QUEEN MARGARET UNIVERSITY COURT

RESPONSE TO CALL FOR EVIDENCE ISSUED BY THE SCOTTISH PARLIAMENT EDUCATION AND CULTURE COMMITTEE

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

1 PREFACE

The Court of Queen Margaret University welcomes the opportunity to respond to the Call for Evidence issued by the Scottish Parliament’s Education and Culture Committee on the Higher Education Governance (Scotland) Bill, introduced in the Scottish Parliament by the Scottish Government on 16 June 2015.

We note that the Committee’s role at Stage 1 of the parliamentary process is to report to the Parliament on the general principles of the Bill – that is, on its overall purpose. We preface our response to the specific questions posed in the consultation with broader observations and comments on the overall purpose of the Bill.

In our response to the original consultation, we set out a number of concerns regarding the impact of the legislative proposals on our current governance arrangements, but concerns also about the wider implications of the proposals for higher education governance and for institutional autonomy within the Scottish HE sector. While we recognise that a number of our concerns, shared by the majority of consultation respondents according to the Scottish Government’s own analysis of responses, have been allayed by amendment to the proposals, a significant number remain. Furthermore, the published version of the Bill has introduced new causes for concern that have not been the subject of consultation.

Our primary concern, set out clearly in our response to the draft Bill, remains that Scottish Ministers consider it appropriate to legislate on the internal organisation of autonomous charities. We remain concerned about the underlying presumption that there needs to be uniformity of approach within the sector and that further change needs be driven by statutory measures.

Having now considered the Higher Education Bill as introduced, we remain concerned about a number of the assumptions concerning existing governance arrangements within the sector, and about the impact and cost of the proposals. In particular, we do not consider that the Scottish Government has demonstrated why legislation on this matter is required.

We consider that the Bill, as drafted currently, represents a fundamental shift in the relationship between Ministers and autonomous higher education institutions, with Ministers exercising considerable power through secondary legislation to decide the categories of governing bodies, the manner of appointment and conditions of service. These are not matters on which the Scottish Government sought views during the Bill consultation.

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1 Consultation on a Higher Education Governance Bill; Analysis of written responses, The Scottish Government, April 2015
In terms of the financial impact, we consider that, while the Financial Memorandum attempts to calculate the direct costs to Universities of the proposals, it does not address the wider financial implications of the Bill. This includes the implications of any threat to HEI’s charitable status arising from any future increase in Ministerial powers, and the additional costs arising from action required under secondary legislation.

We share the concern of others in the sector that increased Ministerial control may lead to universities being reclassified by the Office of National Statistics (ONS) as ‘Central Government’. We consider too that there is significant opportunity costs involved in individual universities across the sector engaging in what is likely to be a complicated and lengthy process for amending their governing instruments.

We have set out detailed comments on the costs and the financial implications of the Bill in our response to the call for evidence from the Scottish Parliament Finance Committee. For completeness, those comments are set out in this response also.

2 CALL FOR EVIDENCE

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

(Question 2): 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.

(Question 3): Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

We have brought together our responses to three questions above, as the matters set out in the questions are inherently connected. Our response is set out in Section 3 below.

3 QUEEN MARGARET UNIVERSITY COURT RESPONSE

Policy Intent and Existing HE Governance arrangements

We preface our comments by noting that the Education and Culture Committee’s call for evidence states that the policy intent of the Bill as ‘to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose’.

The specific requirements are summarised as requiring 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, and to include various persons within the membership of those governing bodies. It also requires that HEIs ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending ex officio; a majority of elected members representing staff and students; and a minimum of 10% student representation.

In common with all Scottish Universities, we are responding to the questions set out above from a position of subscribing fully to the Scottish Code of Good Higher Education
Governance. For Queen Margaret University, specific elements of the proposals eg concerning the size of the academic board, election of staff and student association membership to the board have been enshrined in the University’s governance arrangements for a number of years, so are supported in principle and in practice.

