Universities Scotland

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Scottish Charity No. SC 029163

8 February 2016

Ms Angela Constance MSP
Cabinet Secretary for Education & Lifelong Learning
The Scottish Government
St Andrews House
Regent Road
EDINBURGH
EH1 3DG

Dear Angela

Higher Education Governance (Scotland) Bill: Stage 2

I thought I should write to set out Universities Scotland's view on issues relating to the Scottish Government's proposed Stage 2 amendments to the Bill.

Universities Scotland has valued the increasingly close partnership we have developed with Scottish Government as we have worked together to make the strongest possible contribution to inclusive economic growth. We remain concerned that this Bill will seriously compromise universities' ability to make a full contribution to our nation's success.

I should record Universities Scotland's welcome for the Scottish Government's proposal to remove sections 8 and 13 from the Bill. This addresses the very serious concerns we had about the Ministerial powers in the Bill. We strongly support the Scottish Government's amendments on this subject. We also welcome the proposed removal of 120 member limit for academic boards.

However, Universities Scotland members have a range of concerns about the remaining government amendments. Taken together, we believe the amendments create a confusing and inoperable model for the election of the chairs of governing bodies.

We are also concerned that major new policies, contrary to the Scottish Government's stated intentions at Stage 1, have been introduced without any consultation. These relate particularly to fundamental change to the role of the rector (unless this is an unintended effect of poor drafting), and to a new responsibility on institutions to pay the campaigning expenses of candidates for election as chair.

While we do not in principle support the election of chairs by a constituency other than the governing body, if the Scottish Parliament chooses to legislate for election by a wider constituency we believe it must do so in a way that is operable.

In summary, we have serious concerns in the following areas.

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Rectors/ senior lay governors

Whether by intention or design, amendments 3 and 4 profoundly change the role of rector at universities where this exists. This is at odds with the assurances you gave at Stage 1 that the role of the rector would not be changed. We would welcome clarity about whether these amendments intentionally change the role of the rector, or whether they are highly ambiguous drafting which has this unintended effect.

Our understanding of the effect of amendments 3 and 4, shared by our own legal adviser and by similar advice taken by institutions, is that:

- The rector takes on the substantive role of the senior lay member, with responsibility for
  - 'The leadership and effectiveness of the governing body, [and]
  - Ensuring there is an appropriate balance of authority between the governing body and the Principal'.
- However the amendments then go on to make extensive provision for the advertisement and electoral procedure for the disempowered role of senior lay member – which creates an election for a disempowered role.

This contrasts with your affirmation in the Stage 1 debate of the respective roles of the rector and the senior lay member:

It is extremely important to remember that the role of rector and that of an elected chair, who is otherwise known as the senior governor, are very distinct. Rectors are part of the democratic tradition of our ancient universities. They have an ambassadorial role, they raise the profile of the sector and they have the role of representing staff and students. The role of rector is a very influential one. The role of elected chair or senior governor or vice-convener is to oversee governance. They are steeped in day-to-day governance. Crucially, they appraise the principal's performance, and they often serve on many of the working groups and sub-committees.

For the universities with rectors (apart from Edinburgh) the effect of the government amendments would be that staff would be excluded from the electorate of the person substantively empowered as chair of the governing body.

For universities with rectors, different but overlapping electorates will be asked to vote for two separate people with poorly-differentiated roles on the governing body.

For all universities, the responsibility for 'ensuring there is an appropriate balance of authority between the governing body and the Principal' is inappropriately personalised to the rector/ senior lay member, when this is a responsibility that must be held corporately by the governing body.

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I find it hard to believe that these are the Scottish Government's policy intentions. However, that is the apparent effect of the Scottish Government amendments, which we believe need a profound re-think.

Relevant criteria for selection of senior lay member

The criteria in the government amendment need to be regarded as not excluding the wider role of a nominations committee set out in the higher education governance code e.g. in developing the descriptions of the role and responsibilities of the chair of the governing body and the capabilities required.

The staff and student members of the nominations committee should be drawn from the membership of the governing body, to ensure that the governing body has ownership of the process used to identify candidates for the chair.

