Dear Convenor,

Thank you for your letter of 9 July on behalf of the Education and Culture Committee, asking questions about the Higher Education Governance (Scotland) Bill, introduced to Parliament on 16 June. Answers to each question are set out in the Annex to this letter. I look forward to engaging with the Committee on this Bill as it is considered by Parliament.

The 2012 Review of Higher Education Governance in Scotland, led by Professor Ferdinand von Prondzynski, made recommendations for reform. This work has informed the provisions in the Bill.

The Scottish Government believes that the principles underpinning the Bill are consistent with a modern Scotland. In last year’s Programme for Government, ‘participation’ was set out as one of three key priorities. This Bill aims to reflect that priority within the governance arrangements for our higher education institutions (HEIs). The Scottish Government wants to strengthen staff and student participation in decision-making at HEIs. This Bill is not about Ministers taking a direct role in the life of our autonomous institutions, but rather enabling every voice on campus to be heard.

We have shown our commitment to the higher education sector, again investing over a billion pounds through the Scottish Funding Council in 2015-16. As part of the return for Scotland’s people from this investment, we want to enable development of a more modern and accountable framework of governance for higher education institutions to work within.

I am aware that some stakeholders have questioned the intentions of the Scottish Government in including powers in the Bill to make secondary legislation. In general, the powers for Scottish Ministers to present secondary legislation to Parliament are intended to future proof the content of the Bill, allowing minor adjustment as required, rather than to enable any radical alteration to its provisions. This is explained further in the Delegated Powers Memorandum and the Scottish Government looks forward to discussing this issue as the Bill is examined by the Committee.
In particular, stakeholders have questioned Section 1 of the Bill relating to the appointment of chairing members of governing bodies. After introduction, dialogue commenced with key stakeholders aimed at agreeing a single model for the appointment of elected chairs. I would be happy to provide an update on progress made during these discussions at my appearance before Committee on 10 November.

Prior to and since introduction, I have listened to the views of those with an interest in the Bill. I will continue to do that as it progresses through the Scottish Parliament. I have received correspondence from, and held meetings with, a number of stakeholders, including rectors, on the subject of elected chairs in particular. Concerns have been raised about exactly how chairs would be elected, and what this would mean for existing rectors. Rectors play an important role in the ‘ancient’ institutions, raising the profile of the sector and representing students and, in some cases, staff. The role of Rector is part of the democratic tradition in our ancient universities that is also in keeping with the spirit of democratic renewal informing this Bill.

At the moment, we are talking to everyone with an interest in the Bill about how the appointment of elected chairs of court and other governing bodies might operate in practice. As part of that work, we will seek to minimise, and consider removal, of any features of the model selected that could impinge on the role of rector. I would like to reassure stakeholders and the Committee that I am giving very careful consideration to this matter and that there is absolutely no intention to remove the role of rector from university life.

In addition, the Scottish Government has no intention of politicising the office of elected chair or being involved in the appointment process. It is our intention that the franchise for the electoral process would not expand beyond the community within each HEI. The Bill provisions are aimed at opening up access to decision-making by the people within HEIs, and widening access to the role of chair to a broader group of people from a variety of backgrounds. Our approach is consistent with a fairer, more engaged Scotland.

I hope that the comments in this letter and the attached responses to the questions put by the Committee are helpful.

ANGELA CONSTANCE
Section 1: appointing a chair

1. Paragraph 36 of the policy memorandum notes that implementation of the Code has, ‘to some extent’, increased transparency in appointing a chair. However, there is ‘no guarantee of consistency’ and, “in practice, HEIs have adopted different approaches”. Please explain whether and how the different approaches adopted have affected the quality of governance within the institutions in question.

