## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>The Bill</td>
<td>1</td>
</tr>
<tr>
<td>Issues raised in evidence</td>
<td>1</td>
</tr>
<tr>
<td>ONS reclassification</td>
<td>1</td>
</tr>
<tr>
<td>Charitable Status</td>
<td>10</td>
</tr>
<tr>
<td>Amendment of HEI governing instruments</td>
<td>12</td>
</tr>
<tr>
<td>Governance arrangements – recruitment of chair</td>
<td>14</td>
</tr>
<tr>
<td>Remuneration of chair</td>
<td>16</td>
</tr>
<tr>
<td>Consultation</td>
<td>17</td>
</tr>
<tr>
<td>Conclusion</td>
<td>18</td>
</tr>
</tbody>
</table>
Finance Committee

1. The remit of the Finance Committee is to consider and report on-
   a. any report or other document laid before the Parliament by members of the
      Scottish Government containing proposals for, or budgets of, public expenditure or
      proposals for the making of a tax-varying resolution, taking into account any report
      or recommendations concerning such documents made to them by any other
      committee with power to consider such documents or any part of them;
   b. any report made by a committee setting out proposals concerning public
      expenditure;
   c. Budget Bills; and
   d. any other matter relating to or affecting the expenditure of the Scottish
      Administration or other expenditure payable out of the Scottish Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the Parliament on
   the timetable for the Stages of Budget Bills and on the handling of financial business.

3. In these Rules, “public expenditure” means expenditure of the Scottish
   Administration, other expenditure payable out of the Scottish Consolidated Fund and
   any other expenditure met out of taxes, charges and other public revenue.
Introduction

1. The Finance Committee issued a call for evidence on the Financial Memorandum (FM) of the Higher Education Governance (Scotland) Bill in June 2015. The Committee received fifteen responses to its call for evidence, of which the majority came from higher education institutions (HEIs) and related bodies.

2. To explore further the issues raised in the responses the Committee then took oral evidence on 16 September 2015 from—
   - Universities Scotland; and
   - The Scottish Government Bill Team

The Bill

3. The FM states that the principal purpose 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."

4. Specifically, the Bill makes provision to require HEIs to appoint a chair in accordance with a process laid out by Ministers in regulations.

5. HEIs will also be required to include in their governing body—
   "the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students’ association/union, and two graduates of the institution nominated by a graduates’ association."

Issues raised in evidence

ONS reclassification

6. The majority of respondents to the Committee’s call for evidence expressed concerns that the Bill could lead to universities being reclassified as public sector bodies by the Office of National Statistics (ONS).

7. Universities Scotland, for example, stated—
   "ONS’s programme already includes an intention to review the classification of HEIs. Their classification decisions are informed by factors including the extent of government control and influence over an institution. In Universities
Scotland’s view, the Bill heightens the risk of institutions’ reclassification through the additional controls it hands to Ministers.”

8. Highlighting what it saw as the potential consequences of reclassification, the Committee of Scottish Chairs’ submission stated—

“The specific issue we wish to raise with the Finance Committee is the prospect that increased Ministerial control will lead to the universities being reclassified by the ONS as ‘Central Government’. Should this happen, it would have dramatic adverse consequences. It would—

- prevent universities from retaining annual operating surpluses;
- place a severe restriction on their ability to borrow funds;
- reduce their ability to enter into commercial partnerships; and
- put at risk their status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support.”

9. The University of Glasgow stated that reclassification would have—

“a dramatic and harmful effect on universities’ financial management. Specifically, it would disincentive entrepreneurial activity – a key element for the success of universities – and it would prevent universities from generating annual financial surpluses to invest in maintaining and improving their asset base investment that goes into infrastructure development plans, which rely on revenue surpluses, borrowing and philanthropic support.”

10. Should the risk materialise, the University of Glasgow stated that it could lose income of around £28.7m per annum, with an even greater impact expected for its capital investment programme.

11. Universities Scotland expanded on the potential impact of reclassification in oral evidence, pointing out that HEIs’ total level of borrowing was around £530 million which would have “concerning” consequences were that debt to be taken onto the public balance sheet. Furthermore, HEIs invested around £377 million in capital spending each year which could be put at serious risk were they to be prohibited from borrowing or only able to do so under tight Government control.