We have serious concerns around the underpinning rationale for the Bill ie that Scottish Ministers consider it appropriate to legislate on the internal organisation of autonomous charities. We are concerned also about the potentially detrimental effect of the legislation on the representation of elected members of staff of the University, the potential impact of an election process on the pool of candidates for Chair, and the potential financial impact of the legislation, not only in terms of direct costs, but in terms of the potential loss of charitable status. We provide further explanation on each of these concerns below.

In response to Question 1 in particular, we have not moved from the position set out in our response to the Bill consultation, which is that the policy reasons supporting the Bill do not accurately reflect existing governance arrangements within the sector, and in particular, the most recent modernisation of governance within the sector following the implementation of the Scottish Code of Good Higher Education Governance (hereinafter referred to as ‘the Scottish Code’).

We consider that the underlying policy aims of the legislation ie to increase accountability and transparency, is being achieved already through the Scottish Code. This principle is enshrined within Main Principle 11 of the Scottish Code, which requires that Universities adopt rigorous and transparent procedures.

Practices for the appointment of Chairs are consistent across the sector, with candidates shortlisted and the appointee chosen through open and transparent processes. The selection panel overseeing this process includes staff, students, and independent external governing body members. The final decision/approval is by a body that includes students, multiple staff members, and external stakeholders ie the governing body. These arrangements apply not only to the appointment of Chairs but to the appointment of other external (lay) governing body members.

We question seriously aspects of the proposals as they relate to representation on governing bodies. As we stated in our original response to the consultation, it is a central principle of good governance that members act in the interests of the corporate body and are selected on the basis that they are accountable for the good governance of the institution, rather than for representing the interests of specific groups.

Universities in Scotland are constituted as Charities. As a consequence, they are subject to the provisions of the Charities and Trustee Investment (Scotland) Act 2005 (‘the 2005 Act’), which requires that governing body members, in their roles as trustees, must act in the interest of their charity.

For that reason, we are concerned at the proposal that members of governing bodies are appointed as the nominees of particular interest groups. Such members may find themselves subject to a conflict of interest whereby 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.
Conflict with Governing Instruments

The governance of higher education institutions is defined in various governance instruments that have the force of law. For Queen Margaret University, that includes the Queen Margaret University Order of Council, approved by the Privy Council, and the University's Articles of Association governing its activities as a company limited by guarantee. We consider that the provisions of the Bill are in conflict with 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. That position will apply to each of the HEIs in Scotland.

In the case of Queen Margaret University, it would be arithmetically impossible for the University to comply with the requirements proposed by the legislation while adhering to the requirements contained within the University’s statutory instrument and within the Scottish Code ie that governing bodies should have no more than 25 members, with an independent majority.

The Bill sets out specific requirements in terms of representatives of particular constituencies (Section 4 refers). A number of those requirements are already accommodated within the University’s current Order of Council, including 2 persons elected by staff and 2 persons appointed by nomination of the Students’ Union.

The University is in the final stages of securing Privy Council and parliamentary approval for a proposed amendment to its Order of Council which would accommodate whatever regulation is introduced concerning the process for appointing the Chair. However, other stated requirements would not be accommodated, including provision for two persons appointed by Trade Unions and two persons appointed by being nominated by a graduates’ association. Importantly, the requirement for four additional specific constituencies within the composition of the Court would impact on the balance of lay and ex officio membership and on the maximum permissible members on the Court. It could mean that members openly elected by various categories of staff would be replaced by the nominees of interest groups supported by only a minority of staff.

The University’s current Order of Council provides for ‘between 12 and 16 lay members’, with a proposal to reduce the minimum to 11 plus the Chair under a revised Order of Council. Under the new requirements, and without altering the current composition, the ‘non’ lay membership would total 12\(^2\), resulting in an even split between independent lay members and ex-officio or non-lay members. Were the Bill to pass into legislation in its current form, the University Court would need to consider either increasing its total membership (in breach of the Scottish Code), or reviewing the other current categories of staff membership. Any such change is likely to involve the University in going back to the Privy Council for further amendment to its governing instrument.

