Education and Culture Committee

Stage 1 Report on the Higher Education Governance (Scotland) Bill
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Education and Culture Committee

The remit of the Committee is to consider and report on matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning; matters relating to youth employment, skills and employment training, implementation of the recommendations of the Commission for Developing Scotland's Young Workforce, Skills Development Scotland and other matters falling within the responsibility of the Cabinet Secretary for Fair Work, Skills and Training, and matters relating to culture and the arts falling within the responsibility of the Cabinet Secretary for Culture, Europe and External Affairs.

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Introduction

1. The Higher Education Governance (Scotland) Bill was introduced by the Scottish Government on 16 June 2015.\(^1\)

2. According to its Policy Memorandum, the Bill will support the Scottish Government’s aim of strengthening governance arrangements across the higher education sector. The Policy Memorandum also says the principal objective of the Bill is—

   “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.”\(^2\)

3. Our role at Stage 1 of the legislative process is to scrutinise and report on the Bill’s general principles, and we thank everyone who contributed to our task. All the oral evidence and written submissions provided are available on our website, along with links to reports by other committees and further information provided by the Scottish Government.\(^3\)

4. This section briefly considers some of the over-arching issues arising from our scrutiny and also provides some context to the Bill. We then consider specific topics in more detail.

5. The Bill is concerned with improving higher education governance, although the Scottish Government has not provided any examples of current deficiencies within the sector. Rather, the Cabinet Secretary for Education and Lifelong Learning, Angela Constance, said the Bill was about “continuous improvement” in university governance, while praising the quality of the sector overall.\(^4\)

6. The Scottish Government has linked its interest in governance to the amount of public funding provided to higher education institutions (HEIs), noting an ongoing annual investment of £1 billion.\(^5\) The SPICe briefing on the Bill sets out the main funding sources for Scottish HEIs in 2013-14. Total income was £3.2 billion, of which approximately £2 billion came from public sector grants and fees including more than £1 billion from the Scottish Funding Council, with the remainder coming from the private sector, charities and “other income.”\(^6\)

7. HEIs are firmly opposed to the draft legislation and we explore their specific concerns later in this report. In general, the sector does not consider legislation to be necessary, particularly as institutions are already seeking to improve governance through the voluntary ‘Scottish Code of Good Higher Education Governance’ (‘the Code’).\(^7\) The sector is also concerned that the Bill will increase
ministerial control over HEIs, thereby reducing their autonomy, and that it fails to take account of the diversity of the sector. Professor Timothy O’Shea, the principal of the University of Edinburgh, noted that “the success of UK universities in comparison with universities in other parts of Europe is put down to our autonomy and our ability to operate.”

8. Other organisations, for example, the Scottish Council for Development and Industry and the Institute of Directors, have also expressed concern with at least some parts of the Bill.

9. The written submissions from trade unions and the National Union of Students (NUS) Scotland provided support for the Bill and gave examples of what they considered to be poor governance, or poor decision-making, in higher education. For example, the written submission from the University and College Union (UCU) Scotland stated—

There is a problem with the way that our universities are governed which leads to a lack of robust questioning of strategic decision making of senior management. Our concern is this can lead to many institutions making demonstrably bad educational, financial and other decisions.

10. In oral evidence, the same organisation put such criticisms into context—

No one is questioning that Scottish universities are good—they are good. What we are saying is that they could be so much better if staff, students and trade unions were fully involved in how they operate.

11. Some supporters of the Bill also considered it does not go far enough in addressing their specific concerns. NUS Scotland’s written submission said the Bill was an opportunity to address three main shortcomings with higher education governance: “a lack of a genuine democratic culture in governing bodies; a lack of transparency and accountability over how decisions are made, and who makes them; and, a lack of fair representation and diversity on governing bodies”. However, it then went on to say that the Bill “falls short” on “improving the diversity of, and fair representation on, governing bodies, and tackling senior level pay”.

12. The STUC disagreed with the view put forward by HEIs, that the Code had improved governance in the sector. It argued that the Code’s recommendations “are simply not significantly stretching to change practice for the better throughout the sector”.

13. Although HEIs have been vociferous in their criticisms of the Bill’s potential impact, the Cabinet Secretary has sought to put into context the scale of change being proposed—

The bill is a discrete bill with some discrete measures. It is certainly not looking at overhauling all aspects of university governance.
14. This is the second bill in three years\textsuperscript{15} that makes provision on HE governance and we discussed with officials the ultimate standard of governance the Scottish Government was seeking to achieve for the sector. We asked, for example, whether the Scottish Government had looked at any international comparators on governance in drafting the Bill. Officials replied—

\begin{quote}
I do not think that the plan is to emulate any perfect model. The ambition is to move on with a modest set of proposals \ldots rather than being inspired by a bar that has been spotted elsewhere.\textsuperscript{16}
\end{quote}

15. The Scottish Government also confirmed it was content that the Code and the Bill addressed the core concerns raised by the von Prondzynski review (discussed below), and said it had no plans for further primary legislation in this area in the near future\textsuperscript{17}.

The Bill’s origins

16. According to the Code, the overarching purpose of governance in HEIs is to “promote the enduring success, integrity and probity of the Institution as a whole”. Every HEI is headed by a governing body that is “unambiguously and collectively responsible for overseeing the Institution’s activities”. In discharging its responsibilities a governing body will, amongst other things, “take all final decisions on matters of fundamental concern to the Institution”\textsuperscript{18}.

17. The Code’s development can be traced to a review of higher education governance chaired by professor Ferdinand von Prondzynski. The Bill’s provisions also originate from this review, which reported in January 2012\textsuperscript{19}. A Scottish Government consultation on a draft bill was launched in November 2014\textsuperscript{20}. The Scottish Government, through both the Bill’s Policy Memorandum and the evidence it provided to us, frequently justified its approach with reference to the findings and recommendations of the review (albeit not all recommendations were legislated on and some were adapted by the Scottish Government in drafting the Bill). However, we have provided examples of where we consider the Scottish Government should have provided its own justification and rationale.

