Higher Education Governance (Scotland) Bill

Submission to the Scottish Parliament’s Education and Culture Committee by the University of West of Scotland

Introduction

The University of the West of Scotland writes to submit answers to the Education and Culture Committee outlining our views on the relevant points. We would particularly wish to stress our view that the current governance arrangements for Higher Education governance are effective, kept under review and as we observed in our response to the January 2015 consultation stage, we are not persuaded by the need for legislation in the area of HE governance. The Scottish HEI sector has implemented the principles and guidelines in the 2013 Scottish Code of Higher Education Governance which is delivering the stated aims of the Bill “to establish a required minimum level of inclusivity, transparency and consistency across all HEIs”. We are of the view that that making further changes to the system at present is premature and that the planned review of the Code should continue as planned.

There are a number of concerns relating to the Bill which we would wish to draw out:

- Institutional arrangements for appointing Chairs are already equitable, transparent and highly accountable. Chairs are appointed through rigorous processes and, most importantly, the governing body is fully involved in the process. Introducing an appointment process directed by the Scottish Ministers and potentially involving an election, could reduce the number and quality of candidates; rather the reverse of what is suggested would be the benefit
- Universities are autonomous bodies with distinctive strategic plans and communities. They are also diverse in their mission and provision. Attempting to impose a ‘one size fits all’ approach to the composition of governing bodies and academic boards would affect autonomy and diversity, thereby damaging Scottish higher education which is a recognised asset to Scotland which is acknowledged nationally and internationally
- Introducing new legislation around academic freedom appears unnecessary
- The potential for increased Ministerial involvement in Scottish Universities’ governance in the future for which the bill provides, and the potential thereby for reclassification by the ONS could impact upon their financial position due to issues relating to retaining surpluses, limiting the ability to engage with commercial partners and entrepreneurial activity. It could also impact adversely on their charitable status and make them less attractive for philanthropic activity due to a change in taxation rules. If such changes were introduced they would severely disadvantage the Scottish HE sector compared to other UK HEIs

Our concerns are outlined in more detail in response to the Committee’s specific questions below:
The Education and Culture Committee’s Questions

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

UWS, as part of the Scottish HE sector, has implemented the 2013 Code of Good HE Governance. This has provided institutions with a modern, clear and consistent framework for good governance whilst supporting individual autonomy and sector-wide diversity. Consequently, and as has been highlighted by the many responses to the consultation earlier in 2015, UWS does not consider that there are fundamental issues or evidence of significant concerns with HEI governance, including around modernity, inclusion and accountability. It is strongly felt that a period of settlement would be beneficial for the sector rather than introducing new legislation which incorporates principles already in place and being implemented that ensures Scottish HE governance is effectively ordered with transparent expectations of adherence to principles and guidelines. Therefore, we would argue that the Code is sufficient and that legislation and the potential for ministerial regulation are not required.

Universities and HEIs are clear that their autonomy is essential to their success as it enables them to directly respond to their students’ needs and to engage fully with the professions, industry and other parts of the national and international economy, including other universities and colleges. Institutions are fully aware that alongside this sits the need for effective governance and accountability in order that key stakeholders have confidence in higher education. Governance already has a strong focus on inclusion and accountability through the requirement to include a wide range of independent members, staff and students on governing bodies and to have in place appropriate policies regarding the equality and diversity. Evidence of this includes an increase in the number of female Chairs appointed across the sector. The Scottish Chairs have also confirmed their commitment to addressing gender equality in governing body membership. The One Year Implementation Report on the Scottish Code of Good HE Governance provides further examples of diversity and inclusion on governing bodies, including examples from UWS.¹

While we continue to keep the effectiveness of our governance arrangements under review and are not complacent about this, overall we would wish to reiterate a statement previously made by an individual respondent to the initial consultation: “….Fixing what is not broken seems a waste of precious government time.” We would be interested to understand further the evidence that there is a significant issue with the HE sector to justify such additional legislation at this time.

2. The extent to which the Bill

(a) will improve higher education governance, particularly in the areas above

Diversity is a key aim of boards and the Code and Public Sector Equality Duty are seen as sufficient to support institutions in this objective, with no requirement for further legislation. The Committee of Scottish Chairs announced in April a commitment to a minimum of 40% of both genders amongst the independent members of governing bodies and the success of this goal will be reviewed in 2018. UWS already has 41% female membership on Court and Universities Scotland reports 32% female membership on governing bodies across the sector and an aim to continually increase this and champion equality and diversity. Three Scottish institutions are also participating in the ECU’s pilot Race Equality Charter Mark and others are exploring participation in this new initiative.

The Government claims that the Bill will assist in the creation of ‘an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance’. We would argue that higher education governance is already transparent and inclusive and would invite the Scottish Government to clarify what evidence has led it to have concerns about this.

