Dear Convenor

**HIGHER EDUCATION GOVERNANCE BILL: CLASSIFICATION OF SCOTTISH HIGHER EDUCATION INSTITUTIONS**

I understand that at the evidence session on 16 September on the Financial Memorandum attached to this Bill, one of the Members of the Committee asked to see some of the work involved in the assessment of risk that this Bill could result in re-classification of Scottish higher education institutions as public sector bodies.

Assessment of this risk was conducted prior to introduction of the Bill in June. I understand the Committee would like some information in the short term to help finalise your report on the Bill, and its Financial Memorandum in particular. This letter runs through some of the key features of analysis conducted by the Scottish Government, specifically related to the provisions in the Bill. I hope that it helps clarify the thoughts of the Committee on this important issue.

Key to this determination is the level of government control over their activities. Should universities be re-classified, it would impinge on their ability to borrow private finance. Overall, the Scottish Government considers that the Bill presents no additional risk of re-classification of our institutions as public bodies.
In classifying bodies as either public or private, the fundamental question for ONS is “does government exercise significant control over the general corporate policy of the unit?” The ‘Eurostat’ European System of Accounts (ESA 2010) guidance defines control as the ability to determine general corporate policy. This can be exercised, for example, through the appointment of directors, control of over half of the shareholders’ voting power, through special legislation, decree, or regulation. The difference between the public and private sectors is determined by where control over the organisation lies, rather than by “ownership”.

Whether or not such government control exists is assessed by considering a number of “indicators of government control” set out in the ESA10 published guidance

The Scottish Government considered each of the ESA10 indicators in turn and how they relate, or not, to the provisions in the Higher Education Governance Bill.

a) **government rights to appoint, remove or approve a majority of officers, board of directors, etc. (including where government has rights to veto the above)** – if the government appoints a majority of directors or other key personnel, the unit would be classified to the public sector.

The Bill’s provisions will require higher education institutions to follow an identified process in appointing a new chair and to ensure that membership of the governing body and academic board or senate is representative. The provisions in this new Bill will not give the government any new rights (or powers) to appoint, remove or approve the chair or any other members of the governing body.

b) **government rights to appoint, remove or approve a majority of appointments for key committees** having a decisive role in determining key factors of the unit’s general policy, board of directors, etc. (including where government has rights to veto the above) – if the government has the right to appoint or remove most members of the finance or investment committees (for example), the unit would be classified to the public sector.

As above, the Bill’s provisions do not provide the government with any additional rights (or powers) to appoint, remove or approve committee appointments.

c) **government ownership of the majority of the voting interest** – for example, if a majority of shares in a unit are owned by government, it would be classified to the public sector.

Government ownership of voting is not included in any of the Bill’s provisions.

d) **government rights to appoint or remove key personnel** (or veto appointments/removals) – if government appointments of key positions (for example, chairperson, executive directors) effectively give it a “decisive say” in key aspects of corporate policy, the unit will be classified as public.

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The Bill’s provisions will require HEIs to follow an identified process to selecting a chair, to ensure that membership of the governing body and academic board or senate is representative, but do not introduce any new rights (or powers) for the government to appoint or remove key personnel.

e) **government rights under special shares and options** – if government has special entitlements, for example, in relation to a “golden share”, this may lead the unit to be classified as public.

Government rights under special shares or options are not included in the Bill’s provisions.

f) **government rights to control via contractual agreements** – if government imposes restrictions on the operation of the unit, for example, through its position as a dominant customer, this may lead to classification in the public sector.

Government rights to control via contractual agreements are not included in the Bill’s provisions. The Bill’s provisions in relation to academic freedom may be expected to result in less government control by making explicit the freedom to encourage exploration of new ideas or innovative concepts.

g) **government rights related to borrowing/financing** – if government has a predominant role in setting the conditions of borrowing by the unit, including the terms of borrowing and/or use of funds borrowed, or is the predominant source of financing for the unit (either directly or by providing guarantees on borrowing by the unit), this may lead to classification in the public sector.

Government rights related to borrowing or financing are not covered in the Bill’s provisions.

h) **government control via regulation** – if the government restricts a unit from ceasing activities (that is, exiting markets) or from diversifying its activities, this may lead to classification in the public sector.

The Bill’s provisions do not provide for government control via regulation to cease activities, from diversifying activities or anything similar.

i) **other relevant aspects** – ONS is also required to consider other ways in which the government might exercise control over a unit.

The Bill’s provisions do not give the government direct control in any other ways. The Scottish Government, through provisions in the 2005 Act, already has powers to impose terms and conditions on the funding provided to higher education institutions via the Scottish Higher and Further Education Funding Council, for example in relation to good governance practices of institutions.
Scottish Government analysis suggests that the HE Governance Bill does not increase the level of government control or influence over the higher education sector. However, we have taken note of all evidence shared with both the Finance Committee and the Education and Culture Committee. As the Bill progresses through Parliament, I, or my officials, would be happy to meet with the Finance Committee if that would be helpful. I want to listen to all ideas and constructive suggestions in order to make this legislation as impactful as possible in improving the governance of our higher education institutions.

ANGELA CONSTANCE