



Higher Education Governance (Scotland) Bill:

Evidence from Universities Scotland to the Education and Culture Committee

Universities Scotland and its member institutions share the Scottish Government's commitment to modern, inclusive and accountable higher education governance.

Higher education governance is already highly progressive; for example, including students and multiple staff members on every governing body and their full involvement in the appointment of Chairs and Principals. Governance standards have been very recently reviewed and reformed and are fully enforceable as conditions of SFC funding.

Universities Scotland would welcome the opportunity to provide oral evidence to the Committee during its stage one scrutiny. The sector's diversity is of key relevance to this Bill and we believe it will be helpful if the Committee is able to hear oral evidence from witnesses that fully reflect that diversity.

Summary: Bill provisions

We have specific concerns about the provisions of the Bill. In summary:

- The Bill grants Ministers unprecedented and far-reaching powers in university governance, which could be used by future Ministers to exert significant control. These are of significant concern in themselves and, additionally, could jeopardise universities' current ONS classification.
- The Bill gives Ministers the power to decide how the chairs of governing bodies should be appointed. We are extremely concerned that this power may be used to require institutions to introduce 'elected' chairs who do not have the confidence of governing bodies, and who may be elected on the basis of policies opposed by the governing body. This would create conflict at the heart of governing bodies.
- The Bill creates intrinsically conflicted roles for interest group nominees on governing bodies, contrary to normal standards of good governance.
- Legislation to standardise the size and membership of academic boards is unjustified when institutions are highly diverse, is contrary to university autonomy, and would disenfranchise academic staff.

Summary: Unintended impacts of the Bill

New Ministerial powers are proposed in the Bill which were not the subject of consultation (sections 3,8,13, 14 and 20). These new powers give rise to a fundamental business risk that higher education institutions (HEIs) may be reclassified by the Official for National Statistics (ONS) as Central Government (as has already happened to colleges). This would disable HEIs from multiplying the

impact of public funding by acting entrepreneurially, would severely limit HEIs' capacity to borrow to redevelop their infrastructure, and would put philanthropic support for higher education in jeopardy. Losing all this would severely affect the scale of universities' capacity to contribute to Scotland's economy and society, including in skills provision, social mobility and innovation. ONS reclassification would compromise HEIs' status as independent voices in public life. The risks of ONS reclassification are so critical that we urge the Committee to recommend that the Bill should not progress unless the ONS is able to give an absolute assurance that higher education institutions will not be reclassified.

We are also concerned that increased Ministerial powers may be at odds with HEIs' status as charities, since the law states that organisations do not meet the charity test if they are directed or controlled by Ministers. The Bill as currently drafted gives Ministers extensive powers over how the chairs of governing bodies should be appointed, and wide regulation-making powers for Ministers to decide in future who should be members of governing bodies and academic boards. The Bill opens the risk that future Ministers may use these powers in ways that constitute direction or control. Universities Scotland has asked for specific assurances from Scottish Government on the ONS and charity law points (included at the end of this submission), and we await their response.

Universities Scotland
September 2015

Answers to questions from the Committee

1. What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?

Neither the Policy Memorandum, the preceding consultation nor the 2012 Review of Higher Education Governance identify any significant problems.¹ The explicit motivation for the Bill is cited as to create greater 'consistency', without acknowledgment of consistency in HE governance where it currently exists and with no reasons given for why further consistency would be an improvement in a diverse sector. Governance arrangements naturally vary across Scotland's very diverse higher education institutions, but they have highly progressive core standards in common. All have:

- multiple staff members on the governing body;
- student members on the governing body;
- guaranteed involvement of student and staff governing body members in the appointment of the Chair and all new independent governing body members and the appointment and appraisal of the Principal;
- an open process for the appointment of Chairs and Principals, including public advertisement, managed by a committee or panel that includes staff and student members.

In many cases, these arrangements are longstanding. In 2013, the Scottish Code of Good Higher Education Governance further modernised standards across the sector.² The Code contains many specific requirements and compliance has become a condition of receipt of SFC funding. Some parts of the Policy Memorandum appear to misrepresent this (see below and the Annex).

The Bill is presented as a response to the 2012 Review of Higher Education Governance. The relevant recommendations of that review were not unanimously agreed by the review panel.³ Nor were they subject to consultation when the Review was published. They cannot therefore be taken as evidence of a consensus for the proposals in the Bill. This is confirmed in the responses to the Bill consultation from across civic Scotland.⁴

Universities, much like the public and private sector, have faced the challenge of inclusion in terms of achieving equality and diversity within the membership of governing bodies. This problem was particularly acute in 2012/13 when, unusually, the sector had no women amongst its 19 Chairs. The HE sector has led its own effective response to this issue which has resulted in 31.5 per cent of current Chair roles held by women in 2015. More widely, 32 per cent of independent members of university governing bodies are women which compares favourably with the public sector bodies (29 per cent of seats at UK level) and FTSE100 companies (22.8% of board positions).⁵

¹ 2012. von Prondzynski: "The story of Scottish higher education is overwhelmingly a good one. This report is not an exercise in criticism or complaint." Taken from page *iv* of the Report of the Review of HE Governance in Scotland. The Scottish Government repeatedly acknowledges the sector's successes in public statements, including: Angela Constance, June 2015, "Scottish universities are already viewed as world leading around the globe with four institutions in the world's top 200, more than any other country per head of population apart from Switzerland."

² See the Annex for more detail. The Code can be accessed at <http://www.scottishuniversitygovernance.ac.uk/>, along with a one-year-on report detailing the sector's consistent response.

