

**EXPLANATORY MEMORANDUM TO THE
FURTHER AND HIGHER EDUCATION (SCOTLAND) ACT 2005
(CONSEQUENTIAL MODIFICATIONS) ORDER 2005**

2005 No. 2077 (S. 8)

1. This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 This order amends the Superannuation Act 1972 (the “SA”), the House of Commons Disqualification Act 1975 (the “HoC Act”), the Sex Discrimination Act 1975 (the “SDA”) and the Race Relations Act 1976 (the “RRA”). All of these Acts contain references to the Scottish Further Education Funding Council (“SFEFC”) and the Scottish Higher Education Funding Council (“SHEFC”).

2.2 The Further and Higher Education (Scotland) Act 2005 (the “2005 Act”) dissolves SFEFC and SHEFC and creates the Scottish Further and Higher Education Funding Council (the “new Council”) as its replacement. This order will amend the Acts referred to in paragraph 2.1 to insert references to the new Council, its members and, where appropriate, the duties of the new Council. The provisions which will apply to the new Council under this order are in the same terms as those which applied to SFEFC and SHEFC.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998. The instrument is, by virtue of section 115 of, and Schedule 7 to, that Act, subject to Type C procedure, and is subject to affirmative resolution procedure in the UK Parliament.

3.2 Section 104 of the Scotland Act 1998 provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament. The 2005 Act has created the new Council and in consequence of that, the four Acts referred to in paragraph 2.1 fall to be amended to refer to it. References in the SA, the HoC Act, the SDA and the RRA could not be amended in the 2005 Act since the Scottish Parliament does not have competence to make changes to reserved law. This order accordingly makes the consequential changes described.

4. Legislative Background

4.1 The 2005 Act will be commenced in stages during 2005. The main provisions, including the creation of the new Council and the dissolution of SFEFC and SHEFC, will come into force on 3 October 2005.

4.2 As amended by this order, Schedule 1 of the SA will allow Ministers to make, maintain and administer a pension scheme for employees of the new Council. It is intended that the employees of the new Council are to be included in the Principal Civil Service Pension Scheme. Members of staff of the SFEFC and SHEFC, which were previously supported by one body of staff, were, in the same way, members of the Principal Civil Service Pension Scheme. These staff will transfer to the new Council.

4.3 Schedule 1 to the HoC Act, as amended by this order, will disqualify any member of the new Council in receipt of remuneration from being a member of the House of Commons and so protects political impartiality in the allocation of funding to fundable further and higher education institutions in Scotland. This replicates the position in relation to SFEFC and SHEFC.

4.4 Section 23B of the SDA currently makes it unlawful for SFEFC and SHEFC to perform an act which constitutes sex discrimination in carrying out any of their functions. As amended by this order, the SDA will ensure that the new Council is similarly obligated.

4.5 Article 5 of the order inserts a section into the RRA, which makes it unlawful for the new Council to do any act which constitutes racial discrimination or harassment when carrying out its functions. It also inserts a reference to the new Council in Schedule 1A to the RRA. This places the new Council under the RRA's general duty to eliminate unlawful discrimination and promote equality.

5. Extent

The order applies to the UK.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

“In my view the provisions of The Further and Higher Education (Scotland) Act 2005 (Consequential Modifications) Order 2005 are compatible with the Convention rights.”

7. Policy background

7.1 The 2005 Act provides for the dissolution of SFEFC and SHEFC and the establishment of the new Council. SFEFC has been primarily responsible for allocating funding to further education colleges in Scotland, while SHEFC has had responsibility for allocating funding to universities and other higher education institutions (“HEIs”).

7.2 The new Council will be responsible for funding all colleges, universities and HEIs and will take a strategic overview of the way in which the Scottish Executive's funding for further and higher education is invested to meet the aims of the Scottish Ministers. In particular, the new Council will have a duty to have regard to the economic, social, cultural and skills needs of Scotland, and how colleges, universities and other HEIs contribute to this.

7.3 One of the primary reasons for the decision to merge SFEFC and SHEFC was that there is currently a significant amount of overlap between SFEFC and SHEFC funded activities.

For example, over 20% of higher education level provision in Scotland is delivered in further education colleges. There are also a number of other areas in which there is already cross-over. For example, the UHI Millennium Institute (“UHIMI”) was designated as an HEI in April 2001. It delivers its activities through a network of colleges in the Highlands and Islands of Scotland. Therefore, these colleges receive a portion of their funding through SFEFC, and the rest from SHEFC, via UHIMI. As such, there are two bodies responsible for making strategic decisions about the funding these institutions receive. It was felt that one Council would be able to take a more coherent, strategic view of both sectors.

7.4 It is also important to note here that SFEFC and SHEFC are currently both served by one executive body. Therefore, the staff supporting SFEFC and SHEFC, including the chief executive and all directors, work for both Councils. The executive will now report to one Council only. The staff will all transfer to the new Council on the day on which it is created and SFEFC and SHEFC are dissolved. Throughout this memorandum, reference is made to members and staff of SFEFC, SHEFC and the new Council. For clarity, “members” are those who make up the Council itself i.e. the decision making body. “Staff” refers to those who work for the executive body which supports the Councils.

7.5 As described above, this order will amend four UK Acts in which reference is made to the former Councils and, where appropriate their members. The primary purpose of this order is to ensure consistency in the rights of staff and duties of the Council following the merger.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 There will be no impact on the public sector.

9. Contact

Clare Jones at the Scotland Office, e-mail: clare.jones@scotland.gsi.gov.uk, can answer any queries regarding the instrument.