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14 July 2004

Dear Mark,

Merger of the funding councils: draft Bill

- 1 The two Councils have decided to respond jointly to the consultation on the draft Bill to merge the funding councils. The response is contained in this letter and the attached annexes.
- 2 Our response concentrates mainly on the changes contained in the draft Bill - rather than on all of the detail of the consultation paper - and covers the following issues:
 - proposed changes to the powers and duties;
 - other drafting issues;
 - transitional arrangements; and
 - the name of the new council.
- 3 The draft Bill and consultation paper were considered separately by each Council and their comments have been taken into account by their Joint Co-ordinating Committee (JCC) which agreed the final response.

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The Scottish Funding Councils for Further and Higher Education is the Joint Executive which carries out certain functions of the Scottish Higher Education Funding Council and the Scottish Further Education Funding Council under agreement between the Councils.
'S e Comhairlean Mhaoineachaidh Foghlam Adhartach is Àrd-ire na h-Alba an Co-stiùireachas a tha a' coileanadh cuid de ghnìomhan Comhairle Mhaoineachaidh Foghlam Àrd-ire na h-Alba agus Comhairle Mhaoineachaidh Foghlam Adhartach na h-Alba fo aonta eadar na Comhairlean.

Introduction

- 4 Much of the recent discussion about the draft Bill appears to have lost sight of the reasons that were put forward originally by Ministers and the Scottish Parliament for merging the funding councils. These were about developing Scotland's distinctive education system for the benefit of learners and researchers and, through them, for the benefit of the nation. We believe that all of the stakeholders are signed-up to this aspiration but there are clearly some differences of view about how the legislation should be constructed to help achieve it.
- 5 Our response to the draft Bill tries to set out constructively how we can best achieve that shared aspiration and draws on our experience of operating under the framework of the 1992 Further and Higher Education (Scotland) Act.

Principles that should underpin the legislation

- 6 In our platform statement in the consultation paper, we said that the merger legislation should provide a new enabling framework that allows the colleges and institutions to deliver an effective tertiary education system and respond flexibly to changes over time. We continue to believe that such a framework should be underpinned by the following broad principles:
 - to build parity of esteem for learners, the legislation should treat the FE and HE sectors the same wherever practicable;
 - the autonomy of universities and colleges should be protected, since well-led and responsive autonomous institutions are best placed to respond quickly and effectively to the changing needs of students, employers and society;
 - mechanisms such as policy and management guidance from Ministers and conditions attached to grants are effective and more flexible methods for achieving particular priorities and setting out functions than detailed legislation; and
 - the legislation should not embody very specific and short-term concerns in a way that might be irrelevant and constraining in the future.

These principles have informed our response to the provisions contained in draft Bill.

- 7 We continue to think that the third principle is particularly important. We are already achieving - within the existing powers - an increasingly constructive response from both sectors. Examples include our 'strategic dialogue' processes in HE and now FE, and the HE sector itself identified a role of strategic leadership for SHEFC in the recent PFMR of the Council. These were seen as key elements in the new partnership with higher education – built on confidence and trust – set out in the Scottish Executive's Framework for Higher Education in Scotland. It would be unfortunate if proposals for unnecessary legislation were to undermine this progress.

Changes to the powers and duties

- 8 In the Annex 1 attached to this letter, we have commented on the main changes to the powers and duties in the draft Bill. To assist the analysis, we have listed separately the changes for the new Council, colleges and HE institutions, and Scottish Ministers.

- 9 The Councils welcome many of the proposed changes but would like Ministers to reconsider three provisions in particular relating to the functions of the new Council:
- the duty to secure the 'adequate and efficient' provision of tertiary education and undertaking of research (which may be delegated to the new Council). The term 'adequate and efficient' is open to wide interpretation and the experience of SFEFC is that its achievement is difficult to demonstrate and measure in practice. We also believe that the duty would be unworkable and counterproductive if it is extended to cover research. We have suggested an alternative approach in the attached annex;
 - the power to require the holding of an extraordinary meeting of the governing body of a college or HE institution to discuss financial matters. We believe that it is not necessary to include this requirement in legislation because the Councils already have the means to communicate directly with governing bodies and there are other mechanisms – such as conditions of grant - which can be used effectively to deal with the financial arrangements of a college or HE institution; and
 - the new power to request the governing body of any college or HE institution to evaluate the feasibility, advantages and disadvantages of merger. We believe that this power is too blunt to be effective. There are other forms of collaboration, joint provision, and structural changes which benefit learners and researchers besides merger, and the fact of merger as the intended outcome has often been the real barrier to collaboration. There are also other mechanisms available - such as funding methods - which have been used successfully to encourage greater sharing of resources.

