Scottish Government Response to the

Education and Culture Committee Stage 1 Report

January 2016
INTRODUCTION

The Scottish Government notes the key points and requests for further information made in the Committee’s Stage 1 Report. The following response aims to address the key issues and recommendations set out by the Committee.

For ease of reference, the response includes the text from relevant paragraphs in the Stage 1 Report, and also uses the same paragraph numbering as the Report.
SCOTTISH GOVERNMENT RESPONSE TO THE STAGE 1 REPORT

The Scottish Government’s analysis

34. We consider the reclassification of Scottish HEIs would be in no-one’s interests, given such a decision could cause very significant harm. We therefore consider all reasonable measures should be taken to minimise any risk of reclassification.

The classification by the Office of National Statistics (ONS) of Scottish higher education institutions (HEIs) has been central to our consideration of risk and the policy decisions taken throughout the development of the Bill. The Scottish Government’s assessment is that this Bill does not advance the risk of reclassification. As I said in my evidence before the Committee on 10 November 2015, re-classification is an outcome that the Scottish Government would never want to realise.

Although we are confident that the provisions in the Bill do not amount to government control as set out in the current ‘indicators of government control’ used by ONS, we have listened to what stakeholders have said in respect of certain provisions in the Bill at introduction. Having given the matter careful consideration, the Scottish Government is minded to put forward amendments at Stage 2 to remove sections 8 and 13 of the Bill. In addition, as is set out more fully in response to paragraphs 55 and 68 below, the Scottish Government is also minded to put forward amendments which would reduce or remove the need for regulation-making powers in sections 1 and 2 of the Bill.

As noted at paragraph 29 of the Committee’s report, sections 1, 8 and 13 have been identified by stakeholders as those which they believe would increase the risk of reclassification. While we do not share stakeholders’ fears, the action which the Scottish Government proposes to take should allay concerns that stakeholders have about the Bill contributing to reclassification.

35. Our scrutiny has taken into account not just the current Scottish Government’s intended approach, but also how the powers in question could be used by any future Scottish Government. We therefore welcome the Cabinet Secretary’s commitment to amending or removing the relevant provisions. We expect this to mean the powers could not be used in a way that would unjustifiably increase ministerial control. We consider there should have been more productive discussions between the Scottish Government and the HEI sector about the intended purpose of these provisions, some of which are commonly found in legislation.

The Scottish Government does not want to advance ministerial control over universities; we are clear that they are autonomous bodies. In particular, the powers in the Bill at sections 8 and 13 are fairly common of their type, where it is useful to future-proof primary legislation. However, as stated above, the Scottish Government is minded to put forward amendments at Stage 2 to remove sections 8 and 13, and to reduce or remove the need for regulation-making powers in sections 1 and 2 of the Bill.
As the Committee recognises, the ancillary regulation-making power at section 20 of the Bill is a standard provision that is included in many Bills. The provision gives the Scottish Ministers the power to make further provision via secondary legislation, if necessary or expedient to do so for the purposes of or in connection with the Bill as enacted. Therefore, the power is already limited in terms of the provision that can be made under it. Typically, the provision would allow Ministers to act quickly in order to fix technical problems with the operation of the Bill if any come to light during implementation. The Delegated Powers and Law Reform Committee did not raise any concerns about the provision. We do not therefore propose to remove section 20.

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

A full, separate response to this recommendation will be issued to the Committee, and copied to the Finance Committee, prior to the Stage 1 debate.

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

The extent to which any future legislation proposed by the Scottish Government might represent a potential risk to the classification of Scottish HEIs, as private not-for-profit bodies, would have to be fully assessed in light of the particular proposals being considered, as it has been for this Bill. This is not a situation where there is a ‘one size fits all’ answer, as it will depend upon the detail in each case.

