LEGISLATIVE CONSENT MEMORANDUM

HIGHER EDUCATION AND RESEARCH BILL

Background

1. This memorandum has been lodged by John Swinney, Deputy First Minister and Cabinet Secretary for Education and Skills, under Rule 9B.3.1(c)(ii) of the Parliament’s Standing Orders following amendments. The Higher Education and Research Bill (“the Bill”) was introduced in the House of Commons on 19 May 2016. Two of the relevant UK Government amendments were tabled on 8 September 2016, with the amendment relating to research funding due to be tabled in time for discussion of part 3 of the Bill. The latest version of the Bill can be found at:

http://services.parliament.uk/bills/2016-17/highereducationandresearch.html

Content of the Bill

2. The Bill makes provision to increase competition and choice in the higher education sector in England, aiming to raise standards and strengthen the United Kingdom’s capabilities in research and innovation by:

- opening up the higher education sector to encourage more competition and choice by making it easier for new high-quality providers to start up and achieve degree awarding powers, and subsequently secure university status;
- creating a new student-focused single market regulator, the Office for Students (OfS);
- putting in place a risk-based regulation to ensure that the higher education sector serves its stakeholders: students, employers and taxpayers;
- recognising and rewarding high-quality teaching by enabling the OfS to implement a Teaching Excellence Framework (TEF);
- bringing greater transparency to the data held by the higher education sector, to inform choice and promote equality of opportunity;
- creating a single research and innovation funding body, United Kingdom Research and Innovation (UKRI).

Reasons for Seeking a LCM - General

3. The Bill as amended contains provisions which are within the legislative competence of the Scottish Parliament, making it a “relevant Bill” under Chapter 9B of the Standing Order and consequently requiring the consent of the Scottish Parliament.

4. At introduction the Bill applied only to England. However, amendments tabled on 8 September 2016 and beyond aim to extend three areas of provision to Scotland. Namely, those provisions relating to extending the power of the OfS to make arrangements under clause 25 of the Bill so as to also include Scottish higher education providers where Scottish Ministers consent, joint working with Research England and the OfS and the Scottish Further and Higher Education Funding Council, and clarifying the Secretary of State’s powers to fund research, to ensure they are as broad as the Research Councils.
5. The following paragraphs provide the policy intent and background to the relevant amendments to the Bill for which consent is sought.

**TEF and the Devolved Administrations**

**Policy Intent**

6. Clause 25 of the Bill as introduced gives the OfS a power to make arrangements for a scheme to give ratings to English higher education providers regarding the quality of, and standards applied to, the higher education provided by them. Clause 75 sets out the definition of various terms relating to higher education providers used in Part 1 of the Bill. Clause 111 refers to the extent of the Act, amendments to this clause provide for provisions in respect of the OfS to form part of the law of Scotland.

**Background**

7. Following detailed discussions with Scottish Ministers and officials the UK Government, on 8 September 2016, tabled amendments to the Bill which are designed to enable Higher Education providers in Scotland to participate in TEF, should they wish to do so, where Scottish Ministers give consent. It also allows Scottish Ministers to apply consent generally or to specific providers.

**Reason for requiring legislative consent**

8. Provisions in the Bill which give the OfS a power to make arrangements for a scheme to give ratings to English higher education providers regarding the quality of, and standards applied to, the higher education provided by them are extended to enable HE providers in Scotland to participate in TEF. Given that this provision does not compel HE providers in Scotland to participate in TEF and that some providers have indicated a desire to participate, it would seem appropriate to agree that the UK Parliament can legislate in respect of this matter.

**Joint working provisions**

**Policy Intent**

9. A provision for joint exercise of functions currently exists in the Further and Higher Education Act 1992, this provision is amended as a consequence of the new clause described below.

**Background**

10. For the purposes of the Legislative Consent Motion this provision allows for joint working with Research England (UKRI); the Office for Students and the Scottish Further and Higher Education Funding Council (SFC). The new clause allows the relevant authorities to work together if it appears to them to be more efficient or would allow any of the authorities to exercise their functions more effectively.
Reason for requiring legislative consent

11. A new provision to allow relevant authorities to work together if it appears to them to be more efficient, or would allow any of the authorities to exercise their functions more effectively, is included in the Bill. This provision allows for joint working with Research England (UKRI); the OfS and the SFC. As functions of the SFC fall within the legislative competence of the Scottish Parliament the consent of the Parliament is therefore required for the inclusion of this provision for Scotland.

Funding Research

Policy Intent

12. This amendment introduces a new clause which amends the powers of the Secretary of State, under section 5 of the Science and Technology Act 1965 and section 10 of the Higher Education Act 2004, to provide support for the purposes of research to make it clear that the powers extend to the provision of financial support, including in ways which may require the recipient of support to pay interest or make repayments.

Background

13. At present, the issue with section 5 of the Science and Technology Act 1965 and section 10 of the Higher Education Act 2004 centres around the conditions which can be attached to the financial assistance given under those sections.

14. There is a concern that the Secretary of State’s powers under these Acts could be interpreted as narrower than those of the research councils and there is no power to demand repayment, interest etc. It is not readily apparent that the Secretary of State can, for example, require the repayment of the money, require interest to be paid or attach other financial conditions. The policy is that, although the government wishes to fund science, if the recipient makes a profit, the government should be able to get a share of that. The recipient would have gained that benefit through the use of taxpayer’s money and therefore the taxpayer should also receive a benefit.

15. The Research Councils do not have a similar problem because they are formed under Royal Charter and therefore have all the powers of a body corporate.

Reason for requiring legislative consent

16. As noted above an amendment to the Bill to include a new provision to clarify the Secretary of State’s power to provide financial support for the purpose of research will be tabled in time for discussion of part 3 of the Bill. Although this clarification in itself is reserved, Scottish Ministers have powers within Scotland that mirror the Secretary of State, these changes will therefore require the consent of the Scottish Parliament.

Consultation

17. Given the minor and technical nature of these changes, there has been no consultation in Scotland specifically for this Bill. However, the UK Government consulted widely on the provisions of the Bill in England and Wales and the Scottish higher education sector were encouraged to offer views.
18. The Scottish Government has also engaged with the Scottish higher education sector, including Universities Scotland and NUS Scotland, informally on provisions in the Bill and proposed amendments.

Financial implications

19. It is expected that there will be no costs to the Scottish Government or public authorities as a result of the amendments outlined above extending to Scotland.

Conclusion

20. It is the view of the Scottish Government that it is in the best interests of the Scottish people and of good governance that the relevant amendments made to the UK Higher Education and Research Bill, as outlined above, which fall within the legislative competence of the Scottish Parliament or which alter the executive competence of Scottish Ministers, should be considered by the UK Parliament.

Draft Legislative Consent Motion

21. The draft motion, which will be lodged by the Deputy First Minister and Cabinet Secretary for Education and Skills, is:

“That the Parliament agrees that the relevant amendments to the Higher Education and Research Bill, introduced in the House of Commons, relating to extending the power of the Office for Students (OfS) to make arrangements under clause 25 of the Bill so as to also include Scottish higher education providers where Scottish Ministers consent; to allow joint working with Research England (UKRI) and the OfS and the Scottish Further and Higher Education Funding Council; and clarify the Secretary of State’s powers to fund research, to ensure they are as broad as the Research Councils, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive power of Scottish Ministers, should be considered by the UK Parliament.”

SCOTTISH GOVERNMENT
September 2016
HIGHER EDUCATION AND RESEARCH BILL – LEGISLATIVE CONSENT MEMORANDUM