18. The Policy Memorandum also repeatedly mentioned the importance of ‘consistency’ in HEIs, for example, in relation to the representation of stakeholders on governing bodies. However, the Bill also allows HEIs some flexibility (for example, in relation to certain nomination and election processes). We therefore asked the Scottish Government whether it was content that there was a minimal risk of any significant inconsistencies arising.

19. In response, the Scottish Government said it was aiming to introduce “a set of focused and discrete provisions to improve governance” and that it had “no intention of micromanaging autonomous institutions”\textsuperscript{21}. We highlight this exchange as it is relevant to the Bill overall and, in particular, to the following section on the potential reclassification of Scottish HEIs.
ONS reclassification

20. The question of whether Scottish HEIs may be at risk of ‘reclassification’ emerged as one of the main topics of debate during our Stage 1 scrutiny. This issue was not mentioned in the Bill or its accompanying documents, and much of the detailed discussion was held outwith our Committee. HEIs’ concerns were first discussed in detail during the Finance Committee’s scrutiny of the Bill’s Financial Memorandum, and there has also been a separate chamber debate that covered this issue.

21. According to a note of advice commissioned by Universities Scotland, the Office for National Statistics (ONS) will be assessing the current classification of HEIs between January and June 2016. Universities Scotland asked for advice on whether the measures in the Bill, when considered cumulatively with other recent changes in legislation and policy, could increase the risk of Scottish HEIs being reclassified.

22. The note of advice said there is no specific reference to Scottish HEIs being included in the ONS’ assessment, but nor have they been specifically excluded. The note concluded—

“Our advice is that the Bill, based on an assessment of the range of factors that ONS would consider as part of an assessment of the classification of HEIs, heightens the risk of HEIs being reclassified by the ONS. We think that, when considered cumulatively with other existing government controls over HEIs, the provisions in the Bill would take HEIs into ‘borderline’ territory in terms of their current ONS classification.”

23. HEIs are strongly opposed to this outcome and have identified very significant financial repercussions they believe would result from reclassification. For example, the University of Glasgow told the Finance Committee it could lose income of around £28.7m per annum, with an even greater impact expected for its capital investment programme. Professor Timothy O’Shea suggested the Bill may damage the international reputation of Scotland’s HEIs—

“The discussion is not happening just in this room, and it is being observed around the world. The perception around the world is that the bill, if enacted, will reduce the autonomy of Scottish universities.”

24. The discussion about the Bill’s impact on reclassification has strayed into quite technical areas. At its heart, however, the debate is about the legitimate level of ministerial control over HEIs and the degree to which this control may impinge on their autonomy. The note of advice referred to above is also helpful in setting out some of the “existing areas of government control over Scottish HEIs”, which provides some context to the wider discussions around autonomy and accountability in the HE sector.
The Scottish Government’s analysis

25. In oral evidence, the Cabinet Secretary said the Scottish Government “does not seek to advance ministerial control of our institutions”\(^{30}\), adding that the Bill “does not add to any existing risk of reclassification”\(^{31}\). The Scottish Government has made clear its opposition to reclassification and, in the event that it should occur, would seek to ensure the decision was reversed.

26. The Cabinet Secretary stressed that the issue of possible reclassification was considered in depth in the lead up to the Bill’s introduction, and noted the difficulties of getting a definitive view from the ONS at this point about the Bill’s implications. The Scottish Government has put into the public domain some of the analysis it undertook in considering the potential risk of reclassification\(^{32}\). It has also stated, in a letter to Universities Scotland, how it assessed the risk of reclassification prior to the introduction of the Bill—

> Key to this assessment was the level of government control over higher education institutions (HEIs) activities, based on the Eurostat European System of Accounts published guidance on classification from 2010. The guidance has been examined carefully, with each of the indicators considered in turn and how they relate, or not, to the provisions in the Bill. It is the view of the Scottish Government that the content of the Bill is compliant with the indicators of control.\(^{33}\)

27. However, Universities Scotland and others have questioned the quality of this analysis and the nature of the advice sought by the Scottish Government\(^{34}\).

28. In answer to a question about another occasion when the possibility of reclassification had arisen, the Cabinet Secretary justified a different approach by saying reclassification, in terms of the Bill, was “a statistical classification issue as opposed to a legal issue”\(^{35}\).

Regulations

29. A key issue in the reclassification debate concerns the various sections of the Bill that would grant Scottish Ministers the powers to make future regulations about governing bodies and the academic board. These powers are strongly opposed by the sector, for example, the University of St Andrews stated—

> The proposals in the Bill go significantly beyond even what was envisaged in the Consultation exercise [the Scottish Government consultation on the Bill]. 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 makeup of University Courts and Senates through secondary legislation, without the safeguard of full Parliamentary scrutiny.\(^{36}\)
30. The Scottish Government has maintained that the Bill’s regulation-making powers are intended to “future proof the content of the Bill, allowing minor adjustment as required, rather than to enable any radical alteration to its provisions”\(^{37}\). In oral evidence, the Cabinet Secretary confirmed she was “actively considering whether to amend or remove” the provisions in sections 8 and 13\(^{38}\).

31. As noted, it is not possible to get a definitive view from the ONS about the extent to which the Bill heightens the risk of reclassification. Given the strongly diverging views, it is therefore helpful to provide some independent contribution to the debate by considering the written submission from the Office of the Scottish Charity Regulator (OSCR).

32. It is important to note that this submission considered how the Bill may affect ministerial control but did not make any direct comment on reclassification. The submission made clear the complexity of the issues and should therefore be read in full. However, the following extracts are relevant to the debate—

> Our view is that the [Bill’s] 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 [which relates to Ministerial powers of direction and control over charities].