Charitable Status

41. The charitable status issue is connected to the question of whether the Bill increases ministerial control over HEIs, and, in particular, Scottish Ministers’ powers to make future regulations (as discussed above). We therefore reiterate our support (in paragraph 35) for the Cabinet Secretary’s commitment to amending or removing the relevant provisions, as we consider this would also remove any potential threat to HEIs’ charitable status.

The Scottish Government is aware of how important charitable status is, of its value to the higher education sector, and the benefits it helps institutions deliver to our society and economy. The Office of the Scottish Charity Regulator (OSCR) raised no significant concerns about the Bill’s provisions, as introduced, in its response to the call for evidence issued by the Committee. Its overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs.

However, OSCR rightly highlighted that, should regulations be made, it would have to consider whether, taken together with the existing provisions, these amounted to
ministerial control. While the Scottish Government may not share the view that there is any risk to HEI charitable status, we are, as set out in response to paragraph 35, minded to put forward amendments to remove sections 8 and 13 by amendment at Stage 2. This should reassure those stakeholders who have raised concerns about this issue (to the extent that they remained concerned despite OSCR’s positive assessment of the overall position).

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

The Scottish Government values the Committee’s comments on this matter, which is central to the general principles underpinning the Bill.

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

Having undertaken further engagement with stakeholders in the higher education sector, we are minded to put forward amendments to section 1 in order to put core provisions on the face of the Bill. Our intention is to require the appointment of the elected chair to be undertaken through a two stage process involving first selection and then election.

An appointment process for the elected chair would likely feature:

- open advertisement for the role of chair (specifically the role of the senior lay member of the governing body, as currently exists at all 18 Scottish HEIs (often called the senior governor or vice convenor));
- interview and selection of electoral candidates by a nomination committee (featuring both staff and students) based on an agreed competency criteria; and finally
- an election where the franchise is all staff and students of an HEI.

While we are aware that this model does not attract unanimous support, we believe it meets with our stated policy aim of embedding modern, inclusive and transparent processes. In addition, the inclusion of a robust selection element should ensure that candidates who want to take up the role have the ability required for the position.
56. Given the strong emphasis the sector has placed on maintaining an appropriate link between the chair and the rest of the board, it would be helpful if the Scottish Government could also provide examples of governing bodies in Scotland that do not directly appoint their own chairing member. Where such cases exist, have any evaluations been carried out to determine how this has affected the organisation’s performance? Is the quality of governance in such bodies markedly different?

We note the points raised by the Committee in relation to this issue. The Scottish Government has not undertaken specific research in this area. However, the recommendation that the chair of the governing body of an HEI should be elected originates in the Review of Higher Education Governance in Scotland, a review which took wide ranging evidence from Scotland, the UK, Europe and beyond. Our HEIs are autonomous bodies with few, if any, directly comparable peers. The recommendations in the Review were tailored in response to the evidence collected by Professor von Prondzynski and his colleagues on the particular requirements, with regard to improving governance, of universities and other HEIs.

As all senior lay member candidates on the shortlist for election will be selected by a nominations committee in each HEI, this will ensure that all candidates will possess the attributes necessary to perform the role of leader of each governing body. The introduction of an election element to this process is in line with the principal objective of the Bill, to enable a framework of higher education governance in Scotland that is more modern, inclusive and transparent.

The role of rectors

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

Ministers appreciate the role that rectors play in those HEIs that have them (primarily the ancient universities), raising the profile of the sector and representing students. The role of rector will continue. The rector is part of the democratic tradition in our ancient universities, and is also in keeping with the spirit of democratic renewal informing this Bill.

We can also reassure the Committee that the Scottish Government’s plans for elected chairs, as set out in response to paragraph 55, will, if approved at Stage 2, result in no alteration of the statutory underpinning which exists for rectors in our ancient universities and will ensure that the role is not diminished. We intend to put forward amendments which will remove those consequential modifications in the Bill’s schedule which would have removed the right of rectors at the ancient universities to preside at meetings of the governing body.
The precise way in which the role of rector dovetails with the role of the new elected senior lay member (however it may be designated) will primarily be a matter for each of our autonomous HEIs which appoints a rector. This is the position now in the ancient institutions, as the rector has the right to preside at meetings of court but the substantive role of chair is undertaken by the senior lay member of the governing body, and we understand that the interaction between these roles has not proven problematic for the institutions in question.