12. In addition to the potential financial consequences for HEIs themselves, a number of respondents also highlighted the potential impact on the wider economy. The University of St Andrews stated—

“Independent analysis has confirmed that the University of St Andrews delivers £12 in benefit for every £1 of Scottish Government funding invested. Our ability to excel in a competitive global market depends on our academic reputation, both in terms of excellence in research and a world class learning and teaching
experience. The uncertainty generated by this legislation, and the risk posed to the autonomy, can only damage the academic reputation of the HE sector in Scotland, and undermine our international competitiveness and our contribution to Scotland’s future economic growth.”

13. The University of St Andrews concluded by stating—

“We hope that a clear assurance will be provided that the proposed changes to be made by the Bill, and any regulations that could be potentially made under the powers given in the Bill, will not trigger a reclassification by ONS.”

14. In oral evidence, Universities Scotland stated that it had received legal advice that the Bill “when looked at cumulatively along with the existing indicators of Government control, creates a significantly increased risk of ONS reclassification.” However, it confirmed that it had not raised the issue with the ONS as it felt that “the responsibility lies with the Government to give us a really firm assurance that the issue has been dealt with through proper due diligence.” Universities Scotland also highlighted the difficulty of getting definitive advice from the ONS which had made it clear that it would “make a determination once it has seen what has happened on the ground.”

15. Given the view that the ONS was unlikely to give a definitive decision at this stage, Universities Scotland went on to query “whether what the Bill is trying to achieve is worth creating the risk.”

16. Universities Scotland confirmed that, following the Bill’s introduction, it had raised its concerns about ONS classification with the Government “both orally and in writing” in late June and again in a formal letter dated 13 August but had yet to receive a substantive response.

17. In oral evidence, the Bill Team confirmed that it had received “quite a substantial piece of correspondence that covers a number of items.” Whilst it acknowledged that “it would have been ideal if a response had been given prior to today”, a number of colleagues were working through the “complex and serious issues” raised to ensure that the correct answers are given in the response.

18. When asked why, given that it had been considering the matter in detail since the consultation closed in January, it had not been able to respond to the letter more promptly, the Bill Team stated that whilst it would have been easy to dispatch a quick answer explaining that the ONS would not give any guarantees before the Bill had been enacted, “some of the detailed questions about the legal underpinning of other parts of the Bill must be worked through with great care to ensure that our answers are correct.”

19. When asked to confirm when Universities Scotland could expect to receive a response to its letter, the Bill Team confirmed that it would reply “as quickly as possible.” When pressed further on the expected timescales for its response, the Bill Team stated “we are talking about weeks at the most, certainly not months.”
The Committee considers it unsatisfactory that the Government response was not issued prior to the oral evidence session. Given that the Government has been working on the issues raised for several months, the Committee asks that the response is issued as quickly as possible and made available to members of the lead committee before its evidence session with the Cabinet Secretary for Education and Lifelong Learning.

20. When it was pointed out that the ONS had already stated its intention to review the classification of HEI's regardless of the Bill’s provisions, Universities Scotland confirmed that this had been stimulated by questions relating to English universities. However, Universities Scotland stated that previous experience had suggested that the ONS would not approach this work narrowly and that “adding the risks that the Bill poses would put [Universities Scotland] in a position of quite substantive worry.”

21. When invited to quantify the level of risk as it saw it, with or without the Bill, Universities Scotland stated that without the Bill it assessed the risk as being “lower amber” but that were the Bill to be implemented as it stood, the risk of reclassification was “hovering on the amber to red border.” When invited to comment on this assessment, the Bill Team stated that whilst it respected the assessment, it did not agree with it.

22. When asked when it had become aware of the European System of National and Regional Accounts (ESA 2010) and its impact on classification, the Bill Team stated that the Government “would always have been aware” that it was a determinant of classification of HEIs although—

“The matter was looked at in earnest and in great detail across Government after the consultation on the bill ended in January 2015, and there was Cabinet consideration of it. Knowledge of ESA 2010’s determinant role is there all the time, but specific reference to the issue in detail came after the consultation closed, when we were looking at all the views.”

23. The Bill Team went on to confirm that the issue of reclassification of HEIs had been considered in 2011-12 when college reclassification “was initially being looked at” and was not being considered now as a result of issues relating to the recent reclassification of certain capital projects outwith the education sector.