We would ask the Education and Culture Committee to note that the process of securing Privy Council and Scottish Government approval for an amendment to the University’s Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. It is likely that several governing bodies will require to seek amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days. This has not been factored into the Financial Memorandum that accompanies the Bill.

\(^2\) Principal, 2 x Vice Principals, 2 x Students, 2 x elected staff, 1 x Senate appointee, 2 x TU and 2 x Graduates’ Association = 12
We consider that the Bill 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.

Under current arrangements within the University, it is open to members of staff who are
members of a trade union to nominate colleagues to stand for election as an academic or
other staff member of Court. In these circumstances, the staff electorate decides which
candidates will represent their interests most effectively on the basis of candidate
statements.

In terms of the academic board, or equivalent, the Bill requires HEIs to ensure that their
academic boards are comprised of no more than 120 people and include Principals and
Heads of Schools attending ex officio, a majority of elected members representing staff and
students, and a minimum of 10% student representation.

The Queen Margaret University Order of Council as currently stated does not set out in detail
the composition of its academic board (the Senate), but rather states simply that the Court
‘shall establish a Senate which shall be constituted and regulated in a manner specified by
the Court from time to time on the recommendation of the Principal’. Consequently, there
would be no requirement to amend the QMU Order of Council to bring it in line with
legislation. However, there would need to be some interpretation of the term ‘Head of School’
and some minor adjustment to the current composition in terms of student membership. The
Senate is currently constituted so as to ensure always that the elected staff and student
membership is in the majority.

We do not consider that the specific membership of the academic board, or the manner in
which those members are appointed in an autonomous institution, is an area that should be
governed by legislation. The specific composition and membership of such boards should be
governed by the specific needs of the institutions in question and should reflect the diversity
of institutions in the sector. We do not consider that the proposals have demonstrated that
there is need for a single uniform approach across all institutions in Scotland.

Importantly, we consider that, in determining the composition of governing bodies and
academic boards, which are part of universities’ autonomous self-regulation, the Bill affords
to Ministers substantial new powers that fundamentally change institutions’ constitutional
status. This is in direct conflict with previous assurances from the Scottish Government that it
respects ‘responsible autonomy’. Such powers have the potential to change institutions’
charitable status as explained below, and the potential for Universities to be reclassified as
‘central government’ by the Office of National Statistics.

_Election and Remuneration of Chairs and Charity Status_

We have not moved from our original position on the matter of the election of the Chair,
being concerned that election from a pool of candidates by a constituency other than the
Governing body risks politicising the role of the Chair and turning the process into a contest
along political or ideological lines. We have a serious concern that election will limit the pool
of candidates on the basis that appointment is subject to public contest. We are particularly
concerned that this will impact on the potential pool of female candidates.

On the matter of remuneration of Chairs, we consider that governing body membership
carries a strong public service ethos which is an important motivating factor for those who
participate. Remunerating chairs risks the erosion of this ethos. Remuneration of the chair
alone would also create a significant symbolic imbalance between the chair and other
governing body members, which could adversely affect the unity of the governing body.
Importantly however, we consider that remuneration of the Chair is problematic in relation to charities’ law. Governing body members of HEIs are charity trustees. The Charities and Trustee Investment (Scotland) Act 2005 makes clear that trustees should be remunerated only in exceptional circumstances, usually for providing some service other than serving on the governing body. The unpaid nature of governing body membership is considered an important facet of the distinction between governors and the executive.

The 2005 Charities Act, under Section 67, states that a charity trustee must not be remunerated from charity assets unless certain conditions are met. We do not consider that this important aspect has been addressed in the published draft Bill or in the supporting guidance. While we note that the Office of the Scottish Charity Regulator commented on the Scottish Government’s consultation proposals, we consider that the Bill as published provides Ministers with significantly more power over institutions than was suggested in the consultation.