The Committee has asked that the Scottish Government ensures there is no ambiguity about the respective roles of elected senior lay members of court and elected rectors. Rather than take powers to set out already established roles in statute, the current intention is that the dynamics between both roles is left to the five individual HEIs in question, as it is now.

**Remuneration**

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

- how it would intend to use the power, for example, whether it would expect to set remuneration at a significantly different level than universities would;
- why it is seeking to delegate to “other persons” the power to determine remuneration and allowances in certain cases. Which persons does the Scottish Government have in mind and why?

Having listened to stakeholders’ views, and having given this matter further consideration, the Scottish Government is minded to propose an amendment to this provision at Stage 2, replacing the regulation-making power at section 2 with full provision on the face of the Bill. The focus of such provision is likely to be a requirement that institutions must, upon request by the chair, provide reasonable remuneration to an elected chair in connection with carrying out that role. We think this approach can make a contribution to widening access to the role for candidates with lower incomes, or who are still working. In this context, remuneration should be construed as expenses or allowances, not salary.

On balance, we do not consider retention of a power for Ministers to set levels of remuneration or delegate this role to other persons to be necessary.

**Governing body composition: the impact of new members**

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

The Scottish Government values the Committee’s support on this matter, which is central to the general principles underpinning the Bill.

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

The comments made in the Committee’s report on governing bodies and the role of trade union representatives are noted and welcomed.

The Scottish Government considers that it should be a matter for the governing body to determine how best to accommodate the new statutory members, and it will have the transitional period before the Bill comes fully into force to do this. It is anticipated that this will be approximately 4 years following the Bill’s enactment. The transition period for the Bill is aimed, amongst other things, at ensuring that HEIs will not be required to remove existing members of their governing bodies and that, rather, compliance with the Bill can be addressed alongside the natural turnover of membership of the governing body. However, the question submitted to the Scottish Funding Council by Committee is noted.

Specific issues

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

As set out in response to paragraph 84, the Scottish Government considers that it should be a matter for the governing body to determine how best to accommodate
the new statutory governing body members. However, we have listened to the views presented by stakeholders and reviewed the evidence submitted to the Committee, and are minded to propose an amendment to reduce the number of statutory members to 7: two trade union members, two members of staff, two students, and the elected chair (senior lay member), removing the requirement for two graduate association members. This is in recognition of the fact that most institutions will naturally attract some graduates of that institution to serve on their governing body in any case.

The majority of institutions are likely to already have five of those seven roles on their governing bodies (staff, students and the senior lay member – albeit currently appointed slightly differently). As such, we do not consider that any institution will have difficulty in complying with this provision, and they can introduce these new members in a phased manner during the transitional period.

As far as the RCS' concerns about trade union members are concerned, we understand from its second written submission to the Committee that although it does not officially recognise any trade union, there are three trade unions which would satisfy the definition in section 4(2)(b) of the Bill. Should the RCS not wish to exercise its entitlement to choose between these three, the Bill specifically contemplates the possibility of HEIs allowing different bodies to work together to provide a joint nomination, and section 6(3)(a) allows for this.

86. We have been informed that elected student representatives (the student president and vice-president) would not be eligible to serve on the university court because they are on sabbatical and, therefore, technically not students. It would be helpful if the Scottish Government could clarify this point.

We are continuing to review this matter which was raised during the Committee evidence sessions on the Bill, and will consider putting forward an amendment to the Bill at stage 2 to clarify that relevant student representatives who are on sabbatical would be able to serve. The Scottish Government understands that student representatives in some HEIs remain students during their sabbatical office by virtue of specific provisions in the relevant governance instruments. However, it would appear that in some HEIs, as the Committee has noted, they do not in fact remain students and this will be taken into account in considering any stage 2 amendments.