Advertisement and application

The specification for the content of the advertisement and the means of advertising is far too prescriptive for inclusion in primary legislation. The higher education governance code requires open advertisement but does not go into such unnecessary levels of detail about the mechanics of this. While the information set out in this section should of course be available to applicants, the authors of the section appear not to have understood that the inclusion of this excessive level of detail on the face of an advertisement will fail to create an attractive proposition that encourages potential candidates to take an interest and enquire further about the role.

The way the government amendments deal with remuneration of chairs makes it difficult for the institution to say what 'remuneration and allowances are available' since these are defined in part by what the chair demands.

Interview of certain candidates

The procedure set out in the government amendments is inoperably mechanistic.

It only gives the nominations committee a 'tick box' role in determining whether candidates have met basic criteria for interview and election.

We support the inclusion of student and staff members on nominations committee and believe that this should mean involvement in a more empowered and meaningful committee than stage two amendments would have it, as the Code already requires.

The nominations committee should be able to make a judgement about who among the candidates has the strength of skill, experience and commitment to the institution's mission that should qualify them

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for an interview and potentially for election. This is how universities' nominations committees operate for other roles appointed under their supervision.

Under the government amendment as it stands, people who can 'tick the boxes' but who are not credible candidates will have to go forward for election, with the associated costs and waste of time. This contrasts with political parties' selection of credible candidates for elected office.

The system proposed in the government amendment is comparable to a situation in which every applicant for a job who was able to meet the basic job description would have to get through to the final stage of interview and selection.

When election to be convened

Universities Scotland remains entirely unconvinced of the case for election of the chair by a constituency other than the governing body – which is in itself inclusive of the staff and student interest. We are aware that that same principle is held by other values-based organisations such as the Co-Operative Group and the John Lewis Partnership, and that it has been re-affirmed by the Parliament in relation to the convenership of its own committees.

Even if the Parliament accepts the principle of election of higher education institutions' chairs on a wide franchise, the means of achieving this is unsatisfactory.

The government amendment provides for indefinite paralysis in the event that there is only one willing candidate and a chair cannot be appointed.

It also introduces the completely new policy – which was not discussed at Stage 1 or the subject of any other consultation – that institutions have to pay candidates' campaign expenses. This has not been costed, in common with the measures in the financial memorandum which was subject to severe criticism by the Finance Committee.

Universities Scotland members are very concerned at this. It is a new financial burden on institutions. It will also be a magnet for vexatious or single-issue campaigners, who are attracted by the prospect of being paid by a university to campaign on their favourite issues.

Election franchise and result

This gives by far the greatest power to choose a role about long term view of the institution to the most transient community – the students. If there has to be an election with a student and staff franchise, there should be equal weighting for the 'electoral colleges' of staff' students and the governing body.

Institutions would need to be given the capacity to make rules about who constitutes the staff and student electorate. For instance, would a participant in an online 'MOOC' or in a continuing education class count as a 'student' for the purposes of the franchise?

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Remuneration and conditions

We believe that the mechanism for deciding on remuneration is open to abuse – effectively 'payment on demand' – and may be attractive to vexatious candidates. It also appears to exclude payment based on compensation for additional costs incurred/income foregone by the chair, or payment to the chair's employer in compensation for loss of their time. This is unfortunate, given that a major part of the rationale for remuneration of chairs has been to encourage a wider diversity of candidates. We prefer the amendment laid by Liz Smith.

Transitional arrangements

We would welcome clarity from the Scottish Government about transitional arrangements. Is it intended that existing chairs and members of governing bodies should be able to complete their terms of office before the new arrangements come into force? Will current chairs be able to be re-appointed for a second term under the current arrangements prescribed by institutions? When will chairs start having to be appointed under the new arrangements? What arrangements will be in place between Royal Assent and the revision of the higher education governance code to reflect the consequences of the Act, if it is passed by the Scottish Parliament?

Conclusion

Universities Scotland would welcome your commitment in the Stage 2 debate to reflect further on the concerns raised by the sector and to develop, in a consultative way, alternative proposals for amending the Bill. The current Scottish Government amendments have very serious potential to create confusion and to damage the effective governance of Scottish higher education institutions.

I am copying this letter to the Convener and members of the Education & Culture Committee to support their scrutiny of the Bill.

Yours sincerely

Pete Downes

Professor Sir Pete Downes
Convener