Delegated Powers and Law Reform Committee

Higher Education Governance (Scotland) Bill at Stage 1
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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   
   ii. [deleted]
   
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
Committee Membership

**Convener**
Nigel Don
Scottish National Party

**Deputy Convener**
John Mason
Scottish National Party

Richard Baker
Scottish Labour

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meetings on 8 and 29 September and 6 October 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Higher Education Governance (Scotland) Bill at Stage 1 (“the Bill”)\(^1\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill\(^2\).
Overview of the Bill

3. The Bill was introduced by the Cabinet Secretary for Education and Lifelong Learning on 16 June 2015. The Bill makes provision in relation to the chairing members of governing bodies of higher education institutions (“HEIs”) and the composition of and appointment to governing bodies and academic boards of HEIs; and on the academic freedom of persons engaged in teaching or research at post-16 education bodies.

4. Part 1 of the Bill makes provision in relation to the governance arrangements of HEIs. For the purposes of the Bill, an HEI is a university, or an institution providing higher education designated by the Secretary of State, which is also a “fundable body” (i.e. a body which may receive funding from the Scottish Further and Higher Education Funding Council). The Open University is specifically excluded from the definition of HEI in the Bill.

5. Chapter 1 of Part 1 makes provision in relation to the governing body of an HEI (i.e. the body responsible for the management and administration of the HEI). Chapter 1 provides that the chair of the governing body is to be appointed in accordance with regulations made by the Scottish Ministers, who may also by regulations make provision as to the remuneration of the chairing member; sets out the requirements as to composition of the governing body, and gives the Scottish Ministers the power to modify by regulations such requirements; provides that the process of election and nomination to the governing body is to be conducted in accordance with rules made by the governing body; and specifies that the validity of the proceedings of the governing body is not affected by any defect in appointment or vacancy in membership.

6. Chapter 2 of Part 1 makes provision in relation to the academic board (also known as the Senate) of an HEI (i.e. the body responsible for the overall planning, co-ordination, development and supervision of the academic work of the HEI). Chapter 2 provides that the academic board is to consist of no more than 120 members, and gives the Scottish Ministers the power to modify this number by regulations; sets out the requirements as to composition of the academic board, and gives the Scottish Ministers the power to modify by regulations such requirements; provides that the process of election to the academic board is to be conducted in accordance with rules made by the governing body; and specifies that the validity of the proceedings of the academic board is not affected by any defect in appointment or vacancy in membership.

7. Chapter 3 of Part 1 makes provision as to regulations made under, and defined terms used in, Part 1. Power is given to the Scottish Ministers, by regulations, to modify the definition of a “higher education institution” so as to include or exclude a particular institution.
8. Part 2 of the Bill makes provision in relation to academic freedom. It amends section 26 (academic freedom) of the Further and Higher Education (Scotland) Act 2005 to strengthen the protection of academic freedom for persons engaged in teaching or research at post-16 education bodies (this includes fundable HEIs and further education institutions, including the Open University). The amendment also extends the meaning of academic freedom to include the freedom to develop and advance new ideas and innovative proposals.

9. Part 3 of the Bill makes provision as to ancillary regulations, consequential modifications and commencement.

Delegated Powers Provisions

11. The Committee considered the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:

- Section 20 – Ancillary and consequential provisions
- Section 22 – Commencement.

12. At its meeting on 8 September, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. The correspondence is reproduced at the Annexe. The Committee’s comments and recommendations on these powers are detailed below.

Section 1 – Appointment as chairing member

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<td>Parliamentary procedure:</td>
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Provision

13. Section 1 provides that the chairing member of the governing body of an HEI is to be appointed in accordance with a process set out in regulations made by the Scottish Ministers. Such regulations may include (in particular) provision for: periods of appointment and whether reappointment is possible; means of selection for appointment; and reimbursement of candidates expenses.

14. Section 1 also gives examples of possible means of selection, as follows: public advertisement; criteria for selection; interview of candidates; shortlisting of candidates; and holding an election from among candidates. Before making such regulations, the Scottish Ministers are required to consult each HEI to which the regulations relate and such other persons as the Scottish Ministers consider appropriate (section 3).

