Higher Education Governance (Scotland) Bill.

Evidence to the Scottish Parliament’s Education and Culture Committee
from Professor Andrea Nolan, Principal & Vice-Chancellor of Edinburgh Napier University

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

The extent to which the Bill

(a) will improve higher education governance, particularly in the areas above
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

The Bill proposes a number of specific changes to higher education governance:

- To require higher education institutions to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers
- To require HEIs to include various persons within the membership of their governing bodies
- To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons

Please provide your views on the merit of each of these proposals.

I believe that higher education governance in Scotland is modern, inclusive and accountable. Importantly the sector has demonstrated a commitment to and a record of self-review and continuous modernisation and improvement through, most recently, the development of the Scottish Code of Good Higher Education Governance and institutional governance reviews.

However, we are not complacent, and I recognise that there is more work to be done, for example to progress gender balance on governing bodies where institutions individually and collectively are taking measures and have made public commitments to address this.

I do not believe that the proposals on the face of the Bill will improve higher education governance in the aspects mentioned above. The most concerning aspects of the Bill which could potentially damage governance in the longer term and which may substantially alter the higher education sector’s current level of autonomy are the proposals for delegated powers in relation to the process for appointing chairing members of governing bodies and their remuneration; and in relation to determining the membership of governing bodies and academic boards.
These provisions in sections 1, 2, 8 and 13 of the Bill, supplemented by section 20 would increase the level of control which Scottish Ministers can exercise over higher education institutions and provide for the level of control to be further increased without recourse to primary legislation in future. This is a fundamental change and a departure from often expressed cross-party political support for responsible autonomy in the higher education sector. It opens up the prospect of considerable Ministerial influence over institutional strategy and academic governance in future.

The question also arises as to whether increased control of the sector by Scottish Ministers following enactment of the Bill as introduced or through the subsequent use of delegated powers could cause the Office of National Statistics (ONS) to reclassify higher education institutions as central government bodies or cause institutions to fail the Scottish charity test under the terms of section 7(4)(b) of the Charities and Trustee Investment (Scotland) Act 2005. In respect of the latter concern, which would result in less favourable tax treatment for higher education institutions, I recognise that Scottish Ministers have the power to dis-apply section 7(4)(b).

Reclassification as a central government body by ONS would have a profound impact on Edinburgh Napier University, on our ability to develop an optimum investment strategy and on the nature of the business we could undertake. For example, our recent £75m investment in the renewal and upgrading of our estate at the Sighthill and Merchiston campuses was funded 60% through commercial borrowing, 13% by disposal of property and 27% from accumulated reserves. ONS reclassification would all but rule out an investment strategy of this kind, reducing our ability to use our resources efficiently to provide an excellent and modern experience for our students and make a positive impact on our local economy. ONS reclassification would also restrict the commercial activity the University could engage in because of inflexible budgetary controls and is likely to make us less attractive to philanthropic donors. These are examples of activities through which the University leverages the public funding we receive to add value and economic impact at home and overseas.

Much of what is proposed in relation to governing bodies and academic boards in sections 4 – 7 and 9 – 12 of the Bill is a statement of existing practice. The main exceptions are certain of the proposals for representatives of particular interest groups on governing bodies which do not reflect current practice, to varying degrees, in institutions and the proposed limitation on the size of academic boards which also does not reflect existing practice in some institutions.

The membership of the Court of Edinburgh Napier University currently includes the elected President of the Napier Students’ Association; one other elected student office-bearer selected by the Students’ Association; a member of staff elected by and from the academic staff; a member of staff elected by and from the non-academic staff; and a member of staff appointed by the Academic Board from the membership of the Board.
The proposals would add two additional members of staff, nominated by recognised trade unions and two representatives of a graduates' association to the governing body of Edinburgh Napier University. The proposal that additional staff members be appointed by nomination by recognised trade unions from among their members would be a less inclusive addition to the practice of appointment by election by staff as not all staff in any category are trade union members. Those appointed will be bound to serve only the interests of the institution and not the constituency which nominated them, as is recognised in paragraph 47 of the Policy Memorandum. Edinburgh Napier would have to establish and provide ongoing support for a graduates’ association in order to comply with section 4(1)(f) as it doesn’t currently have such a structure.