87. We also note the Cabinet Secretary’s comments that one of the student representatives on the governing body would have to be the president of the students association and the other would have to be a woman. The Bill does not appear to contain such requirements and we therefore seek clarification from the Scottish Government on this point.

The requirement set out within the Bill is that there are two student members of the governing body nominated by the students of the institution from among the students of the institution. No additional requirements will apply to these two positions. The Bill leaves it to individual HEIs to determine the rules which will apply to the nomination process.
88. We have previously asked the Scottish Government whether, in theory, one person could fill the role of being both a graduate nominee and union nominee to the governing body. The Scottish Government confirmed this was not the policy intention. It added that “membership of each of the categories of governing body member is intended to be mutually exclusive” and said it would consider whether this needed to be made explicit. Given some of the concerns raised about trade union and graduate members of the governing body, we would welcome an update on the Scottish Government’s position in advance of Stage 2.

I can confirm that, as previously stated, the membership of each of the categories of governing body member is intended to be mutually exclusive. We think that this is strongly implicit, and we note that other Acts, including the Post-16 Education (Scotland) Act 2013, are framed in a similar manner in relation to the required composition of boards despite there being, in some cases, at least a theoretical possibility of overlapping appointments. Nonetheless, the Scottish Government is considering whether it would be helpful to make this explicit on the face of the Bill (while noting that we must be careful not to cast doubt on the effect of existing legislation). However, as confirmed in answer to the questions at paragraph 84 and 85, we are minded to put forward an amendment to the Bill at Stage 2 to remove the statutory obligation on HEIs to have two alumni members on the governing body.

**Academic boards**

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

The Scottish Government engaged with Professor von Prondzynski after the Stage 1 evidence session held on 10 November, in relation to the evidence supporting the recommendation that academic boards should comprise a maximum of 120 members. He noted that the Review Panel found that there were academic boards with so many members that meetings became hard to manage. Some Senate meetings struggled to hold quorate meetings due to their size.

Professor von Prondzynski confirmed that the Review Panel formed the view that some of these problems would be mitigated if academic boards were smaller, but also if they had an elected majority.

However, having given consideration to both this and the views of those who oppose this provision as set out in the evidence provided to the Committee detailing the substructures established in institutions which currently have academic boards exceeding the proposed cap, the Scottish Government is minded to consider putting forward an amendment at Stage 2 to remove this requirement (to abide by a cap of 120 members). While the Scottish Government is still of the view that each academic board needs to be of a manageable size and efficiently run, we are persuaded that, on occasion, this can be achieved by a larger academic board.
99. We understand the merit of having a student presence on academic boards and note that HEIs do not appear to have any significant concerns about this proposal. With reference to paragraph 92, it would be helpful if the Scottish Government could identify whether any more tangible benefits are likely to arise from this provision.

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. Students can help mould the academic ethos within an organisation, and ensure that their voice is heard.

100. We are still not clear why – taking into account the explanation provided in paragraphs 93 and 94 – there is to be statutory student representation on academic bodies, but not statutory trade union or graduate representation. We therefore require further clarification on this point.

Governing bodies are the structures responsible for determining the overall strategic direction of HEIs. If trade unions are represented on governing bodies, their contribution to the HEI at that level can have a percussive effect throughout the institution. An institution’s academic board is accountable to its governing body, so the trade union members on the governing body will still have oversight of the academic board even if not directly represented on it. The Bill therefore limits the reach of this provision to only those groups at the very core of every institution: the staff and students. It is not our intention to micro-manage HEIs; this Bill aims to set out some high level obligations. How the different contributors work together as communities is rightfully a matter for them.

**Academic freedom**

117. Scottish Government officials committed to investigating the wording of the existing legislation on academic freedom and to establishing “what consideration, if any, was given to the student side of the equation”. We have not heard anything further from the Scottish Government on this matter and expect to receive an update before the Stage 1 debate.

