

Questions on Part 1

1. *The proposals would move the funding and functions related to National Training Programmes and provision for apprenticeships from Skills Development Scotland to the Scottish Funding Council. What do you think of these measures?*

We support the Bill's primary policy objective, as set out in the Policy Memorandum (para 7), to:

“enable funding for tertiary education and training provision to be more responsive to the needs of learners and the economy”.

To do this, the Bill needs to not only deliver the immediate changes to the public bodies but also, vitally, ensure that the SFC can change its approach to funding over time to fully respond to Scotland's skills needs. For both, there are some areas of the Bill where greater clarity is needed, or where the suggested implementation requires adjustment.

The Bill provides for the transfer of responsibilities for apprenticeships as they are currently configured. It also makes provision for the support of work-based learning.

We are supportive of this transfer of responsibilities. However, we believe that there is merit in a different approach to implementation to that set out in the Policy Memorandum.

There are immediate opportunities to enable universities to better meet employer and learner demand through a changed approach to graduate apprenticeships (GAs). Rather than requiring the external approval of frameworks, there should be a full alignment of the funding and quality/control model for GAs to typical taught programmes. SFC funded GAs have already been incorporated into the system of funded places. Removing the need for framework approval, whilst relying on proven quality assurance mechanisms for the university sector, would enable programmes to be directly (and more rapidly) developed between universities and partners.

Graduate apprenticeships are not the only forms of work-based learning offered by universities and there are also immediate opportunities for work-based learning more widely, building on universities' diverse links with employers.

It is vitally important that the statute allows for new approaches over time so that funding and support for the study of apprenticeships on the one hand, and for wider accredited work-based learning on the other, offer a greater flexibility to institutions when meeting demand. This will have an increasing importance in the context of Scotland's demography; the breadth of choice for learners and employers; and a need for a competitive level of post school qualification across our working age population.

The Bill should therefore enable the Council to evolve its approach to support an expansion of a breadth of university work-based learning including graduate apprenticeships, adding to the substantial amount already offered.

There is a need for greater clarity that the Bill as presented will achieve this.

Section 12J (2) of the Bill provides for SFC to:

“make grants, loans or other payments to a training provider in respect of expenditure incurred or to be incurred by the provider for the purpose of the delivery of Scottish apprenticeships or work-based learning”.

A 'training provider' is defined as a person who:

“(a) provides either work-based learning or the training of an apprentice required under a Scottish apprenticeship framework, and

(b) meets criteria set out in regulations made by the Scottish Ministers”.

Helpfully, the Policy Memorandum notes (para 118) that the definition of a ‘training provider’ is left deliberately broad and could include ‘post-16 education body’.

It would be helpful if on the face of the Bill and / or in Ministerial statement during its passage, for it to be made clearer that the policy intention is that higher education institutions (and others) could be ‘training providers’ for the purposes of these sections.

In our comments on Part 3, we also reflect on the need for a changed SAAS to be able to make policy changes to support work-based learning.

2. The Bill would also move the funding and functions related to college student support from SFC to SAAS so that all student support funding is delivered through SAAS. What do you think of these measures?

This is primarily a question for the college sector to comment on. Clearly, universities have an interest in this change being effective, for example in supporting students who take up university study after their time at college.

3. The Bill will provide SFC with powers to make recommendations, issue guidance and to monitor the financial sustainability of post-16 education bodies. What do you think of these measures?

We have set out below our views on a number of the proposed new powers and duties of the Council.

The reliance on the creation of a regulation-making power for Ministers for full implementation of these elements of the Bill leaves considerable uncertainty as to whether these powers and duties will be:

- effective and deliverable by the Council, including as it manages considerable organisational change over the short to medium term;
- configured in ways that reflect the different status of the fundable bodies to which they relate; and
- compatible with university autonomy and supportive of the maintenance of the university sector’s current ONS classification.

We note that the ONS is [embarking on a review](#) of the transactions in which UK universities engage and that a further review to establish whether universities are subject to public sector control will be considered following the completion of this review.

Given the profound detrimental impact that a reclassification would bring, we ask that the Committee keeps these issues to the fore in its scrutiny of the Bill.

Information sharing (Section 6 of the Bill)

The Bill includes new duties to ensure data sharing by persons receiving SFC funding, under the Council’s new NTP, apprenticeship or work-based learning functions.

