The Committee will meet at 10:30am in Committee Room 4.

1. **Delegated powers scrutiny:** The Committee will consider the delegated powers provisions in the following Bill—

   Further and Higher Education (Scotland) Bill at Stage 1.

2. **Executive responses:** The Committee will consider responses from the Scottish Executive to points raised on the following—

   the Scottish Environment Protection Agency (SEPA) and Sustainable Development, Statutory Guidance to SEPA made under Section 31 of the Environment Act 1995, *(SE/2004/257).*

3. **Draft instruments subject to approval:** The Committee will consider the following—

   the Criminal Procedure (Amendment) (Scotland) Act 2004 (Incidental, Supplemental and Consequential Provisions) Order 2004, *(draft).*

4. **Instruments subject to approval:** The Committee will consider the following—

   the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (No. 2) (Scotland) Order 2004, *(SSI 2004/500).*

5. **Instruments subject to annulment:** The Committee will consider the following—

   the Agricultural Holdings (Fees) (Scotland) Order 2004, *(SSI 2004/496)*
   
   the Agricultural Holdings (Forms) (Scotland) Order 2004, *(SSI 2004/497)*
   
   the Sea Fish (Marketing Standards) (Scotland) Regulations 2004, *(SSI 2004/498).*
6. **Instruments not subject to Parliamentary procedure:** The Committee will consider the following—

the Food Protection (Emergency Prohibitions) (Amnesic Shellfish Poisoning) (East Coast) (Scotland) Revocation Order 2004, *(SSI 2004/501)*

the Food Protection (Emergency Prohibitions) (Diarrhetic Shellfish Poisoning) (East Coast) (No. 3) (Scotland) Revocation Order 2004, *(SSI 2004/502)*.

7. **Instruments not laid before the Parliament:** The Committee will consider the following—


Ruth Cooper
Clerk to the Committee
Tel: 0131 348 5212
The following papers are relevant to this meeting:

**Agenda Item 1**

Subordinate legislation memorandum SL/S2/04/33/1
Bill and accompanying documents (circulated to Committee members only)

**Agenda Items 1-7**

Legal Brief (for members only) – to follow SL/S2/04/33/2

**Agenda Item 2**

Executive responses – to follow SL/S2/04/33/3

**Agenda Items 3 - 7**

Copies of instruments (circulated to Members only)

**Papers circulated for information:**

Minutes of 32nd meeting, 2004 (Session 2) SL/S2/04/32/M
Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of provisions in the Further and Higher Education (Scotland) Bill conferring powers to make subordinate legislation. It describes the purpose of each such provision and explains why the matter is to be left to subordinate legislation.

Outline and Scope of the Bill

2. 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 Bill 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 addition to creating this new body, the Bill sets out powers and duties on Ministers and the Council with regard to further and higher education in Scotland. The Bill also makes provision to bring the listed colleges and higher education institutions (all the fundable bodies as detailed in the Bill, with the exception of the Open University), and the Scottish Agricultural College, within the remit of the Scottish Public Services Ombudsman.

3. In general terms, the Bill amends the 1992 Act, and contains new provisions to achieve the purposes above. 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 Bill, 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 Bill specifies its funding functions, and additional functions.
4. An outline of the Bill is as follows:

- **Part 1**
  - Creates the new Scottish Further and Higher Education Funding Council and allows for the dissolution of 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 7);
  - Sets out further powers of Ministers and the Council in relation to funding (Sections 8 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);
  - Miscellaneous provisions (sections 26 to 29).

- **Part 2** – makes miscellaneous and general provisions, including amending enactments, ancillary provision, regulation and order making powers and interpretation (sections 30 to 34).

- **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 for staff, property and liabilities to be transferred to the new Council.

- **Schedule 2** – lists the institutions which are fundable bodies for the purposes of the Bill. There is provision for variation of this list in section 7.

- **Schedule 3** – contains amendments of enactments in consequence of the Bill.