In terms of accountability, there is a good relationship between the chair and the board which is constructively challenging. There is real concern that potential ministerial regulation of court appointments could reduce the effectiveness of the governing body, damaging the relationship between the governors and the chair and this could have a negative impact upon HE governance.

There are currently no issues relating to efficiency regarding the engagement with the Privy Council when making any necessary constitutional changes. Certainly UWS experience has been that any amendments have been dealt with efficiently and effectively within an acceptable timescale.

We cannot therefore see that the Bill will improve matters significantly, given the comments made in 1 above. The new Code of Governance needs time to take its full effect and a review has been planned for 2016. The outcome of this review may reasonably be expected to continue to enhance and strengthen HE governance in Scotland.

(b) may alter the higher education sector’s current level of autonomy

Freedom of speech and expression, championed and demonstrated by institutions such as autonomous universities, is a hallmark of strong and confident democracies. Institutional autonomy is at the heart of universities, enabling them to develop their own mission and strategies appropriate and relevant to their particular range of students and communities as well as enabling them to provide a distinctive offer to commercial and professional organisations in terms of partnership, entrepreneurial activity and innovation.
This was acknowledged by the former Cabinet Secretary for Education and Lifelong Learning, Michael Russell MSP, less than a year ago in his ministerial foreword to the Consultation Paper on a Higher Education Governance Bill when he said “They are diverse organisations, characterised by a distinctive ethos with autonomy at the core.” This benefits the students and increases their chances of success and future employability and is particularly welcomed by the international market as it allows differentiation and specialisation. It also benefits the economy through offering a diverse range of activities and research across the country. The introduction of legislation that is designed to provide greater consistency will inevitably have an effect on institutional independence and would undoubtedly be detrimental as the benefits of autonomy referred to above would be adversely affected. It is also inconsistent with assurances given during the post-16 Bill that Scottish Government did not intend to interfere in ‘responsible autonomy’, as highlighted by Universities Scotland².

Universities and HEIs are not, nor should they be, identical. Their diversity adds great value to the HEI sector and how it is perceived internationally and therefore attempting to have a ‘one size fits all’ approach to governance could be potentially damaging to the sector.

It should also be noted that stakeholder engagement could be affected by any perceived element of political involvement in universities’ governance which may, in turn, damage the sustainability of institutions and the local, regional and national economy through reduced engagement. We would invite the Committee to consider this issue.

(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

Currently lines of accountability between HE, public bodies and the Scottish Government are quite clear and there are many checks and balances to ensure that governance is handled appropriately. If a political dimension is introduced into the appointment of university chairs this could lead to divisions between sections of the board and between the chair and the board which would be damaging to institutions and the relationships between HEIs, the Scottish Government and relevant public bodies. Interfering with this structure could have a serious effect on the future of HE governance.

We would have strong concern that, following the introduction of the Post-16 Education (Scotland) Act, where there has been increasing centralisation of the Scottish FE sector, this HE Bill could result in greater control and centralisation of the HE sector which would diminish the overall strength and value in the current sector.

Given the potential for significantly increased levels of Ministerial control and direction of HE proposed in the Bill, we are concerned at the possible impact this might have in due course on the classification of Scottish HEIs as charitable bodies. Such a development would put the Scottish HEIs at a severe

² http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Bills/P16_Universities_Scotland.pdf
disadvantage when compared to other UK and International HEIs. We would strongly encourage the Scottish government to review this aspect of the Bill and ensure this would not be an unforeseen consequence in the future. For example, HEIs are currently able to hold surpluses – vital for development, in particular with capital projects that are critical to attracting staff and students – and engage in diversification of income and work streams as well as philanthropic activity. It could have considerable financial implications if Scottish HEIs were no longer able to engage in this kind of activity due to changes in their charitable status.

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

We have commented previously that is our view there is no compelling case for new legislation on HE governance. The bill presents a range of legislative measures, many of which are already addressed by the Scottish Code of Good HE Governance and therefore being implemented. Given that the Code was comparatively recently introduced and a report has been published on the developments it has engendered, we would be interested to hear what, if any shortcomings have been identified which require new legislation of this kind.

As we have already stressed, institutional autonomy is at the heart of universities. An attempt to impose consistency on a diverse sector made up of autonomous institutions is potentially difficult and undesirable. We would be concerned that the increase in control that the government wishes to introduce could severely affect institutional autonomy. Currently, the system works effectively and in a timely manner. It would seem to us that adding a further layer of legislative complexity and duplication is unnecessary. We would have concerns that it could also cause delays and obstructions if legislation needed to be amended or supplemented. Introducing legislation of this kind naturally makes institutions concerned that this could signal an intention to reduce autonomy further in the future – a move that universities would strongly oppose for the reasons given earlier. Autonomy is at the heart of universities and ensures that they are able to provide the best quality of provision for the students in their part of the sector.