Drafting issues

- 10 In Annex 2 attached to this letter, we have provided comments on detailed issues of drafting. These are mainly suggestions for tightening the wording in the draft Bill or clarifying the intention behind some of the provisions. We have also taken the opportunity to suggest some new provisions which tidy up aspects of the 1992 Act.

Transitional arrangements

- 11 The consultation paper invites views on the arrangements that should be put in place to ensure a smooth transition to the new Council. We believe that the new Council should be established in shadow form before it is given its full statutory powers to fund colleges and HE institutions. This should allow it some time to agree its structures and methods of operation – such as the relationship between the Council and its committees – and begin to develop its strategies and policies in the light of any new guidance from Ministers.
- 12 We suggest that the new Council should operate in shadow form for a relatively short period of about four months to minimise the potential for planning blight and uncertainty. Assuming that the legislation is approved by the Scottish Parliament, this suggests that the new Council could be established in shadow form from 1 April 2005 and assume its full powers at the beginning of the academic year on 1 August 2005. The existing Councils would be dissolved on 31 July 2005.

- 13 We will of course need to ensure that the draft Bill contains sufficient transitional provisions to deal with the transfer of liabilities and responsibilities from the two existing Councils. These provisions will need to include the transfer of commitments to pay grants and the responsibility to apply conditions of grant. We will contact your staff separately to consider this issue further.

Name of the new Council

- 14 We believe that the choice of name for the new Council is important because it will set the tone for its work. The name should either:
- reflect our shared aspiration to develop a coherent system of education that will benefit learners and researchers and, through them, the nation; or
 - reflect the main function of the new Council, namely to fund colleges and universities.
- 15 We have not been able to identify an evidently 'best' name. This is an issue which might benefit from some further thinking once the final shape of the draft Bill is known and we would be willing to work with you over the summer period to identify a suitable name.

Concluding remarks

- 16 I hope that you find this response helpful. We have provided the response on a confidential basis and will leave it to you to decide whether to place it in the public domain, although we would prefer that Annex 2 remains confidential as it contains sensitive advice about the staff of the new Council. In respect of this annex, the Secretary to the Council will be writing to you separately about the proposed change to the existing position that the Chief Executive should be a member of the Council. Both Councils had thought initially that this was simply an oversight.
- 17 I have a final point which has come to our attention after the Councils and the JCC had completed their deliberations. I am confident, however, that they would support our view that, in respect of the provision for Ministers to give directions to the Council where the affairs of a college or HE institution are being mismanaged (s7 (1) and (2)) the existing provisions for prior consultation should be retained. They have been omitted from the draft Bill.
- 18 Please feel free to contact me if you would like to discuss any aspect of the response.

Yours sincerely

Roger McClure
Chief Executive

Tertiary Education (Funding etc) Scotland Bill: changes to existing powers and duties

The Council

Proposed change	New Bill	Comments
<p>The duty on Scottish Ministers to secure adequate and efficient provision of further education is extended to cover:</p> <ul style="list-style-type: none"> the provision of all tertiary education; and the undertaking of research among the institutions which provide tertiary education. <p>The draft Bill allows Ministers to delegate this duty to the new Council, subject to such conditions as they may determine.</p>	<p>s1 (1) and (2)</p> <p>s8</p>	<p>We agree that the main duties of Scottish Ministers in relation to tertiary education and the funding of research should form the first provision in the Act but believe that the proposed wording should be reconsidered for two reasons.</p> <p>Firstly, the term 'adequate and efficient' derives from the Education (Scotland) Act 1980 which required education authorities to provide "for their area <i>adequate and efficient provision of school education and further education</i>" (s1 (1)). We believe that the term is meaningful in the context of a compulsory service such as school education - where the population is known, attendance is compulsory and the curriculum is standard - but it is no longer appropriate to the current context of further education. The term is also open to wide interpretation and the experience of SFEFC is that its achievement is difficult to demonstrate and measure in practice. To extend the term 'adequate provision' to higher education would compound the difficulties because most higher education institutions draw their students from regional, national and international markets.</p> <p>We assume that 'adequacy' relates to the volume, quality and relevance of the provision and believe that these dimensions could be captured more effectively by focusing the duty around the needs of learners and potential learners. Such an approach would better support the concept of lifelong learning and indeed would fit well with the 'people-centred' approach of the Scottish Executive's lifelong learning strategy and the new duty for the Council to have regard to skills needs in Scotland. In terms of the duty to secure 'efficient provision', we suggest that this is now covered by other legislation such as the Public Finance and Accountability Act (Scotland) and the requirement for Best Value.</p> <p>Our second reason for suggesting that the wording should be reconsidered is because of the proposed extension of 'adequate and efficient' to the undertaking of research. The use of the term</p>