As the issue of information sharing is addressed in the Bill, we believe that there should be consideration of how to address the long-established need for enhanced data sharing between parts of the education sector to support widening access. For example data on receipt of free school meals (FSM) and school clothing grant. We understand from Scottish Government that there are currently statutory obstacles to this.

Scotland's universities are actively working to meet the Commission on Widening Access targets for fair access by 2030. A person centric metric of socio-economic deprivation would be of significant assistance with this agenda, and we are concerned about the impact of delays if another legislative route were to be found in the next Programme for Government (which will have very little legislative time to deliver before the next election).

We note that:

- the sharing of data on FSM has been a policy objective for many years, see for example the [report of the Scottish Government's Access Data Working Group](#) in early 2019;
- the Information Commissioner's Office (ICO) wrote recently to the Committee, noting to date it has not had any engagement with the Scottish Government on these issues. Further, the ICO notes the importance of a clear lawful basis for sharing FSM data under Data Protection law, whilst also acknowledging that data sharing may not be happening due to other, non-statutory reasons; and
- the Committee had the opportunity to discuss these issues with the Cabinet Secretary on 2 April where the potential for a SSI to resolve these issues was discussed.

We ask that, as part of the passage of this Bill, the Committee considers whether it provides a vehicle for addressing any statutory obstacles that the SSI will not. Overall, the sector would value a clear, timed pathway to these issues being resolved.

Notifications to the Council (Section 7)

The Bill does not provide detail on the scope of, and thresholds for, the duty for institutions to notify the Council. The Explanatory Notes and Policy Memorandum point to circumstances of 'serious jeopardy' and 'material change' however the examples provided do not all point to thresholds of such significance.

We note that the form, manner and timing of notifications will be specified through regulations which will be the subject of consultation. However, we understand that this affirmative procedure will not take place until after passage of the Bill. There should therefore be an exploration of the detail of this proposal during the passage of the Bill, to frame and inform the subsequent creation of regulations.

We want to see action during the passage of the Bill to ensure that thresholds for notification set out in regulations are effective, deliverable and acknowledge the reporting requirements under existing regulatory mechanisms to avoid duplication and unnecessary complexity for HEIs. For instance, there are already thresholds for collective consultation which HEIs work to in the event of redundancies and there is already a threshold trigger point at which notification to the Information Commissioner's Office is required by HEIs in the event of a data breach. We also note that the [Financial Memorandum with the SFC](#) already specifies a requirement on an institution's accountable officer to *"inform SFC's Accountable Officer without delay of any circumstance that is having, or is likely to have, a significant adverse effect on the ability of the institution to deliver its education programmes, research and other related activity, including delivery of its Outcome Agreement with SFC"*.

These questions of threshold and timing are important if the duty is to be effective and manageable for HEIs and for the Council and if it is to reflect appropriately the autonomous status of universities.

Efficiency studies: the needs and interests of learners and making recommendations (Section 8)

The Bill expands the scope of the SFC's existing powers to conduct efficiency studies to include the needs and interests of learners and gives the Council the power to make recommendations to fundable bodies following such a study. The term 'the needs and interests of learners' is not defined. The example provided in the Policy Memorandum is that of a course closure where there is a risk of students being unable to complete their studies.

Paragraph 186 of the Policy Memorandum notes that *"there is no corresponding duty on the fundable body to do anything in response to the recommendations. However, as a matter of good governance and practice, the Scottish Government would expect the fundable body to consider them appropriately"*. However, paragraph 184 notes that *"recommendations could include setting specific improvement targets and **requiring** the development of an improvement plan"* (our emphasis).

There is a need for greater clarity on the topics that might be the subject of efficiency studies, including the definition of 'the needs and interests of students', to understand the likelihood that the proposed powers would be effective and are compatible with institutional autonomy. We note that this section of the Bill is seeking to introduce a common system to fundable bodies that are both within (colleges) and outwith (universities) the public sector.

