Universities Scotland brief for the stage one debate on the HE Governance Bill on Thursday, 14 January 2016

This brief is sent to you after publication of the Scottish Government's response to the Education Committee's stage one report on 11 January.

In summary

This brief asks for your support in the stage one debate on four areas relating to the Bill:

1. **To acknowledge the existing strengths in Scotland's system of higher education governance.** These strengths have been commented on positively by the Cabinet Secretary for Education and the Education Committee. Scottish HE has a long history of having staff and students at the heart of its mechanisms of governance. Staff and students are full members of universities' governing body – the Court – at every institution. 94% of institutions have two or more staff members. 72% have two or more student members of Court.

2. **We ask for your support in ensuring that the Government answers the Education Committee's set of 17 questions for clarity and further evidence in full.** Following the Scottish Government's response to the Education Committee's stage one report we still believe a number of issues remain unclear or un-evidenced. We have listed these, as we see them, below. It is vital this is forthcoming so that MSPs can perform their important role of informed scrutiny.

3. **We ask for your support with the <u>complete removal</u> of sections 8 and 13 of the Bill which would give the Scottish Government the power to modify important parts of HE governance by regulation**. We remain concerned that these sections increase the risk of ONS reclassification. The Government's response to the stage one report gives the strongest indication yet that it is 'minded' to remove these sections. This constructive move would be welcome. Their removal would not compromise the Bill's policy objectives.

4. **We ask for your support to ensure that any change to the role of Chair will actually improve good governance.** The Government's response to the stage one report outlines a two-stage process for the Chair's selection including a selection process, followed by an election. Previously, section one of the Bill was left unspecified. We remain concerned that this approach has the potential to actually undermine the very objectives of accountability and diversity in governance that the Bill looks to advance. We recognise that stakeholders are divided on this issue (as does the Government) and so we ask you to consider this proposal in light of four questions as set out on page 9.

These points are set out in more detail in the following pages. We acknowledge that the Scottish Government's response to the stage one report makes a number of constructive suggestions for stage two amendments that would go some way to addressing some of our concerns about the Bill. Where this is the case we welcome it. However, we remain concerned about the progression of what is largely an un-evidenced Bill and the potential impact this could have on what is already a high-performing and well governed sector, such as Scotland's higher education sector.

For more information, or any other questions, please don't hesitate to contact:

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The existing strengths in Scottish HE governance have been widely acknowledged

There has been broad acknowledgement that HE governance in Scotland is already strong

Existing strengths in the HE sector's existing governance arrangements have been acknowledged by the Scottish Government, the Education Committee and the author of the original review of HE Governance, Professor von Prondzynski:

During stage one the Cabinet Secretary said: *"The premise that I am starting from is not the premise that there is a deficit. I am not for a minute saying that governance in our university sector is poor."* Angela Constance MSP.

The stage one Education Committee report states: *"The Bill is concerned with improving higher education governance although the Scottish Government has not provided any examples of current deficiencies within the sector."* pg. 1.

Professor von Prondzynski said when publishing his 2012 review: *"The story of Scottish higher education is overwhelmingly a good one. This report is not an exercise in criticism or complaint."* (2012 review, pg. iv).

Universities support the highest standards of accountability, transparency and inclusion in their governance

Universities support the view that HE Governance must be '*modern, inclusive and accountable*' as set out as the Bill's policy objectives in the policy memorandum. We also believe in achieving the highest standards.

We believe HE governance **is** those things, thanks in part to a new and progressive Code of Governance introduced by the sector in 2013. More information on each point follows.

HE governance is already <u>modern</u> because a broad range of improvements have been made since 2013

A new Code of Good HE Governance was introduced in summer of 2013. So far it has delivered at least 350 positive changes to enhance HE governance. The Scottish Funding Council has officially adopted the Code as encapsulating the standards of good HE governance.

The progress, delivered by the Code, has been acknowledged the Cabinet Secretary and many of universities' stakeholders.

Cabinet Secretary: *"Mrs. Scanlon is right that progress has been made with the code—I would never demur from that."* Evidence to Education Committee, 10 November 2015.