		<p>'adequate' suggests a very narrow conception of research which is at odds with the long standing policy priority (one that precedes the 1992 Act) of securing research that is internationally competitive. We also believe that it would be virtually impossible to define and measure the level of research that is necessary to ensure that there is 'adequate provision'. And attempts to measure the 'efficiency' or 'efficient undertaking of research' are notoriously difficult.</p> <p>Our preferred approach would be to include a simple duty (or power) in this section of the legislation which allows Ministers to fund research in the institutions which provide tertiary education. Where this duty is delegated to the new Council, it can be left to guidance to set out how it is to be carried out in practice.</p> <p>We suggest a revised wording for s1 (1) as follows:</p> <p><i>"It is the duty of Scottish Ministers to:</i></p> <ul style="list-style-type: none"> <i>(a) secure the provision of tertiary education that has regard to the needs of learners and potential learners in Scotland; and</i> <i>(b) to support the undertaking of research among the institutions which provide tertiary education."</i> <p>This duty, when taken together with the new duty to have regard to the skills needs in Scotland (s17), should ensure that Scotland's national needs are taken into account by the new Council.</p>
<p>A new duty for the Council to have regard to skills needs in Scotland (current and potential).</p>	<p>s17 (1) and (2)</p>	<p>We note that this new duty arises from a commitment made in the coalition government's Partnership Agreement and welcome the way in which it has been worded in the draft Bill.</p>

Proposed change	New Bill	Comments
<p>The current duty on SHEFC to assess quality in HE is extended to cover assessment and enhancement of quality in all colleges and HE institutions.</p> <p>The requirement for a quality assessment committee is removed.</p>	<p>s15 (1) and (2)</p>	<p>We welcome this change which ensures that the duty with regard to the assessment and enhancement of quality is the same for both further and higher education. We agree that the legislation should not include a duty to establish a quality assessment committee.</p>
<p>A statutory duty on the new Council to establish a research committee.</p>	<p>Schedule 1, paragraph 11 (1)</p>	<p>Given the UK-wide arrangements for funding and assessing research - and the international context within which most research is undertaken - it will be important that the new Council has access to expert advice from researchers and others who understand this broader context. This new duty which will provide assurance to institutions and stakeholders that the Council's policies for research are being informed by such expert advice.</p>
<p>The new Council will have the power to require the holding of an extraordinary meeting of the governing body of a college or HE institution to discuss matters relating to its financial support. A member of the Council or its chief executive is entitled to address the meeting.</p>	<p>s13 (1) and (2)</p>	<p>We believe that it is not necessary to include this requirement in legislation because:</p> <ul style="list-style-type: none"> • the Councils already have the means to communicate directly with governing bodies about matters of financial support; and • there will be other powerful mechanisms at the new Council's disposal which can be used effectively to deal with issues about the financial arrangements of a college or HE institution, such as the statutory power to attach conditions of grant to funding. <p>Also there is also no guarantee that the governing body would take account of the message conveyed by the Council.</p>