24. When asked in oral evidence why the FM did not contain an analysis of the risk of ONS reclassification, the Bill Team stated that “it had analysed it carefully over a number of years.” When considering the recommendations of the 2012 Review of Higher Education Governance—

“The issue of reclassification was factored into all that thinking, and there was thorough analysis of the ESA 2010 guidance on the indicators of control. The summation of that work, which involved dialogue across Government, was that...
the final planned content of the Bill would be compliant with those indicators of control, which is why the financial memorandum does not feature analysis of that.”

25. The Bill Team also confirmed that the reclassification issue had not been included in the Business Regulatory Impact Assessment for the same reasons.

26. The Bill Team confirmed that as the ONS “will not give categorical analysis or summation statements on the plans of this or any government” “there has been no discussion in which it has assessed and cleared any of the Bill’s content.” However, the Bill Team confirmed that “there has been thorough consideration of the risk, with the emphasis being squarely on the indicators of control” and stated that “nothing in the Bill will require HEIs to ask Ministers for permission to do anything.”

27. Expanding on this point, the Bill Team stated—

“it is not about Ministerial control; there have been assertions that Ministers may find themselves on governing bodies. There is absolutely no intention on the Government’s part to do that or to have any direct involvement in or control over appointments. It is about the process.”

28. The Bill Team further stated that it would be “completely undesirable” for Ministers to make appointments to boards and the Bill was not intended to give them such powers—

“The Government would never want to directly put anyone on any governing structure in a university, and that includes Ministers. I know that concerns or views have been expressed about that, but that is not the intention.”

29. Therefore “the Scottish Government’s conclusion is that the risk that is posed by the Bill does not advance beyond any risk that existed prior to it.” When pressed on this point by the Committee, the Bill Team confirmed its view that whilst “a modicum of risk exists”—

“Our assessment is that any current level of risk is not advanced by the provisions in the Bill, set against an analysis of the ESA 2010.”

30. Whilst it had not raised the specific issue directly with the ONS, the Bill Team confirmed that the Government had been developing “close relations” with it which had been “extremely helpful” as a result of capital discussions. Government officials had also participated in workshops with ONS where related issues had been discussed in general terms. This had led the Government to conclude that “there is low risk [of reclassification] and it is around factors that were already present in universities. In our belief, nothing that is being done will increase that risk.”
31. When asked to expand on its own internal assessments and the discussions it had held with ONS, the Bill Team stated—

“We used our skills and experience and the knowledge that is within the Scottish Government to assess the risks. Then, as I have said, we used our wider understanding, based on discussions with the ONS around other reclassifications, to build into that assessment.”

32. In response to a direct request to share its detailed analysis and risk assessment with the Committee, the Bill Team replied—

“We would need to provide Ministers with advice on that, and it would depend on what form the work takes. We can certainly consider that direct request. We will sort through the constituent parts of that collection of work and reply to the committee.”

33. The Cabinet Secretary for Education and Lifelong Learning responded to the request in a letter dated 5 October. The letter “runs through some of the key features of the analysis conducted by the Scottish Government” in relation to each of the ESA 2010 indicators of government control and reiterates the Government’s view “that the Bill presents no additional risk of reclassification.”

The Committee recommends that the full analysis is published in advance of the Parliament being asked to vote on the Bill at Stage 1.

34. In response to questioning from the Committee the Bill Team also confirmed that it had not sought external legal advice on the issue or the opinions of experts in the field—

“There has been no external liaison on the matter. It is a sensitive issue and we would not have a wide consultation on that point alone when the issues were being unpacked in great detail internally. We did not conduct external discussions or take expert advice from outwith Government.”

35. However, the Bill Team confirmed that it would “happily consider” Universities Scotland’s legal advice suggesting a significantly increased risk of reclassification, if Universities Scotland was prepared to share it.

36. Universities Scotland wrote to the Committee on 1 October 2015 attaching a note of advice from its lawyers that it had commissioned after the oral evidence session. The note of advice suggested that “the challenges posed to HEIs by such an [ONS] assessment exercise should appear at the level of ‘significant risk’ on their risk registers.” Universities Scotland confirmed that it was content for the note to be published.
37. When the Committee expressed “surprise” that the Government had not written to the ONS, given recent developments with regard to the classification of certain capital projects, the Bill Team pointed out that “The view of heightened risk in relation to the Bill, in its coverage in the media, is relatively recent.” The Bill Team further noted that when asked to comment by the press, the ONS confirmed that it was not prepared to give an opinion without looking in detail at the Bill’s provisions and their outcomes—

“At the start of a process, things can change. After a consultation, two of the proposals can go and four can be left. It is a moveable picture. The ONS likes to see the settled picture—as the convener said, it likes to see the end point.”