Comment

15. The Delegated Powers Memorandum (“DPM”) produced by the Scottish Government explained that, while the Government considers it crucial that the Bill includes a minimum requirement for the chairing member of a governing body to be appointed in accordance with a process set out in regulations, it is not considered necessary to set out the detailed process in primary legislation. The DPM noted that the regulations could potentially include a considerable amount of detail, which it is thought could be better provided for in secondary legislation. The DPM also explained that the power to make regulations will provide flexibility to
allow for modification of the process to reflect variations in practices within the higher education sector, without resorting to primary legislation.

16. In terms of procedure, the DPM explained that the affirmative procedure is considered appropriate, since the process of appointing a chairing member will be a key process for HEIs. The DPM also noted the requirement for consultation with stakeholders before the power is exercised.

17. While generally the Committee is content that both the affirmative procedure and the requirement for consultation are appropriate in these circumstances, given the significance of the appointment of chairing members for HEIs, the Committee notes that the appointment of chairing members is a key policy in the Bill and is a matter of considerable controversy amongst HEI stakeholders.

18. The Committee therefore sought further explanation from the Scottish Government as to why it is considered appropriate for the key provisions as to the appointment of chairing members to be postponed to secondary legislation, and whether such key provisions could instead be set out on the face of the Bill and therefore be made subject to full Parliamentary consultation and debate, with the detail of the process to be set out in regulations.

19. The Scottish Government’s response reiterated that it is not considered appropriate for the detailed process for the appointment of chairing members to be set out on the face of the Bill, this being considered more appropriate for secondary legislation. The Scottish Government did however indicate that, influenced by continuing dialogue with stakeholders on this matter, it is considering whether it might be appropriate to bring forward an amendment at Stage 2 setting out a provision on the face of the Bill for a single model for the appointment of elected chairs, although the Scottish Government considers that it might still be more appropriate for some details of the process to be left to regulations.

20. While the Committee accepts in principle that the detail of the process for the appointment of chairing members could be postponed to secondary legislation, it considers, since this is a key policy in the Bill, that it could be more appropriate for the key provisions as to the appointment of chairing members to be set out on the face of the Bill and therefore be made subject to full Parliamentary scrutiny.

21. The Committee notes that the Scottish Government, influenced by continuing dialogue with stakeholders on this matter, is considering whether it might be appropriate to bring forward an amendment at Stage 2 setting out a provision on the face of the Bill for a single model for the appointment of elected chairs. The Committee will return to consider these powers after Stage 2.
Section 2 – Remuneration to be payable

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

Provision

22. Section 2 provides that the Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chairing member of the governing body of the institution. Such regulations may include (in particular) provision that: specifies or limits the circumstances in which sums must be offered; requires sums to be reasonable given the responsibilities of the chairing member; or delegates to other persons the function of determining sums in particular cases.

23. Before making such regulations, the Scottish Ministers are required to consult each HEI to which the regulations relate and such other persons as the Scottish Ministers consider appropriate (section 3).

Comment

24. The DPM explained that most, if not all, governing bodies do not pay remuneration to chairing members. The Scottish Government considers remuneration and allowances should be available to chairing members in order to increase the potential range of candidates.

25. Similarly to the power in section 1, the Scottish Government considers that it is not necessary to set out the detail in relation to remuneration and allowances in primary legislation; such detail is considered to be more appropriate for secondary legislation. The DPM also noted that this approach will allow flexibility to change the provisions on remuneration and allowances to reflect changing practices within the higher education sector, without resorting to primary legislation.

26. The DPM explained that the affirmative procedure is considered appropriate given the potential impact that the exercise of the power could have on HEIs. The DPM also noted the requirement for consultation with stakeholders before the power is exercised.

27. While generally the Committee is content that both the affirmative procedure and the requirement for stakeholder consultation are appropriate in these circumstances given the significance for HEIs of the remuneration and allowances payable to chairing members, the Committee notes that the principle of remuneration for chairing members is in general a new concept for HEIs and has met with opposition amongst stakeholders.