> Section 8 of the Bill 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 Bill 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 the impact of these measures with respect to ministerial control.\(^{39}\)

33. The Finance Committee and the Delegated Powers and Law Reform Committee both reported to us at Stage 1\(^{40}\) and both considered the Scottish Government could provide clarity on the regulation-making powers.

34. **We consider the reclassification of Scottish HEIs would be in no-one’s interests, given such a decision could cause very significant harm. We therefore consider all reasonable measures should be taken to minimise any risk of reclassification.**
35. Our scrutiny has taken into account not just the current Scottish Government’s intended approach, but also how the powers in question could be used by any future Scottish Government. **We therefore welcome the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions.** We expect this to mean the powers could not be used in a way that would unjustifiably increase ministerial control. We consider there should have been more productive discussions between the Scottish Government and the HEI sector about the intended purpose of these provisions, some of which are commonly found in legislation.

36. There has been considerable disquiet from Universities Scotland about the level of analysis undertaken by the Scottish Government on how the Bill may alter the risk of reclassification. **We therefore agree with the Finance Committee that the Scottish Government should publish, before the Stage 1 debate, the full analysis it has undertaken on this issue.**

37. The issues discussed above raise broader questions about the extent to which any future Scottish Government’s development of legislation, policy or funding relating to HEIs may, in effect, be constrained by the possible risk of reclassification. **We would welcome the Scottish Government’s views on this issue.**

**Charitable status**

38. The OSCR quote in paragraph 32 is also relevant to a second financial issue raised by HEIs, namely the Bill’s possible impact on institutions’ charitable status. Universities Scotland said it was concerned “that increased Ministerial powers may be at odds with HEIs’ status as charities, since the law states that organisations do not meet the charity test if they are directed or controlled by Ministers”\(^{41}\).

39. There has been an exchange of correspondence between Universities Scotland and the Scottish Government on this topic and both have cited OSCR’s written submission to us to support their case. With reference to the first half of the OSCR quote in paragraph 32, the Scottish Government concluded “OSCR’s overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs”\(^{42}\). Universities Scotland, meanwhile, referred to the second part of the OSCR quote in paragraph 32 and concluded “OSCR have been clear that the exercise of the Ministerial powers proposed in the Bill could give rise to a risk to charitable status, on the basis that HEIs are subject to Ministerial powers of direction and control.”\(^{43}\)

40. The Finance Committee’s report – which predated the most recent letter from Universities Scotland to the Scottish Government on this issue – noted the concerns raised by HEIs about charitable status then concluded it was “satisfied
41. The charitable status issue is connected to the question of whether the Bill increases ministerial control over HEIs, and, in particular, Scottish Ministers’ powers to make future regulations (as discussed above). **We therefore reiterate our support (in paragraph 35) for the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions, as we consider this would also remove any potential threat to HEIs’ charitable status.**

**The governing body chair**

42. According to the Code, the chair is responsible for the leadership of the governing body and is ultimately responsible for its effectiveness. Universities Scotland’s written submission said there is an open process for the appointment of chairs, and the guaranteed involvement of student and staff governing body members.  

43. As introduced, the Bill requires HEIs to appoint the chair of their governing body in accordance with a process to be set out in regulations made by the Scottish Ministers. Section 1 currently lists some of the steps that may be covered in the appointment process. We asked whether any steps would be left to HEIs to determine and the Scottish Government responded as follows—

   "Removal of a chair is not a matter that the Bill will provide for. This, along with most other terms and conditions of appointment, will remain an issue for HEIs, who shall continue to have the power to remove any member of the governing body and (according to the Code of Good HE Governance) must do so if the member materially breaches the conditions of his/ her appointment."

44. The Policy Memorandum stated that, due to the clear difference in stakeholder opinion, the Bill would not feature specific detailed provisions at introduction. Instead, detail was to be provided in regulations “following further discussion on co-design with key stakeholders.”

45. However, the Scottish Government is now considering making amendments to allow for provision on the face of the Bill “for a single model for the appointment of elected chairs.” This is, therefore, an issue where the current position is not entirely clear.

**The rationale for change**

46. According to the Policy Memorandum, the policy aim of this section is “to establish a required minimum level of openness, transparency and consistency across all HEIs.” The Scottish Government considers this matter could not be left to the Code as “there is no explicit provision specifically stipulating the required
composition of the governing body in all HEIs". The Policy Memorandum adds "it is too crucial to the achievement of good and consistent governance for the composition of governing body membership not to be addressed directly by legislation"\textsuperscript{50}.

**Stakeholder reaction**

47. Our call for written submissions generated a considerable amount of criticism about this proposal; the RSE’s submission summed up most of the main concerns—

> We re-emphasise the overriding need for the governing body to have full confidence in the impartiality and leadership abilities of its chair, and for the relationship between the chair and Principal to be mutually supportive but challenging. A process culminating in an election by any electorate broader than the governing body itself cannot guarantee either of these two crucial elements. It risks "politicising" the role and increasing the influence of people with either a very temporary stake in the university or others with clear vested interest. It may result in a chair beholden to a particular constituency rather than one able to pursue the best interests of the institution as a whole. In addition, turning the process into an election campaign will be likely to narrow, rather than widen, the pool of candidates, deterring people who are not comfortable with public campaigning and self-promotion but who may be well qualified for the role.\textsuperscript{51}

48. These types of arguments were challenged by NUS Scotland—

> … it has been argued that by electing chairs we may get to a situation whereby the chair doesn’t enjoy the ‘confidence’ of the governing body. However, while there is no evidence to suggest that would be the case, it also undermines the role of the chair and governing body. Governing bodies, as with all trustee boards … should act as critical friends to institutions, on behalf of their stakeholders – staff and students. We would seriously question any governing body, and the role they are carrying out, that did not put their trust in a chair who had trust put in them by staff and students.\textsuperscript{52}

49. It is relevant to note that the chair of the review of HE governance, Ferdinand von Prondzynski, has reiterated to us his support for "a more inclusive approach to appointing governing body chairs". His justification was that this could “avoid the impression that governing bodies are not accountable to anyone other than themselves, which could be said to be the current position”. Professor von Prondzynski also agreed with the point that a governing body should have confidence in its chair, and called again for an open recruitment and selection process run by the governing body, which would include interviews and shortlisting.\textsuperscript{53}
The Cabinet Secretary's response

50. Many of the concerns expressed to us mirrored those provided to the Scottish Government’s earlier consultation on the draft bill, as noted in the Policy Memorandum. We therefore sought to understand why the Scottish Government now intends to provide detailed provisions on the face of the Bill, having ruled that out earlier due to the “clear difference in stakeholder opinion”; it appeared to us that the parties involved were no closer to a mutually acceptable solution.