38. Later in the session, the Bill Team stated “We cannot be complacent, but nobody has raised the existing risk in this debate until perhaps the past four to six weeks. There was no mention of the ONS risk in the dialogue when the consultation was open.”

39. In response to further questioning from the Committee, the Bill Team agreed that there was actually a “slight risk” that writing to the ONS might, in fact, “increase the risk of its undertaking investigation or even reclassifying” and would “certainly delay matters.”

40. When asked by the Committee whether its risk assessment had included consideration of the potential opportunity costs that would arise from reclassification, the Bill Team confirmed that it had not but undertook to “examine thoroughly” the figures submitted by stakeholders. However, the Bill Team went on to state that this did not mean it was giving the figures credence and reiterated its view that the Bill would not “advance any current risk substantively.” Nevertheless, it confirmed that it had been working closely with HEIs on capital planning and was “very aware of the extent of the financial implications of reclassification.”

41. For the avoidance of doubt, the Bill Team confirmed that “that there is absolutely no intention on the Government’s part that reclassification would be an outcome; it is something that we would seek actively to avoid.”

42. Whilst it considered the risk of reclassification to be low, the Bill Team went on to confirm that “if, as a result of a wider ONS review of universities, there were any risk of reclassification—Ministers have made it clear that that is not a policy goal—we would take what measures were required to ensure that universities were not reclassified.”

43. When pressed to clarify whether this meant that the Government would act to change the Bill’s provisions in what it considered to be the unlikely event that reclassification did happen, the Bill Team stated—

“we do not think that reclassification will happen. Even if it did, it would not happen during the bill’s passage. For that to happen, the bill would need to
become an act and the ONS would have to go through a long process of poring over every element of it, but that is entirely theoretical.”

44. Expanding further, the Bill Team explained that—

“If reclassification is triggered it does not come into immediate effect. The colleges in England and Wales were given a period in which to review their control mechanisms and make changes that would keep them outside the boundary. That is what we were saying.

There is a very low risk of reclassification and we do not believe that the bill will change that. That is a key point. The risk already exists because of the nature of universities and their interaction with the Scottish Government. If a reclassification decision was triggered by an ONS review, which could well be triggered by a review of universities down south—that is the most likely scenario—we would ask for a period in which to review the entire structure around universities, which could lead to changes that would keep them outwith the boundary.”

45. In response to questioning from the Committee about whether HEIs might not actually want democracy and transparency and were using their concerns about finances as a “smokescreen”, Universities Scotland acknowledged that stakeholders held different positions, but assured the Committee that it did have “genuine financial concerns” about the Bill. Were these financial concerns not a factor in its thinking, Universities Scotland was of the view that it “would be able to work with Government and have a good discussion about the issues that are being addressed in the bill in relation to transparency and representation on university governing bodies.”

46. Universities Scotland went on to confirm that whilst it did have very real concerns about the potential financial implications of the Bill, they were “real concerns that are capable of creative resolution. If the powers in the bill that are given to Ministers are looked at again and alternative ways of doing things found, the ONS risk could be managed downwards. I would like to be confident that that would be the case.”

47. When asked whether it would be more comfortable if the powers being granted to Ministers regarding the membership and structures of a governing body could only be exercised through further primary legislation instead of by statutory instrument, Universities Scotland replied “That would be a different matter, yes.”

48. When asked by the Committee what parts of the Bill should be amended in order to reduce the risk of reclassification, Universities Scotland drew attention to sections 8, 13 and 20 which it considered were “the provisions that raise the critical risk factors.” In Universities Scotland’s view “There is creative scope for a rethink about how to do things in those sections in order to take Ministers out of the equation.”
49. Universities Scotland also highlighted the experience of college reclassification in Wales which “introduced elements that allowed greater student and staff representation on the governing bodies while allowing the colleges to be reclassified as non-profit independent organisations.” This model, it was suggested, “could be considered to avoid the level of control that we are talking about while addressing the concerns that stakeholders have about how governing bodies should be composed.”