The Royal Society of Edinburgh wrote in its stage one evidence:

"…we point to the progress that has been and is continuing to be made in modernising the governance arrangements of HEIs, for example through… the introduction of the Scottish Code of Good HE Governance (the Code) in 2013. We question the need for this progress to be overlaid by additional legislation." P. 2-3.

To stay modern, a Code review was planned for three years after its original launch in summer of 2013. This was in recognition that best practice in governance evolves and a desire on the part of the HE sector to evolve with it. That scheduled review is due in 2016.

HE Governance is already _inclusive_ because staff and students have full membership of the governing body and other decision-making committees

Staff and students are included as full members of the governing body – the Court - and many other decision-making committees:

- Every Scottish higher education institution already has staff and students as full members of Court. 72 per cent of HEIs have _two or more_ student governors. 94 per cent of HEIs have _two or more_ staff governors (the Principal and Vice Principals don't count as 'staff' for this purpose).

- Staff and students also sit on a number of other decision-making committees within their universities that feed into the final decisions made by the Court. Staff and students sit on their institution's selection committee, at every university, which governs the selection process for the Principal and Chair amongst other key appointments. In addition to that, other committees can include: the audit committee, policy committees for teaching and research, equality and diversity committee and estates committees.

Universities are committed to equality and diversity as part of their inclusive arrangements:

- HE has made progress on gender balance. 8 of the last 10 appointments to the role of Chair have been women taking the gender balance amongst Chairs to 44.4% women: 55.6% men.

- The Committee of Scottish Chairs has committed to work towards achieving a 40:40:20 gender balance amongst independent members of Courts. This was announced in 2015. A review of progress is scheduled for 2018. Read the Chair's commitment on gender in full.

- The gender commitment does not extend to elected staff and student members as universities respect the right of staff and students to determine their own processes to choose their members of Court.

HE governance is already _transparent_ because appointments are made by open and consistent processes. The Code requires key information and documents to be published

Transparency is delivered in many different ways:

- Open and public advertisement for the role of Chair, along with a published job description and skills matrix, makes the recruitment process fully transparent.

- The governing body sets the policies of the remuneration committee, which decides on pay for the principal and senior staff. The Court can see for itself that decisions made by the remuneration committee comply with these policies.

- Universities publish the agendas and minutes of their Court meetings online as well as a register of interests for their independent members on their websites.

- Universities publish the externally facilitated reviews into the effectiveness of their governance, which are conducted every five years.

- The HE Code of Good Governance goes a lot further in terms of requiring transparency from universities than the equivalent FE Code which was published in December 2014.

There is a need for Government to provide more evidence and information in order to move forward with the Bill

The stage one report highlights 17 issues to be clarified or supported by evidence

The Stage 1 Report makes it clear that a lot more evidence, information and clarity is needed to inform the Bill's progression. The Education Committee points to 17 issues where more information is needed in a Bill 10 pages long. The Scottish Government's response to the stage one report only partially answers the Committee's questions.

We ask you to help ensure that full clarity and set of evidence and clarity is forthcoming before the Bill progresses through stage two because it is very important that the process of scrutiny at stage two is properly informed. The range of views on aspects of the Bill makes the need for evidence even more important.

This is not just our view, but the view of the Education Committee: *"we have highlighted in this report examples of further information we believe the Scottish Government should provide in order that members' participation in the stage one debate is as informed as possible."* Stage one report, p24.

Gaps remain in the evidence base and rationale for the Bill

In considering the Bill at stage one, we ask you to satisfy yourself that key challenges from the Education Committee's Stage 1 report have been addressed in full. We believe the following issues remain outstanding:

- The absence of a persuasive rationale for the Bill in light of recognition of the sector's existing good governance.
- The need for any new process for election of chairs to <u>increase</u> the pool of suitable candidates.
- The need for complete clarity about the respective roles and appointment methods of chairs and rectors. In particular, how will it work to have two elected 'chairing' roles in a Chair and a Rector in some universities with different electoral processes? See page 6-8 of this brief for more detail.
- The lack of evidence of other sectors where election of the chair by a wide constituency had been successful.
- The Committee's concerns that existing elected roles for staff and student members of governing bodies are likely to be sacrificed to make room for the new members nominated by interest groups.
- The committee's concern that 'one size fits all' prescriptions on governing body membership will be unworkable for some institutions e.g. the small specialist institutions like the Royal Conservatoire and Glasgow School of Art, which have only been partially dealt with.
- The absence of a rationale for legislation on the role and composition of academic boards.
- The committee's strong criticism of the lack of consultation about the Financial Memorandum.