28. The Committee therefore sought further explanation from the Scottish Government as to why it is considered appropriate for the principle and basic
framework of remuneration for chairing members to be postponed to secondary legislation, and whether such principle and basic framework could instead be set out on the face of the Bill and therefore be made subject to full Parliamentary consultation and debate, with the detail to be set out in secondary legislation.

29. The Scottish Government’s response reiterated that it is not considered appropriate for provisions in relation to remuneration and allowances for chairing members to be set out on the face of the Bill due to the potentially considerable level of detail necessary, this being considered more appropriate for secondary legislation.

30. The response explained that, while the Scottish Government notes the Committee’s suggestion that the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill, it still considers that provisions on remuneration would be more appropriately contained in regulations.

31. The response also noted, however, that if an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it.

32. While the Committee accepts in principle that detailed provision on remuneration for chairing members could be postponed to secondary legislation, it considers, since this is generally a new concept for HEIs, that it could be more appropriate for the key provisions on remuneration for chairing members to be set out on the face of the Bill and therefore be made subject to full Parliamentary scrutiny.

33. The Committee notes that the Scottish Government has indicated that, if an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it. The Committee will return to consider the powers after Stage 2.

Section 8 – Power to modify section 4

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Provision

34. Section 8 gives a power to the Scottish Ministers to modify section 4 of the Bill, which sets out the requirements for the composition of the governing body of an HEI. Section 4 provides that a governing body is to be composed of: the chairing member; 2 staff members, elected by the staff; 1 academic staff member, nominated by a trade union; 1 support staff member, nominated by a trade union;
2 students, nominated by a students' association; 2 graduates, nominated by a graduates' association; and such other persons as are appointed by virtue of an enactment or in accordance with the governing document of the HEI.

35. Section 8 provides that the Scottish Ministers may by regulations modify the categories of membership set out in section 4, and the number of persons to be appointed under a particular category in that section.

Comment

36. The DPM explained that this power is taken to allow for prompt and effective change to be made to the requirements for the composition of governing bodies. The DPM suggested that changes in future practice in the higher education sector or relevant developments in good governance principles might lead the Scottish Ministers to conclude that the provisions in section 4 require modification.

37. In terms of procedure, the DPM explained that the affirmative procedure is considered appropriate given that this is a power to amend significantly the effect of primary legislation, and also given the potential impact that the exercise of the power could have on HEIs and their governing bodies.

38. Although this power is widely drafted, the Committee is content in principle with the explanation for the need for taking this power, and that the affirmative procedure is appropriate in these circumstances, given the significance for HEIs of the requirements as to composition of governing bodies and the fact that this is a power to modify primary legislation.

39. The Committee notes, however, that unlike the powers in sections 1 and 2, there is no requirement on the face of the Bill for the Scottish Ministers to consult HEIs prior to making regulations under this section. Given the potential impact of regulations made under this section on what is a significant area, the Committee asked the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8.

40. The Scottish Government’s response noted the Committee’s suggestion and indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations, and any other persons whom the Scottish Ministers consider appropriate.

41. The Committee is content in principle with the power in section 8 of the Bill, and that it is subject to the affirmative procedure. However, given the potential impact of regulations made under this section on what is a significant area, the Committee considers that a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8.
42. The Committee notes that the Scottish Government has indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by regulations made under this section, and any other persons whom the Scottish Ministers consider appropriate. The Committee will return to consider these powers after Stage 2.

Section 13 – Power to modify sections 9 and 10

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

Provision

43. Section 13 gives a power to the Scottish Ministers to modify sections 9 and 10 of the Bill, which set out the requirements for the size and composition of the academic board of an HEI.

44. Section 9 provides that the board is to consist of no more than 120 members. Section 10(1) provides that the board is to be composed of: the principal of the institution; the heads of school of the institution; academic staff members elected by the academic staff; students elected by the students; and such other persons as are appointed by virtue of an enactment, in accordance with the governing document of the HEI or in accordance with a decision of the governing body of the HEI. Section 10(2) provides that more than 50% of the board members must be elected academic staff and students, and at least 10% of the members must be elected students.

