



The Scottish Parliament
Pàrlamaid na h-Alba

Published 5th December 2016

SP Paper 43

3rd Report, 2016 (Session 5)

Web

Education and Skills Committee

Legislative Consent Memorandum on the Higher Education and Research Bill (LCM (S5)4)



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Education and Skills Committee

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Education and Skills Committee

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Introduction

1. The Legislative Consent Memorandum on the Higher Education and Research Bill¹ seeks consent from the Scottish Parliament in relation to the following UK Government amendments to the Bill:
 - TEF amendment - provides for the Office for Students (OfS) to rate one, some or all Scottish Higher Education Institutions under the Teaching Excellence Framework (TEF) if the (OfS) receives consent from Scottish Ministers to do so;
 - Joint working amendment - provides for joint working between the OfS, UK Research Innovation (UKRI) and the SFC where it is appropriate; and
 - Research amendment - clarifies the Secretary of State's power to set conditions in providing funding for research.

Report

2. The Committee took evidence on the LCM at its meeting on 16th November from Universities Scotland, the Royal Society of Edinburgh, University and College Union Scotland, the National Union of Students Scotland and the Scottish Funding Council. It also received written evidence in advance from these bodies. The Committee wishes to thank these organisations for providing evidence to the Committee, including seeking to keep the Committee updated on the progress of amendments to the Bill reflecting Scotland's interests during readings in the House of Commons. The Committee's scrutiny covered the contents of the LCM and also the concerns of key stakeholders on the wider implications of the Bill for Scotland. Background on the Bill, the LCM and links to the written evidence and the *Official Report* that informed the Committee's conclusions are attached in Annexe A.

Teaching Excellence Framework amendment

3. The Bill introduces a legal framework to enable a Teaching Excellence Framework to be utilised in different ways such as rating higher education institutions. The relevant amendment to the Bill will enable Scottish Ministers to consent to Scottish Universities being able to opt-in to the TEF.
4. Witnesses suggested the TEF and associated markings will be a means, in England, for tuition fees to be increased² and to influence the numbers of overseas students attending higher education institutions³. It was suggested in evidence that the TEF would provide less current or granular information⁴ than the much valued Scottish quality assurance mechanism, which operates through partnership, puts students at the centre and is driven by peer review and improvement⁵. It was also suggested the TEF could potentially lead to a diminution of this Scottish mechanism⁶ or a double burden of work on Scottish institutions⁷.
5. Scottish universities operate in an extremely competitive environment at UK and international level meaning the TEF presents Scottish Universities with a dilemma on whether to opt-in to the system, since being able to demonstrate having the highest levels of quality and student satisfaction is important to bringing in students from elsewhere. The likelihood, it was suggested, is that universities would feel a huge pressure to take part in order to protect their positions on the international stage⁸.
6. Concerns were also raised on the potential for linking TEF gradings to university entitlements to recruit international students⁹.
7. Finally in relation to the TEF, witnesses highlighted the importance of ensuring the metrics within the TEF do not create a system that is unfairly stacked against

Scottish institutions¹⁰. The Committee wishes to add its support to ongoing work that seeks to ensure the matrix sufficiently reflects Scotland.

8. Despite its reservations, the Committee appreciates that universities feel they require to have the option to opt-in to the TEF in order to continue to market themselves competitively, including on an international scale. On that basis, the Committee accepts the need for this amendment.


Joint working amendment


9. While issues were raised in Committee in relation to the make-up of the UKRI and associated Research Councils, all of the organisations commenting on this amendment supported the principle of joint working between OfS, UKRI and the SFC.

10. On the basis of evidence received, the Committee supports this amendment.

Research amendment

11. Universities Scotland highlighted the difficulty of introducing the LCM in advance of the amendment it related to being tabled in the House of Commons. The initial Universities Scotland submission suggested concern at the scope of such an amendment stating:

 “The extract of the memorandum that concerns us states: “although the government wishes to fund science, if the recipient makes a profit, the government should be able to get a share of that.” Universities Scotland would have concerns if an amendment to the Bill looked to give the Secretary of State powers to share in ‘profit’ generated by the recipients of research funding. We would not support the Legislative Consent Motion with respect to that provision.”
12. It continues that, if the amendment passed on 18th October by the Public Bill Committee was the amendment in question, which includes no reference to profit-sharing from the outputs/outcomes of research funded by the Secretary of State, then Universities Scotland is content with this.
13. The letter from the Minister for Further Education, Higher Education and Science states that:

 “As regards the concerns raised by Universities Scotland in respect of the LCM and funding of research, I can confirm that there was no amendment

tabled by the UK Government to create a power to share in profits arising from research.”