There is no straightforward methodology for quantifying the effect (on the achievement of good governance) of the approaches taken by each of Scotland’s HEIs. What the Bill seeks to do is guarantee a level of consistency and transparency in approach, and ensure that all HEIs are joined in a common purpose to achieve high standards of governance across the sector. This aim inspired the recommendations in the 2012 Review of Good Higher Education Governance, which in turn has inspired the provisions in the Bill. Governance in our universities is obviously not of a low standard. However, it can always be better, fairer, more transparent and more inclusive. With that in mind, we believe that chairs appointed through a consistent appointment process across all HEIs, and ultimately elected to their positions, will help to drive continuous improvement of governance in Scotland’s higher education sector.

2. “Section 1(2) allows for regulations to be made in connection with appointing a chair. It highlights some matters (e.g. periods of appointment) but not others (e.g. removing a chair). Please set out all the steps involved in appointing a chair and confirm which of these are likely to be left to the HEIs to determine, rather than be specified in regulations”.

Removal of a chair is not a matter that the Bill will provide for. This, along with most other terms and conditions of appointment, will remain an issue for HEIs, who shall continue to have the power to remove any member of the governing body and (according to the Code of Good HE Governance) must do so if the member materially breaches the conditions of his/her appointment. The Bill simply aims to introduce a consistent process for the appointment of a chair. Influenced by dialogue with stakeholders, we plan to consider an amendment at Stage 2 that would replace Section 1 of the Bill with provision on the face of the Bill, rather than in regulations, for a single model for the appointment of elected chairs.

If such a Stage 2 amendment was not lodged, setting out the exact steps for appointment of a chair would be done following dialogue with stakeholders, in accordance with the requirements of Section 3.

However, if set out on the face of the Bill via Stage 2 amendments, the principal features of a process of appointment might involve open advertisement; fair and transparent consideration of all candidates based on ability to perform the role; assessment of all candidates demonstrating the skills and ability to carry out the role; and election by an inclusive, fair and balanced franchise from within the institution.
Sections 4-8: governing bodies

3. The policy memorandum notes (paragraph 41) that these provisions will create “a more inclusive environment” and “embed a level of consistency across the institutions”. What specific and measurable improvements are expected to arise as a result of the changes?

The specific improvements and benefits expected will flow from all parts of the HEI community having the ability to make their voices heard as part of the governance structures guiding an HEI. We envisage that the more inclusive approach proposed by the Bill will strengthen unity and the sharing of responsibility between different parts of the community within HEIs. With regard to measuring improvement, this is a matter that we would be keen to work with institutions on in the coming years, should the Bill be passed by the Scottish Parliament.

4. Paragraphs 46 – 47 of the policy memorandum explain, in response to concerns raised in consultation responses, that trade union nominees will be expected to act in the best interest of the HEI (as will, presumably, other members). Is there an agreed and established definition of “best interest”?

All members of the governing body should approach their work as being about the betterment of the HEI and everyone who works and studies there. While the Bill does not impose a duty in this respect nor contain a definition of ‘best interest’, we believe that the concept is well understood within the sector. For example, Main Principle 6 of the Code states that all members shall exercise their responsibilities in the interests of the HEI as a whole rather than as a representative of any constituency. The Scottish Government is clear that, while the membership of the governing body and academic board will ensure that an inclusive mix of interests are represented in HEI governance, all members must act in the best interest of the HEI as a whole.

Furthermore, as charity trustees, governing body members are under a duty under section 66 of the Charities and Trustees Investment (Scotland) Act 2005 to act in the interests of the charity, i.e. the HEI, while engaged in the business of the governing body.

5. Please explain why student representatives are to be nominated for the governing body, but elected to the academic board.

The Bill requires every HEI governing body to feature 2 student members nominated by the students’ association of the HEI (although it would be open to an HEI to have more than 2 student members on its governing body if it chose to do that). It is considered proportionate to require these 2 positions to be filled by nomination by the students’ association, rather than election because it is likely that, in the majority of HEIs, these positions will be filled by office bearers of each student’s association who will have already been elected to their respective positions in the students’ association.