³ See <http://www.gov.scot/Topics/Education/UniversitiesColleges/16640/ReviewHEGovernance/RecommendationsLetter>

⁴ See, among others, the consultation responses of the Royal Society of Edinburgh, the Institute of Chartered Secretaries and Administrators, the Scottish Council for Development and Industry, and Glasgow University Students Representative Council.

⁵ HE figures on gender balance among independent members correct as of November 2014. Figures for UK public bodies and FTSE100 companies taken from Women on Boards and also correct as of 2014.

2(a) The extent to which the Bill will improve higher education governance

We do not believe the Bill sets out measures that will improve governance. On the contrary, we are concerned that the creation of conflict between Chairs and governing bodies, and the creation of intrinsically conflicted new representative roles on governing bodies, will be detrimental to good governance. We believe the appropriate way in which the governance of autonomous higher education charities can be continually evolved is for the Scottish Code of Good Higher Education Governance to be reviewed regularly, in a way that includes diverse stakeholder perspectives.

2(b) The extent to which the Bill may alter the higher education sector's current level of autonomy

The pre-legislative consultation did not include fundamental new powers granted to Ministers to change the composition of governing bodies and academic boards or to prescribe procedures for appointing and remunerating Chairs. These are radical departures from previous legislation. These provisions open the door to Ministerial influence over institutional strategy and to academic freedom being compromised by governmental control over institutions' governance and internal academic management structures. While this may be far from current Ministers' intentions, potential future uses of the Bill's provisions need to be considered. These powers also contribute to the increased risk of ONS reclassification.

2(c) The extent to which the Bill may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

In 2013, the Scottish Parliament decided that the Scottish Funding Council, rather than Ministers, should be responsible for ensuring that HEIs had appropriate standards of good governance, given effect in the Scottish higher education governance code.⁶ This established a clear, robust and fully coherent line of accountability, with the body responsible for the public funding of higher education institutions ensuring that this funding was directed to institutions with high standards of governance.

The SFC's role would be undermined by the creation of wide new powers for Ministers. The Bill gives Ministers power over wide areas of university governance including the appointment and remuneration of chairs of governing bodies, the composition of governing bodies, and the composition of internal academic boards. This shifts the balance of responsibility for ensuring good governance standards from a non-political body to Ministers, greatly increasing the risk of future political interference in higher education.

3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

Universities Scotland does not see a need for any of the legislative provisions in the Bill. Non-legislative means, including institutional reviews of governance effectiveness and regular review of the Scottish Code of Good Higher Education Governance through an inclusive process, can ensure continual evolution of good governance. When published in 2013, the Code committed to review progress after

⁶ Section 2, 9A of the Post-16 Education Scotland Act.

three years; this timetable is now less certain because the Bill creates a ‘moving target’ about what further changes to the Code may be necessary.

4. Specific proposals:

Regulations for the appointment of Chairs of governing bodies

- Unlimited powers are granted to Ministers to vary the proposed regulations. These were not subject to consultation and raise the prospect of indefinite degrees of political direction of the process.
- The Bill leaves open the possibility of election of the Chair by a constituency other than the governing body, contrary to accepted good practice across autonomous organisations of all kinds. 78 per cent of respondents to the pre-legislative consultation objected to this.⁷ The line of accountability and confidence from the Chair to the governing body is an important safeguard against damaging instability. Carrying the mandate of another electorate – possibly from a low turn-out election as in some recent rectorial elections – could easily bring a Chair into conflict with the governing body. A divided governing body is less able to hold senior management to account and less able to take crucial strategic decisions, especially when the division is between the Chair and a majority of the governing body.
- The current process for appointing a Chair, as stated in the Code, obligatorily includes staff members, students and independent governors at every key stage, as members of the nominations committee that makes a skills assessment, prepares the job description and undertakes formal interview.⁸ While the content of the proposed regulations is unknown, the Scottish Government has not made a proposal that US believes improves on this level of stakeholder engagement.
- Any publicly adversarial election process is likely to restrict the pool of qualified candidates for the role of Chair, with implications for attracting a diverse set of candidates. Trial elections of NHS Board members in 2010 found a lack of diversity among candidates.⁹ A different NHS Board pilot scheme, which was found to attract a wider range of candidates, involved improved advertising and recruitment processes. These are already the norm in higher education and are delivering improved diversity: for example, six of the last seven appointments to Chair HEI governing bodies were women.
- The rationale for the proposal, as set out in the Policy Memorandum, is based on a flawed understanding of current governance arrangements. These are neither optional nor inconsistent: key matters such as open advertisement and interviews with full stakeholder involvement have been obligatory since the SFC adopted the Code. All institutions comply.
- The role of any elected Chair would clash with that of the elected Rector role at the Ancient universities. See the Annex for details.

⁷ See the independent summary of written responses to the pre-legislative consultation (p3):

<http://www.gov.scot/Publications/2015/04/4961/0>

⁸ 2013 Code of Good HE Governance, Main Principle 11, p.22.