To illustrate the need for greater clarity:

- universities regularly make managed adjustments to their offering of courses and modules in light of demand, with appropriate management of the interests of students enrolled. Whilst the example in the Policy Memorandum would suggest that these decisions and processes would be outwith the intended scope of these measures, it is not clear that they are;
- how would the power of the SFC to commission a study, to make recommendations and to potentially publish those recommendations, relate to a higher education institution's commercial activities and interests? For example, the provision under contract of training, research or consultancy with an employer. Again, we would assume that these would be outwith the intended scope but this is not clear; and
- the Bill includes provision for the Council to *"publish any recommendations issued under subsection (4) as it considers appropriate"*. This leaves the decision on publication wholly with the SFC without a recognition that publication might affect the commercial interests of a higher education institution that sit beyond the direct funding relationship. The Policy Memorandum is also silent on this issue. There should be exploration of how SFC would determine the appropriateness of publication, including dialogue with the institution(s) concerned and any effect on their wider activities.

We also note that the needs and interests of students are not always aligned with efficiency. For example, some learners change their desired learning outcome and therefore repeat a year of study. Different institutions may offer courses with similar titles that take different approaches to the content and are therefore aimed at different levels. In addition, different, similarly titled, courses in different institutions (for example in engineering) may have different entry requirements and combining courses like this could result in some learners being unable to access their desired course.

Information on financial sustainability (Section 9)

We note the new provisions on the financial sustainability of post-16 education bodies and the intention for these to support information flows. Existing arrangements provide for a regular and substantial flow of information from institutions to the Council, for example Financial Statements, Strategic Plan Forecasts and Financial Forecast Updates. As noted above, there are also requirements under the SFC's Financial Memorandum for accountable officers to *"inform SFC's Accountable Officer without delay of any circumstance that is having, or is likely to have, a significant adverse effect on the ability of the institution to deliver its education programmes"* and *"of any serious weakness, such as a significant and immediate threat to the institution's financial position, significant fraud or major accounting breakdown"*. There is also regular engagement between the Council executive and institutions, for instance through Outcome Agreement Managers.

We imply from the Policy Memorandum that the intention of the Bill is to support flows of information when there are exceptional circumstances, be it requested by the SFC or offered by institutions, and that, whilst this is already provided for under the SFC's Financial Memorandum, the aim is to place it on a statutory footing.

We would value greater clarity on the practical implementation of these provisions. It will be important that the Council has the capacity to absorb and analyse the information that it receives and to engage with institutions where it finds reason to do so. In this context we highlight our wider concern that, whilst we are supportive of the Bill's objectives, it will be important for the Council to have the capacity and skill set to both give effect to the substantial internal programme of organisational change and meet new duties whilst, very importantly, sustaining its important current role.

Guidance (Section 10)

As the Policy Memorandum notes, The SFC already issues guidance to fundable bodies on a range of matters. The Bill gives the SFC the power to issue guidance to fundable bodies.

Given this power will apply to some organisations in the public sector and some that are not, and higher education institutions' operations have a significant breadth including much that is not supported by resources from the Scottish Government / SFC, we welcome the clarification that guidance will apply to *"activities in respect of which the person is in receipt of funding"* (para 37, Explanatory Notes to the Bill).

Questions on Part 2

The Bill makes changes to the governance of the SFC, to take account of its expanded functions, and to ensure that the Council has the skills and experience that it needs. Are the measures sufficient?

Appointment of members of the Council and members' skills and experience (Sections 14 and 15)

In our consultation response we noted our concern about the provisions to remove the time limit on appointments and restriction on reappointment of Council members. We are therefore pleased that the Policy Memorandum notes continuing adherence to the current 8 year limit on maximum duration of appointment in The Ethical Standards Commissioner's Code of Practice for Ministerial Appointments to Public Bodies. We would value further assurance during the course of the Bill that this will apply.

Our consultation response suggested that the significant widening of SFC responsibilities justified a limited increase in the number of Council members to ensure a sufficient balance of skills and experience. We believe that this should be considered through amendment to the Bill, in particular given our concerns set out below about the potential for a reduced insight into the operation of universities across the Council membership.

The Financial Memorandum to the Bill notes:

“Given the transfer of a significant proportion of SDS’s responsibilities and budget to the SFC, it might be anticipated that the SDS Board could have fewer members in future”.

The modelling suggests a reduction of between 2-4 members from the SDS Board. However, there is not a parallel acknowledgement that the SFC Board would need to expand due to it taking on these responsibilities and budget.