**Delegated Powers**

5. The Bill contains sections which provide for orders, and one section which provides for regulations. These may be categorised as follows:

- Sections 2 and 34(2) contain provisions for setting the date or dates for the dissolution of the existing Councils and the general commencement of the Bill’s provisions.
- Sections 26(1)(b) and Schedule 3 paragraph 6(1)(c) amend existing legislation.
- Sections 5(7), 7(1), 8(6), 22(4)(j), and 24(1) contain provisions for the making by the Scottish Ministers of orders under negative procedures.
• Sections 7(2)(i) and 7(4) allow Ministers to amend or alter the criteria which the Council require to have regard to, in relation to fundable body status. These will require affirmative procedures.
• Section 8(7) gives Ministers the power to set fee levels for fundable bodies, within terms and conditions of grants imposed on the Council, by affirmative order.
• Section 31 enables ancillary provisions to be made by order under negative procedure, except that affirmative procedure is required where an ancillary provision amends an Act.

6. The statutory instruments permitted under sections 7(2)(i), 7(4), 8(7) and 31 (where an order under section 31 amends an Act) will require to be approved by a resolution of the Scottish Parliament. This will ensure that the Scottish Parliament has an opportunity to scrutinise any proposed revision of the criteria for fundable body status which the Council must have regard to, the specification of fee levels within grant terms and conditions imposed on the Council and fundable bodies, and any consequential changes to primary legislation. It has been considered that the other provisions for orders or regulations made under the Bill should be subject to negative procedure.

Section 2: Dissolution of other funding bodies

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

7. This order will set the date to dissolve the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council. It is considered that this is an appropriate matter for subordinate legislation, by negative procedure. The formal date of dissolution of these bodies will depend on various procedural and administrative arrangements, which shall take place in future, and the precise date of dissolution cannot presently be identified. The date of formal dissolution of the existing Councils may not be the same date as for the formal establishment of the new Council.

Section 5(7): Fundable further and higher education

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

8. This will give Scottish Ministers power to alter the definitions of “fundable further education” and “fundable higher education” in the Bill. It is considered that this would be an appropriate matter for subordinate legislation, to allow the definitions to reflect changes which may occur over time, in the types of programmes and courses specified within these definitions. By section 5(8), Ministers will require to consult the Council before making the order.
Section 7(1): Fundable Bodies: further provision

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

9. This gives Ministers the power to amend Schedule 2, which contains the list of fundable bodies. As fundable bodies are subject to mergers, closures or changes of name, or new bodies are established, or bodies are added as eligible for funding, or removed, the content of the Schedule should be updated. Accordingly, listing in the Schedule will mean that the body is eligible for funding by the Council. Ministers may only make such an order if the Council has proposed or approved the making of the modification. In doing so, the Council must have regard to the matters specified in section 7(2).

Section 7(2)(i): Fundable Bodies: further provision

Power conferred on: The Scottish Ministers.
Power exercisable by: Regulations.

10. Section 7 of the Bill outlines various provisions, procedures and arrangements that the Council must have regard to the desirability of ensuring are met, before the Council proposes or approves that a new body is added to, or removed from, the list of fundable bodies in schedule 2. Section 7(2)(i) gives Ministers the power to specify additional provisions, procedures or arrangements in future. This will allow Ministers to ensure that if additional requirements emerge in future, or changes of circumstances or other legal requirements necessitate future additions to the list of provisions, procedures or arrangements, then Ministers are able to incorporate these. It is considered that these would be sufficiently material changes, as they may affect whether a body is included in the list of fundable bodies, that Parliamentary scrutiny through the affirmative procedure would be appropriate.

Section 7(4): Fundable Bodies: further provision

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

11. This allows Ministers to alter the various provisions, procedures and arrangements that the Council must have regard to the desirability of ensuring are met, as specified in section 7(2)(a) to (h). In a similar way to section 7(2)(i), this will allow Ministers to ensure that if changed requirements emerge in future, in relation to the specified provisions, procedures and arrangements, then Ministers are able to incorporate these. Again, for the reasons stated above, it is considered that these would be sufficiently material changes that Parliamentary scrutiny through the affirmative procedure would be appropriate.
Section 8(6): Funding of the Council

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.
Parliamentary procedure: Negative resolution of the Scottish Parliament.