14. On that basis Universities Scotland is content with the terms of the amendment.

15. On the basis of evidence received, the Committee is content with this amendment.
16. The Committee therefore recommends that the relevant Legislative Consent Motion, based on the amendments to the Higher Education and Research Bill set out in the Legislative Consent Memorandum, is passed by the Scottish Parliament.

Wider implications of the Bill on Research

17. The Committee is only required to report to Parliament on the contents of the LCM. However, the evidence taken by the Committee highlighted wider concerns in relation to research. Specifically how the functions of the proposed UK-wide research funding body, the UKRI, will sit alongside Research England, and whether the UKRI works in the interests of all of the UK.
18. The organisations the Committee heard from were unanimous and, as a result of this evidence, the Committee has real concerns about the impact of the Bill on research architecture and funding streams. As these matters do not directly relate to the LCM they are detailed in Annexe B.

Further amendments to the Bill

19. The Committee appreciates that the Scottish Government’s position aligns with the stakeholders in relation to many of the issues raised in evidence on research and also on the TEF and therefore the Committee supports the efforts of the Scottish Government in seeking to bring Scottish influence to bear with the UK Government and Parliament. The Committee has written to the House of Lords and the Home Office to add the weight of its support to these efforts. These letters are attached at Annexe B. The letter to the House of Lords sets out specific amendments proposed by organisations that the Committee wishes to highlight for further scrutiny.

20. Separate to this Committee’s conclusions on the LCM, the Committee recommends that the Bill is further amended to reflect and protect the unique and valued higher education system in Scotland.

Annexe A

Background on the Bill, the LCM and the Education and Skills Committee's scrutiny

Purpose of the Bill

The House of Commons Library briefing on the [Higher Education and Research Bill](#) notes that the Bill is in four parts:

- **Part 1** establishes a new body, the Office for Students (OfS); the OfS will act as the regulator and funding body (teaching) for the sector; the Higher Education Funding Council for England will be abolished and the Office for Fair Access (OFFA) will be merged into the new body. This part also creates a new single entry system for higher education providers; this will operate through a new register of higher education providers and by changing criteria on the granting of degree awarding powers and university title.
- **Part 2** contains measures to create new alternative payments; these payments will be non-interest bearing student finance. This part also contains provisions on the deregulation of higher education corporations.
- **Part 3** makes changes to research infrastructure which will enact some of the recommendations in the Nurse Review of the UK Research Councils. The provisions will create a new body, UK Research and Innovation (UKRI); the seven Research Councils and Innovate UK will be integrated into UKRI along with a new body, Research England.
- **Part 4** contains related general provisions.

The Bill implements the legislative proposals in the Department for Business, Innovation and Skills (BIS) White Paper, [Success as a Knowledge Economy: Teaching, Social Mobility and Student Choice](#) and in Sir Paul Nurse's report, [Ensuring a successful UK research endeavour: A Review of the UK Research Councils by Paul Nurse](#), November 2015.

Extract of the LCM on the amendments triggering the need for a legislative consent motion

The following paragraphs are extracted from the LCM and 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

1. 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 Office for Students to form part of the law of Scotland.

Background

2. 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

3. 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

4. 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

5. 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

6. 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

7. 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

8. 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.

9. 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.

10. 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

11. 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.

Evidence to the Education and Skills Committee

The following submissions were received following the Committee's initial request for information:

- [Universities Scotland](#);
- [The Scottish Funding Council](#);
- [Royal Society of Edinburgh](#);
- [NUS Scotland](#); and
- [University and College Union Scotland](#).

The Committee initially asked these organisations to comment on:

- the contents of the LCM;

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- any outstanding concerns in relation to the Bill's impact on Scotland that are not fully addressed by the LCM; and
- the Scottish Government's views on how the Bill could be further amended (this is set out in its [letter to the Public Bill Committee on 12 September 2016](#))

The Committee then sought the Scottish Government's perspective on the issues raised in the initial submissions received.