45. Section 13 provides that the Scottish Ministers may by regulations modify: the number of members of the board specified in section 9; the categories of membership set out in section 10(1); and the number or percentage of persons to be appointed under a particular category in section 10(1). Such modification as to number may be made by specifying a fixed number or percentage, or a maximum or minimum (or both).

Comment

46. The DPM explained that this power seeks to allow for a prompt and effective change to the requirements as to the size and composition of the academic board, in order to respond to any changes in future practice in the higher education sector and to relevant developments in good governance principles.

47. In terms of scrutiny, the DPM explains that the affirmative procedure is considered appropriate, given that this is a power to amend significantly the effect of primary legislation and also given the potential impact that the exercise of the power could have on HEIs and their academic boards.
48. Although this power is widely drafted, the Committee is content in principle with the explanation for the need for taking this power, and that the affirmative procedure is appropriate in these circumstances, given the significance for HEIs of the requirements as to composition of academic boards and the fact that this is a power to modify primary legislation.

49. The Committee notes, however, that there is no requirement on the face of the Bill for the Scottish Ministers to consult HEIs prior to making regulations under this section. Given the potential impact on what is a significant area, the Committee asked the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13.

50. The Scottish Government’s response noted the Committee’s suggestion and indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations, and any other persons whom the Scottish Ministers consider appropriate.

51. The Committee is content in principle with the power in section 13 of the Bill, and that it is subject to the affirmative procedure. However, given the potential impact of regulations made under this section on what is a significant area, the Committee considers that a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13.

52. The Committee notes that the Scottish Government has indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by regulations made under this section, and any other persons whom the Scottish Ministers consider appropriate. The Committee will return to consider these powers after Stage 2.

Section 15 – Meaning of higher education institution

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<td>negative</td>
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Provision

53. Section 15(1) sets out the definition of an HEI for the purposes of Part 1 of the Bill. HEI has the same meaning as in the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”) – that is, a university or an institution providing higher education designated by the Secretary of State. However, such an institution falls within the definition only if it is also listed in schedule 2 (fundable bodies) to that Act. Schedule 2 lists those bodies which may receive funding from the Scottish
Further and Higher Education Funding Council ("the Funding Council"). The Open University is specifically excluded from the definition.

54. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition set out in section 15(1) so as to include or exclude a particular institution.

Comment

55. The DPM explained that the policy intention is that all publicly funded HEIs should be subject to the governance provisions in Part 1 of the Bill, but that an HEI operating in both Scotland and another jurisdiction (such as the Open University) should be excluded from the Bill’s governance requirements, to avoid being made subject to conflicting governance regimes. The Open University is already specifically excluded from the definition.

56. The DPM further explained that the power to amend the definition is taken to give the Scottish Ministers the flexibility to include or exclude a particular HEI from the definition in the event of changed circumstances, for example if another cross-border HEI similar to the Open University begins operating in Scotland and receives public funding.

57. The Committee considers that, while the example given in the DPM might explain why a power to exclude an HEI from the definition is required, it does not explain why a power to include an HEI is required, since the definition will already catch all universities and designated institutions eligible to receive public funding, by virtue of being listed in schedule 2 to the 2005 Act (bodies which may receive funding from the Funding Council). The Committee therefore asked the Scottish Government for further explanation as to why a power to include an HEI in the definition is required, and for examples of when such a power might be used.

58. The Committee also asked the Scottish Government for an explanation as to why the negative procedure is thought appropriate in this case, given the potential impact of a modification of the definition so as to include a particular HEI, on the institution in question; and to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15.

59. In its response, the Scottish Government agreed that the definition in the Bill will capture all HEIs which receive public funding, by virtue of being included in schedule 2 to the 2005 Act, and that this would include any future HEIs added to that schedule. On further reflection, the Scottish Government considers that the power to include new institutions beyond fundable bodies may not be required, since the policy intention is that only fundable bodies should be covered by the requirements of the Bill. The Scottish Government will therefore consider an amendment at Stage 2 to amend the power to change the definition so that it can be used only to exclude institutions from the definition.
60. In light of this potential amendment, the Scottish Government did not consider that any response was required to the Committee’s enquiries in respect of when a power to include a specific institution in the definition might be used, and why the negative procedure is considered appropriate. Similarly, the Scottish Government did not consider that a requirement for consultation need be included on the face of the Bill, again given the potential amendment discussed above.