As the Council takes on these responsibilities, the Policy Memorandum notes that the Bill will change the specific skills, knowledge and experience that Scottish Ministers are to consider when appointing new members and that this *“signifies a shift away from an emphasis on appointing Council members who are actively employed or engaged in the college or higher education sectors”* (para 250 of Policy Memorandum). The Policy Memorandum notes in this context that perceived or actual conflicts of interest amongst Council members who are actively employed or engaged in the college or higher education sectors can affect the delivery of Council business. We recognise that the current Act and provisions in the Bill would mean that, when making appointments, Ministers would still have regard to the desirability of including persons who:

- have experience of, and have shown capacity in, the provision of fundable further education or fundable higher education; and
- have experience, and have shown capacity, relating to research or the application of research.

However, coupled with the rejection of the option to expand the number of Council members, we have a strong concern that the Council may not in future have experience of the breadth of university operations when making decisions. For instance: insight on current research and innovation strategy and the operation of the dual support system which levers significant resources into Scotland and is a driver of economic growth; the formation and growth of international partnerships and their relationship with the delivery of tuition and research in Scotland; and the complex systems of regulation that apply to the university sector.

This question should be explored during the passage of the Bill and we would wish to see the restoration of criteria that are proposed for removal. If conflict of interest is the sole driver for these changes, this is an issue navigated by other Boards and so there should be exploration of the reality of this issue; whether it justifies the complete exclusion from Council membership of any currently serving staff member of an institution; and, if so, how else individuals with the necessary experience might be drawn into Council membership. As the Policy Memorandum states, *“the approach to managing conflict-of-interest is best determined and set out administratively, through documents relating to the appointment process and letters of appointment”* (para 258 of the Policy Memorandum).

Co-opted members of the Council (Section 16)

In our consultation response we acknowledged the potential value in having co-opted members of the Council but only as a time-limited mechanism to implement change in the Council’s composition.

We recognise that there may also be unexpected circumstances where there is a sudden fall in the membership of the Council where, again, co-opted members might be part of a temporary solution.

However, we do not believe that the ongoing use of co-opted members is the best path for the governance of the Council. We observe that the Council is free to invite individuals with expertise in a given area to attend its meetings to offer advice and contribute in all of the ways set out at paragraph 262 of the Policy Memorandum.

Creation of an Apprenticeship Committee (Section 17)

The Policy Memorandum states that the *“objective in establishing an apprenticeship committee is to provide the SFC with the right structures to manage its new apprenticeship functions”*. Noting that it is expected that the Committee will have responsibility for preparing Scottish apprenticeship frameworks and will absorb at least some of the functions and responsibilities of various bodies and groups in the current apprenticeships landscape, the Policy Memorandum also notes that its functions are expected to evolve.

We welcome this indication that the Apprenticeship Committee will need to evolve over time to meet expectations.

As we have noted, we believe that the future development of graduate apprenticeships can be achieved without the need for frameworks, relying instead on established arrangements for funding and quality etc.

As we have set out in our views on Part 1, we also believe that there is an opportunity over time to take a more holistic view of skills needs, apprenticeships and work-based learning.

The proposed statutory Apprenticeship Committee would sit alongside the existing statutory Skills Committee that has a purpose in statute *“of advising the Council on matters relating to skills”*. In practice, that existing statutory skills committee is the SFC’s Skills, Enhancement, Access and Learning (SEAL) Committee. It has a remit that includes the *“employer experience of the tertiary education system”* and *“the coherence of SFC funded provision, the development of strategic and impactful partnerships with employers across the education and skills system and work to address employers’ and learner needs”*.

We question whether the policy objective of the Bill to enable funding for tertiary education and training provision to be more responsive to the needs of learners and the economy is best served by the establishment of two statutory committees, with very close if not overlapping responsibilities as currently defined. Consideration should be given to instead establishing a governance structure for apprenticeships reporting to the SEAL Committee that would focus on the important business connected to apprenticeships set out in the Policy Memorandum. That structure could be given delegated powers for making decisions on apprenticeships, so that business can be progressed to required timescales. Then, as needs evolve, the SEAL Committee could adjust its own remit and that of any sub-committees that advise it.

Questions on Part 3

The Bill aims to clarify the process for providing student support to Scottish students studying at private institutions in the UK. Do the measures provide enough clarity? Are the measures sufficient?

