Higher Education Governance (Scotland) Bill: evidence to Education and Culture Committee

Summary

The University of St Andrews is deeply concerned about the scope and provisions of the Higher Education Governance (Scotland) Bill. We fully endorse the aims of having governance structures that are open, transparent, accountable and inclusive. To this effect, we embraced the Scottish Code of Higher Education Governance, introduced in 2013, and have used this to deliver a governance framework that ensures a strong voice for staff and students alike, supported by independent external expertise and scrutiny, whilst recognising the particular traditions and needs of our University.

Our concern is that these aims risk being undermined, rather than strengthened, by the measures proposed in the legislation. We do not consider that there has been any convincing explanation presented of what the problem is that this legislation is intended to remedy.

The proposals in the Bill go significantly beyond even what was envisaged in the Consultation exercise. The extent of the proposed powers to be exercised through secondary legislation risks introducing a dangerous level of political influence and control over Universities. Sections 1, 8 and 13 allow Ministers to enable future changes to the make-up of University Courts and Senates through secondary legislation, without the safeguard of full Parliamentary scrutiny. Section 14 appears to give Ministers a very broad and open ended power to “make different provision for different purposes”, which should properly be exercised by Parliament through primary legislation.

Taken together, the proposals in the Bill would significantly undermine the autonomy and independence of Scottish Higher Education institutions, and jeopardise Universities’ ability to ensure academic freedom and act as sources of independent thinking. The Royal Society of Edinburgh stated in their response to the consultation exercise, “Institutional autonomy and independence are fundamental principles that underpin the successful performance of Scotland’s HE sector. The proposals outline a level of governmental intervention that is entirely inappropriate for an autonomous sector”.

The Bill also puts at risk universities’ status as charities, and their classification by the Office for National Statistics as non-profit institutions. This would not only be damaging to our academic standing in an increasingly competitive international environment, but would also curtail the entrepreneurial activity we undertake and the value we contribute to the Scottish economy.

St Andrews receives less than one quarter of our total funding from the Scottish Government, and a recent study demonstrated that we deliver over £12 economic benefit for every £1 we are given by the Scottish Government. We make a net contribution of £485 million to the Scottish economy annually and directly support almost 9000 Scottish jobs. We are able to do this because we are autonomous, not in spite of it.
We hope that, before the Bill has passed through the Committee stage, the Scottish Government will secure concrete assurances that the Bill, and any regulations that could potentially be made under the powers given in the Bill, will not trigger a reclassification by the ONS, or threaten the charitable status of HE institutions. We would like to see on the face of the Bill a clear commitment to maintaining universities’ autonomy and freedom from political influence, and to respecting the diversity of institutions that is such a key strength of the Scottish HE sector and the student experience.

Questions

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

Higher Education governance has been subject to considerable reform in the past few years, most recently with the introduction of the Scottish Code of HE Governance in 2013. This sets out 18 key principles with comprehensive supporting guidelines, within an overall framework that recognizes the distinct and diverse nature of each Scottish HE institution. An interim progress report on its implementation published in 2014 commended the progress that has been made. Compliance with the Code is a condition of grant set by the Scottish Funding Council, and a recent internal audit report showed that the University of St Andrews was not only fully compliant but in a number of areas exceeded the requirements of the Code in terms of modernity, inclusion and accountability. The Code is due for review in 2016, and every three years thereafter.

At no time have Scottish Ministers explained the specific problems that this legislation is intended to address, or the failings they perceive in the Code or in HE Governance more generally that require primary legislation to rectify. We believe the best route for ongoing modernization of HE Governance is through the review of the Code.

2. **The extent to which the Bill (a) will improve higher education governance, particularly in the areas above**

Like other HE Institutions, the University of St Andrews has a governance structure that is open, transparent and accountable, and which ensures a strong voice for academic staff, non-academic staff and students alike, supported by independent external expertise and scrutiny. We do not believe that any of the measures in the Bill will improve Higher Education governance.

On the contrary, proposals to dictate the composition of university Courts and Senates, made without any recognition of existing statutory constraints, will have the effect of excluding or diminishing groups of people currently represented. This will be to the detriment of the academic provision and the associated student experience.
For example, to accommodate the Bill’s requirement for Trades Union nominees on Court, the University of St Andrews would have to abolish the existing Court position that is directly elected by the entire non-teaching staff of the University. This will disenfranchise the vast majority of staff who do not belong to a trade union.

Similarly, the Bill appears to reduce to a purely ceremonial function the role of the Rector - elected by the entire student body as a champion of their interests. The Policy Memorandum and Explanatory Notes are silent on this, and it did not appear anywhere in the original Consultation.

The suggestion that there should be contested elections for Chairs of Court goes against basic principles of good governance – that the chair of a board, whether of a university, a non-departmental public body, or a private company, should have the confidence of the entire board, not just the faction that got the most votes.

In the words of the Royal Society of Edinburgh’s response to the initial consultation, the proposals are “inappropriate, unnecessary and potentially counter to good governance”.

(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 proposals in the Bill, in particular sections 1, 8, 13 and 14, will fundamentally diminish the higher education sector’s autonomy. They will give Ministers unprecedented power to make further future changes to the appointment of Chairs and the composition of Courts and Senates, without the safeguard of full parliamentary scrutiny. This opens the door to greater future political influence and control, and in the words of the Royal Society of Edinburgh, represents “a level of governmental intervention that is entirely inappropriate for an autonomous sector”.

The Bill puts at risk universities’ ability to act as sources of independent thinking, and also potentially their status as charities and their classification by the Office of National Statistics as non-profit institutions. This would not only be damaging to our academic standing in an increasingly competitive international environment, but would also jeopardise the entrepreneurial activity we undertake and the value we contribute to the Scottish economy.