As the Committee notes, officials agreed to investigate the construction of the standing definition in the Further and Higher Education (Scotland) Act 2005 and establish what consideration, if any, was given to the student side of the equation. That work is on-going and to date it appears that in the construction of the definition of academic freedom in the 2005 Act, the protection of the academic freedom of students was not something on which representations were made. However, we do not consider that the same policy rationale exists for students in this context, as at its core the safeguard is about appointments and staff privileges in the context of their work for an HEI or college. That said, where, for example, PhD students are involved in carrying out teaching, they would benefit from the same protection in relation to their teaching activities.
We have also taken careful note of all of the evidence presented, in particular the importance of ensuring that academic freedom cannot be cited as a cover for airing views that are offensive to the extent that their promulgation constitutes a criminal offence. As was stated by my officials in evidence before the committee, the criminal law would prevail in such cases, and the provisions of the Bill do not change that. However, in light of all of the comments made, we are considering the final form of the relevant provisions in this area, with a view to possibly putting forward an amendment at Stage 2.

118. We also look forward to receiving clarification on the following statement in the Bill's Financial Memorandum: “Alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs. However, no additional costs are expected to arise.”. We also invite the Scottish Government's views on UCU Scotland's suggestion that academic freedom should also apply to academic related and support staff.

This passage simply means that academics may cite the new definition in a dispute by quoting the expanded scope of the definition - for example, the slightly stronger obligation on the HEI to 'aim to uphold'. This might help some academics feel confident enough to cite academic freedom in a dispute situation, or to pursue a dispute for longer. However, it is unlikely that this would lead to an increase in the low number of existing cases, hence the assumption of low additional costs.

As regards academic related support staff, we have reviewed the construction of the definition of academic freedom in the Further and Higher Education (Scotland) Act 2005. This focuses solely on academic staff. We do not see a strong justification for extending the definition along these lines, as the intention is to protect views which relate to the teaching, learning provision or research that a staff member is directly engaged in, so as to avoid stifling academic debate. Accordingly, the Scottish Government does not consider it necessary to extend this further to academic and related support staff.

Financial memorandum

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

The Scottish Government will update the Financial Memorandum following Stage 2 in accordance with the Scottish Parliament’s Standing Orders.

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

The Scottish Government is committed to ensuring that each Financial Memorandum is of a high quality and provides the Parliament and interested parties with clear information about the financial implications of a Bill. The Finance Committee’s concerns will be taken into account when preparing future Financial Memoranda.
Conclusions

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

The University Sector Advisory Forum was established in 2012. The membership comprises Universities Scotland, institution representatives for the post ’92, ancient, and chartered institutions, unions and NUS Scotland.

The Forum meets once or twice a year and its remit is to consider the Scottish Government’s and SFC’s university sector strategies. The remit of the Forum has evolved since 2012 but specifically, it aims to provide the Scottish Government and the SFC with expert input into their key strategies.

Should the Bill be passed by the Scottish Parliament, the Scottish Government will keep the Committee informed of developments in monitoring its impact.

130. The Scottish Government has explained its reasoning for each of the Bill’s provisions. However, we have highlighted in this report examples of further information we believe the Scottish Government should provide in order that members’ participation in the Stage 1 debate is as informed as possible. We have also highlighted the concerns about the issue of reclassification, and have suggested a possible solution that we consider the Scottish Government should be able to deliver. While recognising there is a difference of opinion, as set out at the beginning of this report, we agree it is appropriate to seek to improve governance, particularly to try to avoid future problems arising. Taking all these points into consideration, we support the strengthening of governance in higher education and thus the Bill’s general principles. The Stage 1 debate will be an opportunity for all members to question in more detail the precise means by which this will be delivered.

The Scottish Government welcomes the Committee’s support and notes the comments made in the Stage 1 Report. The Scottish Government is happy to provide any further information required.