51. Given the very strong concern expressed by HEIs, we also asked the Cabinet Secretary whether she considered there would be a problem if the chair were to be appointed or elected by a group other than the governing body. The Cabinet Secretary responded—

> No, I do not. When people are elected and appointed to positions, they have a responsibility that is based on the job that they are elected or appointed to do. As an MSP, I am elected by the good people of Almond Valley but, as a minister, I am subject to the ministerial code and have to respect the place and rights of Parliament.

52. The Cabinet Secretary said the Scottish Government remained open-minded on some issues, but was committed to the election of chairs, rather than their being appointed. The Scottish Government has previously said “the franchise for the electoral process would not expand beyond the community within each HEI”. Ms Constance also stressed the importance of an elected chair actually being able to take up the post, mentioning “some sort of fit-and-proper-person test” and noting that some elected rectors had not been able to chair the court (rectors are discussed in more detail below).

53. In response to our questioning, the Cabinet Secretary said the Scottish Government had not established how many new candidates for the post of chair were likely to come forward as a result of the Bill.

54. HEIs have already taken steps to open up the process of recruiting governing body chairs, including the involvement of students and staff. **We support measures that would potentially increase the pool of suitable candidates for the post of chair and agree that openness, transparency and consistency in the appointment process is desirable.**

55. At this point, the exact means by which the chair is to be appointed is not clear and our evidence-taking has indicated no consensus amongst stakeholders about a way forward. It therefore appears that the Scottish Government may have to adopt a model that will not attract unanimous support. **In order to inform the Stage 1 debate on this key part of the Bill, the Scottish Government should provide more detail on the process envisaged, such as whether there will be a pre-selection of candidates before an election; if**
so, who will be responsible for conducting that process; and who exactly will form the electorate for the election of chair.

56. **Given the strong emphasis the sector has placed on maintaining an appropriate link between the chair and the rest of the board, it would be helpful if the Scottish Government could also provide examples of governing bodies in Scotland that do not directly appoint their own chairing member. Where such cases exist, have any evaluations been carried out to determine how this has affected the organisation’s performance? Is the quality of governance in such bodies markedly different?**

### The role of rectors

57. Another outstanding issue to be resolved before the Stage 1 debate is exactly how the provisions on an elected chair will take account of those universities that currently have an elected rector.

58. Our scrutiny of this issue was hampered by the fact the Bill, its accompanying documents and the analysis of the Scottish Government’s consultation on the draft bill made very few substantial references to the position of rector. The Bill only mentions ‘rectors’ twice, both times in terms of amendments to existing legislation; the Explanatory Notes to the Bill do not explain the reason for, or consequences of, these proposed changes.

59. Despite this lack of clarity, we have received some impassioned evidence about the threat posed by the Bill. For example, the written submission from the current rector of the University of St. Andrews, Catherine Stihler, stated—

> The unique Scottish tradition of the Scottish Ancient universities for students to select and elect their Rector to chair University Court, the ruling body of the university, is a special and precious tradition which the Higher Education Bill before you, will remove.

60. We received other similar submissions, while a number of former rectors of the University of Edinburgh highlighted to the media their concern about the role’s possible abolition.

61. The Cabinet Secretary has been clear that the Scottish Government does not desire such an outcome—

> ... we will seek to minimise, and consider removal, of any features of the model [for elected chair] selected that could impinge on the role of rector … there is absolutely no intention to remove the role of rector from university life.

62. There was some confusing evidence provided to us about the precise nature of the roles currently undertaken by rector. In essence, however, it appears that
while some rectors have a statutory right to chair the university court (i.e. the governing body), and some do so, the broader, substantive duties associated with ‘chairing’ an HEI are carried out separately by a senior governor.

63. In oral evidence, Ms Constance highlighted various difference between the role of rector and senior governor, for example, that the senior governor has overall responsibility for leadership and good governance of the court, while rectors do not have a role in overseeing governance. The Cabinet Secretary said she had no desire to change the statutory right of some rectors to chair court, but said this needed to be considered alongside the role of elected chairs. While not absolutely explicit, it appears the Bill will result in the universities in question having both an elected chair and a rector.

64. It is regrettable that the position of rector has not been clarified by now and that there was no substantive discussion of this issue in the Bill or its accompanying documents. However, we welcome the Scottish Government’s reassurance that the role of rector will not diminish. The final model proposed by the Scottish Government must ensure there is no ambiguity about the roles of elected chairs and elected rectors, and that both figures are able to work together for the good of the institution.

Remuneration

65. The Bill’s provisions about the chairs of governing bodies also cover their possible remuneration; section 2 states that Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chair.

66. Universities Scotland has also criticised these provisions as being unnecessary—

   …since institutions already have the power to remunerate Chairs and/or independent members at their own initiative, and it is provided for in the HE governance code. It is inappropriate in principle for Ministers rather than governing bodies of autonomous institutions to decide on the reasonable remuneration level. 60

67. The Cabinet Secretary explained that the rationale for this proposal flowed from the von Prondzynski review, which had highlighted that remuneration may attract a wider range of people and could also reflect the time commitment made by chairs. The Cabinet Secretary confirmed the issue of remuneration was being examined to see “whether it is actually required and whether it is expressed in the best possible way” 61.