There is significant potential for conflicting requirements of the Bill and statutes/ordinances of institutions. This would require review and amendment of HEIs governing instruments thereby adding to the administrative burden on institutions and other bodies who must approve such changes. This would also bring associated financial and timescale issues in order to amend governing instruments. We believe the estimates provided in the financial memorandum for such activities underestimate the costs involved as they do not take account of HEI staff time. We do not believe that is good use of HEI or government time and resource given that the system works effectively at present.

One individual respondent to the initial consultation document indicated “good governance is not achieved through legislation, but rather through continuous examination and improvement of practices by institutions”. UWS shares this view and would endorse the comments above about planned review of the
implementation of the Code and the further enhancements and sharing of best practice this can be expected to deliver.

**Specific proposals**

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**

  We are concerned about the proposed power of the Scottish Ministers to engage with the process of appointment of chairs of HEI governing bodies, their terms of appointment and possible remuneration and the impact such powers could potentially have to exert an element of control over an HEI. We are also concerned about the potential powers for Ministers to revisit and change regulations in the future. This undermines institutional autonomy and independence and would be of significant concern to this institution.

  We strongly believe that increasing the number of candidates, in particular from different backgrounds, is important and should be the aim of any good governance arrangement. However, there is a real concern that introducing an election element in the selection process for the appointment of chairs could result in a reduced, rather than an increased, number of applications. Many suitable potential candidates would be concerned that an election would lead to failed candidacy becoming public knowledge and consequently they may choose not to engage in the process, thus depriving the HE sector of their expertise. This is something that should be seriously considered by the committee.

  We therefore have a real concern that the final appointment of a chair by an electorate rather than the governing body itself could create a tension between the two and reduce the effectiveness of decision making. The chair needs to have the full support of the governing body and this kind of change could seriously damage that level of confidence, thereby potentially damaging the governance of higher education institutions.

  It should be noted that this kind of approach was previously been trialled within the health sector but NHS boards did not find that elections broadened the pool of those appointed and the scheme was abandoned in 2013. It may be that other options could be considered as part of the appointment process, for example, including other Universities in the recruitment process, developing core criteria which appointment panels could augment for their own institution etc. The planned review of the Scottish Code of Good HE Governance could consider and promote existing good practice on the appointment of chairs which might be utilised more widely in the HE sector.

  We do not object to the advertisement of vacancies for chairs or court members (indeed that is already our practice), the appointment of recruitment consultants
to undertake the process and the engagement with a wide range of stakeholders on the interview panel. However, it should be stressed that, once again, the Code of Governance has already made enhancements and ensured a consistency of approach to appointment procedures which requires an open process to be held for the appointment of chairs and governing body members. The Bill does not therefore appear to add further value to this area of practice.

Currently we have calculated the involvement of the chair to be around 30 days per year. However, the financial memorandum associated with the bill suggests costs to institutions if chairs were remunerated (which is not our practice at present) would equate to 6 days. We would suggest that it is highly unlikely that any chair would only ‘work’ with their institution for this limited amount of time and therefore the cost implications would need to be significantly increased. It should also be noted that the cost to institutions of debating and responding to the potential introduction of the Bill is already into thousands of pounds and will continue to increase as the Bill makes its way through the relevant channels. As noted above, institutions will also be required to make changes to Senate and Court constitutions and associated documents and regulations which would also be costly in terms of staff and legal advice time.

With regard to the remuneration to the chair of the governing body, the Scottish Code of Good HE Governance already provides for remuneration of members subject to certain considerations. Whilst the potential remuneration for a chair may bring a wider range of candidates forward and therefore broaden the outlook of the board this is not guaranteed. Attracting candidates from less financially rewarded backgrounds is a positive feature, but there is no guarantee that providing remuneration for the post will have this effect.

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

We strongly favour social partnership and the involvement of a wide range of stakeholders in boards, but we are confident that this is currently in place and is reflected within the Code of Governance. The UWS Court includes lay members with a broad range of professional and life experience, elected academic staff, elected professional support staff and elected students. Universities Scotland has indicated in earlier responses that nearly a third of all governing body members are recruited from staff, students or the alumni and independent members are also part of the governing body structure, forming the majority.

The Scottish Code of Good HE Governance expressly reflects the existing legal requirement that charity trustees must act impartially for the institution’s good and exercise their responsibilities in the interests of the institution as a whole rather than as a representative of any constituency. It would be essential that if governing members were to be representatives of specific interest groups that they understood that their role as a governor and a charity trustee would be to act for the good governance of the institution and not as a representative of their particular group which could result in a conflict of interests. This is a real concern for institutions and it remains unclear in the bill and supporting documents how this governance tension would be addressed.
Trade union links with higher education are good and institutions have systems in place to engage with the unions in addition to the Joint Negotiating Committee for Higher Education Staff. Many trade union members stand for election to the governing body but this is in a different capacity to that of being specifically appointed as a union representative. We would have concerns that it may not be in the best interests of good governance for trade unions to be explicitly represented on the governing body as they could feel mandated to represent their union (which may be one of several representing institutional staff) position rather than that which is best for the Institution’s long term development. This could introduce conflicts of interest and would not sit comfortably when looking at the international dimension of HEIs; for example, Ireland removed compulsory union membership in governing bodies in 1997.