12. Section 8(6) deals with the ability of Ministers to specify requirements in relation to fees payable to fundable bodies, as part of the terms and conditions imposed on the Council for grant funding. The Council can be obliged, as a condition of its grant from Ministers, to place conditions on a fundable body which obtains grant from the Council, in relation to the level of fees paid to that fundable body. Section 8(6)(a) provides that Ministers may by order specify the classes of persons for whom the fundable body is to secure that fees paid to the body will be equal to the fee levels as provided for in section 8(7). Section 8(6)(b) provides that Ministers may by order specify (i) the programmes of learning or (ii) courses of education in respect of which the fundable body is to secure that fees paid to the body will be equal to the fee levels as provided for in section 8(7).

13. This provision for specification of fees levels as part of the terms and conditions of grant to the Council will only apply to such classes of persons, programmes of learning or courses of education, as Ministers specify by order. It is considered appropriate that this is dealt with by way of order by negative procedure, to enable Ministers to specify in future the details of which persons, courses or programmes the power would apply to. It is not possible to specify fee levels, or which persons should pay these fees, at this point in time, as the determination of initial fee levels, and to which persons or courses this shall apply, is dependant on future external factors.

14. The provision is different from, but has analogies with, the existing provision in section 42(3B) of the Further and Higher Education (Scotland) Act 1992. This provides (in relation to the Scottish Higher Education Funding Council (SHEFC)), that terms and conditions of grant to SHEFC can require the recipient of a grant, loan or other payment to higher education institutions to secure that fees payable by any class of persons prescribed by regulations in connection with the attendance of courses, as prescribed by the regulations, are equal to such maximum allowance amounts that Ministers may determine under section 73D(2) of the Education (Scotland) Act 1980. Section 42(3B) is repealed by the Bill.

Section 8(7): Funding of the Council

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

15. This gives Ministers the power to specify fee levels to be applied for the purposes of section 8(6). It is not possible to set fee levels in the Bill itself as Ministers are considering their options on this issue in consultation with stakeholders. In particular, Ministers are exploring the possibility of setting a different fee level for medicine. The setting of fees in higher education is a particularly sensitive area and this new power in the Bill will allow Minister to differentiate fee levels for certain subjects. This is only intended to be used in
exceptional circumstances, but is viewed by some stakeholders as controversial. As such, it is considered that the affirmative resolution procedure would be appropriate to ensure that a suitable level of Parliamentary scrutiny is given to any such proposals.

16. If Ministers determine that it is appropriate for this power to be used, this power would be used to set fee levels. The Explanatory Notes and Policy Memorandum which accompany the Bill make it clear that if used, this power would only be used sparingly. At the moment, medicine is the only area being considered for this. A similar approach in other areas would only be considered in future where there is strong evidence that not doing so would disadvantage Scottish students.

17. Fee levels for particular academic years will also depend on future external factors. Provision by order allows for the specification of fees by reference to a particular academic year, or to authorise Ministers to determine fees for subsequent academic years. For subsequent years, Ministers may be authorised to determine fees that are, in each case, no higher than the initial specified year, or which, in any subsequent year, may be higher than the fees in the initial year, provided that the increase is no greater than required to maintain the value in real terms of the fees (having regard to any retail price index). Clearly, as time goes by, the real terms value of fee levels will fluctuate. It is therefore necessary to give Ministers a power to allow for changing circumstances in future, and for inflation.

Section 22(4)(j): Consultation and collaboration

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

18. Section 22(4) lists the bodies and persons that the Council must consult with in the exercise of its functions, so far as it considers appropriate. An order will allow Ministers to specify additional persons to be added to the list, to cover changes of circumstances, or changes in the nature or status of the specified bodies. It is considered that the power to make such amendments to the list is appropriate to be exercised through negative resolution procedure.

