Post-16 Education (Scotland) Bill

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The Post-16 Education (Scotland) Bill is an important piece of legislation, setting out some new principles in particular for the college sector. It also contains some provisions of relevance to the higher education sector, and I shall here restrict my comments to these.

Section 2 of the Bill allows the Scottish Funding Council to impose a condition of grant on universities, requiring them to ‘comply with any principles of governance or management which appear to the Scottish Ministers to constitute good practice in relation to higher education institutions.’ This may be taken to be a reference to the review on higher education governance that I chaired in 2011, and which reported about one year ago. In our conclusions we recommended that there should be a code of good governance drafted specifically for Scotland. Since we made that recommendation, the Committee of Scottish Chairs have come forward with a proposal to draft such a code.

The controversy surrounding this provision in the Bill may in part be related to the fact that the Chairs’ code has not yet been finalized or published. In these circumstances, it is not yet clear what particular principles of good governance might be enforced by the legislation. Moreover, the fear has arisen that the provision could be used to apply some other unspecified set of principles of good governance, or might even at some future date be used to apply the views of particular politicians or officials.

There are potentially two ways of dealing with this situation. One is to suggest that the timing of the provision is wrong, and that it should be addressed (if at all) when the legislation promised for higher education is published a year or two from now. In those circumstances the code, the content of which should by then be known, could be referenced specifically, thereby removing the fear that the principles of good governance to be applied could be from another source altogether.

The other possibility would be to allow this matter to be handled outside of any legislative framework. It could be addressed by the Cabinet Secretary, writing in his usual guidance to the Funding Council, asking the SFC to make it a condition of grant that principles of good governance are applied, on a ‘comply or explain’ basis.

Section 3 of the Bill addresses access to higher education. If it is enacted it will allow the SFC to make it a condition of grant that a higher education institution apply an access agreement negotiated with the Council.

There can and should be little argument that widening access to higher education has to be a public policy priority. Universities themselves, and indeed university Principals explicitly in a recent communication, are committed to widening access. It is also appropriate that this matter is addressed by the SFC, and that it do so through imposing a condition of grant as set out above. It could be suggested that this is best dealt with through the normal ministerial guidance, rather than through legislation. That said, I have little argument with the principle stated in this proposed
provision, nor with the concept of an access agreement negotiated between universities and the SFC. However, if it is to be contained in a workable statutory provision, the drafting may need to be re-considered to ensure that it does not permit unexpected and unworkable consequences.

Section 4 addresses the issue of tuition fees payable by students from the other jurisdictions in the United Kingdom. The main provision here is one that would limit the amount that a university may charge to the maximum permitted elsewhere in the UK. There is a technical issue in relation to this, in that tuition fees charged elsewhere in the UK are not all the same. The system varies between England, Wales, and Northern Ireland. To be effective, the sector would probably need to state that the limit is set to the highest amount that can be charged in any other UK jurisdiction.

It could be argued that UK fees should be treated like fees payable by international (non-EU) students. Tuition fee levels for these students are decided autonomously by universities. However, fee levels in other parts of the UK are capped for students studying there, and in these circumstances it may be difficult to allow fees in Scotland for the same categories of students from those parts of the UK to be higher. The section as drafted is probably more complex than it should ideally be, as it allows, in its drafting, a capping that uses other criteria than fee levels in the other UK jurisdictions. I do not myself have any serious misgivings about a tuition fee cap that matches the limits set elsewhere in the UK, but might have concerns about a provision that is rather more open-ended than that, allowing criteria to be applied that are not explicitly set out in the Bill.

Overall, I have no argument with the principles that are at the heart of the Bill in its provisions as they affect higher education. The essence of these is that universities, like other bodies, need to be accountable, and need where appropriate to apply principles and priorities of public policy. Whether this needs to be done by the legislation in the current instance could be debated.

There may be an argument for suggesting that the key issues at stake here should be part of an overall statute on higher education, which has in any case been signalled for later in this parliament. But if the provisions are to be enacted now, there is an argument for some re-drafting of the provisions set out in the Bill as published. In that context, reinforcing the clear principle of university autonomy should be an important objective.