Annex C

Higher Education (Scotland) Bill

Written Evidence from OSCR – The Education and Culture Committee

1. Introduction

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (‘the 2005 Act’) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,800 charities registered in Scotland, and this includes Universities and other higher education institutions (HEIs).

The Committee issued a call for written evidence on the Higher Education (Scotland) Bill (the Bill) in June 2014, and below is OSCR’s submission which is focused on Questions 2 and 4. OSCR welcomes the opportunity to provide comment on the Bill having previously commented on the Scottish Government consultation. In forming our view we have considered our overall vision, which is of charities you can trust and that provide public benefit, underpinned by the effective delivery of our regulatory role.

2. Written evidence

2.1 Context

The Committee has had outlined a number of questions. OSCR response is specific to Questions 2 and 4.

In considering the proposals in this Bill OSCR has reviewed how they would work alongside the 2005 Act. HIEs, as charities, are subject to the requirements of the 2005 Act. In addition, the members of HIE governing bodies are charity trustees and are therefore subject to particular duties under the 2005 Act. The two areas specifically considered are the proposals’ alignment with section 7(4) (b) of the 2005 Act, which relates to Ministerial powers of direction and control over charities, and section 66, which sets out the duties of charity trustees.

2.2 Ministerial Control

2.2.1 Context

As charities, HIEs must meet the charity test as set out in section 7 of the 2005 Act. Under this, to be registered as a charity an organisation must pursue only charitable purposes and it must provide public benefit. Under section 7(4) (b) an organisation

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1 Qu2: The extent to which the Bill (a) will improve higher education governance (b) may alter the higher education sector’s current level of autonomy, (c) may affect the lines of accountability between Scottish Government, relevant public bodies and the higher education sector. Qu4: Provide views on the merits of each proposal.
will however 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.’

It is worth noting at this point that section 16 of the Bill defines ‘governing documents’ for older universities, charter universities and designated institutions. These definitions of ‘governing documents’ are not in each instance the same as the constitutional documents we have considered. Our assessment is based on the definition of constitution in section 106 of the 2005 Act.

2.2.2 Ministerial control assessment

The assessment of ministerial control is complex, and the view we outline below is based on the information we have had to hand. There are two questions we have had to consider:

- Firstly, whether the Bill when enacted will form part of the HEIs’ constitutions as defined in the 2005 Act (as described above, this differs from the definition of ‘governing document’ set out in section 16 of the Bill)
- Secondly, if they do form part of the constitutions, whether these powers in the constitution allow Ministers to direct or control the organisations’ activities.

HEIs have a variety of constitutional structures falling into three categories:

- Ancient (or older) universities
- Chartered universities
- Designated institutions (post 1992 HEIs)

Our view is that the Bill, when enacted, will not itself form part of the constitutions of charter universities or of designated institutions. The trustees of these bodies will require to comply with the legislative requirements of the Bill, and in due course may require to amend their constitutions to ensure their governance provisions are compliant with it.

However, in respect of the older universities (Aberdeen, Edinburgh, Glasgow and St Andrews) we consider that Part 1 of the Bill will form part of their constitution. This is because the Bill amends the Universities (Scotland) Act 1966, (‘the 1966 Act’) which in our view forms part of their constitution to make the appointment of university courts subject to the provisions of Chapter 1 of Part 1 of the Bill. In addition the Bill repeals section 7 of the 1966 Act, which provides for the composition of the senates. Provision for their composition is provided in Part 1 Chapter 2 of the Bill.

As a result of this, we have considered whether, taken as a whole, these powers allow Ministers to direct or control the older universities’ activities. We have considered this on the basis set out in our published guidance on these issues, and in the light of previous cases. Considerations here include:

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2 http://www.oscr.org.uk/charities/guidance/meeting-the-charity-test-guidance/ministerial-direction-or-control
• How important or central to the organisation’s overall activities are the functions that Ministers can control?
• Can Ministers take the initiative in making an organisation do something, or can they merely react to a request from the organisation or third party?
• Can Ministers use their powers whenever and however they wish, or are there limits to this?

Part 1 of Chapter 1 makes provision for the appointment of the chairing member, remuneration payable to that member and the composition of the governing body. It also gives Scottish Ministers express powers to make regulations in these areas. In order to undertake the assessment of whether Scottish Ministers have the power of direction or control, we must consider Chapter 1 of Part 1 of the Bill and the powers for Ministers contained in it.