It should also be noted that the Scottish Code of Good HE Governance requires members ‘not to act individually, or as representatives of a constituency or in informal groupings' and indicates that ‘… Members nominated by particular constituencies should not act as if delegated by the group they represent. No member may be bound, when speaking or voting, by mandates given to him/her by others, except when acting under approved arrangements as a proxy for another member of the governing body’. This is in direct conflict with the Bill; we would ask how the Government intends to deal with this issue. Indeed, the 7 Nolan Principles of Public Life requires office holders to act in terms of the public interest, not under obligation of other parties or conflict of interest and to be objective, impartial and make decisions without bias.³

While there may be value in seeking alumni to join the court, and indeed alumni often apply to serve on the courts of institutions where they engaged with their own higher education, it is not necessary to legislate for such membership. Equally in may not always be possible to secure the services of an alumnus who also has the requisite skills and attributes to fill a particular skills gap in any given vacancy at a given point in time which might leave a governing body inquorate under these proposals. It should be for individual universities to determine the specific membership requirements of its governing body taking into account the needs of the institution and the balance of skills and attributes across the existing court membership.

Finally we note that to include the various specific categories of membership proposed on the governing body could cause a conflict with the need to have no more than 25 members on a governing body as indicated in the Governance Code. Incorporating the proposed categories of membership as prescribed by the bill could compromise the ability of HEIs to co-opt or appoint members to address any identified gaps on the skills matrix maintained by the governing body to ensure that there is an appropriate balance of skills and experience to enable the governing body to meet its primary responsibilities.

• To require HEIs to ensure that their Academic Boards are comprised of no more than 120 people, and include various persons

Institutions are hugely diverse and vary considerably and therefore their Academic Boards (or Senates) reflect this. There is also a degree of flexibility in membership which allows institutions to include or co-opt members as appropriate and aligned to their mission. By their very role and purpose to consider the academic work of the university, academic staff are at the core of Academic Boards’ membership. Attempting to introduce consistency across the board interferes with institutional autonomy and is not considered to be acceptable and would limit the ability of boards to be responsive and adaptable for the benefit of their own institution. It would be more appropriate to ensure that institutions should be able to set their own size and board composition based on the structure and needs of the institution and perhaps to handle this through the review of the Code of HE Governance.

As noted above regarding the composition of the governing body, we are concerned by the proposed future powers for the Scottish Ministers to modify by regulations the number, categories of membership and percentage of persons to be appointed to the HEI Academic Boards.

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

Academic freedom

The Bill also proposes to 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”.

While the other provisions in the Bill only focus on higher education institutions, this provision will apply to publicly-funded colleges and all higher education institutions (collectively known as post-16 education bodies). Post-16 education bodies are to uphold the academic freedom (within the law) of all relevant persons i.e. those engaged in teaching, the provision of learning or research.

Academic freedom is central to the ethos of universities. It has been a principle in Scotland for many hundreds of years and is seen as a key success factor as it enables flexibility, diversity and the ability to decide individually how to provide the high quality provision appropriate to the relevant market in terms of educating students, undertaking research, innovation and knowledge exchange. The existing rigorous academic processes that are in place within HEIs as part of their autonomy and accountability support academic freedom. As Universities Scotland indicated in its response to the earlier consultation, “There is already a statutory basis, with SFC oversight, for the requirement for institutions to ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments.” their implementation of the statutory protection of academic freedom is unnecessary, There does not appear to be evidence that the current 2005 Act restricts or has left open to threat the freedom ‘to develop and advance new ideas and innovative proposals’
and we would ask for further clarification of the benefit of amending the legal definition.

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. The Bill states that academic freedom is to be exercised “within the law”.

Academic freedom is already covered in the law, in HEI governing instruments and in contracts of employment and therefore providing a further layer of governance will add little of benefit. We cannot identify any specific academic areas that would be particularly enhanced by the additional legislation proposed.

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.

All universities have a desire to foster academic freedom and this is built into many of their processes. The area of difficulty may be when including post-16 provision as those providing HE in an FE context are not governed in the same way as HE institutions.

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 would expect to be clear that the views being expressed were those of the individual, rather than of the institution, but this is the case currently, and therefore changing the definition should not be necessary. It may be helpful to clarify the position and make it expressly clear that individuals exercising their academic freedom are doing so on their own behalf, and not representing their institution, but this has not been an issue thus far.