50. The Bill Team expressed the view that “there is some ground for profitable dialogue between the Government and partners on the content of the secondary legislative provisions. That point has been reinforced again and again. Colleagues have said that the bill would benefit from such dialogue and that it would address issues of risk.”

51. Expanding on this point later in the session, the Bill Team stated—

“if the secondary legislative powers could be modified in a way that did not harm the bill’s overall policy intention, the Scottish Government would be open to a conversation on that. If such modification minimised risk or the perception of risk, that could be beneficial.”

52. The Bill Team further stated—

“from what has been said today, it seems that the content of those secondary powers would be looked at in the light of the evidence that was submitted to both committees. I cannot predict exactly what that would mean but, given that concerns have been raised, we will look thoroughly at the content, the impact and the intent of the secondary legislation. I restate that the intent was to future proof the legislation in some way. I am not being dismissive of people’s views of risk, but it is about good housekeeping; there is no intent to advance Ministerial control through those secondary powers. However, given that those issues have been raised, I am sure that the Government will consider them.”

The Committee welcomes the Bill Team’s commitment to working with stakeholders to minimise their financial concerns, particularly those concerns relating to the possibility of ONS reclassification and the impact it might have. This commitment is particularly welcome in light of the Bill Team’s assurance that Ministers do not wish to see reclassification happen and would take measures to prevent it should it arise.

The lead committee may wish to invite the Cabinet Secretary to outline the steps that the Government would take in such a scenario, whether as a result of the Bill or of the pre-existing risk described in evidence.
The Committee further welcomes the Bill Team’s undertaking to “look thoroughly at the content, the impact and the intent of the secondary legislation” in light of the financial concerns expressed in evidence. The lead committee may wish to seek further information from the Cabinet Secretary about the scope of this work, how it is progressing and the amendments the Government intends to bring forward as a result at Stage 2.

The Committee believes that clarification of these issues and the nature of any amendments that the Government intends to bring forward should be provided before the Parliament is asked to vote on the Bill at Stage 1.

Charitable Status

53. On a related point, several respondents expressed concerns that the Bill could result in HEI’s having their charitable status rescinded by OSCR as a result of increased levels of Ministerial control.

54. For example, the University of Aberdeen expressed concerns that—

“the consequences of the Bill, in particular the addition of Ministerial powers over internal governance, could lead to the loss of charitable status. Our charitable status is of fundamental importance to our ability to attract funding and philanthropic support. The loss of that status would have major and far reaching consequences for the future sustainability of the University.”

55. Universities Scotland also stated—

“At a financial level, charitable status is essential to institutions’ solvency. Loss of charitable status would, in particular, mean that institutions lost their entitlement to 80% relief from non-domestic rates. This was estimated in 2008 as being worth £27m per year. Loss of charitable status would also severely prejudice institutions’ capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions who are no longer charities.”

56. Whilst the University of Glasgow stated—

“while there is any uncertainty in universities charitable status, there are implications for funding from those bodies which are required to fund only charitable entities.”

57. Queen Margaret University suggested—

“As part of its deliberations, we would ask the Finance Committee to consider what further advice the Scottish Government has taken from OSCR on this
matter i.e. beyond the original consultation, and what opinion has been offered by OSCR?"

58. OSCR submitted written evidence to the Education and Culture Committee setting out the criteria by which an HEI’s charitable status is assessed. It concluded—

“Our view is that the 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.

Section 8 of the Act 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 Act 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.”

59. OSCR’s written evidence also confirmed that it had considered “the requirements for the composition of the governing body set out in section 4 of the Bill, and whether these would be likely to prevent the charity trustees of HEIs from fulfilling their trustee duties.” In respect of this point, OSCR concluded—

“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.”

60. When invited to comment on OSCR’s submission in oral evidence, Universities Scotland stated—

“We have reflected on OSCR’s advice. A brief summary of OSCR’s position would be that although the bill in itself probably does not lead to a risk of reclassification for charitable purposes, if ministers used their powers to amend the membership of governing bodies, to amend the membership of academic boards or to make the very general changes to legislation that section 20 allows them to make, that could lead to a situation in which OSCR had to re-examine whether universities were meeting the charity test in relation to ministerial directions. I am taking that at face value. One thing that OSCR recognises—this is pertinent to the ONS reclassification point—is that the bill gives ministers
power to alter the constitution of universities, and that is one of the risk factors in relation to ONS reclassification.”