[Scottish Government](#)

The Committee also requested submissions with a specific focus on research and received these additional submissions:

[The Royal Society of Edinburgh](#)
[Scottish Funding Council](#)
[Universities Scotland](#)

The Committee then took [evidence on the LCM on 16th November](#), beginning with a specific panel and then ending the public session with a discussion with the SFC as part of the Committee's pre-budget scrutiny.

Annexe B

Letter to Lord Fowler, the Speaker of the House of Lords

Dear Lord Fowler

The Education and Skills Committee of the Scottish Parliament has been scrutinising the provisions of the Higher Education and Research Bill in order to assess their potential impact in Scotland, focusing on research architecture and funding streams and also on the Teaching Excellence Framework. Witnesses from Universities Scotland, Royal Society of Edinburgh, UCU Scotland, NUS Scotland and the Scottish Funding Council all gave written and oral evidence to the Committee. I attach links to the *Official Report*, associated written submissions and correspondence from the Scottish Government for your reference.

The Committee is aware of the continued representations from the Scottish Government to the UK Government in relation to the potential impact of this Bill in Scotland and the need to reflect and protect the specifics of what is a very valued Scottish system through amendments to the face of the Bill.

The Committee was struck in its evidence session how unified witnesses were in their views on how the Bill needs to be amended, and these views align with the Scottish Government's efforts.

We wish to add the weight of the Committee's support to these efforts, including highlighting particular amendments that should be made to reflect the Scottish perspective.

Teaching Excellence Framework

Witnesses suggested the TEF is a means, in England, for tuition fees to be increased and for influencing the number of overseas students. It was suggested in evidence, the TEF would provide less current or granular information than the much valued Scottish quality assurance mechanism, which operates through partnership, puts students at the centre and is driven by peer review and improvement. It was also suggested the TEF could potentially lead to a diminution of the Scottish mechanism or a double burden of work on Scottish institutions.

Scottish universities operate in an extremely competitive environment at UK and international level meaning the TEF presents Scottish Universities with a dilemma on whether to opt-in to the system since being able to demonstrate having the highest levels of quality and student satisfaction is important to bringing in students from elsewhere. The likelihood, it was suggested, is that universities would feel a huge pressure to take part in order to protect their positions on the international stage.

As a result of concerns raised the Committee agreed not only to write to you but also to write to the Home Office seeking clarification as to whether it will link TEF gradings to university entitlements to recruit international students. Alastair Sim from Universities Scotland highlighted serious concerns from his organisation in this regard:

There is also an underlying worry....what will happen if the Home Office—in our view, it is inevitable—decides to link TEF gradings to our entitlement to recruit international students. As far as I am concerned, every institution in Scotland is robustly quality assured and I do not think that there is any justification whatsoever for using TEF ratings to determine whether we are allowed to recruit international students. There would be a serious risk if the Home Office was to do that.

Finally in relation to the TEF, witnesses highlighted the importance of ensuring the metrics within the TEF do not create a system that is unfairly stacked against Scottish institutions. The Committee wishes to add its support to ongoing work that seeks to ensure the matrix sufficiently reflects Scotland. The Committee would be very supportive of any progress made through your scrutiny of the Bill in this regard.

Research architecture and funding

The panel highlighted the value of the current collaborative approach across the UK. Universities Scotland stated that “We believe the UK research endeavour is deeply collaborative between UK and devolved-level actors and that this is an asset to the excellence of research in universities and research institutes across the UK. We want to see this maintained in the new structures.”

In light of this the stakeholders all raised issues with the structure and governance of UKRI. RSE stated that “UKRI can only achieve [its] aims if it truly represents research communities across all parts of the UK, and, through the Research Councils, across all disciplines.”...“Explicit recognition of UKRI’s country-wide role is particularly crucial in light of the inclusion of Research England within the body. The RSE shares the concerns of Universities Scotland and others that this structure may significantly, if unintentionally, skew the focus of UKRI towards England, to the detriment of the devolved nations”

The RSE also raised specific issues in relation to the dual support mechanism whereby “two previously distinct strands of public funding for research merge within one body...there is potential for negative impact for Scotland if funds for which it can currently compete through the Research Councils are moved to Research England, from which Scotland’s institutions will be excluded.”

