made by the Scottish Ministers. In particular, section 8(2) allows Ministers to impose terms and conditions on the Council when making such grants, including requirements in relation to the nature and level of student fees. During its stage 1 consideration the Committee had some concerns in relation to the width of the powers conferred on Ministers by section 8(6) and 8(7).

8. The Committee recommended that subsection 8(6), which relates to the class of students and types of courses which may be subject to fees, be subject to affirmative procedure. In relation to subsection 8(7), which relates to the level of fees which can be specified by Ministers, the Committee initially suggested a form of “super-affirmative” procedure whereby proposals could be considered by the Parliament before a draft instrument is laid. The Committee on receipt of the Executive’s response, however, accepted the Executive’s point that a sufficient degree of scrutiny would be in place should affirmative procedure be adopted and should a requirement to consult be included for orders made under section 8(6) and 8(7).

9. The Executive has brought forward an amendment to ensure that orders made under subsections 8(6) and 8(7) are subject to affirmative procedure and the Committee is content that this amendment addresses its concerns in this regard.

10. In addition, the Executive has tabled an amendment to insert a new subsection (12A) in section 8 of the Bill which will oblige Ministers, before making an order under section 8(6), to consult: the Council; at least one body of persons representative of students of fundable bodies; such governing bodies of fundable bodies as Ministers consider appropriate; and such other persons as Ministers consider appropriate. The Committee is assured that this amendment goes some way to addressing its concerns but considered that it would have been beneficial for this amendment to be taken a step further by stating on the face of the bill how Ministers might have regard to the results of any consultation. The Committee agreed to raise this issue at the stage 3 consideration of the bill during the debate of relevant amendments.
Section 22(4)(j): Consultation and collaboration

11. This provision as it appeared in the Bill at Stage 1 conferred on Ministers the power, by order, to specify those persons, in addition to those listed in paragraphs (a) to (i) of section 22(4), who the Council must consult and collaborate with in the exercise of its functions. The Committee noted that the provision did not allow for amendment of the list itself, but only additions to it.

12. As a result of the Committee’s concerns, the Executive has brought forward an amendment to remove section 22(4)(j) and to put in its place new section 22(5A) which confers upon Ministers the power to modify the list in accordance with the suggestion by the Committee.

13. The Committee is content that the amendment, in the form of new subsection (5A) of section 22, adequately addresses its concerns.
ANNEX A

SUPPLEMENTARY MEMORANDUM TO SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

FURTHER AND HIGHER EDUCATION (SCOTLAND) BILL

Purpose

1. This supplementary memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.7.9 of the Parliament’s Standing Orders, of provisions in the Further and Higher Education (Scotland) Bill conferring powers to make subordinate legislation. This memorandum refers to the Bill as amended at Stage 2 and it should be read in conjunction with the Executive’s memorandum to the Subordinate Legislation Committee, which was submitted when the Bill was introduced.

Subordinate Legislation Powers following Stage 2

2. The Subordinate Legislation Committee suggested that some of the order making powers within the Bill should be subject to the affirmative procedure. The affected sections, which were originally under negative procedure, are sections 5(7), 7(1), and 8(6).

3. The powers in section 8(6) and (7) are now subject to a new consultation condition contained in subsection (12A) of that section as inserted at Stage 2.

4. Again, following a recommendation from the Subordinate Legislation Committee section 22(5A) has been added so as to allow the Scottish Ministers to modify the list of bodies with whom the Council is to consult and collaborate in the exercise of its functions.

5. Section 32 provides for procedures.

Section 5(7): Fundable further and higher education

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

6. This provision gives the Scottish Ministers power to alter the definitions of “fundable further education” and “fundable higher education” in the Bill. It is considered that this would be an appropriate matter for subordinate legislation as it allows the definitions to reflect changes which may occur over time in the types of programmes and courses which should be specified by these definitions. By section 5(8), Ministers require to consult the Council before making the order.

7. To reflect recommendations made by the Subordinate Legislation Committee, this order-making power is subject to affirmative procedure.
Section 7(1): Fundable Bodies: further provision

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

8. This provision gives the Scottish Ministers power to amend schedule 2, which contains the list of fundable bodies. As fundable bodies are subject to mergers, closures or changes of name, or new bodies are established, or bodies are added as eligible for funding, or removed, the content of the schedule should be updated. Accordingly, listing in the schedule will mean that the body is eligible for funding by the Council. Ministers may make such an order only if the Council has proposed or approved the making of the modification. In doing so, the Council must have regard to the matters specified in section 7(2).