Financial Memorandum – Impact of the legislation

We consider that, in determining the composition of governing bodies, academic boards and senates, which are part of universities’ autonomous self-regulation, the Bill affords to Ministers substantial new powers that fundamentally change institutions’ constitutional status. Such powers have the potential to change institutions’ charitable status as explained below, and the potential for Universities to be reclassified as ‘central government’ by the Office of National Statistics.

The Office of the Scottish Charity Regulator (OSCR) sets out a number of indicators that organisations must meet to pass its ‘charity test’. One of the indicators that may disqualify an organisation from charity status is the extent of Ministerial control. Such control may include:

• Power to add to or amend the powers given to boards of management;

• Consent/ approval required in relation to making a material change in the constitution;

• Consent/ approval required to make a change to the constitution.

In our original response, we stated that this would appear to have implications for any legislation that provides for Scottish Ministers prescribing changes to an institution’s constitutions, including appointments. While we note that the Office of the Scottish Charity Regulator (OSCR) commented on the Scottish Government’s consultation proposals, we consider that the Bill as published provides Ministers with significantly more power over institutions than was suggested in the consultation.

The loss of charitable status would result in HEIs losing their entitlement to 80% relief from non-domestic rates. We consider that 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 which do not have charitable status.

Equally, reclassification by the ONS would jeopardise Universities’ status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support. Such re-designation would prevent universities from retaining annual operating surpluses, place restrictions on their ability to borrow funds and reduce their ability to enter into commercial partnerships.

As part of its deliberations, we think it would be useful for the Committee to consider what further advice the Scottish Government has taken from OSCR on this matter ie beyond the
original consultation, and what opinion has been offered by OSCR? However, it is important to note that the Scottish Government cannot give undertakings regarding future decisions of the ONS or the Regulator. The proposed legislation can therefore result in unintended consequences over which the Scottish Government does not have control.

Recruitment of the Chair

On the matter of Recruitment of the Chair, we note the estimated costs attributed to this exercise as set out in the Financial Memorandum that supports the Bill. We do not recognise the basis on which such costs for other bodies and individuals have been calculated. We consider that the costs attributed are a significant under-estimate.

The Financial Memorandum suggests that the ‘potential selection of candidates for chair might involve open advertisement and selection of candidates based on suitability for the role of chair’ (emphasis added). Such transparency is a requirement under the Scottish Code.

While we accept the approximate costs attributed to reimbursement of candidates’ reasonable interview expenses, we do not accept the costs attributed to external advertisement and to the management of the appointment process.

The Financial Memorandum states that the cost of recruitment is approximately £3000 in staff costs and £2000 in external publicity costs for recruitment of a Chair on a four year recruitment cycle for the Chair.

The recruitment cycle for the Chair at QMU is three years, rather than the four suggested in the Financial Memorandum, with equivalent costs being incurred within that 3 year cycle depending on whether or not an incumbent Chair’s term is extended by the Court.

Our experience is that the cost of placing a modest advertisement within a national Scottish newspaper is of the order of at least £5000. In addition to the costs of paid advertisement, there are costs attributable to staff time in managing the recruitment and appointment process.

By way of illustration, the current process for appointing the Chair of Queen Margaret University is overseen by the Nominations Committee under powers delegated by the University Court. The Nominations Committee, which includes Court lay members, staff and student members, shortlists and interviews candidates, before selecting a preferred candidate and making recommendation for approval by the Court. As far as is practicable, this process is managed so as to dovetail with the ordinary schedule of Court and Committee meetings. This minimises the cost in terms of members’ time and other expenses.

We anticipate that, were the University required to conduct a wider election for the position of Chair, depending on the composition and size of the electorate, and the process for nomination and election, then this would represent significant additional cost in terms of staff resource. In particular, the staff time required to publicise the election, obtain nominations, arrange ballot papers, verify and count votes and address any issues arising from process would be significantly greater than that currently involved in such recruitment. Without knowing the specific detail of the proposals, it is difficult to quantify the full extent of the additional cost to the University.