61. It is not clear to the Committee why a power to include a specific institution in the definition of “higher education institution” in the Bill is required, since the definition in the Bill will already catch all universities and designated institutions eligible to receive public funding, by virtue of being listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (bodies which may receive funding from the Scottish Further and Higher Education Funding Council). Given the potential impact on the institution in question, the Committee considers that any regulations made under this section to include a specific institution in the definition could be made subject to the affirmative procedure and that a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any such regulations.

62. The Committee notes that the Scottish Government has indicated that an amendment will be considered at Stage 2 to amend the power to change the definition in section 15 so that it can be used only to exclude institutions from the definition, and not to include institutions in the definition. The Committee will return to consider these powers after Stage 2.
1 The Higher Education Governance (Scotland) Bill as introduced is available at the following website: http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd.pdf [Accessed October 2015]

2 The Higher Education Governance (Scotland) Bill Delegated Powers Memorandum is available at the following website: http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/Degated_Powers_Memorandum.pdf [Accessed October 2015]
## Annexe

**Correspondence with the Scottish Government**—

On 8 September 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 8 September and seeks an explanation of the following matters:

### Section 1 – Appointment as chairing member

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2. Section 1 provides that the chairing member of the governing body of a Higher Education Institution ("HEI") is to be appointed in accordance with a process set out in regulations made by the Scottish Ministers. The process for appointment of chairing members of governing bodies is a key policy in the Bill and is understood to be a matter of controversy amongst HEI stakeholders.

3. The Committee asks the Scottish Government:

   (a) to explain why it is considered appropriate for the basic framework for the appointment of chairing members to be postponed to secondary legislation; and

   (b) to consider whether the basic framework for the appointment of chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail of the process to be set out in regulations.

### Section 2 – Remuneration to be payable

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4. Section 2 provides that the Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chairing member of the governing body of the institution.

5. The principle of remuneration for chairing members of governing bodies is a new concept for HEIs and is understood to have met with opposition amongst HEI stakeholders.
6. The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the principle and basic framework of remuneration for chairing members to be postponed to secondary legislation; and

(b) to consider whether the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail to be set out in regulations.

Section 8 – Power to modify section 4

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Provision

7. Section 8 gives a power to the Scottish Ministers to modify section 4 of the Bill, which sets out the requirements for the composition of the governing body of an HEI. The proposed requirements as to the composition of governing bodies set out in the Bill are understood to have met with opposition amongst HEIs.

8. The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

Section 13 – Power to modify sections 9 and 10

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9. Section 13 gives a power to the Scottish Ministers to modify sections 9 and 10 of the Bill, which set out the requirements for the size and composition of the academic board of an HEI. The proposed requirements as to the size and composition of the academic board of an HEI set out in the Bill are understood to have met with opposition amongst HEIs.

10. The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.
Section 15 – Meaning of higher education institution

Power conferred on: the Scottish Ministers  
Power exercisable by: regulations  
Parliamentary procedure: negative

11. Section 15(1) sets out the definition of an HEI for the purposes of Part 1 of the Bill. HEI has the same meaning as in the Further and Higher Education (Scotland) Act 2005 – that is, a university or an institution providing higher education designated by the Secretary of State. However, a university or designated institution falls within the definition only if it is also listed in schedule 2 (fundable bodies) to that Act. Schedule 2 lists those bodies which may receive funding from the Scottish Further and Higher Education Funding Council. The Open University is specifically excluded from the definition.

12. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition set out in section 15(1) so as to include or exclude a particular institution.

13. Given that the definition of HEI determines which institutions are subject to the governance requirements set out in the Bill, changes to the definition to include or exclude a particular institution could have a sizeable impact on the institution affected.