⁹ <http://www.gov.scot/Publications/2012/12/8580>

Requirements to include various persons within the membership of governing bodies

- The membership of governing bodies at all of Scotland’s higher education institutions currently includes staff, students and independent members drawn from Scotland’s public, private and third sectors. This practice of inclusion is a long-held tradition within our institutions.
- Our concern relates not to the inclusion of a broad range of stakeholders on governing bodies but to the introduction of unlimited Ministerial control over the membership of governing bodies, which raises the risk of undue future political influence on the governance of HEIs.
- It is a widely accepted principle that governing body members should not carry any external mandate but should serve only in the interests of the institution.¹⁰ This is recognised in the Policy Memorandum (paragraph 47) but not in the legislation itself. No explanation is given in any of the Bill’s documentation as to how appointees of a trade union could serve *in this capacity* without carrying a union mandate that limits their capacity to act disinterestedly – or, if they could genuinely act without a mandate, what is then gained by having union appointees, representing 27 per cent of staff in the sector, rather than simply staff governors elected by all staff.
- Adding new obligatory governing body members affects inclusivity and the balance of skills, because of guidelines limiting the size of the governing body. Again, this is recognised in the Policy Memorandum (paragraph 44), but its implications are not considered. It would affect at least 12 institutions and would be likely to result in the loss of independent expertise on governing bodies.
- The obligatory inclusion of alumni governors pays no regard to the very different traditions and structures of different institutions and their alumni organisations.

Proposals to ensure that academic boards are comprised of no more than 120 members

- This brings Ministerial influence further into institutions by allowing future Ministers to determine elements of internal academic governance.
- In the Ancient universities, all professors are automatically academic board (Senate) members, while well-developed committee structures ensure the effective and efficient operation of large Senates. Therefore, the Bill would disenfranchise several hundred members of academic staff. No rationale for this is offered.

Academic freedom

- As academics themselves, university Principals and Directors both understand and value academic freedom immensely.
- No evidence has been presented that academic freedom is currently inhibited.
- The freedom ‘to develop and advance new ideas or innovative proposals’ is already guaranteed under existing legislation, as a corollary of the freedom to “question and test established ideas and received wisdom”.¹¹
- Academic freedom and university autonomy are two distinct aspects of a successful HE sector, but the autonomy of universities provides important protection against potential political infringements of academic freedom. The Bill’s provisions introduce new Ministerial controls.

¹⁰ OSCR charity Trustee duties: “Trustees should put the interests of their charity before their own interests, or those of any other person or organisation.” At: <http://www.oscr.org.uk/charities/managing-your-charity/trustee-duties>

¹¹ Further and Higher Education (Scotland) Act 2005, 26(4)(b).

Annexes:

- A. Section-by-section analysis**
- B. Additional Background**
- C. Comments on financial memorandum**
- D. Questions put to Scottish Government on 13 August**

Annex A: Section-by-section analysis

This Annex provides additional detail of Universities Scotland’s concerns on each section of the Bill. Points made in the main submission to the Committee are not repeated in detail here.

Section 1: Appointment as chairing member

Our serious concerns over this section are expressed in our response to the Committee’s questions.

The Policy Memorandum is misleading on the scope, specificity and authority of the Code, in stating that *“While implementation of the Code has, to some extent, increased the level of transparency across the sector in relation to appointing a chair, there remains no guarantee of consistency across the sector and, in practice, HEIs have adopted different approaches.”*

This is not the case. The Code of Governance lays down a specific set of requirements to ensure an open process including public advertisement and interview, with staff and student governors involved at all stages. These requirements are obligatory. They have been followed by every institution that has undertaken the appointment of a Chair since the Code’s introduction and are confirmed policy at every institution.

In general, the Policy Memorandum understates the specificity and binding force of the Code.

The Bill (in Consequential Modifications) removes the right of a Rector to ‘preside’ at the governing body of each Ancient university. The policy intention behind this is unclear and it was not subject to consultation. This would in effect amount to the elimination of the traditional Rector role, a significant part of which is to be a voice for students. Otherwise, it is unclear how the historic role of Rector could be maintained in the presence of a Chair elected by a different constituency, with a potentially clashing mandate.

This unclarity and incompatibility of roles contrasts with the current well-functioning arrangements. A clear and well understood distinction exists between the ‘presiding’ role of the Rector, in the terms of the Universities (Scotland) Act 1889, and the strategic leadership role of a senior governor, who is equivalent to the institutional Chair and is appointed according to the Code’s specified procedures for appointing Chairs. All of the relevant universities have clear protocols on this distinction.

Section 2: Remuneration to be payable

This provision is unnecessary, since institutions already have the power to remunerate Chairs and/or independent members at their own initiative, and it is provided for in the HE governance code.¹²

It is inappropriate in principle for Ministers rather than governing bodies of autonomous institutions to decide on the reasonable remuneration level. Also at a practical level, institutions of highly diverse scale and mission need to be able to make diverse decisions about this.

¹² Main Principle 11, p23 in the Scottish Code of Good Higher Education Governance.

Section 3: Consultation for section 1 and 2

The requirement for consultation is an inadequate protection against potential future misuse of the proposed wide-ranging ministerial powers to exercise undue influence on higher education institutions.

Section 4: Composition of governing body

Our principal concerns about this section are set out in our response to the Committee's questions. Here we note some complexities and consequences of the proposed changes that should be borne in mind.

This section requires eight members on each governing body to be selected by particular interest groups and, in so doing, introduces multiple new obligatory members to many governing bodies. This has implications for the size and balance of governing bodies. The Code states that governing bodies should not normally exceed 25 members. Implementation of the Bill in its current form would leave eight of the eighteen relevant institutions with governing bodies of over 25 members and would have to seek ways to remove existing categories of member.

The Code also specifies, as a basic safeguard of good governance, that lay (external) members should make up a majority of the governing body. A further four institutions would have to remove some governing body members in order to maintain this requirement while staying within the 25 member limit. In general, institutions would be forced to accommodate the new categories of member by removing existing 'internal' governing body members.