9. To reflect recommendations made by the Subordinate Legislation Committee, this order-making power is subject to affirmative procedure.

Section 8(6): Funding of the Council

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

10. Section 8(6) allows the Scottish Ministers to specify requirements in relation to fees payable to fundable bodies, as part of the terms and conditions imposed on the Council for grant funding. The Council can be obliged, as a condition of its grant from Ministers, to place conditions on a fundable body which obtains grant from the Council, in relation to the level of fees paid to that fundable body. Section 8(6)(a) provides that Ministers may by order specify the classes of persons for whom the fundable body is to secure that fees paid to the body will be equal to the fee levels as provided for in section 8(7). Section 8(6)(b) provides that Ministers may by order specify (i) the programmes of learning or (ii) courses of education in respect of which the fundable body is to secure that fees paid to the body will be equal to the fee levels as provided for in section 8(7).

11. This provision for specification of fees levels as part of the terms and conditions of grant to the Council will only apply to such classes of persons, programmes of learning or courses of education as Ministers specify by order. It is not possible to specify fee levels, or which persons should pay these fees, at this point in time, as the determination of initial fee levels, and to which persons or courses this shall apply, is dependant on future external factors.

12. The provision is different from, but has analogies with, the existing provision in section 42(3B) of the Further and Higher Education (Scotland) Act 1992. This provides (in relation to the Scottish Higher Education Funding Council (SHEFC)), that terms and conditions of grant to SHEFC can require the recipient of a grant, loan or other payment to higher education institutions to secure that fees payable by any class of persons prescribed by regulations in connection with the
attendance of courses, as prescribed by the regulations, are equal to such maximum allowance amounts that Ministers may determine under section 73D(2) of the Education (Scotland) Act 1980. Section 42(3B) is repealed by the Bill.

13. To reflect recommendations made by the Subordinate Legislation Committee, this order making power is subject to affirmative procedure.

14. An additional subsection (12A) has been added to section 8 during stage 2 which puts a requirement on the Scottish Ministers to consult the Council and other key stakeholders, including student representatives, before making an order under section 8(6).

Section 8(7): Funding of the Council

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

15. This provision gives the Scottish Ministers the power to specify fee levels to be applied for the purposes of section 8(6). Provision by order allows for the specification of fees by reference to a particular academic year, or to authorise Ministers to determine fees for subsequent academic years. For subsequent years, Ministers may be authorised to determine fees that are, in each case, no higher than the initial specified year, or which, in any subsequent year, may be higher than the fees in the initial year, provided that the increase is no greater than required to maintain the value in real terms of the fees (having regard to any retail price index). Clearly, as time goes by, the real terms value of fee levels will fluctuate. It is therefore necessary to give Ministers a power to allow for changing circumstances in future, and for inflation.

16. Fee levels cannot presently be set in the Bill, as Ministers are considering their options on this particular issue in consultation with stakeholders. Fee levels for particular academic years will also depend on future external factors, as indicated above. The setting of fees in higher education is a particularly sensitive area and the new power to differentiate fee levels for certain subjects in exceptional circumstances could be viewed by some as controversial. As such, it is considered that the affirmative resolution procedure would be appropriate to ensure that a suitable level of Parliamentary scrutiny is given to the proposals.

17. If Ministers determine that it is appropriate for this power to be used, this power would be used to set fee levels. The power is intended to be used sparingly, and only in areas where there is evidence that not doing so would disadvantage Scottish students.

18. An additional subsection (12A) has been added to section 8 during stage 2 which puts a requirement on the Scottish Ministers to consult the Council and other key stakeholders, including student representatives, before making an order under section 8(7). That this order-making power is subject to affirmative procedure is unchanged.
Section 22(5A); Consultation and collaboration

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

19. Section 22(4) lists the bodies and persons with whom the Council is to consult and collaborate in the exercise of its functions, so far as it considers appropriate. An order will allow Ministers to specify additional persons to be added to the list, to cover changes of circumstances, or changes in the nature or status of the specified bodies.

20. It is considered that the power to make such amendments to the list is appropriate to be exercised through negative resolution procedure.

21. Section 22(5A) was added at stage 2 to reflect the recommendation from the Subordinate Legislation Committee that Ministers should have the power to amend the list of bodies in section 22(4). In consequence, section 22(4)(j) has been removed.