The Committee is very aware of the value of Research Council funding and in general the strong record of support for Scottish projects, based on the competitive excellence of Scottish universities. It also supports evidence heard on the need to ensure UKRI is reflective of Scottish interests and to ensure that the role of Research Councils is not downgraded.

Specifically, the Committee would support amending the bill to create a statutory firewall between the funding of research England and the funding of Innovate UK and UKRI generally. It would also support amending the bill to ensure Scottish representation on UKRI and the Research Councils. Universities Scotland highlighted a number of other potential amendments in evidence, all seeking to ensure Scottish

interests are factored into decision making. The Committee draws this particular extract of the *Official Report* to your attention for consideration (cols 13 and 14).

Yours sincerely

James Dornan MSP
Convener
Education and Skills Committee

Letter to Rt Honourable Amber Rudd, Home Secretary

Dear Ms Rudd

The Education and Skills Committee of the Scottish Parliament has been scrutinising the provisions of the Higher Education and Research Bill, in order to assess their potential impact in Scotland. This has included a focus on the Teaching Excellence Framework. Witnesses from Universities Scotland, Royal Society of Edinburgh, UCU Scotland, NUS Scotland, Scottish Funding Council all gave written and oral evidence to the Committee. I attach links to the *Official Report*, associated written submissions and correspondence from the Scottish Government for your reference.

The Committee is aware of the continued representations from the Scottish Government to the UK Government in relation to the potential impact of this Bill in Scotland and the need to reflect and protect the specifics of what is a very valued Scottish system.

The Committee was struck in its evidence session how unified witnesses were in their views on how the Bill needs to be amended, and how these views align with the Scottish Government's efforts.

We wish to add the weight of the Committee's support to these efforts, to ensure the Bill reflects and protects the unique and valued higher education system in Scotland.

Teaching Excellence Framework

Scottish universities operate in an extremely competitive environment at UK and international level meaning the TEF presents Scottish Universities with a dilemma on whether to opt-in to the system, since being able to demonstrate having the highest levels of quality and student satisfaction is important to bringing in students from elsewhere. The likelihood, it was suggested, is that universities would feel a huge pressure to take part in order to protect their positions on the international stage.

Witnesses suggested the TEF will influence the ability of institutions to bring in more overseas students. Alastair Sim from Universities Scotland highlighted serious concerns from his organisation in this regard:

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There is also an underlying worry....what will happen if the Home Office—in our view, it is inevitable—decides to link TEF gradings to our entitlement to recruit international students. As far as I am concerned, every institution in Scotland is robustly quality assured and I do not think that there is any justification whatsoever for using TEF ratings to determine whether we are allowed to recruit international students. There would be a serious risk if the Home Office was to do that.

Given the value of international students to Scottish universities, the Committee wants to add the weight of its support to the concerns raised by key Scottish stakeholders. Specifically, the Committee seeks assurances from the Home Office that the TEF will not be used in the way Universities Scotland fears.

Yours sincerely

James Dornan MSP
Convener
Education and Skills Committee

¹ <http://www.scottish.parliament.uk/SPLCM-S05-1.pdf> The Memorandum (LCM-S5-4) was lodged by John Swinney on 20 September 2016

² Education and Skills Committee. *Official Report*, 16 November 2015, Col 2.

³ Education and Skills Committee. *Official Report*, 16 November 2015, Col 3.

⁴ Education and Skills Committee. *Official Report*, 16 November 2015, Col 5.

⁵ Education and Skills Committee. *Official Report*, 16 November 2015, Col 4.

⁶ Education and Skills Committee. *Official Report*, 16 November 2015, Col 5.

⁷ Education and Skills Committee. *Official Report*, 16 November 2015, Col 9.

⁸ Education and Skills Committee. *Official Report*, 16 November 2015, Col 9.

⁹ Education and Skills Committee. *Official Report*, 16 November 2015, Col 10.

¹⁰ Education and Skills Committee. *Official Report*, 16 November 2015, Col 16.