Remove the risk of ONS reclassification that exists within the Bill

Removal of sections 8 and 13 would reduce the risk of ONS reclassification

Sections 8 and 13 of the draft Bill, as introduced, would give the Scottish Government the power to modify important parts of HE governance, including membership of the governing body, by regulation. This increases the risk of an ONS reclassification.

We ask for your support in the complete removal of these two sections from the Bill because we remain very concerned that they increase the risk that the Office of National Statistics might find grounds to reclassify universities as a public body. This would jeopardise millions of pounds of university income universities. The complete removal of these sections would give the HE sector the peace of mind it is looking for on this issue. Amending these sections would leave doubt.

We welcome the Scottish Government's strongest indication yet that it is minded to remove these sections as stated in its response to the stage one report, published on 11 January: "*Having given the matter careful consideration, the Scottish Government is minded to put forward amendments at Stage 2 to remove sections 8 and 13 of the Bill*" p3.

The complete removal of sections 8 and 13 would address our concerns, which have also been shared by the Education Committee. The stage one report said: "*We consider the reclassification of Scottish HEIs would be in no-one's interests, given such a decision could cause very significant harm. We therefore consider all reasonable measures should be taken to minimise any risk of reclassification… We therefore welcome the Cabinet Secretary's commitment to considering amending or removing the relevant provisions.*" Pg6-7.

As ONS cannot give a verdict on whether the Bill increases the risk of reclassification until after the Bill is passed we ask MSPs to remove these sections to avoid introducing a significant element of instability into universities' operating environment. Neither section is fundamental to the policy objectives of the Bill.

The potential impact of an ONS reclassification would be so damaging it should not be left to a matter of interpretation

If ONS were to reclassify Scotland's universities as a public body the sector stands to lose competitively-won income from charities, from philanthropy, income which is earned by universities entrepreneurially and reduce/remove institutions' capacity to borrow. This could cost the sector well in excess of £400 million per year, at a conservative estimate.

The Scottish Government has published its rationale for its view on the risk of an ONS reclassification in a separate response to the stage one report, out on 11 January. The risk comes down to how the ONS may choose to interpret its 'indicators of control'. The Scottish Government, in its analysis, views it one way and we view it another. The point is that if the Bill were passed with sections 8 and 13 in it the risk remains. As a reclassification has been stated clearly as "in no-one's interests" we believe the only complete way to address this risk is to remove the sections.

Universities Scotland will ask its lawyers to consider the Scottish Government's ONS analysis in detail because of the severity of the potential implications. Until this has been possible we ask the Parliament to pause in making further judgements about the level of risk.

Ensure that any change to the role of Chair, in section one, will actually be an improvement to good governance

The current model for the Chair's appointment is inclusive, transparent and makes the position highly accountable to the full Court membership

The existing governance model for appointing the Chair, as prescribed in the Code, is:

- **Inclusive** as staff and students are on the nominations committee that determines the job description, skills matrix and interview process.
- **Inclusive** as it is very capable of delivering equality and diversity. 8 of the last 10 appointments to the role of Chair have been women taking the gender balance amongst Chairs to 44.4% women: 55.6% men.
- **Transparent** as the position is advertised widely in the press and online and in a targeted way, through focused channels, to reach out to the widest diversity of candidates.
- **Accountable** as the Court appoints the Chair there is clarity that the Chair has the confidence of the full Court and that he/she is accountable to the full Court membership.