In summary these are as follows:

1. Appointment of the chairing member

Here Scottish Ministers would, following consultation, be setting criteria within which one of the older universities could appoint a chairing member. While this does give Ministers the power to specify in some detail how the recruitment could be conducted, it does not give Ministers the power of appointment or removal of a chairing member (which we would consider to be a strong indicator of Ministerial control). Moreover, regulations cannot be made without consultation with the older university involved.

2. Remuneration payable to that member

Here Scottish Ministers may by regulation make provision for remuneration payable to chairing members of a HEI. This does allow Ministers to exert a degree of control over an HEI’s decision on this particular issue. Our view is that this would not in itself amount to an ability for Ministers to exert control in a way that is central to the activities of the HEI. Again, Ministers must consult with the older university involved before making regulations.

3. Composition of the governing body

Section 4 of the Bill provides for the composition of the membership of an HEI’s governing body, in particular specifying numbers of members to be appointed by staff, student associations, trade unions and graduates’ associations. Section 8 gives Scottish Ministers the power to make regulations to vary these categories and numbers. These sections do not give Scottish Ministers the power to appoint or nominate members to the governing body: this power lies with the various nominating bodies. Nor do they give Scottish Ministers the power to remove members of the governing body (which might amount to an indication of control by Ministers). In our view therefore they do not give Ministers any power to control the HEI’s activities.
4. Composition of the academic board (‘Senate’, ‘Senatus academicus’)

Chapter 2 provides for the composition of the academic board of an HEI, in particular specifying the maximum number of members, categories of membership and the percentage of members to be appointed by staff and students. Section 13 gives Scottish Ministers power to make regulations to vary these categories and the percentage of members appointed under a particular category. These sections do not give Scottish Ministers the power to appoint members to the academic board. Nor do they give Scottish Ministers the power to remove members of the academic board (which might amount to an indication of control by Ministers). In our view therefore they do not give Ministers any power to control the HEI’s activities.

2.2.3 Overall

Our view is that the provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4) (b) of the 2005 Act.

Section 8 of the Act gives Ministers the power to make regulations to modify the categories of membership set out in section 4 and the numbers in each category. Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions these amounted to ministerial control. Similarly, Section 20 of the Act gives Scottish Ministers wide power to make such further regulations ‘as they consider necessary or expedient for the purposes of or in connection with this Act’. Should such regulations be made in respect of Part 1 of the Bill when enacted we would have to consider to the impact of these measures with respect to ministerial control.

2.3 Charity Trustee Duties

Members of a HEI governing body are also a charity trustees and as such have duties and responsibilities set out in section 66 of the 2005 Act. These duties include:

(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.

We have considered particularly the requirements for the composition of the governing body set out in section 4 of the Bill, and whether these would be likely to prevent the charity trustees of HEIs from fulfilling their trustee duties. These are issues we commented on at the consultation stage, and we have looked at them again in the light of the Bill as introduced. We would note that these are not matters which can cause a charity to fail the charity test, but cover the conduct of charity trustees in particular situations.

We have looked at the provisions of the Bill for governing board members to be nominated by particular bodies or groups. It is not particularly unusual for charities to have charity trustees nominated by other bodies or groups. As quoted above, section 66 of the 2005 Act specifically sets out how charity trustees should act in situations where conflicts of interest arise between the charity and any person responsible for their appointment. Given the overall size and composition of the governing bodies provided for in the Bill, we do not see anything to prevent any conflicts of interest arising for charity trustees nominated under the provisions in the Bill being dealt with in a way that enables the trustees to meet their duties.

Also, OSCR recommends to charities as a matter of good practice that an effective governing body should ensure they have among their members the right skill set and mix. This is also stated in Principle 9 of the Scottish Code of Higher Education Governance. Again, given the overall size and composition of the governing bodies provided for in the Bill, we do not see that the provision for charity trustees to be nominated in terms of the Bill will be incompatible with good practice in this respect.

4. Overall

OSCR welcomes the opportunity to give a view to the Committee on this Bill, and hopes they find the evidence useful. We have though highlighted our considerations in respect of ministerial control, and also highlighted that members of HEIs governing bodies are also charity trustees and have duties under the 2005 Act that should be considered alongside these legislative changes. Should there be any further questions about our evidence please contact Nicola McBain (Engagement Manager, Policy and Partnerships) at nicola.mcbain@oscr.org.uk