The restriction on the size of academic boards would not affect Edinburgh Napier and the other proposals for academic boards on the face of the Bill are consistent with the University’s current arrangements. However, it would be of concern that Ministers could in future alter the composition of academic boards as this seems inconsistent with a commitment to academic freedom.

All institutions, including Edinburgh Napier would have to address conflicts between the proposals on the face of the Bill, their existing governance documents and the principles of good governance with which institutions are obliged to comply as a condition of grant from the Scottish Funding Council (exercising its power under the Post-16 Education (Scotland) Act 2013). In Edinburgh Napier’s case there may be a requirement to seek amendments to the University’s founding Order of Council in order to comply with both legislation and good practice, particularly in relation to maintaining a clear lay majority on the governing body.

The Bill is part of a wider package of recent reforms to higher education governance, including the development of a Scottish Code of Good Higher Education Governance.

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

There are existing legislative frameworks, through which governance arrangements can be changed (in the case of Edinburgh Napier University, the Further and Higher Education (Scotland) Act 1992). The Post-16 Education (Scotland) Act 2013 already requires institutions to comply with any principles of governance which appear to the Scottish Funding Council to constitute good practice in relation to higher education institutions. Thus it is not clear why further legislation is necessary.

The Bill consists of provisions which are already existing practice, provisions which would do little to enhance existing practice and potentially damaging provisions for delegated powers. The reasons for taking the delegated powers in sections 1, 2, 8 and 13 of the Bill set out in the Delegated Powers Memorandum do not appear to be evidence based. They refer to a level of detail which might be required, to a hypothetical need to make prompt changes and to respond to changes in future
practice. I am unaware of any historic precedent of a circumstance requiring sudden change in higher education governance arrangements, and consider that the indication that regulations to be brought forward in due course might include a "considerable level of detail" highlights the prospect that such regulations could result in significantly increased Ministerial control.

I note that the policy aim of the delegated power under section 1 stated in the Policy Memorandum, paragraph 28, was to establish a minimum level of openness, transparency and consistency (or, in the Delegated Powers Memorandum, paragraph 9, inclusivity, transparency and consistency). However no argument is advanced as to what minimum level is appropriate in a very diverse sector, whether it is presently absent or why new legislation is considered necessary to achieve it, although it has been noted that the matter was considered too crucial not to be addressed in legislation. The Bill, in proposing this delegated power does not address the 'crucial matter' and does not appear to deliver or guarantee into the future the desired policy objectives outlined other than the simple consistency that regulations, which could take any and many forms, will be made by Scottish Ministers.
Academic freedom

The likely practical effect of the provisions on academic freedom.

I do not believe that the provisions on academic freedom in section 19 of the Bill will have any practical effect. The difference between the proposed wording and the wording in the Further and Higher Education (Scotland) Act 2005 does not appear to be a material change. In addition to the obligations created by the 2005 Act, universities are obliged under the Post-16 Education (Scotland) Act 2013 to comply with principles of good governance which include a requirement to ensure academic freedom. It is not apparent that the stated policy aims of strengthening the protection of academic freedom and ensuring that the protection of academic freedom is more comprehensive and transparent (paragraph 63 of the Policy Memorandum) are advanced by the proposed new wording.

Are there any significant constraints – other than legal constraints – on academic freedom?

There is a threat to academic freedom contained within the Bill in the form of the delegated powers proposal in section 13. This provides that Scottish Ministers may modify, without limit, the membership of academic boards by regulation, with limited parliamentary scrutiny of any such future proposals. This provision potentially allows for significant Ministerial control and influence over institutions’ academic policies, practice, standards and regulations through the ability to specify membership of the body responsible for these matters.

Are the situations in which relevant persons can exercise their academic freedom clear?

The obligation placed on post-16 bodies by the proposed wording in section 19 of the Bill is clear. Specifying the limits to the exercise of academic freedom which arise from other obligations under the law or in relation to professional standards and similar matters is not within the scope of the Bill and does not need to be.