61. When it was pointed out that in reaching its conclusions, OSCR had considered each of the points which the ONS would also have considered, Universities Scotland stated that the ONS would “look at the legislation through a different lens: that of the European system for accounts” and its associated guidance.

62. When asked whether there might be ways round the proposed legislation such as through arms-length foundations holding charitable funds, Universities Scotland responded “There might well be, but they would not be as safe, as secure and as clear cut. My argument would be: why would you increase the risk if it is not essential to achieve the purposes of the bill?” Furthermore, Universities Scotland considered that the creation of such an arms-length foundation would contradict the declared intent of the legislation which was to create transparency and accountability.

The Committee notes that a number of concerns were raised in written evidence in relation to HEIs’ charitable status but is satisfied that these were addressed in OSCR’s submission to the lead committee.

Amendment of HEI governing instruments

63. A further issue which a number of respondents considered had not been addressed in the FM was that of the amendment of HEI governing instruments to align with the changes to primary legislation. Whilst the FM acknowledged that the Government could expect to incur “negligible additional staffing costs”, in making the adjustments, it did not refer to any related costs for HEIs themselves.

64. The University of the Highlands and Islands pointed out that it had made changes to its constitution in 2013/14 and “on the basis of this experience, the Bill significantly underestimates both the cost and the time required to make these changes.”

65. Similarly, Scotland’s Rural College explained that any changes to its Articles of Association cannot be made without the consent of the Scottish Ministers and OSCR. After being created through the merger of a number of separate colleges in 2012, Scotland’s Rural College stated that it had taken almost three years from the date of the request to the consent of Ministers being granted. Therefore, it considered that its experience—

“In relation to changing Articles of Association indicates that the assumption in the FM of the time and cost required to amend HEIs governing instruments is not accurate and that it significantly understates the resource requirement both for the Scottish Government and for the institutions involved.”
66. Queen Margaret University stated—

“We would ask the Committee to note that the process of securing Privy Council and Scottish Government approval for a relatively straightforward amendment to the University’s Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. This process commenced in June 2014, and the amendment is due to commence in late September 2015. Securing the necessary approval involved commissioning of legal advice, the equivalent of 5-6 days of university administrative time to oversee the process, as well as consideration of draft amendments by senior staff and the University Court at various stages of the approval process. The changes required by the Bill would be more substantial for the University than the amendments currently being progressed, and as such, would likely incur higher administrative and staff time costs than the current amendment.

As stated above, it is likely that several, if not most, governing bodies will require to seek similar amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days…We consider that none of these costs have been factored into the Financial Memorandum that accompanies the Bill.”

67. Whilst the University of Edinburgh stated—

“Implementing legislative change would require a significant amount of work to review, consult, amend and implement at least eight University ordinances. This includes engagement with the Privy Council, consultation with staff and stakeholders, legal and policy work. We estimate one-off costs of £79,500 for these processes and the legislative changes.”

68. In oral evidence Universities Scotland pointed out that HEIs were required to undertake significant consultation when making changes to their Articles of Association and would also incur legal fees. “That is a huge complication. It is the opportunity cost, rather than the real cost, that is significant.”

69. In response to questioning from the Committee on why the costs of HEIs amending their governing instruments had not been included in the FM, the Bill Team stated that the updating of governing instruments was required to comply with the code of conduct and was part of mainstream business for HEIs. The Bill Team further stated that given the variation from one HEI to another, it had found it “very challenging to identify and package up any standard costs in that regard, given the staggered nature of the time that it would take to change ordinances and governing instruments after the Bill becomes an Act.”
The Committee reminds the Government that FMs are required by Standing Orders to set out “the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise”, including for other bodies, individuals and businesses over and above the Scottish administration and local authorities. The lead committee may wish to invite the Cabinet Secretary to explain why the estimated costs to HEIs of amending their governing instruments were not included in the FM.