The likely effect of this in most cases is that places for staff governors would have to be removed from some governing bodies. These are open to all staff (of relevant categories; e.g. academic or non-academic), whereas trade union membership comprises 27 per cent of staff in the sector. This means that any necessary removal of staff governors to accommodate union-appointed governors would amount to a loss of influence for the majority of staff.

At 4(1)(d), it appears inappropriate to call non-academics 'support staff', unless the specific intention is to exclude more senior non-academic professionals from being nominated to the governing body.

At 4(1)(g), it is stated that other members should be appointed 'in accordance with the governing document of the institution', without recognising that the membership prescribed at 4(1) is inconsistent with those 'governing documents'. No provision is made for how institutions should resolve these conflicts.

The Bill and Policy Memorandum pay no heed to the existence of multiple trade unions representing staff at most institutions and the resulting complexities in determining which trade union should nominate governing body members. Nor does it deal with the situation at institutions where there is no recognised trade union.

Section 5: elections to governing body

We would question the need for this section. As autonomous institutions, HEIs are able to organise elections in accordance with their statutes/ordinances and already do so for certain categories of governing body member.

Section 6: nominations to governing body

This section seems redundant in ways parallel to section 5 and also fails to recognise the potential complexities of appointing via multiple recognised trade unions.

It would seem inappropriate to rule out the possibility of election for these proposed members.

Section 7: Validity of body's proceedings

As autonomous organisations, HEIs have their own rules regarding the validity of proceedings. The provision is therefore unnecessary.

Section 8: Power to modify section 4

In answering the Committee's questions we set out our deep concern over this section, which (a) was not subject to consultation and (b) grants an unprecedented degree of influence to current and future Ministers, a serious erosion of autonomy and a threat to the charitable status and ONS classification of HEIs, whether now or as a result of a future Minister's actions. Parliament has not previously given Ministers the power to decide who is on an HEI's governing body.

We note that Scottish Ministers already have a significant degree of oversight of any changes in higher education governance, including any future proposals to change governing body membership, through the system of approval by the Privy Council (or, by assumption, any successor body).

Section 9: Size of academic board

We believe that legislation about the internal organisation of autonomous charities is inappropriate in principle and contrary to the interests of many academic staff. In the larger Ancient universities, hundreds of professors would see the removal of their current right to contribute to academic governance.

Section 10: Composition of academic board

Given the various internal structures at different HEIs, the phrase 'heads of school' fails to map to any position at some institutions and would designate very different roles at others. Likewise, not all Scottish HEIs have a Principal.

Such technical issues reflect the broader inappropriateness of legislating on the internal academic governance of highly diverse institutions.

10(1)(e)(ii) disregards the fact that section 10 in general may be contrary to the 'governing document of the institution'.

Section 11: Elections to academic board

See the comment on section 5. Legislation is not required for HEIs to proceed with internal elections, as they already do.

Section 12: Validity of the board's proceedings

See the comment on section 7.

Section 13: Power to modify sections 9 and 10

See the comments on section 8.

We note that while Parliament has previously legislated about the composition of academic boards (Senates), this did not grant ministerial powers to regulate – and indeed the power to modify the composition of Senates was given back to universities through their power to make ordinances. Therefore, this provision significantly increases ministerial powers at the expense of university autonomy.

Section 14: Procedure for regulations

The affirmative procedure does not provide an adequate safeguard against the future over-extension of ministerial powers to exert undue influence on higher education. Ministers working within majority governments would be expected to succeed in introducing changes.

Section 19: Academic freedom

This section contains unexplained changes from the proposals that were subject to pre-legislative consultation. The Committee should carefully scrutinise the legal implications of the proposed change of wording “must aim to uphold”, bearing in mind the contexts in which academic freedom is most likely to be invoked and what new responsibilities this does or does not impose on governing bodies. The Committee should probe whether the Scottish Government understands this as creating a new responsibility different in substance from the current requirement to ‘have regard to’ academic freedom, and what the intended consequences of this are.

However, we would suggest that the Bill’s focus on the *definition* of academic freedom ignores more important dimensions to the protection of this freedom. A coherent and meaningful approach to academic freedom must secure freedom from any undue influence over research and higher education, not least political influence. In this respect, the overall coherence of the Bill is problematic, as it purports to strengthen academic freedom while introducing Ministerial powers that could in principle give Ministers substantial leverage over institutions, or even facilitate direct intervention, so that future Ministers could secure direction of the institution and its academic priorities through their effective power over who governs the university and serves on its academic board.

Section 20: Ancillary regulations

This section appears to give Ministers an unspecified extent of power to amend primary legislation. Notwithstanding the need for the affirmative procedure, this is a significant concern, for reasons raised elsewhere in this submission.

Annex B: Additional background

This Annex provides additional detail to inform the Committee’s consideration of the Bill, specifically:

- **the Code of Governance**, noting some inaccurate impressions conveyed in the Policy Memorandum;
- **the diversity of the higher education sector**, which shows the Bill’s drive for uniformity to be inappropriate;
- further detail on the basis of **ONS reclassification and its potential costs**; and
- **academic freedom**, addressing the Committee’s detailed questions.

The Scottish Code of Good Higher Education Governance

The Code was created in 2013 under the guidance of a Steering Group commissioned by the Committee of Scottish Chairs, at the invitation of the Cabinet Secretary for Education and Lifelong Learning. It was written on the basis of 80 meetings involving more than 350 university staff, students and others.

