

Universities Scotland briefing on HE Governance Bill, stage 2 amendments

Universities Scotland is grateful to the Convener and all members of the Education and Culture Committee for its considered scrutiny of the Higher Education Governance (Scotland) Bill to date and for the Committee's stage one report. We ask that the Committee maintain this close level of scrutiny at stage two despite the very real time pressures now facing the Bill.

This brief outlines Universities Scotland's position on each of the amendments laid at stage two and asks for your support in accepting or rejecting each of the amendments. See annex A. The brief is ordered according to the marshalled list of amendments.

Welcome amendments on sections 8, 13 and 9

We welcome Scottish Government amendments to remove sections 8 and 13, which would have granted Government the power to modify sections of the Bill via regulations. Our concerns that this heightened the risk of an ONS reclassification have been allayed by this action.

The Government amendment to section 9, to remove the arbitrary cap on an academic board, is also very welcome. We believe this would have simply disenfranchised some members of the academic community from participation in this structure of governance in a Bill where the stated policy intention is to enable 'more... inclusive participation'.

Remaining concerns

- **Transferral of responsibilities from Chair to Rector**

We are very concerned about amendments 3 and 4 that are open to interpretation as transferring responsibilities from the Chair/senior lay member to the Rector at the five institutions that have them. We support the role of Rector, where it exists. We also recognise it to be a very different role from that of Chair. We had taken comfort from the Cabinet Secretary's comments at various points during stage one that she had no intention of changing the role of Rector. Yet these amendments would leave the sector open to exactly that outcome.

- **A risk of reversing progress on gender balance**

We support the Chairs in their commitment to diversity within the governing body and in transparency and inclusion in the recruitment process for the Chair. This is being delivered already, through the Code of Good HE Governance. The sector already advertises widely and openly for this role with a set of criteria determined by the nominations committee, which has staff and student members. This process has delivered significant progress in the gender balance of Chairs.

Scotland will have achieved 50:50 gender balance in the role of university Chair by autumn 2016, when one or two recent appointments take up their positions as Chairs. This far exceeds that achieved by many other sectors; public or private. This has been achieved through rigorous, open and inclusive appointment procedures with the role going to the best person for the job. We fear this progress will be undone by the Bill's intention to introduce elections as there is evidence, including that from NUS Scotland's own experience, that elections deter female applicants. Scotland's recent experience of the health board elections found that elections can deter good candidates from applying.

- **No evidence that elected Chairs strengthens governance**

At Stage one this Committee asked the Scottish Government if it had any evidence to show whether certain models of appointing a governing body's Chair produced better governance. No evidence has been forthcoming. We are aware that the Scottish Parliament's own Standards and Procedures Committee recently recommended that the Parliament did not look to elect its Committee Conveners because: "*Nothing we have heard has persuaded us that the introduction of elected conveners would result in more effective committees or conveners.*" The experience of other values-based organisations outside of the HE sector, including the Co-Operative and John Lewis, has led them to continue/move to a model where the Chair is appointed by the board rather than elected because this model delivers the strongest form of governance and enables the institutions to remain true to their values.

- **Heavy-handed, overly prescriptive law-making**

The Bill goes too far in prescribing the process for appointing a Chair/senior lay member of a governing body to a sector of autonomous institutions.

It also introduces a new requirement for universities to pay for an unlimited number of prospective Chairs' campaigning costs. This has not been subject to consultation and no estimates have been provided for by the Scottish Government.

The process, as outlined in Government amendments, also allows for an indefinite hiatus in selecting a Chair in the event that a second, suitable candidate cannot be found to make the election a contested one.

Inclusion and diversity already a core part of HE governance

- **Staff and students have an integral role in governance in our universities.** Every Scottish higher education institution already has staff and students as full members of its governing body (or 'Court'). 67 per cent of HEIs have *two or more* student governors. 94 per cent of HEIs have *two or more* staff governors and 44 per cent have five or more (the Principal and Vice Principals don't count as 'staff' for this purpose). Find details of this for every HEI in Annex B.

Staff and students also sit on a number of additional decision-making committees within their universities that feed into the final decisions made by the Court. Staff and students at every university sit on their institution's selection committee which governs the selection process for the Principal and Chair amongst other key appointments. In addition to that, other committees can include: the audit committee, policy committees for teaching and research, equality and diversity committee and estates committees

- **Progress in the diversity of all lay members of the governing body, in addition to progress among Chairs.** In early 2015 the Chairs committed to work towards achieving 40:40:20 diversity among the co-opted members of the governing body. In May 2013 the percentage of women across holding these posts in higher education governing bodies was 29%. In January 2016 it stands at 39%. Further progress is expected as governors' terms of office are completed and vacancies arise.