68. The von Prondzynski review recommended that the chair should receive “some form of reasonable remuneration” 62. However, we remain unclear why the Scottish Government requires a statutory power to make regulations about remuneration when HEIs already have a power to remunerate chairs. We
therefore call on the Scottish Government to set out the intended benefits it expects to derive from assuming this power. We also invite the Scottish Government to address the following points, which were not explained in the Bill’s explanatory notes—

- how it would intend to use the power, for example, whether it would expect to set remuneration at a significantly different level than universities would;

- why it is seeking to delegate to “other persons” the power to determine remuneration and allowances in certain cases. Which persons does the Scottish Government have in mind and why?

Governing body composition

69. The Bill is concerned with both the chair of the governing body and its wider membership. Section 4 says the governing body is to be composed of various persons, for example: two elected staff members, two trade union nominees, two students’ association nominees; and two graduates’ association nominees. Membership of sub-committees of the governing body is not covered by the Bill.

70. The Policy Memorandum made the case for this approach with reference to both the von Prondzynski review and the Scottish Government’s consultation on the Bill. In essence, the Scottish Government considers that a fully representative membership “is key to the effectiveness of the governing body”. The Policy Memorandum goes on to say that consistency in approach will increase transparency and democracy, ensure more effective representation of internal stakeholders and help to create a more inclusive environment within the institution.

Reaction to the proposals

71. The Committee of Scottish Chairs told us “governing bodies are highly inclusive” and pointed out that all have staff and student governors, and a majority of independent members. This group also summed up one of the sector’s main concern about these provisions, namely the role envisaged for trade union nominees—

I do not think that any of us has an issue with trade union members being on the governing body. However, it is hugely important that they are clearly there in a representative capacity for the whole staff, not for a narrower interest, which could lead to the accusation—or concern—that there would be a conflict of interest.

72. Trade unions have supported the Scottish Government’s position and have criticised the views expressed by some university representatives. For example, the UCU said in oral evidence—
Just because students, staff and trade unions have a stake in the organisation does not mean that they are not interested in the success of that organisation. Trade unions are democratic organisations. Our members and representatives are elected to posts in institutions. To say that there is a democratic deficit does not sit well with us.66

73. In order to better understand stakeholders’ concerns we questioned the Scottish Government on the expected role of trade union members and what was meant by saying that they – and other members – had to act in the organisation’s “best interest”67. The Scottish Government responded as follows—

All members of the governing body should approach their work as being about the betterment of the HEI and everyone who works and studies there. While the Bill does not impose a duty in this respect nor contain a definition of ‘best interest’, we believe that the concept is well understood within the sector … . The Scottish Government is clear that, while the membership of the governing body … will ensure that an inclusive mix of interests are represented in HEI governance, all members must act in the best interest of the HEI as a whole. Furthermore, as charity trustees, governing body members are under a duty under section 66 of the Charities and Trustee Investment (Scotland) Act 2005 to act in the interests of the charity, i.e. the HEI, while engaged in the business of the governing body.68

74. OSCR’s written submission made some comments relevant to this discussion—

… it is not particularly unusual for charities to have charity trustees nominated by other bodies or groups … . 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.69

Accommodating new members

75. Some HEIs have raised other, related concerns about this provision, for example, questioning why trade union members should be included on the governing body when levels of union representation at some institutions are very low. Universities Scotland has also criticised the Bill’s effect on the size and balance of existing governing bodies, concluding that at least twelve HEIs would have to remove at least one member of their governing body in order to maintain both a lay member majority and no more than 25 members—

The fact is that, for the majority of institutions, this cannot be done unless existing members are removed. The members who would typically have to be removed to maintain an independent majority and a membership no higher than 25 would be staff representatives elected from categories not
set out in the Bill (e.g. elected by the Senate or academic board), or members elected by all staff additional to two elected staff members prescribed in the Bill.  

76. Universities Scotland has also repeatedly challenged the Scottish Government’s analysis of the Bill’s effect on the existing membership of governing bodies.

77. The reference to 25 members above stems from the Code, which requires a governing body to be no greater than this size and to have a clear majority of independent (lay) members. Further, the Scottish Funding Council (SFC) requires compliance with the Code as a condition of public funding.

78. The Scottish Government has acknowledged that complying with the Bill is “likely to create conflicts with HEIs’ existing governance instruments” but considers all relevant institutions will be able to accommodate the members required by the Bill. A letter from the Scottish Government referred to a period of transition in which HEIs will amend their governing instruments in line with the new statutory requirements.

The impact of new members

79. Perhaps the main consideration in this discussion should be the likely impact of the new governing body members on the quality of governance in HEIs. Trade unions and some student groups have both criticised aspects of existing HE governance. It was argued by some that requiring their inclusion on governing bodies may reduce the likelihood of poor governance decisions being made. However, as noted, all governing body members are required to act in the best interest of their institution, which suggests that members are not to use their position to campaign for a particular ‘cause’. We therefore asked the Cabinet Secretary exactly how opening up governing bodies to trade unions and more students would lead to better governance.

80. The Cabinet Secretary responded—

“...I believe that members of staff, trade unionists and students are well capable of taking part and making a contribution to the big strategic decisions that a university governing body has to make... On the point about better governance, by definition and outcome, that broader and more inclusive approach that includes all the voices on the campus can be only a good thing in helping the sector to move forward.”

81. The Cabinet Secretary said her understanding was that the size of the university court at 25 members was not fixed. She stressed that the provisions would be implemented over a period of four years, adding “We are not in the business of cack-handedly removing existing members.”

82. The Cabinet Secretary also said she recognised the varying levels of union membership across institutions but added, “We are talking about two places for
trade union members in a court of 25, representing both academic and non-academic staff.” She also noted the progress made by HEIs in changing the membership of their governing bodies, and highlighted that “the majority of institutions would already have four out of the eight places that the bill seeks to implement”\(^74\).