Proposed change	New Bill	Comments
<p>Scottish Ministers given a new power – which will be exercised through the Council – to request the governing body of any college or HE institution to evaluate the feasibility, advantages and disadvantages of a merger with another college or HE institution.</p>	<p>s26 (1), (2) and (3)</p>	<p>We note the intention behind this new power but believe that it will be too blunt to be effective. Our experience of operating under the 1992 legislation is that there are other mechanisms available which have been used in the past successfully to encourage consideration of collaboration, joint provision, structural change and merger between colleges and HE institutions. These mechanisms will continue to be available to the new Council and – for that reason – it is not necessary for a new power to be included in the legislation. In addition, if sharing resources effectively is the aim, merger is not the only way of achieving this.</p>
<p>A new duty on various bodies to provide the new Council with information which it may require in order to carry out its functions.</p>	<p>s18 (2), (3) and (4)</p>	<p>We welcome this new duty which recognises that the new Council will need the co-operation of other bodies in Scotland in order to carry out its functions effectively.</p>
<p>The current power which allows SHEFC to undertake studies into the economy, efficiency and effectiveness in the management or operations of any HE institution is extended to all colleges and HE institutions.</p>	<p>s14 (1) and (2)</p>	<p>We agree with this change which regularises the position for FE.</p>
<p>A new duty which requires the Council to carry out its functions in a manner which encourages equal opportunities.</p>	<p>s19 (1) and (2)</p>	<p>We agree that the new Council should operate in a manner which encourages equal opportunities but believe that:</p> <ul style="list-style-type: none"> • this duty is already covered in existing legislation¹; and that • it is unhelpful to include the same - or a very similar - statutory requirement in two pieces of

¹ Equal Pay Act 1970 (as amended), Sex Discrimination Act 1975 (as amended), Race Relations Act 1976 (as amended), Disability Discrimination Act 1995 (as amended), Protection from Harassment Act 1997, Flexible Working (Procedural Requirements) Regulations 2002 and other related statutory instruments, Employment Equality (Sexual Orientation Regulations) 2003, Employment Equality (Religion or Belief) Regulations 2003, Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (as introduced by the Employment Act 2002).

		<p>legislation using different forms of words as it reduces the clarity of the legislation.</p> <p>We recognise that the new Council should encourage equal opportunities in the exercise of its functions but believe that this is an issue about its conduct which could be handled in the Management Statement or guidance.</p>
<p>A duty on the new Council to prepare, after the end of the financial year, a report on its activities. The report must be published and sent to Scottish Ministers.</p>	<p>Schedule 1, paragraph 16 (1) and (2)</p>	<p>We agree with this new duty which largely reflects existing practice and should enhance perceptions of accountability.</p>
<p>The current duty on SHEFC to consult before establishing conditions of grant is extended to cover both FE and HE.</p>	<p>s12 (5 (a) and (b))</p>	<p>We agree with this change which ensures appropriate parity of treatment for both sectors.</p>
<p>The current duties on SHEFC to:</p> <ul style="list-style-type: none"> • encourage HE institutions to maintain and develop funding from other sources; and • have regard to the desirability of preserving any distinctive characteristics of particular institutions <p>are extended to cover all colleges and HE institutions.</p>	<p>s12 (6 (a) and (b))</p>	<p>We agree with this change which ensures appropriate parity of treatment for both sectors. Also, since the new Council will be funding a very broad range of providers, the need to have regard to distinctive characteristics of particular providers is more important than at present.</p>

Colleges and institutions

Proposed change	New Bill	Comments
<p>The current duty on colleges to provide suitable and efficient FE to students is modified and extended: all colleges and HE institutions will now be required to provide efficient provision of tertiary education of a suitable range (in terms of the area and the needs of students and potential students.)</p>	<p>s23 (1) and (2)</p>	<p>The extension of this duty to higher education is unlikely to be workable in practice because most higher education institutions operate in national and international markets and do not develop their provision with a particular focus on local demand, nor would it be efficient for them to do so. We believe that it is important that there is a suitable range of provision to meet the needs of the country as a whole, but this can be achieved by a range of existing mechanisms – such as the use of funding methods – which do not need to be enshrined in legislation.</p> <p>For the reasons set out in our response to section 1 (1) of the draft Bill – regarding adequacy and efficiency – we believe that the duty on colleges and HE institutions should focus on the needs of learners and potential learners.</p>
<p>A duty for all colleges and HE institutions to provide the Council with a development plan each year.</p>	<p>s24 (1) and (2)</p>	<p>The requirement on colleges to provide a 'development plan' derives from the 1992 legislation and is now outdated as the context in which they operate is significantly different from the period following incorporation.</p> <p>We assume that the intention behind this section of the draft Bill is to ensure that colleges and HE institutions plan effectively for the use of the significant levels of public funds which they receive. Our experience is that this can be achieved by using mechanisms which are already at the disposal of the Councils – such as conditions of grant – and that there is no need to prescribe an additional duty in the legislation.</p>
<p>Colleges in the FE sector given the power – with the consent of Scottish Ministers – to change the name of the college or of the governing body.</p>	<p>s27</p>	<p>We welcome this change which recognises the maturity of the FE sector and provides greater autonomy to colleges.</p>

