

**EXECUTIVE NOTE TO
DRAFT : THE FURTHER AND HIGHER EDUCATION (SCOTLAND) ACT 1992
(MODIFICATION) ORDER 2008 (S.S.I 2008/)**

The above instrument is made in exercise of the powers conferred by section 102 of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). The instrument is subject to affirmative resolution procedure.

Policy Objectives

The Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”), which came into force in April 2006, introduced a new statutory definition of a charity in Scotland as ‘a body entered in the Register’(s.106). Whether an organisation is a charity under the terms of the Act, therefore, depends on whether a charity has been entered on the Scottish Charity Register. All Scottish higher education institutions are currently registered charities and require to meet the charity test outlined in the 2005 Act. However, section 7 of the 2005 Act states that a body would not meet the charity test if its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities. In the case of higher education institutions (“post 1992”) designated under the terms of the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”), section 47(1) of that Act gives powers to the Scottish Ministers to close a designated institution and wind up its governing body. The Office of the Scottish Charity Regulator (OSCR) has indicated that it considers that this power constitutes Ministerial control.

Scottish Ministers are keen to protect the charitable status of the Scottish post 1992 higher education institutions and, therefore, retain their parity with the Charter and Ancient universities in Scotland. Section 102 of the 2005 Act provides the power to make an order to modify an enactment to prevent a body established by enactment from failing the charity test in relation to its independence from Ministers, as well as in relation to the distribution of assets. This Order, therefore, inserts additional provision in section 47 of the 1992 Act so that where section 47 is part of the constitution of a designated higher education institution established by enactment Scottish Ministers are required to obtain the consent of the governing body of the institution prior to exercising those powers. The meaning of constitution is defined in section 106 of the 2005 Act as being ‘in relation to a charity or other body established by enactment, means the enactment which establishes it and states its purpose.’ OSCR has indicated that this amendment to section 47 of the Act provides sufficient mitigation of Ministers’ powers to close a designated higher education institution.

Consultation

Representatives of the Scottish Trades Union Congress, National Union of Students Scotland, Universities Scotland and officials at the Office of the Scottish Charity Regulator have been consulted during the preparation of the instrument.

Financial Effects

A Regulatory Impact Assessment has not been prepared as this instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government, Lifelong Learning Directorate
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