83. By definition, the Bill’s proposals on governing bodies would make them more inclusive, although it cannot be guaranteed that governance and decision-making would improve as a consequence. **Nonetheless, we agree with the principle that a diverse group of people, all of whom clearly have a shared interest in the institution’s continuing success and who bring a wide range of experience in skills and governance, should be included on the governing body.**

84. We note that all members of a governing body are required to act in its best interest – a point acknowledged by trade unions – and therefore cannot agree that the appointment of trade union members would undermine this principle. HEIs have, however, asked legitimate questions about the Bill’s impact on existing governing body members. Although the Scottish Government does not envisage a problem with HEIs complying with this provision, it is the Scottish Funding Council that requires HEIs to follow the Code as a condition of grant of public funding. **We therefore seek assurances from the SFC that no institution would be forced, by the Bill’s proposals, to remove existing members of governing bodies, several of whom are elected members of staff, and also that there would be no detrimental effect on university management if the governing body number exceeded 25.**

**Specific issues**

85. There are some other, more specific issues around these provisions that we wish to highlight. Glasgow School of Art (GSA) and other HEIs pointed out that they do not have a graduates association, which they consider would be needed to comply with this section of the Bill. GSA described the creation of such an association as “an extremely costly and time consuming exercise”\(^75\). The Royal Conservatoire of Scotland has raised concerns about its ability to comply with the requirement to appoint trade union members. We call on the Scottish Government to address these specific concerns. **More generally, given the diversity of the sector, we would welcome confirmation from the Scottish Government that all HEIs will be able to comply with the requirements of section 4.**

86. We have been informed that elected student representatives (the student president and vice-president) would not be eligible to serve on the university court because they are on sabbatical and, therefore, technically not students. **It would be helpful if the Scottish Government could clarify this point.**
87. We also note the Cabinet Secretary’s comments that one of the student representatives on the governing body would have to be the president of the students association and the other would have to be a woman\textsuperscript{76}. The Bill does not appear to contain such requirements and we therefore seek clarification from the Scottish Government on this point.

88. We have previously asked the Scottish Government whether, in theory, one person could fill the role of being both a graduate nominee and union nominee to the governing body. The Scottish Government confirmed this was not the policy intention. It added that “membership of each of the categories of governing body member is intended to be mutually exclusive” and said it would consider whether this needed to be made explicit\textsuperscript{77}. Given some of the concerns raised about trade union and graduate members of the governing body, we \textbf{would welcome an update on the Scottish Government’s position in advance of Stage 2.}

\textbf{Academic boards}

89. According to the von Prondzynski review, academic boards are responsible for academic governance and academic planning. Their key responsibilities are defined as being “the oversight of academic quality, the safeguarding of academic freedom and the necessary co-ordination with governing body to ensure that decision-making at all levels is properly informed”\textsuperscript{78}.

90. The Bill requires HEIs to ensure their academic boards comprise no more than 120 people and include, amongst others, elected academic staff and students. Staff and students together are to make up more than 50\% of the membership of an academic board, with students alone comprising at least 10\% of the membership. We understand that only three HEIs’ academic boards currently contain more than 120 members.

91. The Policy Memorandum says the provision will “… embed a level of consistency across all academic boards and will ensure they are both effective and representative in their decision making”\textsuperscript{79}. The Policy Memorandum does not, however, provide any indication of whether, or the extent to which, the Scottish Government considers these to be significant deficiencies in academic boards.

92. We asked the Scottish Government – both orally and in writing – to set out the benefits it expected to derive from requiring student membership on academic boards. In response, the Scottish Government said this representation would “help to advance equality on the academic board”\textsuperscript{80} and “could only enrich the academic conversation”\textsuperscript{81}. Officials added in oral evidence that they could not “catalogue tangible changes in the way in which an academic board would run”\textsuperscript{82}.

93. We wrote to the Scottish Government to ask why governing bodies, but not academic boards, were to include trade union and graduate nominees. The Scottish Government replied as follows—
Ultimately, governing bodies ... are the structures responsible for determining the overall strategic direction of HEIs. If a governing body’s composition is inclusive, fair and balanced, this will permeate throughout the institution. With the provisions on membership of the governing body designed to achieve this effect, there is no need to stipulate that there must be union or alumni representation on the academic board.83

94. If changing governing bodies is to have the effect set out above, we asked the Cabinet Secretary why student representation was required on the academic board. Ms Constance reiterated the points above and said the Scottish Government’s position was “still that the academic board is for academics and students”84.

Reaction to the proposals

95. Universities have criticised this section of the Bill on the grounds that they consider academic board composition to be a matter for HEIs, rather than the Scottish Government, to determine and because it takes no account of the diverse nature of institutions. For example, some universities raised concerns to us about setting the ‘threshold’ for academic board membership at 12085.

96. Similar concerns were also expressed in the prior Scottish Government consultation on the Bill and we were therefore surprised when the Scottish Government said it did not “anticipate any difficulty for HEIs” in meeting the threshold86. Scottish Government officials separately said the threshold of 120 member had come from the Von Prondzynski review—

97. The von Prondzynski review referred to evidence “which points towards dysfunctionality where the membership of the [academic] board is too large”88, but did not provide any further detail. It recommended that academic boards “should not normally be larger than 120 members”. Neither the von Prondzynski review nor the Scottish Government’s subsequent consultation specifically mentioned the figure of 10% student representation, although the review did recommend that there should be “significant (rather than token) student representation”89.

98. The Scottish Government took the principles on the academic board from the von Prondzynski review. However, we are concerned about the lack of evidence on this issue and consider that the Scottish Government should provide a more detailed explanation as to why it should legislate on this body. We also ask whether there could be flexibility around the 120 member threshold.