Scottish Ministers

Proposed change	New Bill	Comments
<p>Introduces a new category of Specified Tertiary Education Providers (STEP) eligible to receive funding from the new Council.</p>	<p>s21</p>	<p>The introduction of STEPS is a legislative drafting tool and is likely to be counterproductive. The same result could be achieved by having two or more lists in the schedule to the Bill (say, one for colleges and one for universities) and for the operative sections of the Bill to refer to the two categories rather than to the consolidated term.</p> <p>We believe that it is important that Scottish Ministers should continue to have the power to designate an institution as a higher education institution and that this should continue to be a condition for eligibility to receive RAE-related volume/quality funding. We note from the consultation paper that this will be made clear in a memorandum attached to the legislation.</p>
<p>Scottish Ministers given the power – by regulation – to specify conditions that a college or HE institution must meet in order to become a STEP and retain STEP status.</p>	<p>s22 (1), (2), (3), (4) and (5)</p>	<p>We agree that the legislation should give Scottish Ministers the power to specify threshold conditions that a college or HE institution should meet in order to be considered by Ministers to become eligible for, and continue to receive funding from, the new Council. These conditions should create a significantly high threshold for colleges and HE institutions to achieve in order to ensure that the needs of learners are sustained in the medium to longer term.</p> <p>We note the proposed conditions set out in Annex A to the consultation paper and would expect to have the opportunity to discuss these with the Scottish Executive before any regulations are drafted.</p>

Proposed change	New Bill	Comments
<p>The 'academic freedoms' guaranteed to HE institutions in the current legislation are extended to colleges. These mainly prevent Ministers from framing terms and conditions of grant by reference to:</p> <ul style="list-style-type: none"> • particular courses of study; • programmes of research; • selection or appointment of academic staff; or • the admission of students. 	<p>s4 (1), (12) and (13)</p>	<p>This is an important change which will help to achieve parity of esteem between the two sectors.</p>
<p>Scottish Ministers will have the power to issue directions of a general or specific nature to the new Council. These directions cannot relate to an individual college or HE institution.</p>	<p>s6 (1) (2) and (3)</p>	<p>We note that this power alters the current position for SHEFC since Ministers can only issue directions to SHEFC of a general nature. We believe however that this change is unlikely to alter the current arrangements in practice or the ability of Ministers to make orders under the legislation about specific matters (s31 give Ministers the power to make orders under the Act).</p>

Proposed change	New Bill	Comments
<p>The power for Scottish Ministers to give directions to the Council about the provision of financial support to an HE institution where there is financial mismanagement: the power relating to HE is extended to cover all colleges and HE institutions.</p>	<p>s7 (1) and (2)</p>	<p>We welcome this change as it will ensure that colleges and HE institutions are treated in the same way.</p> <p>Separately, we note that Annex 1 to the consultation paper suggests that Scottish Ministers will no longer have the power - under the terms of the 1992 Act - to remove members of the Board (other than the principal) of a college where the affairs of the college are being mismanaged. This appears to be inconsistent with the draft Bill which indicates that the relevant section (s24) of the 1992 Act will remain in force. This is an important issue and we would welcome clarification.</p> <p>We believe that this is an area where a different approach to the powers contained in legislation may be required for FE and HE because of:</p> <ul style="list-style-type: none"> • the unique role that the Privy Council continues to exercise in relation to the governing bodies of designated higher education institutions, which has no equivalent for colleges; and • because of the different ways in which the governance arrangements for colleges and HE institutions have developed. <p>We suggest therefore that the power in relation to boards of management of FE colleges should be retained by Scottish Ministers.</p>
<p>Scottish Ministers will no longer have the power to give directions to college Boards of Management (or, for that matter, HEIs).</p>	<p>Not relevant</p>	<p>We welcome this change as it will ensure that colleges and HE institutions are treated in the same way.</p>