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.

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

At no stage has the Scottish Government articulated the problems that it believes need to be tackled by legislative measures. We believe that any further reforms of Higher Education governance should be driven through the triennial reviews of the Code, not through legislation.
Specific proposals

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

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

• 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

The HE Code of Governance already requires the Chair to be appointed through a transparent process, following open advertisement; and sets limits on the period of appointment. HE Institutions already have the discretion to pay Chairs (although none believe it is in the interests of the institution to do so) and to reimburse expenses incurred by Court members or applicants for posts.

It is unclear how the proposals in the bill will deliver better governance or add to existing good practice. St Andrews’ Senior Governor is appointed through open competition, following open public advertisement. Court agrees clear criteria for selection, and a transparent process for the shortlisting, interview and selection of candidates.

The suggestion that Scottish Ministers should be able to set through Regulations the criteria for selection of a Chair of Court introduces a new degree of political control and influence over HE institutions. It would allow a future Administration to determine who was and was not eligible to be appointed as Chair, and would fundamentally undermine the autonomy of the sector.

The suggestion that there should be contested elections for Chairs of Court goes against basic principles of good governance – that the chair of a board, whether of a university, a non-departmental public body, or a private company, should have the confidence of the entire board, not just the faction that got the most votes.

Although the Bill makes no direct reference to the role of the Rector, the consequence of the legislation would be to reduce this ancient tradition to a purely ceremonial function, removing an important champion of student interests who is elected by the entire student body.

• To require HEIs to include various persons within the membership of their governing bodies

The Court of the University of St Andrews already includes representatives from the academic, non-academic, student and graduate communities. These are elected directly by their constituencies. It is transparent, inclusive and representative.

The composition of the Court of St Andrews is defined by existing statute, which sets its size at 23 members and defines the constituencies from which they will be drawn. At least four ordinances would require significant revision to accommodate the changes required by the Bill, a complex and time consuming process that requires ultimately Privy Council approval. Even with these ordinances changed, it is difficult to see how the requirement for these eight posts could be squared with the principles
of good governance set out in the Code, which requires a majority of lay members and places an overall ceiling of 25 members.

One consequence would be to replace the elected non-academic representative with nominees from the trades unions – disenfranchising the vast majority of staff who are not members of a trade union. Another would be to reduce the level of student representation from the current four (including the Rector) to two. It is not clear how the Scottish Government believes this will improve the diversity and representative nature of Court.

Having Court representatives nominated by particular interest groups (as opposed to being elected from particular constituencies) presents a particular challenge. As charity trustees, they are required to act in the best interests of the University, but this risks presenting the individuals concerned with a conflict of interest should the best interests of the University diverge from the policies of the nominating body. In fairness to Court members who may be nominated in this way, the Bill should explicitly state that their requirement under charity law to act collectively in the best interest of the HEI overrides any policies or agendas of the individual body that is nominating them.

The power given to Ministers under section 8 to make further changes to the composition of Courts without the safeguard of full Parliamentary scrutiny introduces an additional level of potential political control over institutions that runs directly counter to the assurance given in the Consultation document that ‘The Scottish Government does not want to increase Ministerial control over universities’.

- To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons

In St Andrews, the Senate, of roughly 230 members, has devolved its functions to the Academic Council of 45 individuals. This includes the Deans of Faculty, Heads of School, Senate Assessors on Court, Student Members and elected members from the Arts and Science faculties. It provides a balanced and effective forum for decision making on all education matters, including the semester system, marking scales and teaching regulations.

The consequence of the Bill would require the Academic Council to be disbanded and replaced by a reformed Senate that would either have to be significantly larger in number or significantly less representative in its composition. We do not believe that this would be in the interests of good governance or effective administration.

The power given to Ministers under section 13 to make further changes to the composition of University Senates without the safeguard of full Parliamentary scrutiny considerably undermines academic freedom and institutional autonomy by introducing an unacceptable level of potential political influence over matters of academic judgement.
Academic freedom

The Bill will also replace the current legal definition of academic freedom “with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals”.

Please provide your views on the following—

5. The likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

6. Are there are likely to be any significant constraints – other than legal constraints – on academic freedom? For example, the particular ethos within an institution; funding pressures; institutions’ policies on equality and diversity; etc.

7. Are the situations in which relevant persons can exercise their academic freedom clear? For example, should their freedom be limited to their work within an institution, as opposed to views they may express outwith the institution?”

We do not object to the revised definition of academic freedom, but do not see any evidence that further definition is required and do not consider that the revised definition will strengthen academic freedom or deliver specific benefits. Academic freedom is essential to the work of a university, and we believe that the concept is already sufficiently understood to encompass the exploration of new ideas.

The Bill changes the obligation on institutions from “must have regard to the desirability of ensuring academic freedom of relevant persons” to “must aim to uphold the academic freedom of all relevant persons”. The rationale for this significant additional responsibility is not made clear – it did not appear in the consultation document and the Policy Memorandum is silent on the subject. It is unclear how this higher level of obligation (“must aim to uphold”) would accord with separate statutory duties placed on Universities. Section 26(1) of the Counter-Terrorism and Security Act 2015, for example, imposes a statutory duty on HE bodies to have due regard to the need to prevent people from being drawn into terrorism.

More generally, it is difficult to square the apparent desire of this section of the legislation to increase levels of academic freedom with the risk to academic freedom and institutional autonomy posed by the proposed increase in Ministerial control over how Universities function.

University of St Andrews
31 August 2015