99. We understand the merit of having a student presence on academic boards and note that HEIs do not appear to have any significant concerns about this
100. We are still not clear why – taking into account the explanation provided in paragraphs 93 and 94 – there is to be statutory student representation on academic bodies, but not statutory trade union or graduate representation. We therefore require further clarification on this point.

Academic freedom

101. The Bill seeks to alter the existing statutory definition of “academic freedom”, as set out in the Further and Higher Education (Scotland) Act 2005. Two main changes are proposed—

- The definition is now to include relevant persons’ freedom within the law to “develop and advance new ideas or innovative proposals”;

- Relevant bodies now “must aim to uphold the academic freedom of all relevant persons”. This replaces the current definition, according to which relevant bodies “must have regard to the desirability of ensuring” academic freedom.

102. According to the Policy Memorandum, the policy aim of this change is “to expand the current definition and to strengthen the protection of academic freedom … This is to ensure that, going forward, the protection of academic freedom is more comprehensive and transparent.”

Unlike the rest of the Bill, these provisions will apply to the Open University in Scotland, colleges and all Scottish HEIs.

Background

103. The von Prondzynski review did not highlight any particular concerns or problems with the existing statutory definition of academic freedom. It did, however, compare this definition with the equivalent Irish legislation and concluded, in essence, that the Irish definition be adopted. The review did not give the impression that this would lead to a radical change, noting simply that the Irish definition “perhaps expresses slightly more comprehensively the full significance of academic freedom”.

104. Academic freedom is also covered in the Code; main principle one provides that governing bodies are to “ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments”.

proposal. With reference to paragraph 92, it would be helpful if the Scottish Government could identify whether any more tangible benefits are likely to arise from this provision.
Stakeholder views

105. The written submissions we received on the Bill provided comparatively few comments on this provision, with a common view that it would have little material effect.

106. Unions, for example the UCU, were the most supportive of the proposal—

"We have a good definition of that [academic freedom] in Scotland from the Further and Higher Education (Scotland) Act 2005, but the bill will add to that by giving clarity to and strengthening the definition. The UCU has been asked on occasion to defend some of our members around questions of academic freedom. I think that the bill is a positive step forward."

107. HEIs considered there was little justification for the proposed change. For example, the University of the West of Scotland said—

"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."

108. HEIs also highlighted what they considered to be a paradoxical position, whereby this provision would seek to strengthen academic freedom but within the wider context of a Bill that would diminish universities’ freedom.

The Scottish Government view

109. We raised with Scottish Government officials and the Cabinet Secretary some of the concerns expressed by HEIs and also sought to understand exactly how the Bill would strengthen the concept of academic freedom.

110. Both officials and the Cabinet Secretary repeatedly suggested that this section of the Bill was not designed to address a particular problem—

"The Government is not coming from the premise of deficiency. In looking at the recommendations of the von Prondzynski review, we saw an opportunity to make modest adjustments or improvements to the definition of academic freedom. I appreciate that, again, there is a range of views about the value of those modest changes."

111. Scottish Government officials also referred to the provision as a “modest” change and said the consultation on the Bill “threw up support for the provision or neutral views on it … . The stakeholder evidence that we gathered generally supported a modest expansion of the existing statutory definition of academic freedom”. However, we note that the analysis of the Scottish Government’s consultation showed that 50 of 99 respondents disagreed with the view that the principle of “academic freedom” should explicitly refer to freedom to encourage new ideas.
The other proposed change – about ‘aiming to uphold’ academic freedom – does not seem to have been specifically consulted on. We are therefore not sure which ‘stakeholder evidence’ was being referred to by officials.

112. In response to our questions, the Scottish Government confirmed it had no examples of academics who had previously been penalised for exercising their academic freedom in a manner that would now be permitted under the Bill.

113. We also asked why provision was required around the expression of ‘new ideas’. Scottish Government officials explained that “the specific academic freedom is about the freedom for academics to express their new ideas. This is a protection of their academic freedom. It is not so much about the universities’ reputation …”.

114. The Scottish Government has acknowledged that the proposed changes to the existing statutory definition of academic freedom are modest. We have provided further background on this provision, in order to inform the Stage 1 debate.

Specific issues

115. Various specific issues about academic freedom were raised in the written submissions. The most substantive issue was raised by the Scottish Council of Jewish Communities, which expressed concern about widening the statutory definition of academic freedom “while not also imposing equivalent statutory responsibilities to protect those who may suffer detriment from careless or malicious use of that freedom”. Its submission contained various examples of negative treatment experienced by Jewish students in Scottish HEIs.

116. The Cabinet Secretary did not believe the Bill’s provisions on academic freedom would undermine existing legislation that offers protection to students—

> It is clear that, whether the current definition or the modest proposed change to the definition applies, people are not excused from the requirement to operate within the law. There is a wide range of legislation on, for example, incitement and discrimination, and nothing in the current or proposed definitions excuses people from their obligations to comply with that legislation.

117. Scottish Government officials committed to investigating the wording of the existing legislation on academic freedom and to establishing “what consideration, if any, was given to the student side of the equation”. We have not heard anything further from the Scottish Government on this matter and expect to receive an update before the Stage 1 debate.
118. **We also look forward to receiving clarification on the following statement in the Bill’s Financial Memorandum:** “Alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs. However, no additional costs are expected to arise.”. We also invite the Scottish Government’s views on UCU Scotland’s suggestion that academic freedom should also apply to academic related and support staff.

**Financial Memorandum**

119. One of our roles at Stage 1 is to report on the Bill’s Financial Memorandum, taking into account the report from the Finance Committee. That committee raised a number of specific issues for us to discuss with the Cabinet Secretary and also made some general criticisms of the consultation undertaken on the potential costs arising from the Bill\(^\text{100}\).

120. We asked the Cabinet Secretary why the estimated costs to HEIs of amending their governing instruments had not been included in the Financial Memorandum. The Cabinet Secretary said this was because such work was “part of the core business of a university” and she did not anticipate significant new costs arising from the Bill\(^\text{101}\).