In the Post-16 Education (Scotland) Act 2013, the Scottish Parliament decided that standards of good university governance should be set and overseen by the SFC, a move that appropriately places responsibility for governance in the hands of an independent expert higher education body and also marries oversight of governance with accountability for public funding. The SFC has declared the Code to constitute the principles of good governance for Scottish higher education and therefore compliance with the Code has become a condition of SFC funding for each HEI.

The scope and force of the Code

Contrary to certain statements in the Policy Memorandum (e.g. paragraphs 14, 34 and 36), the Code places clear and binding requirements on institutions and has been effective in ensuring the adoption of consistent standards across the sector. While the Code is structured in terms of Principles and Guidelines, it makes clear that institutions are expected to comply with all of these. To quote from Lord Smith’s foreword to the Code:

“All universities in Scotland will be expected to comply with the Code’s Main Principles and to observe the guidelines. The Code has been written so that exceptions will be rare. Where universities have a material reason for being unable to comply, they must explain why; this principle of “comply or explain” is a widely-accepted governance concept. Any such exceptions to compliance with the Code will be disclosable through the process of audit.”

The SFC’s adoption of the Code gives this external force. It follows that non-compliance with any part of the Code would only be acceptable if the SFC were satisfied that the particular nature or circumstances of a given institution required such an exception. This is an appropriate recognition of the sector’s diversity and of the SFC’s role in applying independent expert judgment where required.

The Post-16 Education Act grants the SFC the power to impose other standards on the sector. It is therefore misleading for the Policy Memorandum to imply that good governance rests on a binary choice between the Code and new legislation (e.g. paragraph 67). In adopting the Code, the SFC has

made an active choice to employ a mechanism that promotes collaborative and constructive enhancement of the governance of autonomous institutions, informed by appropriate expertise on all sides.

An interim one-year assessment of the Code's impact demonstrated intensive activity across the sector to ensure full compliance (and in many cases to go well beyond compliance, with additional measures appropriate to the institution). Over 350 changes to policy and/or practice were recorded and others were in progress, demonstrating both the sector's commitment to modern governance and the Code's efficacy as a regulatory mechanism.¹³

Opportunities for further review and improvement

With the Code in place, the standards of good governance are clear and mandatory, but it is also important for a modern and progressive system that governance arrangements should be open to continuous improvement. This is the approach that is already being taken by the higher education sector.

When the Code was introduced, a commitment was made to review it after three years, with direct stakeholder involvement, giving due time to assess its impact and to ensure that it remains up to date. This review process was scheduled for 2016 but will now be delayed because of the uncertainties caused by the Bill.

The diversity of the sector

The Policy Memorandum repeatedly cites 'consistency across the sector' as the sole motivation for introducing legislation on higher education governance (e.g. paragraph 14). However, diversity is a feature and a strength of the Scottish higher education sector and it is to be expected that highly diverse institutions will require a degree of variation in their governance arrangements.

Each of the nineteen HEIs has evolved along a distinct pathway, whether established as a university 600 years ago or emerging from the development of other institutions within the last decade. Their distinct sizes and backgrounds enable them to fulfil a variety of missions, serving the needs of Scotland's different industries and a wide variety of students and pursuing diverse and complementary research specialisms that enrich Scotland's innovation landscape.

Given such a variety of institutions, in size, mission and constitutional foundations, there should be no presumption that uniformity in governance arrangements is always desirable. The following table gives just three illustrations of how of the 19 institutions that make up the higher education sector differ on parameters that are relevant to governance:¹⁴

¹³ The one-year progress report can be viewed at <http://www.scottishuniversitygovernance.ac.uk/thecode/>

¹⁴ Numerical data refer to academic year 2013-14. Source: Higher Education Statistics Agency.

Institution	Number of staff (FTE)	Number of students (headcount)	Annual income from all sources	Constitutional status
Royal Conservatoire of Scotland	234	925	£ 18,142,000	Company limited by guarantee, with shareholders
University of the Highlands and Islands	210 directly employed; many other staff employed through partner colleges	7,470	£ 62,731,000	Partnership of colleges, incorporated as a company limited by guarantee. Also a regional strategic body for further education.
University of Edinburgh	8,619	27,625	£780,630,000	Established by royal charter

ONS classification

Any loss of autonomy raises the risk of reclassification of HEIs as Central Government organisations by the ONS. This technical adjustment would have far-reaching negative consequences for the sector and for Scotland. The risk is real and immediate:

- The ONS has a specific intention to review the classification of higher education institutions as part of its current programme of work.
- It is a matter of public record that when the ONS reviews the designation of institutions as either Non-Profit Institutions Serving Households (NPISH) or Central Government, “The key factors in each of these decisions are public sector powers over the various institutions”.¹⁵
- Recent years have seen serious cases of ONS reclassification to Central Government, including Scottish FE colleges and Scottish Futures Trust projects, with major consequences for those institutions and for the Scottish Government.
- The loss of autonomy may be seen cumulatively. Other recent innovations in the relationship between HEIs and the Scottish Government, such as Outcome Agreements, would count towards this, raising the risk associated with any further legislation.
- Similarly, even if reclassification were avoided now, the Bill would contribute significantly to a cumulative loss of autonomy which could trigger reclassification at a future date.

Classification by ONS as Central Government would comprehensively transform universities’ financial capabilities, through restrictions on borrowing and the creation and use of surpluses, the loss of philanthropy and an inevitable reduction of partnership with the private sector. This would profoundly affect HEIs’ ability to invest and consequently their ability to operate with success in a competitive global context.