We are concerned that the new proposal for selection and then election might undermine accountability and diversity - the very objectives the Bill aims to deliver

The proposal to elect the Chair after a pre-selection process could actually undermine accountability of the Chair:

A risk to accountability – At present there is a water-tight link between the Chair's appointment and the governing body he is accountable to as the governing body appoints him/her. The new proposals would weaken that link by passing over the final decision to a different audience. That would weaken the governing body's authority to hold the Chair to account.
The election stage has the potential to empower one individual, the Chair, at the expense of the full membership of Court.

A risk to diversity - If the Chair is elected we are concerned this could have unintended negative consequences for the diversity of candidates prepared to stand. An evaluation by the National Union of Students Scotland, of its own internal election processes in 2014, found: "*women are far less likely to stand in elections with 28.98& of candidates standing in elections being women*."

We are concerned that an open, public, adversarial election would be a deterrent to good candidates for the role of Chair altogether and might inadvertently reduce the potential pool of applicants.

The evidence base shows organisations have moved away from elections in favour of a board-appointed process to achieve better governance

The Education Committee's stage one report asks the Scottish Government for its evidence of the impact of different models of appointing the Chair and whether there is a marked difference in the quality of governance. The Scottish Government's stage one response states: "*The Scottish Government has not undertaken specific research in this area.*" P6. Universities Scotland has.

We are aware of examples of governance reform that have moved away from elections, in favour of a board-appointed process or retained their appointment process to ensure good governance:

The Co-Operative Bank. The Co-operative Bank launched a comprehensive review of its governance model after financial scandals and scandals personal to the Chair in 2013. Prior to the review the Chair was elected by Co-operative members. One of the recommendations of the governance review, which has since been enacted, has been to move from a member-elected Chair to an Independent Non-Executive Director Chair as this is considered to deliver stronger governance. As in a plc, the Chair (as with other NEDs) *is selected by the Board*, but members get to vote on this choice at the next AGM.

The John Lewis Partnership. John Lewis is an employee-owned organisation with a highly democratic structure but it has chosen never to have an elected Chair. The Chair of the board is appointed to *ensure stability and continuity of the organisation's values, and the President of the Partnership Council is elected by the Council itself.*

It is standard practice in the third sector for an organisation's Board to select its own Chair, as universities do now through a transparent and open process.

Universities Scotland cannot find evidence to support improvements in good governance from an elected Chair as the Government proposes. Therefore we cannot accept this proposal.

We retain concerns about the two-stage selection and election process as described in the Government's stage one report response.

Our priority is to protect good governance. We can only support measures where we has strong reason to believe they will improve governance. As we find the evidence base around elected Chairs lacking we cannot support this proposal.

We also have a number of concerns about the proposal as laid out. We ask you to consider the proposal in light of the following questions:

1. **Does the proposal strengthen the Chair's accountability to the governing body, the body which holds ultimate responsibility for a universities' governance?** Or, does it strengthen the Chair's accountability to another group/community which does not hold ultimate responsibility for good governance?

2. **Does the proposal offer reasonable confidence that it can deliver better outcomes for equality and diversity than at present?** As stated already, 8 of the last 10 appointments to the role of Chair have been women taking the gender balance amongst Chairs to 44.4% women: 55.6% men. We have evidenced concerns, from NUS Scotland, that elections deter female candidates.

3. **Does the proposal establish that all candidates allowed to progress are credible with the right skill, experience and potential to deliver this demanding and important role?**
   The process outlined in the Government's stage one response acknowledges the need for a "robust selection element [which] should ensure that that candidates who want to take up the role have the ability required for the position." P5.

This new requirement is welcomed by Universities Scotland and should remain an essential step in whatever final process is decided for selecting a Chair.

4. **Does the proposal provide clarity between the role of Chair and that of Rector, where it exists in five universities?** Introducing an election-element into to the selection process for the Chair creates a major overlap with the selection process for existing Rectors and so undermines the role of Rector and creates a muddle of accountability between the two roles. If the Chair is to be elected by staff and students, that role would have a wider democratic mandate than the Rectors at the Universities of Glasgow, St Andrews, Aberdeen and Dundee, which are elected by the student body only.

   This would give rise to confusion over who has legitimacy to chair Court meetings and who has more legitimacy to perform the more substantive elements of a Chair's role (as senior lay governor) such as line management responsibility of the Principal.

ENDS

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