Section 24(1): Requirements as to Council’s functions

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

19. This section allows Scottish Ministers to impose requirements of a general or specific nature on the Council, as regards the exercise of its functions. The requirements cannot relate to the functions of the Council in having regard to the criteria specified for fundable bodies in section 7, or to information, advice or assistance provided by the Council in terms of section 17, nor can they relate to a particular fundable body. It is considered appropriate that an order by negative resolution here will allow Ministers, if required, the ability to specify general or specific requirements, or to make different provisions for different cases that may be necessary as a result of future circumstances. An important factor justifying Scottish
Ministers’ powers to potentially impose requirements on the Council is the high level of funding received by the Council from the Scottish Ministers.

Section 26(1)(b): Application of the Scottish Public Services Ombudsman Act 2002

Power conferred on: Her Majesty.
Power exercisable by: Order in Council.

20. Section 26 amends the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”) to extend the remit of the Ombudsman to include those bodies which are fundable bodies under schedule 2 of the Bill, (with the exception of the Open University) and the Scottish Agricultural College (SAC). The section does this by adding a new Part 3 of Schedule 2 of the 2002 Act, listing the fundable bodies (except the Open University), and the SAC. By a new subsection (7) of section 3 of the 2002 Act, Her Majesty may by Order in Council amend Part 3, by modifying or removing entries, or adding entries relating to persons or classes of persons providing fundable further education or fundable higher education under the Bill.

21. This is appropriate because as the nature and functions of bodies change over time, it may be necessary to remove or add them to the remit of the Ombudsman. The same ability to amend the list (by Order in Council) applies for the authorities listed in Part 2 of Schedule 2 of the 2002 Act which are under the remit of the Ombudsman. Accordingly, the procedures are consistent between Parts 2 and 3 of Schedule 2. It is considered that the amendment of the list of persons or classes of persons within the new Part 3 of Schedule 2 of the 2002 Act is a sufficiently important matter that affirmative procedure is appropriate for approval of the draft Order in Council.

Section 31: Ancillary provision

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.
Parliamentary procedure: Negative Resolution of the Scottish Parliament, except that any Order under section 31 that amends an Act is subject to Affirmative Resolution.

22. This gives Ministers the powers to make incidental, supplemental, consequential, transitional, transitory or saving provisions for the purposes of or in consequence of the Bill. The primary purpose of this provision is to allow consequential amendments to be made to legislation, if required. Section 32(4) specifically provides that an order under section 31 which amends an Act will require to be subject to affirmative procedure. Schedule 3 of the Bill provides for consequential amendment of enactments that have been identified, but it may be that further provisions are required in future. Further consequential, incidental or transitional provisions may be required later, for example, in relation to the detailed arrangements for the establishment of the new Council, or the dissolution of the existing Councils. It may also be that Schedule 1 of the Bill does not in future cover
all the legal and administrative arrangements that may be required at the time the new Council is established, in which event this power will be of use.

Section 34(2): Commencement

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

23. This is a commencement provision and there is no parliamentary procedure.

Schedule 3, paragraph 6(1)(c) (amending section 44 (designation of institutions) of the 1992 Act)

Power conferred on: The Scottish Ministers.
Power exercisable by: Order.

24. This provision is a consequential amendment of the 1992 Act. Section 44(1) of the 1992 Act provides for Ministers to be able by order to designate any higher education institution as an institution eligible to receive funding from the Scottish Higher Education Funding Council. This amends this provision so that Ministers may, by order, still designate such institutions for the purposes of those parts of Part II of the 1992 Act that remain in force. Particularly, this relates to the provisions in section 45 of the 1992 Act enabling the Privy Council to exercise powers in relation to such designated institutions.

ELLD: FAED & HESD
October 2004
Executive Responses

- the Scottish Environment Protection Agency (SEPA) and Sustainable Development, Statutory Guidance to SEPA made under Section 31 of the Environment Act 1995, (SE/2004/257)
THE SCOTTISH ENVIRONMENT PROTECTION AGENCY (SEPA) AND SUSTAINABLE DEVELOPMENT, STATUTORY GUIDANCE TO SEPA MADE UNDER SECTION 31 OF THE ENVIRONMENT ACT 1995, (SE/2004/257)