In 2013-14, HEIs invested £371 million in educational and research and innovation infrastructure, 72.5 per cent of which came from sources other than grant funding – the very sources that are under threat from ONS reclassification. If unable to sustain such investments, the sector would rapidly become significantly disadvantaged in the international competition for the best students and researchers, putting at risk over £2 billion of non-SFC income and an £11 billion overall contribution to the Scottish economy. Even on its own, the loss of HEIs’ capital investment would be significant loss to the wider

¹⁵ <http://www.ons.gov.uk/ons/guide-method/method-quality/specific/economy/na-classifications/class/classification-of-sixth-form-and-further-education-institutions---october-2010.pdf>

economy. Capital investment by higher education institutions has been shown to bring higher economic impact than overall capital investment (returns of 5.5:1 and 4:1, respectively).¹⁶

The range of finance available to HEIs as autonomous organisations is central to their ability to lever government funds, creating much greater impact than could be achieved with public funding alone: SFC grants constitute just 35 per cent of the sector's total income.

¹⁶ BiGGAR Economics (2015), *Contribution of Universities to the Scottish Economy*.

Annex C: Comments on Financial Memorandum

This Annex responds to the Financial Memorandum (FM). The points below have also been submitted to the Finance Committee's separate call for evidence.

All of the provisions in the Bill that have practical consequences create additional complexity and new administrative and/or financial burdens, relative to existing governance arrangements.

We believe the costs discussed in the FM have been generally underestimated, while a number of significant costs have not been considered.

Wider costs

The FM does not consider the cost, to HEIs and the country, of the possible ONS classification of HEIs as Central Government entities, which could follow from increased ministerial influence over HEIs. As noted above, the consequent transformation of HEIs' financial foundations would jeopardise around £300 million of infrastructure investment annually, which brings returns of £5.50 for every pound invested.

Underestimated costs notably include:

- *The cost of remuneration of the Chair*

These costs are calculated on the erroneous premise that 'reasonable remuneration' would require payment only for attending meetings. We note that the motivation for the proposal to remunerate Chairs is understood to be the encouragement of diverse candidates for the role. It is highly unlikely that qualified individuals would be influenced by remuneration at six days per year for a role that demands a great deal more commitment on a regular basis. Indeed, such obviously inadequate remuneration might well be counterproductive.

More realistic calculations of time devoted to chairing an HEI's governing body, as evidenced by advertisements for the role at several institutions, stand at around 50 days per year. On this basis, even assuming the FM's estimate of a daily rate, the cost would be c.£460,000, meaning that **the FM underestimates this cost by around £405,000.**

- *Advertising costs for recruitment of the Chair (an existing cost, but covered in the FM)*

On the basis of institutions' own experience, these costs are underestimated by £4,000 - £8,000 per institution, meaning that **the FM underestimates the sector-level cost by at least £72,000 and up to £144,000.**

- *Likely costs of running elections for Chairs*

Contrary to the assumption of the FM, it may not be possible to run such elections using low-cost ICT solutions without disenfranchising some constituencies. Even if online solutions were possible, such elections would involve set-up costs. HEIs have often outsourced comparable elections to ensure independence, efficiency and full and fair opportunities to participate. Realistic costs are difficult to estimate, especially as the nature of the proposed election is not known, but the evidence of

comparable exercises suggests costs of £1,000 - £3,000 at some or all institutions, even if an electronic-only system is used (hence up to £54,000 overall, where the FM expects 'minimal' cost) and around £7,000 where postal ballots are also used, meaning up to £126,000 at sector level.

The following costs are not addressed in the FM:

- *The cost to HEIs of administering changes to HEIs' governing instruments*

The FM makes a reasonable estimation of the cost, in staff time, to the Scottish Government of administering changes to HEI governing instruments. However, the FM makes no corresponding estimation of the cost, in staff time, of the administration needed with all 19 HEIs to change governing instruments.

In making amendments for compliance with the Code and other recent changes, HEIs have often experienced protracted processes to make such changes through the Scottish Government and Privy Council. The precise impact is difficult to estimate; one HEI suggests **the equivalent of at least one full-time senior member of staff for one year would be required** to deal with all the required changes.

It is important to note that the cost of such changes to comply with the Bill would follow extensive work at all institutions since July 2013 to ensure compliance with the Code of Governance. If an alternative to the Privy Council is to be explored in the future, the sector faces the prospect of a still further extended period of upheaval in governance. At all stages, this is a significant draw on staff time and resources, with corresponding opportunity costs. This is a high price to pay for reform which, according to even its strongest advocates, is a matter of enhancement rather than a reaction to any notable problems.

- *Staff time devoted to appointments processes, especially Chair appointments*

Staff involvement in these processes includes a significant time commitment for several senior managers. Since the Bill's effect would be to complicate appointment processes in multiple ways, the cost in terms of staff time is likely to rise significantly further.

- *Legal fees incurred for necessary professional advice on changes to HEIs' governing instruments*

Again, this difficult to estimate accurately, but is likely to be a substantial five-figure sum across the sector.

- *Setting up new appointment processes for categories of governing body member that some or all institutions currently do not have.*

For some institutions, this is likely to involve the establishment of a formal graduates' association appropriate for the role of electing or nominating governing body members. It is difficult to give precise costs for creating and maintaining such processes in the absence of further detail.

Meeting the costs

Higher education institutions will have no choice but to find the required resources from existing budgets. While the sums involved are relatively modest in the context of HEIs' broader activities, they are big enough to have real operational impacts. It is important to note that this diversion of resources

would carry opportunity costs and would come at a time of existing budgetary restriction, when HEIs are working hard to deliver efficiencies across their operations.