With reference to academic boards, the relevant recommendation in the 2012 Review of Good Higher Education Governance was that, with the exception of those attending ex officio, all other members should be elected by the constituency they represent. In fulfilling the requirement under section 10, up
to 12 students might be elected to that body (as the Bill sets a maximum membership of 120 and requires that at least 10% of that membership must be students). It was felt that due to the larger volume of students involved, and the fact that it would be unlikely that as many as 12 students would have previously been elected to positions in a students’ association, these positions should be filled by election.

6. Section 7 ensures that the validity of proceedings of the governing body of an HEI is not affected by any vacancy arising in membership or category of membership. This means that, in the event of an unexpected vacancy arising, the HEI can continue to function pending the appointment of a new member under section 4. Will this section be relevant in the event that a governing body is unable, from the outset, to secure a trade union, staff, student or trade union member?

Yes, this section will apply in the situation described by the Committee. However, we think that it is unlikely that there will be circumstances in which an HEI will be unable to secure a trade union, staff or student member. The Bill requires that HEIs must adhere to the requirements of Section 4 from the outset. Section 7 merely provides for continuity of HEI governance functions where an unexpected vacancy arises. But it would also cover situations in which it takes longer to recruit a new governing body member, for example due to no-one standing for elections and a further election process having to be run.

7. Could one person fill the role of being both a graduate nominee and union nominee to the governing body?

It is not the policy intention that one individual could fulfil both roles. Indeed, membership of each of the categories of governing body member is intended to be mutually exclusive. It is possible that an academic or support staff union member, nominated by the union to be the member of the governing body, could also happen to be a graduate of the HEI. However, in order to be both a graduate member and a union member of the governing body they would need to be nominated by both the relevant union and the graduates’ association and accept both nominations. We consider it unlikely that this situation would arise or that this would be acceptable to either the graduates’ association or the union, but we will consider whether the implication that membership of each category is to be mutually exclusive needs to be made explicit.

Sections 9-13: academic boards

8. Why are students to comprise 10% of the membership of academic boards and what benefits are expected to derive from this? Is it likely that all HEIs will be able to meet this threshold?

Ensuring that at least 10% of the academic board is drawn from the student body will help to advance equality on the academic board. Students will be afforded a significant presence, enabling their unique perspective to be shared.

We do not anticipate any difficulty for HEIs in meeting this threshold. However, we will listen to the views of all stakeholders on this and the other provisions.
9. Why are governing bodies, but not academic boards, to have trade union and graduate nominees?

Ultimately, governing bodies (also known as ‘courts’) are the structures responsible for determining the overall strategic direction of HEIs. If a governing body’s composition is inclusive, fair and balanced, this will permeate throughout the institution. With the provisions on membership of the governing body designed to achieve this effect, there is no need to stipulate that there must be union or alumni representation on the academic board.

Section 19: academic freedom

10. Does the Scottish Government have any case study examples of academics who have previously been penalised for exercising their academic freedom in a manner that would now be permitted under the Bill?

No. The purpose of Section 19 of the Bill is to strengthen the existing definition of academic freedom, make it clear that HEIs must aim to uphold a person's academic freedom and make explicit freedoms which were previously only implicit, rather than to fundamentally change the existing definition.

11. Academic freedom is to be exercised “within the law”. Please briefly summarise the key existing legislation that would place some constraints on academic freedom.

Rights to exercise academic freedom would be affected by many areas of the law e.g. relevant aspects of both criminal and civil law such as, incitement to racial hatred, defamation and breach of confidence to name a few. Exercising one’s academic freedom provides no immunity from the application of the wider civil and criminal law.

12. Academic freedom can be exercised by those who teach, make learning provision or undertake research. Will the provisions apply to a student at an HEI or college who is also undertaking some teaching or 'learning provision' (please also clarify what is meant by the latter term)?