We note that the Policy Memorandum states that this part of the Bill aims to put the designation of private providers for the purposes of student support on a clearer statutory footing. We are

supportive of the aim of enabling greater transparency in the designation process. However, we note that implementation will be through the making of regulations by Scottish Ministers. It would be helpful if Ministers were to offer an indication of the content of these regulations during the passage of the Bill so that these can be commented upon.

More broadly, as the arrangements for student support are considered, we hope that a number of matters can be addressed. The Committee may wish to test whether the proposed changes will enable resolution of these:

- there is currently an inconsistency between access to SAAS support for fees between graduate apprenticeships on the one hand, and other work-based learning degrees on the other. Alignment would be a pragmatic step towards the intention of aligning skills needs and rapid development of programmes between universities and partners.
- our members have encountered challenges for midwifery students as, under the current SAAS interpretation of legislation, these students are ineligible for non-means tested loans as they are deemed to be 'employed'.

Further comments

In your view, what should the outcomes of the Bill be?

As we have noted in comments on question 2, where new powers and duties are proposed for the Council, these should be configured such that they are:

- effective and deliverable by the Council, including as it manages considerable organisational change over the short to medium term;
- configured in ways that reflect the different status of the fundable bodies to which they relate; and
- compatible with university autonomy and supportive of the maintenance of the university sector's current ONS classification.

The outcomes of the Bill will depend in large part on the capacity and agility of the SFC and SAAS to implement change. This should be explored fully during the passage of the Bill. Particularly important is the potential effect of implementing substantial change on the delivery of the Council's current responsibilities.

We have highlighted this in our evidence to the Finance and Public Administration Committee on the Financial Memorandum to the Bill. In that, we echoed the concerns that we expressed in the pre-legislative consultation about the operational impact of the delivery of reform on the Scottish Funding Council, particularly at a time when the Council needs to respond to the financial challenges faced by the university sector.

In our response to the Finance Committee we noted:

"In our consultation response we were supportive of change but noted that: "we envisage a significant process of organisational change for the SFC which will need to be effected without diminishing its important, broad and complex current role". We also noted that, "the time and resources required to effect the proposed changes and the related opportunity costs should not be underestimated".

We also noted our concern *“about the significant opportunity cost of pursuing complex change at a time when all of the sectors funded under option 2 are facing significant financial challenges. For universities those challenges include both cuts to funding through SFC and decline in income sources that are now needed to cross-subsidise the tuition and research funded by SFC. The level of that cross-subsidy is increasing each year as Scottish Government funding falls in real terms”*.

We are pleased that the Financial Memorandum to the Bill recognises the need for a Transition Team and that the approach to this is informed by the experience of the Welsh Government in respect of the implementation of the Tertiary Education and Research (Wales) Act 2022. It also estimates the costs of addressing human resources and non-staff elements of change. In both cases the costs seem well-evidenced to achieve the plan for the transfer of staff and integration of services such as IT. It should be noted that the Memorandum assumes that between 148.4 and 174.6 FTE staff will transfer from SDS to SFC across a range of grades. They will therefore outnumber the Council’s current executive of around 140 FTE staff as set out in its Annual Report, (the FM notes that SFC currently has 190 FTE staff) . The Memorandum does not reflect sufficiently on the management challenge and cost of delivering this change well, including the fact that the two organisations currently have differing organisational purposes and associated cultures.

There is also no exploration in the Memorandum of the extent to which the Council’s current duties will be deliverable during a period of significant change, nor how there would be capacity during a period of change to respond to situations falling into the Council’s new proposed powers and duties, eg for efficiency studies and for financial sustainability. There is an implication that all of these will be achievable by the current SFC staffing capacity. Our experience is that, even before the Bill is implemented, universities are experiencing incidences of the Council delaying actions due to insufficient capacity.

We therefore believe that there is a likelihood of a substantial diversion of Council staff time towards designing and implementing organisational change, beyond that considered in the Financial Memorandum.

We make these comments not to oppose the proposed changes, but rather to ensure that they are implemented successfully. An exploration during the passage of the Bill of the reality of SFC capacity now, and during change, would be welcome. In particular gaining a fuller understanding from the Council and Scottish Government about their detailed planning to avoid a diminution of existing activities alongside capacity to deliver the proposed new powers and duties”.

ENDS