Annex D

Questions for the Scottish Government from Universities Scotland on the Higher Education Governance (Scotland) Bill (asked on 13 August)

This paper seeks the Scottish Government's answers to some specific questions about particular issues of major legal and practical concern which arise from publication of the Bill. The questions focus on areas of significant concern where further information is required to enable university leaders to appraise the risks and costs arising from the Bill. They focus on:

- The risks of higher education institutions' reclassification as public sector bodies by the Office for National Statistics
- Potential conflicts with charity law
- Conflict between the requirements proposed in the Bill and the requirements of institutions' own governing documents.

These specific questions are asked without prejudice to university leaders' more extensive concerns about the Bill, which will be set out in our evidence to the Scottish Parliament.

A. ONS classification

Universities Scotland members are extremely concerned that Bill may lead the Office for National Statistics to classify higher education institutions as public sector bodies. This has already happened to colleges. The risks are heightened by ONS's specific intention to review the classification of higher education institutions as part of its current programme of work.

As well as the recent reclassification of colleges as public sector bodies, we are aware of further current ONS reclassification proposals with severe real-world impacts. The ONS reclassification of Scottish Futures Trust infrastructure projects would bring their costs within public sector borrowing and inhibit the creation of public/ private partnerships: see [Scotland hits snag in funding model for infrastructure projects](#). ONS are also looking at the reclassification of Housing Associations in England as a result of increased Ministerial direction, with similar impacts: see [ONS confirms it will examine associations' status](#).

The reclassification of higher education institutions as public sector bodies would have immense financial impact and immense adverse impact on institutions' competitiveness.

ONS consider the degree of government influence and control over bodies when deciding whether to classify them as part of the public sector. In Universities Scotland's view, the Bill significantly heightens the risk of institutions' reclassification as public sector bodies through the additional controls it hands to Ministers: as set out above these include:

- Power to decide how people should become chairs of governing bodies
- Power to decide how long people should serve as chairs of governing bodies
- Power to determine the remuneration of chairs of governing bodies
- Power to determine the composition of institutions' governing bodies
- Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.

ONS are likely to look at these in cumulation with the existing framework of control of institutions by government and its agencies, including the Outcome Agreements framework and the statutory

requirement to observe the governance code as a condition of grant. Reclassification would make institutions subject to the requirements of the Scottish Public Finance Manual.

Critical adverse impacts of ONS reclassification of institutions as public sector bodies would include:

- An end to institutions' entrepreneurial activity since institutions would be unable to retain surpluses generated through these activities.
- Inhibition of universities' ability to enter joint ventures with business to promote innovation.
- Severe restriction of institutions' capacity to borrow money to develop new infrastructure, and inclusion of institutions' borrowing within overall public borrowing.
- An end to philanthropic support for institutions, since donors do not typically give money to government bodies.
- An end to institutions' status as autonomous charitable bodies separate from the State.

Specific questions

- What legal advice did Scottish Government take on the Bill's potential impact on the ONS classification of higher education institutions?
- What advice have Scottish Government taken directly from ONS about the potential impact of the Bill?

B. Charity law: Charitable status of institutions

The Higher Education Institutions covered by this Bill are all educational charities. Charitable status is an essential part of universities' identity and mission.

At a financial level, charitable status is essential to institutions' solvency. Loss of charitable status would, in particular, mean that institutions lost their entitlement to 80% relief from non-domestic rates. This was estimated in 2008 as being worth £27m per year.

Loss of charitable status would also severely prejudice institutions' capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions who are no longer charities.

As drafted, the Bill is causing Universities Scotland members some concern about potential loss of charitable status.

Section 7(1) of the Charities and Trustee Investment (Scotland) Act 2005 contains the Scottish charity test, supplemented by the definition of charitable purposes in section 7(2). However, section 7(4) provides that a body which meets the terms of the section 7(1) does not in fact 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.

While the Office of the Scottish Charity Regulator commented on the Scottish Government's consultation proposals, the Bill gives Ministers significantly more power over institutions than the proposals that were consulted on. Universities Scotland members are very concerned that increased Ministerial controls may prejudice institutions' charitable status. Particularly:

- Power to decide how people should become chairs of governing bodies
- Power to decide how long people should serve as chairs of governing bodies
- Power to determine the remuneration of chairs of governing bodies
- Power to determine the composition of institutions' governing bodies

- Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.

Taken together, these powers appear to represent a substantial degree of Ministerial control.

Specific questions

- Have the Scottish Government taken advice from OSCR about the implications of the Bill for institutions' charitable status?
- If so, what advice was offered by OSCR?

C. Charity law: role of members

Universities Scotland members are concerned that the Bill appears to put members of the governing body in a situation which is in conflict with their role as charity trustees.

Section 66 of the Charity and Trustee Investment (Scotland) Act 2005 sets out the general duty of charity trustees:

(1)A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—

(a)seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
(b)act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and

(c)in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—

(i)put the interests of the charity before those of the other person, or

(ii)where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

(2)The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3)Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4)Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.

(5)All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—

(a)that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and

(b)that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.

The Scottish Code of Higher Education Governance also imposes duties on institutions which have the force of law as conditions of grant under section 9A of the Further and Higher Education (Scotland) Act 2005. The code requires that:

*“The governing body should exercise its responsibilities in a corporate manner; that is to say, decisions should be taken collectively by all of the members acting as a body. Members should not act individually, **or as representatives of a constituency or in informal groupings**, to take decisions on governing body business on an ad hoc basis outside the constitutional framework of the meetings of the governing body and its committees.”*

Main Principle Number 6 – Responsibilities of Members provides that:

“All members shall exercise their responsibilities in the interests of the Institution as a whole rather than as a representative of any constituency. The Institution shall maintain and publicly disclose a current register of interests of members of the governing body on its website.”