14. The Committee asks the Scottish Government:

(a) for clarification as to why a power to include a higher education institution in the definition is required, since it appears that the definition in the Bill will already catch all universities and designated institutions (other than the Open University) which may receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005;

(b) for examples of when a power to include a higher education institution in the definition might be used;

(c) why the negative procedure is considered appropriate in this case, given the potential impact of a modification of the definition so as to include a particular higher education institution, on the institution in question; and

(d) to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15, again given the potential impact on affected institutions, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.
On 22 September, the Scottish Government responded as follows:

Having considered the points in your letter, the Scottish Government would respond as follows:-

**Paragraph 3**

The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the basic framework for the appointment of chairing members to be postponed to secondary legislation; and

(b) to consider whether the basic framework for the appointment of chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail of the process to be set out in regulations.

In respect of point (a), as set out in the Delegated Powers Memorandum, it was considered crucial that the Bill included the minimum requirement to have a chairing member of the governing body of a higher education institution (HEI) appointed in accordance with a statutory process. It was not considered necessary to set out the detailed process of appointment of the chairing member in primary legislation. The regulations could potentially include a considerable level of detail about the process that could be better provided for in secondary rather than in primary legislation. It is also considered that the power would allow the Scottish Ministers the flexibility to modify any process regarding the appointment of chairing members to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

With regard to point (b), influenced by continuing dialogue with stakeholders on this matter, Scottish Government is considering whether it might be appropriate to bring forward an amendment at Stage 2 that set out a provision on the face of the Bill for a single model for the appointment of elected chairs, although it might still be more appropriate for some details of the process to be left to regulations.

**Paragraph 6**

The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the principle and basic framework of remuneration for chairing members to be postponed to secondary legislation; and

(b) to consider whether the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail to be set out in regulations.
In respect of point (a), since this power is very closely associated with the power in section 1 of the Bill, Scottish Government considered it appropriate that the basic framework for remuneration for chairing members should be set out in regulations as it would not be appropriate to include provisions in relation to remuneration and allowances in primary legislation due to the potentially considerable level of detail necessary. It is also considered that the power would allow the Scottish Ministers the flexibility to modify any provisions on remuneration to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

With regard to point (b) Scottish Government has noted the Committee’s suggestion, but still considers that the provisions on remuneration would be more appropriately contained in regulations. If an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it.

Paragraph 8

The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

The Scottish Government notes this suggestion and will consider an amendment at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

Paragraph 10

The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

The Scottish Government notes this suggestion and will consider an amendment at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

Paragraph 14

The Committee asks the Scottish Government:

(a) for clarification as to why a power to include a higher education institution in the definition is required, since it appears that the definition in the Bill will already catch all universities and designated institutions (other than the Open...
University) which may receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005;

The Scottish Government agrees that the definition in the Bill will capture all HEIs which receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005, and that would include any future HEIs added to the list of fundable bodies. On further reflection, it is considered that the power to include new institutions beyond fundable bodies may not be required since the policy intention is that only fundable bodies should be covered by the new requirements and the Scottish Government will therefore consider an amendment at Stage 2 to amend the power to change the definition so that it can be used only to exclude institutions from the definition.

(b) for examples of when a power to include a higher education institution in the definition might be used;

(c) why the negative procedure is considered appropriate in this case, given the potential impact of a modification of the definition so as to include a particular higher education institution, on the institution in question; and

With regard to points (b) and (c) the Scottish Government agrees that the above power at section 15 of the Bill to include an HEI may not be required, and therefore it is not considered that any response is required for these questions.

(d) to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15, again given the potential impact on affected institutions, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

With regard to point (d) and in respect of the answer to (a) above, the use of the power is expected to be limited to those circumstances where a particular HEI needs to be excluded from the definition of “higher education institution”. The regulations will give Scottish Ministers the flexibility to make changes in the event of changed circumstances of a particular institution, which result in the institution needing to be excluded. The change will not impose any new requirements on the institution and will only apply to the particular excluded institution. As such, we consider that any use of the power is likely to be uncontroversial and consequently current provisions in the Bill are appropriate in the circumstances.