70. The Bill Team also confirmed that the Government had considered and consulted on reforming the Privy Council process. However—

“Ministers decided not to pursue that in the bill, for many reasons, but I would cite the deep complexity of the historical arrangements through which we have arrived at the current system. There are some features that are regrettable, including the time taken, the detailed legal matters and the going back and forth between legal advisers. However, as part of the announcement about the bill, Ministers mentioned a separate piece of work involving the Privy Council and a modernisation conversation, which would commence before any new legislation was thought of in the future.”

Governance arrangements – recruitment of chair

71. The FM states that individual HEIs could be expected to incur costs in relation to the recruitment of chairs (eg, advertising, administrative and interview expenses). This was estimated to total £8,000 every four years with advertising costs amounting to a quarter of that total.

72. The FM therefore states that—

“Assuming the maximum estimated advertising cost for each of the 18 HEIs affected, over the course of a four year cycle of chairing member replacements for the higher education sector in Scotland, the cost of advertising the vacancies might total a maximum of £36,000.”

73. However, a number of respondents suggested that this was an underestimate. Scotland’s Rural College for example, stated that it had recently incurred advertising costs of £16,000 when recruiting new Board members.

74. Both Queen Margaret and Napier Universities also pointed out that they had spent around £5,000 on advertising when recruiting chairs, whilst the University of Dundee stated that it had spent around £12,500 for external publicity during its last recruitment exercise for the University Court.

75. Universities Scotland suggested that on the basis of HEIs’ own experience, the FM underestimated advertising costs by £4,000 to £8,000 per HEI meaning a sector-wide underestimate of up to £144,000.
76. The University of Dundee also pointed out that whilst the FM included a maximum expenses allowance of £500 each for candidates attending interview, it did not include any expenses costs for “those members of the governing body acting as members at both the shortlisting and interview stages.”

77. The FM states that the Bill will require HEI’s “to run an election to appoint the successful candidate” and assumes that “any additional costs will be minimal and able to be absorbed within existing institutional budgets” (on the basis that low cost ICT solutions are available).

78. However, the University of Dundee stated that it had recently spent £21,000 on an election for the post of Graduates’ Assessor on Court. Scotland’s Rural College also stated that it would not be possible for it to conduct elections using an electronic solution whilst Universities Scotland suggested that online elections would cost between £1,000 and £3,000 with postal ballots costing around £7,000.

79. In oral evidence, Universities Scotland stated—

“My real concern with the FM is about the quality of thinking that has gone into this work. For instance, a cost of £1,000 is being projected for the electoral process for a chair of court. I have looked at the evidence that has been submitted by universities—and I have run electoral processes for alumni members of governing bodies—and the universities are saying that, to run a proper electoral process costs £21,000 to £30,000.”

80. When asked whether election costs for chairs could realistically be expected to cost as much as alumni elections, Universities Scotland confirmed that in its view, set-up costs “would probably involve a ballpark five-figure sum” but it should be possible to run the system quite effectively in the future.”

81. When invited to respond to these points in oral evidence, the Bill Team explained that the £1,000 figure related to expenses for two candidates participating in an election. It went on to explain that it had encountered difficulties in quantifying the cost of recruiting chairs because the franchise for the elections had yet to be defined. Costs would also be dependent on the method by which an election was held. The Bill Team explained that the estimates in the FM—

“are about compliance with the bill. Extending a practice beyond legal compliance could result in many different costs. For example, one institution might use one newspaper and comply with the legal obligation in the bill, but another institution might decide to use four or five newspapers. The costs will be different depending on the approach that is taken.”

82. However, the Bill Team did confirm that it intended to undertake additional work on the FM which would be informed by the evidence gathered by both the Finance Committee and the Education and Culture Committee.
The Committee welcomes the commitment of the Bill Team to undertake further work in respect of the potential costs of recruiting a chair and, in so doing, to draw on the evidence submitted to it and to the lead committee. The lead committee may wish to invite the Cabinet Secretary to provide an update on this work.

Remuneration of chair

83. The FM estimates that remuneration of the chair will cost each HEI around £3,000 per annum. This estimate is based on an assumed daily rate of £512 (based on the Public Sector Pay Policy for Senior Appointments Technical Guide 2013/14) for attendance at six meetings per year. However, the majority of respondents cast doubt on the veracity of this estimate.