The supporting guidelines to Main Principle 6 provide that:

“It is central to the proper conduct of public business that chairs and members of governing bodies should act and be perceived to act impartially, and not be influenced in their role as governors by social or business relationships (see also Main Principle 3). Good practice requires that a member of a governing body who has a pecuniary, family or other personal interest in any matter under discussion at any meeting of the governing body or one of its committees at which he/she is present shall, as soon as practicable, disclose the fact of his/her interest to the meeting and, if requested by the chair, shall withdraw from that part of the meeting ... Members nominated by particular constituencies should not act as if delegated by the group they represent. No member may be bound, when speaking or voting, by mandates given to him/her by others, except when acting under approved arrangements as a proxy for another member of the governing body.”

Universities Scotland is concerned that members of governing bodies who are appointed as the nominees of particular interest groups may find themselves in a conflict of interest where they cannot exercise the mandate of the interest group that nominated them without breaching the general duty of charity trustees to the good governance of the institution and the specific requirements of the code. Nominated members of governing bodies may find that they frequently have to declare a conflict of interest and refrain from participating in the business of the governing body, or that their continued participation puts them at risk of misconduct in the administration of the charity.

The Bill also raises a separate issue about what should happen if an institution does not have a recognised trade union for academic or ‘support’ staff, or if there are multiple recognised trade unions for these categories of staff. Who, in these circumstances, would nominate the trade union members of the governing body?

Specific questions

- Have the Scottish Government taken advice from OSCR about the difficulties which nominated members may have in complying with the general duty on charity trustees and the requirements of the HE governance code?
- If so, what advice was offered by OSCR?
- What is the Scottish Government’s policy intention about the nomination of members of the governing body in the circumstances outlined above?

D. Charity law: Skills and expertise

As noted above, the Scottish Code of Higher Education Governance imposes duties on institutions which have the force of law as conditions of grant under section 9A of the Further and Higher Education (Scotland) Act 2005.

The code requires institutions to have a balance of skills and expertise on their governing bodies, to have a majority of independent members on governing bodies, and to have a governing body of a reasonable maximum size. Specifically:

Main Principle Number 9 provides that:

“There shall be a balance of skills and experience among members sufficient to enable the governing body to meet its primary responsibilities and to ensure stakeholder confidence. The governing body shall draw up and make public a full evaluation of the balance of skills, attributes and experience required for membership of the governing body, which shall inform the recruitment of independent members of the governing body. The membership of the governing body shall be regularly assessed against this evaluation.”

Main Principle Number 10 provides that:

“The governing body shall have a clear majority of independent members, defined as both external and independent of the institution. A governing body of no more than 25 members represents a benchmark of good practice.”

Universities Scotland is concerned that the greatly-extended non-independent membership proposed at section 4, and its potentially indefinite extension by Ministers under section 8, will make it impossible for some institutions to comply with these requirements of the code.

Specific questions

- What analysis have Scottish Government made of the specific impact of the Bill on each institution’s ability to meet the requirements of the code set out above?
- What policy consideration did Scottish Government give to whether the provisions in the Bill were consistent with the requirements on institutions under the code?

E. How to deal with conflict between the requirements proposed in the Bill and the requirements of institutions’ own governing documents?

The governance of higher education institutions is defined in various governance instruments that have the force of law:

- Articles of association for institutions constituted as companies (including Glasgow School of Art, the Royal Conservatoire of Scotland, SRUC and the University of the Highlands and Islands)
- Royal Charters (for institutions including Dundee, Heriot-Watt, and Stirling)
- Ordinances for ancient Scottish universities made by The Queen in Council
- Institutions’ own statutes, approved by the Privy Council.

The provisions of the Bill will be in conflict with a range of these instruments, which make provision for the membership and conduct of governing bodies and academic boards/ senates which is different from that set out in the Bill.

The Bill does not make specific provision for what institutions should do if they are subject to conflicting requirements that have the force of law. This creates uncertainty.

Specific questions

- What consideration the SG gave to the extent to which:-
 - the composition of each governing body already reflected the various groups who would have a right to appoint members of that governing body under S4; and
 - The introduction of members in implementation of section 4 would put governing bodies in breach of the Code unless they removed members appointed under their existing statutes.
- More generally, what consideration has the Scottish Government given to the conflict between the provisions of the Bill and the requirements on each institution under the various governance instruments outlined above?
- How does the Scottish Government believe these conflicts can be resolved if no provision for this is made in the Bill?
- What relationship is envisaged between 'rules' proposed in the Bill (sections 5, 6, 11) and existing governance instruments?
- Has the Scottish Government made any estimate of the costs to institutions if existing governance instruments require change?
- Has the Scottish Government consulted the Privy Council Office about processes for changing existing governance instruments, and if so what advice was given by the Privy Council?
- What timescale does the Scottish Government envisage for any action to make existing governance instruments consistent with the requirements set out in the Bill?

F. Regulation-making powers

The Bill gives Ministers extensive regulation-making powers. Without prejudice to university leaders' serious concerns about the extent of these powers, which will be set out in our evidence to the Scottish Parliament, it would be useful to know what the Scottish Government's intentions are with regard to the publication of draft regulations during the course of the Bill, to enable the Scottish Parliament to consider how the powers in the Bill will be used.

Universities Scotland

1 September 2015