Remuneration of Chairs

On the matter of remuneration of Chairs, we would reiterate the view that we set out in our response to the consultation, which is that governing body membership carries a strong public service ethos which is an important motivating factor for those who participate.
Remunerating Chairs risks the erosion of this ethos. Remuneration of the Chair alone would also create a significant symbolic imbalance between the chair and other governing body members, which could adversely affect the unity of the governing body.

The unpaid nature of governing body membership is an important facet of the distinction between governors and the executive. Under existing arrangements, financial considerations should not be a bar to any potential candidates for the position of chair, because expenses available to governing body member can include any lost earnings and childcare costs incurred as a result of governing body membership.

Importantly however, we consider that remuneration of the Chair is problematic in relation to charities law.

Importantly, we reject completely the basis on which the remuneration of the Chair has been calculated, and in particular the number of days attributed to undertaking the role.

We are currently in the process of recruiting for a new Chair. In setting out for applicants the requirements of the role, we have stated that the time commitment will vary from week to week, but the likely overall time commitment required is approximately 50 days per year. In breaking down those 50 days, we have provided for the full Court meeting on at least 6 occasions per academic year, including a two-day Away Day on campus.

The Chair is required to Chair or attend meetings of Committees of Court throughout the year, and to meet occasionally with Court members on an individual basis. Currently, the Chair of Court convenes the Nominations Committee, and is in membership of the Finance and Estates Committee and the Senior Management Remuneration Committee. There is background reading associated with each of these meetings. The Chair of Court is also expected to be available to provide informal support to the Principal and Vice-Chancellor, the University Secretary and members of Court. In addition to the requirements set out above, the Chair is expected to attend events held by the University, including the annual graduation ceremony in early July, professorial lectures, social and celebratory events.

In summary, were the costs to Queen University calculated on the basis of the daily rate set out in the consultation, the remuneration of the Chair would be of the order of some £26k, not including reimbursement of reasonable expenses.

*Future costs eg arising through secondary legislation*

As we have stated above, we have concerns around the costs arising from the practical implications of the proposals as they impact of current governance arrangements of HEIs in Scotland. The provisions of the Bill are in conflict with existing governance instruments, such instruments having made provision for the membership and conduct of governing bodies and academic boards/ senates which is different from that set out in the Bill. It is likely that several, if not most, governing bodies will require amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days. There are implications also for time allocated for Parliamentary scrutiny. We consider that none of these costs have been factored into the Financial Memorandum that accompanies the Bill.

None of the above includes the opportunity costs of engaging in a complicated and lengthy process of revision to the University’s governance arrangements.
**Academic freedom**

It is suggested that the replacement of the current legal definition of academic freedom is with a view to ‘strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals”. In our view, the likely practical effect of these provisions will be neutral on the basis that these freedoms are exercised already under the current definition. In our response to the consultation, we stated that we did not disagree with the inclusion of a reference to the freedom to encourage new ideas in the statutory definition of academic freedom. However, we stated also that the existing definition of academic freedom contained within the Further and Higher Education (Scotland) Act 2005 would extend to the freedom to encourage new ideas by reference to the freedom to question and test established ideas and received wisdom and to present controversial and unpopular points of view.

Academic Freedom has clear legal and regulatory protection under existing arrangements. Mechanisms currently exist that provide for changes to definition without the need for legislation. The Scottish Code of Good Higher Education Governance sets out a clear expectation in this area as a Main Principle, and compliance with this is already a condition of public funding through the relationship of the Code and the SFC Financial Memorandum.

In this regard, it is difficult to see how additional legislation enhances the existing arrangements which presently enable Scottish Ministers and the SFC to make such orders that are sought under the proposed legislation.

Keir Bloomer  
Chair of University Court  
Queen Margaret University  
4 September 2015