It is certainly feasible that a student engaged in a teaching or research position at an HEI or college could be a “relevant person” for the purposes of Section 26 of the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”). The amendments proposed by the Bill will not change that, therefore, a post-16 education body must aim to uphold such a person’s academic freedom while the person is engaged in those activities. There is no definition of “learning provision” in the 2005 Act and the Bill does not insert one. However, we are conscious that the 2005 Act applies to higher and further education and defines “fundable further education” to mean “any programme of learning” which meets certain criteria, whereas “fundable higher education” is defined as “any course of education” which meets certain criteria. It is our understanding that “learning provision” is a catch-all term to ensure that the delivery of both courses of education at post-16 education bodies providing fundable higher education and programmes of learning at post-16 education bodies providing fundable further education, are covered. This term is also broad enough to capture all teaching outwith the formality of lectures and the most common forms of teaching delivery. An example of this might be practical seminars led by research students for undergraduates and the provision made for...
dissertation students or those doing a research Masters/PhD where the tutor’s role is to provide support and guidance to assist the student with learning (rather than to teach the student as such).

13. The policy memorandum notes the definition of academic freedom in the Irish Universities Act 1997. This definition includes the phrase “in his or her teaching, research and any other activities in or outside the university”. Please confirm whether the Bill’s provisions will apply to a relevant person’s activities both within and outwith an HEI/college. What type of activity outside an HEI/college would and would not be covered by the new definition of academic freedom?

The Bill obliges the post-16 body to aim to uphold the academic freedom of relevant persons and to ensure that specific matters (appointments held or sought and entitlements or privileges enjoyed at the post-16 body i.e. within the institutional setting) are not adversely affected by a relevant person’s exercise of their academic freedom. Under the 2005 Act, a relevant person’s exercise of academic freedom might involve activity outwith work and this is unchanged by the amendments proposed by the Bill. However, there is clear implication that this activity must relate to the teaching, provision of learning, or research that the relevant person is engaged in at the post-16 education body. As such, the definition of academic freedom in the Bill (which is unchanged from the existing definition in this respect) clearly applies where a person publishes an article in an academic journal but would only apply when attending a demonstration or aligning with a particular political movement if it was clear that that act related to the teaching, learning provision or research they the person is engaged in.

General

14. The policy memorandum discusses at various points the benefits of consistency in governance across HEIs. However, it also allows HEIs some flexibility (for example, in relation to certain nomination and election processes). Where flexibility is to be allowed, is the Scottish Government content that there is a minimal risk of any significant inconsistencies arising? Does the Scottish Government intend to issue any non-statutory guidance to HEIs on such matters?

Consideration of non-statutory guidance is a matter that could be discussed with stakeholders in future. However, the Scottish Government has no plans to issue such guidance. With this Bill, the Scottish Government aims to introduce a set of focused and discrete provisions to improve governance. We have no intention of micromanaging autonomous institutions and that why the Bill sets parameters but leaves it to HEIs to nominate and elect members to certain positions in accordance with rules to be made by the governing body of the HEI. The Scottish Government is content that, within the parameters set by the Bill, there is a minimal risk of any significant inconsistencies arising but that HEIs retain the freedom to devise certain election and nomination processes to suit individual HEIs.

15. Does the Scottish Government anticipate that the Code will be rewritten to ensure it reflects the changes set out in the Bill? Between the provisions of the Code and the Bill, is the Scottish Government now content that all concerns about governance are being adequately addressed?
Should the Bill be passed by the Scottish Parliament, the provisions will need to be considered by the Scottish Funding Council alongside the Code which sets out the principles of governance which appear to the Council to constitute good practice. This is a matter for the Scottish Funding Council.

The Scottish Government is content that between the Code and the Bill the core concerns raised by the 2012 Review of Higher Education Governance in Scotland are addressed. The Scottish Government has no plans for further primary legislation in this area in the near future. Indeed, the secondary legislation making powers in the Bill are limited to those areas where adjustment may be necessary in the light of practice and operation of the Bill provisions so that such adjustments can be made efficiently, rather than to enable Ministers to advance the Bill’s provisions in any significant respect. The intention is that all such powers will be exercised responsibly and in full consultation with stakeholders. Further, any regulations will be subject to Parliamentary scrutiny.