121. In response, we highlighted that universities would incur the costs of amending their governing instruments as a result of action taken by the Scottish Government. We also asked about the discrepancy in evidence provided by the Scottish Government and HEIs to the Finance Committee, concerning the costs and time involved for HEIs in recruiting a governing body chair.

122. In response, the Cabinet Secretary said the Scottish Government would take the Finance Committee’s comments into account in considering whether to provide an updated Financial Memorandum at Stage 2. However, Ms Constance said she still believed there would not be substantial costs arising as a result of the Bill\(^\text{102}\).

123. **We acknowledge the concerns raised by the Finance Committee and stakeholders about the Financial Memorandum, and welcome the Cabinet Secretary’s commitment to examining these concerns.**

124. **We also expect the Scottish Government to take the Finance Committee’s concerns about consultation into account, as appropriate, when preparing future Financial Memorandums.**

**Policy Memorandum**

125. As lead committee, we must also consider and report on the Bill’s Policy Memorandum. We have highlighted specific examples where the Policy Memorandum could have provided more detailed information. We have also
provided our views on the Bill’s main provisions, bearing in mind the Scottish Government’s aim of strengthening governance in the HE sector. However, we consider that the Policy Memorandum should also have been clearer about the Bill’s “principal objectives”, namely more “modern, inclusive and accountable” governance. For example, the Policy Memorandum could have provided more information on what is meant by ‘accountability’; to whom HEIs are accountable; and how the Bill would change levels of accountability. Given the nature of the concerns raised by the HE sector, it would have been very helpful had the Policy Memorandum provided definitions or more detailed discussion of fundamental concepts such as governance and autonomy.

Conclusions

126. The Higher Education Governance (Scotland) Bill contains relatively few provisions but has generated a considerable amount of comment and criticism. Some of the main concerns expressed were in relation to matters not explicitly mentioned in the Bill or its accompanying documents. Our Stage 1 consideration was made more difficult because various provisions were not fully defined by the time we concluded our evidence-taking. For example, the exact process by which a governing body chair is to be appointed; the remuneration that chairs may receive; the relationship between a rector and an elected chair; and the use of regulation-making powers are all areas where the Cabinet Secretary has indicated that the Scottish Government’s position is not fixed. We have asked the Scottish Government throughout this report for further detail on a number of such issues, which will help to ensure all members are fully informed in advance of the Stage 1 debate.

127. Evaluating the Bill’s success could be a difficult task as the Scottish Government has not described any deficiencies in existing governance, nor has it stated whether any of the specific problems identified by advocates of reform would be less likely to occur in future. Further, governance is also being revised separately through the Code.

128. In response to our questioning, the Cabinet Secretary confirmed she would want to monitor the impact of the Bill in conjunction with the sector as a whole. Ms Constance also referred to a university sector advisory board, and suggested this board could have “a renewed focus on governance, monitoring impact and measuring success and progress”\textsuperscript{103}. The Code is also due to be reviewed next year, while governing bodies are expected keep their effectiveness under annual review.

129. \textbf{We welcome the Cabinet Secretary’s commitment to monitoring the Bill’s impact in conjunction with the sector as a whole, and her statement that the university sector advisory board could help to measure the Bill’s success. We look forward to receiving detailed information on how this}
board would work in practice, including how it could be informed by any other reviews of HE governance.

130. The Scottish Government has explained its reasoning for each of the Bill’s provisions. However, we have highlighted in this report examples of further information we believe the Scottish Government should provide in order that members’ participation in the Stage 1 debate is as informed as possible. We have also highlighted the concerns about the issue of reclassification, and have suggested a possible solution that we consider the Scottish Government should be able to deliver. While recognising there is a difference of opinion, as set out at the beginning of this report, we agree it is appropriate to seek to improve governance, particularly to try to avoid future problems arising. **Taking all these points into consideration, we support the strengthening of governance in higher education and thus the Bill’s general principles.** The Stage 1 debate will be an opportunity for all members to question in more detail the precise means by which this will be delivered.\textsuperscript{104}
The Note of Advice was commissioned by Universities Scotland from Anderson Strathern LLP: http://www.scottish.parliament.uk/S4_FinanceCommittee/General%20Documents/AS_legal_advice_1_Oct_15.pdf

The ONS' "Classification Update and Forward Workplan, September 2015" states (see http://www.ons.gov.uk/ons/dcp171766_418142.pdf):

"17. Universities
Current classification: Transactions not at economically significant prices.
Reason for assessment: policy - significant increases in tuition fee maxima
Impact on Fiscal Aggregates: not applicable
Impact on National Accounts: medium
Expected completion: Half 1 (January - June) 2016
From September 2012, the maximum tuition fees which could be charged by universities in England and Wales were increased from around £3,500 to £9,000. ONS will review the treatment of these fees in light of this change; in particular, whether tuition fees are now charged at 'economically significant prices'. This is relevant when assessing whether universities are 'market' or 'non-market' producers."

At the time of writing there is an outstanding letter from Universities Scotland to the Scottish Government which contains further criticisms of the Scottish Government's analysis of this issue.

http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/General%20Documents/HE_Governance_Bill_-_Email_Questions_from_US_13_August_-_Response_-_16,...pdf
We have heard conflicting views on this matter, but it appears that the following institutions have the post of rector: the four ‘ancient’ universities, Dundee and the UHI. Methods of appointment and responsibilities vary.

The schedule to the Bill sets out two proposed amendments, to the Universities (Scotland) Act 1889 and the Universities (Scotland) Act 1966.
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. (University of St Andrews). The University of Aberdeen’s Academic Board (senate) has 150 members. The University’s written submission says it is unclear about how the Bill’s proposals would affect ex officio members but notes that “the business of Senate would be compromised if we lost the critical input from key members of senior management team and from other ex officio members".

See column 62.