84. The Committee of Scottish Chairs, for example, stated—

"as every member of this committee can confirm, university chairs have much more demanding portfolios than can be addressed in 6 days per annum. The time commitment is at least one day per week, and in recent years has been greater than this….Regrettably, it appears from the FM that the Scottish Government does not understand the significance of this role and the time required to fulfil it."

85. Similarly, the Royal Conservatoire of Scotland stated—

"The FM significantly underestimates the commitment required of the Chair of the Conservatoire’s Board of Governors. We would estimate that commitment to be one day per week so, assuming a 45 week year, remuneration for our Chair would incur an additional cost of £23k, not the £3k cited in the FM. As an aside, it is of concern that the FM should so significantly underestimate the commitment required of a Board Chair — it could be reasonably inferred from that that Scottish Government is not as well-informed about HE governance as it should be."

86. Whilst the University of the Highlands and Islands stated—

"The Bill underestimates the time spent by a Chair of Court on university business. We currently pay the Chair for the equivalent of 1.5 days per week (reduced from 2 days in 2014/15 whilst new arrangements were being embedded)."

87. Universities Scotland expanded on the theme in oral evidence stating that it would cost the sector around £368,000 per annum to remunerate chairs for what it considered the typical number of days on which they would be working on university business (40 days) at the Government rate.
88. However, Universities Scotland went on to explain that the level of expenditure was not necessarily its main concern, stating—

“it is really about due diligence. If the developers of the bill conceive the chair’s role as simply being to chair a meeting six times a year, they have failed to understand what the role of a chair of a governing body is.”

89. When asked to respond to this suggestion in oral evidence, the Bill Team noted the variation in the number of days cited in written evidence and the difference in the role of chair in different HEIs. It explained that its intention had been to examine “the core of the job so as not to overstretch the coverage of what would be statutory remuneration” but conceded “it is fair to say that the focus was pared back a little too much” and undertook to “consider all the evidence and to revisit some of the assumptions, particularly in respect of the number of days that a chair spends doing their job.”

The Committee is disappointed about the disparity between the Government’s estimate of the time commitment required of a chair and the evidence provided by HEIs and questions the robustness of the consultation exercise in this regard. The Committee therefore welcomes the Bill Team’s commitment to undertake further work and “revisit assumptions” of the time commitment and related costs. The lead committee may wish to invite the Cabinet Secretary to provide an update on this work.

Consultation

90. A number of respondents to the Committee’s call for evidence stated that whilst they had participated in the consultation, what they considered to be key issues had not been included in it. The Committee of Scottish Chairs, for example, stated—

“the universities have had no opportunity to date to comment on important matters that were not included in the consultation but which now form part of the Bill. The detailed assumptions contained in the financial memorandum were not the subject of consultation. More significantly, the Bill proposes that government Ministers take new powers on themselves covering fundamental aspects of university governance. These could have a serious detrimental impact on University finances. They did not form part of the consultation: indeed the proposals are in direct contradiction to statements made in the Ministerial Foreword to the consultation paper.”

91. Napier University also stated “there are potential financial implications for Edinburgh Napier University which are not reflected in the FM and which were not evident from the proposals which Scottish Ministers consulted upon.”
92. In oral evidence, Universities Scotland stated that it had had no discussions whatsoever with the Government on the FM. Whilst the consultation had asked about costs and savings “in very general terms”, “the specific figures that were presented in the financial memorandum were not subject to consultation. We could have helped to refine those, so I regret that.”

93. Universities Scotland further stated that “the Ministerial powers in the Bill that are causing us concern were not the subject of consultation...We are very anxious to find a way forward that takes the Ministerial powers out and reframes the way in which those issues can be dealt with. We do not think that due diligence has been done on managing that risk.”

94. Responding to these concerns in oral evidence, the Bill Team stated--

“The point was made that there was no consultation on the financial aspects. I think that I said earlier that the views of colleagues were slightly surprising in the sense that those aspects [relating to secondary legislation] were largely intended as future proofing. Maybe in another bill such sections would have passed off without as much comment, but I acknowledge the clear concerns and views of many who have submitted evidence.”

95. The Committee considers that certain elements of the Bill which have contributed to stakeholder concerns about the potential financial impact of the Bill should have been included as part of the consultation exercise. The lead committee may wish to invite the Cabinet Secretary to set out the reasons for this omission.

Conclusion

The Education and Culture Committee is invited to consider the above in its scrutiny of the Bill at Stage 1.