

FURTHER AND HIGHER EDUCATION (SCOTLAND) ACT 2005

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the [Further and Higher Education \(Scotland\) Act 2005 \(asp 6\)](#) . They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. 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

3. 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 Act 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 the Council the Act sets out the powers of and duties on Ministers and the Council, which are addressed in more detail below. The Act also makes provision to bring colleges and higher education institutions (the fundable bodies as detailed in the Act with the exception of the Open University), and the Scottish Agricultural College, within the remit of the Scottish Public Services Ombudsman.
4. In general terms, the Act amends the 1992 Act to achieve its purpose and also 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 Act 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 Act 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.
5. The Act followed 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 2004, 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

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the Scottish Public Services Ombudsman (“the Ombudsman”). The responses received on all of these consultations have been considered in redrafting the Act.

THE ACT

6. The main provisions of this Act 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 8);
 - Sets out powers of Ministers and the Council in relation to funding (Sections 9 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 31).
 - Part 2 – makes miscellaneous and general provisions including amending enactments, ancillary provision, regulation and order making powers and interpretation (sections 32 to 36).
 - 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 Act. There is provision for variation of this list in section 7.
 - Schedule 3 – contains amendments in consequence of the Act.

THE ACT – 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

7. 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

8. 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

9. 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 Act). 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 Act.

Section 4 The Scottish Ministers: general duty

10. 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

11. This provides definitions of fundable further and higher education for the purposes of this Act, updating where necessary to reflect changes to some school qualifications. The definitions in the Act 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

12. 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

13. 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.
14. 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.
15. 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)).

Section 8 Support needs

16. This section defines the term 'support needs' for the purposes of the Act. The need for support is linked to a person's ability to access and participate in fundable further or fundable higher education, as compared with other people of the same age group. Students experience barriers in accessing and participating in learning for many reasons, and may therefore require support. Such a barrier may arise from factors relating to, for example, social, cognitive, emotional, psychological, linguistic, disability (physical or mental), ethnicity or family and care circumstances. These support needs may range from those needs that are relatively mild and temporary through to those that are complex and more enduring. But a support need may not arise solely due to the matters set out in subsection (3).

Funding of further and higher education etc.

Section 9 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), and (13) to (17) 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 and a duty to consult certain persons (as set out in subsections (13) to (16)).
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 10 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 11 Administration of funds

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

Section 12 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 (unless it is not expedient to do so), 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.

The Council: functions

Section 13 Quality of fundable further and higher education

23. 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.
24. 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

25. 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.
26. It is not intended that the Council will be responsible for devising or implementing such a framework, but that it should take account of the view of Ministers, and consult with fundable bodies and other representatives to adopt the framework which is most relevant.

Section 15 Efficiency studies

27. 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

28. 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

29. **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

30. 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

31. 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.
32. 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 Act. 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

33. 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.
34. It also gives the Council a duty to have regard to the desirability of achieving sustainable development and encourage fundable bodies to contribute to the achievement of sustainable development in so far as is reasonably practical for them to do so.
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 (4) requires the Council to have regard to the educational and related needs (including support 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, consult 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 (8) 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 Academic Freedom

43. This puts a duty on fundable bodies to have regard to the desirability of ensuring academic freedom for those involved in teaching, learning or research in relation to their appointment, or any entitlement or privileges they may enjoy. This includes the freedom (within the law) to hold and express opinions, question and test established ideas and received wisdom and present controversial or unpopular points of view.

Section 27 Remit of the Scottish Public Services Ombudsman

44. This extends the remit of the Ombudsman to include those bodies which are fundable bodies under schedule 2 of the Act, (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 28 Inspection of accounts

45. 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 Act.

Section 29 Educational use of certain property

46. Subsection (1) amends section 25 of the 1992 Act to ensure that if Scottish Ministers use powers under section 25 to close a college and transfer all property, rights, liabilities or obligations to Ministers, then these must transfer to another charity and be applied for the purpose of the advancement of education.
47. Subsection (2) amends section 47 of the 1992 Act to ensure that if Scottish Ministers use powers under section 25 to close a higher education institution and transfer all property, rights, liabilities or obligations return to Ministers, then these must transfer to another charity and be applied for the purpose of the advancement of education.

Section 30 Change of name by certain bodies

48. 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 31 Information about recorded children

49. 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 32 Amendment of enactments

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

Section 33 Ancillary provision

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

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Section 34 Orders and regulations

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

Section 35 Interpretation

53. This section provides definitions of certain expressions used in the Act.

Section 36 Short title and commencement

54. This section gives the short title of the Act and provides for its commencement.

Schedule 1 — The Scottish Further and Higher Education Funding Council

55. This schedule sets out 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

56. 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

57. This schedule makes consequential amendments which will be required to other legislation as a result of this Act.

PARLIAMENTARY HISTORY

Stage	Date	Key Documents
Introduction	20 September 2004	Bill as introduced: www.scottish.parliament.uk/business/bills/pdfs/b26s2-introd.pdf
Stage 1	5 October 2004	www.scottish.parliament.uk/business/committees/enterprise/or-04/ec04-2102.htm#Col1086
	2 November 2004	www.scottish.parliament.uk/business/committees/enterprise/or-04/ec04-2301.htm
	9 November 2004	www.scottish.parliament.uk/business/committees/enterprise/or-04/ec04-2401.htm
	16 November 2004	www.scottish.parliament.uk/business/committees/enterprise/or-04/ec04-2501.htm
	20 December 2004	Final Committee Report: www.scottish.parliament.uk/business/committees/enterprise/reports-04/elr04-12-01.htm
Stage 1 Debate	20 January	www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor0120-01.htm
Stage 2		Bill as amended:

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Stage	Date	Key Documents
		www.scottish.parliament.uk/business/bills/pdfs/b26s2-stage2-amend.pdf
	22 February 2005	www.scottish.parliament.uk/business/committees/enterprise/or-05/ec05-0501.htm
	1 March 2005	www.scottish.parliament.uk/business/committees/enterprise/or-05/ec05-0601.htm
Stage 3 Debate	20 April 2005	www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor0420-01.htm
		Bill as passed: www.scottish.parliament.uk/business/bills/pdfs/b26s2-aspassed.pdf
Royal Assent	1 June 2005	Further and Higher Education (Scotland) Act 2005: www.opsi.gov.uk/legislation/scotland/acts2005/20050006.htm