ANNEX A: Universities Scotland’s position on the stage two marshalled list of amendments on the Higher Education (Scotland) Bill

Section of the Bill	A#	In the name of:	Amendment relates to	We ask you to:	Explanation & evidence
Before section 1	3 & 4	Angela Constance	Position of senior lay member Interaction with the role of rector	REJECT	<p>These amendments need to be looked at together.</p> <p>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 given by the Cabinet Secretary 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.</p> <p>US’s understanding of the effect of amendments 3 and 4, confirmed by our own legal adviser and by similar advice taken by institutions, is that:</p> <ul style="list-style-type: none"> - The rector takes on the substantive role of the senior lay member, with responsibility for <ul style="list-style-type: none"> o ‘The leadership and effectiveness of the governing body, [and] o 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. <p>This contrasts with the Cabinet Secretary’s affirmation in the Stage 1 debate of the respective roles of the rector and the senior lay member:</p> <p><i>“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-convenor is to oversee governance. They are steeped in day-to-day governance.</i></p>

				<p><i>Crucially, they appraise the principal's performance, and they often serve on many of the working groups and sub-committees."</i></p> <p>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.</p> <p>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.</p> <p>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.</p> <p>The Scottish Government is likely to assert that it is not their policy intention to change the role of the rector: if so, these amendments need a profound rethink.</p>
	4a & 4b	Stewart Maxwell	<p>ACCEPT IF amendments 3&4 are approved</p>	<p>These amendments are intended to preserve the role of the rector in the event that amendments 3 and 4 are approved.</p> <p>However, they do not address the fundamental problem that, for universities with rectors, the Scottish Government are proposing an essentially unworkable system where different but overlapping electorates will be asked to vote for two roles with overlapping functions in presiding at or chairing the governing body.</p> <p>The electorates are unlikely to understand that.</p> <p>The elected rector and elected senior lay member will be able to contest with each other who has the stronger democratic mandate.</p> <p>Electing both roles fails to recognise the profoundly different skills required by a rector as the student advocate and institutional ambassador, and the chairing member with responsibility for good governance of the institution, and the inappropriateness of public adversarial election for the latter role.</p>

	5	Angela Constance	Relevant criteria etc	REJECT	Liam McArthur's amendments 27-28 set out a preferred mechanism for the election of chairs, requiring adherence to standards of good practice in the higher education governance code and NOT requiring detailed over-prescription of mechanisms on the face of statute – which will inhibit the continued evolution of good practice.
	6	Angela Constance	Advertisement & application	REJECT	<p>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.</p> <p>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.</p>
	7	Angela Constance	Interview of certain applicants	REJECT	<p>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.</p> <p>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 for an interview and potentially for election. This is how universities' nominations committees operate for other roles appointed under their supervision.</p>

					<p>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.</p> <p>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.</p>
Appointment of Chairing member	8	Angela Constance	When election to be convened	REJECT	<p>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.</p> <p>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.</p> <p>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.</p>
Appointment of the Chairing member	9	Angela Constance	Election franchise & result	REJECT	<p>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.</p>

					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?
	10	Angela Constance	Appointment & tenure	REJECT	This amendment is contingent on acceptance of amendments 3-9.
	11	Angela Constance	Remuneration & conditions	REJECT	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 amendment 31 laid by Liz Smith.
Section 1 Appointment as Chairing member	27-29	Liam McArthur		ACCEPT	<p>These need to be looked at together.</p> <p>They set out a workable framework for the election of chairs of governing bodies, giving institutions the discretion to set out arrangements for this.</p> <p>They require that this should be done in accordance with standards set out in the higher education governance code which, unlike primary legislation, is subject to regular change as good practice evolves.</p> <p>They require the engagement of students and staff in the process of selecting the chairs of governing bodies, e.g. through membership of the nominations committees that select candidates.</p> <p>They leave the role of the rector untouched, and allow institutions to avoid the nonsense of having student/ staff elections for both the rector and the senior lay member.</p>
Section 1	12	Angela Constance	Leave out section 1.	ACCEPT	Removes Ministers' powers to determine how the chairs of governing bodies should be appointed.

After section 1	30	Liz Smith	Resignation or removal of Chairing member	ACCEPT	<p>This amendment is important if the Parliament legislates to require election of chairs of governing bodies by an electorate other than the governing body.</p> <p>The Scottish Government's proposals are highly likely to result in the election of chairing members who are single-issue candidates, who are opposed to the policies of the governing body, or who are not prepared to offer the attendance and commitment necessary for someone with important responsibilities for the good governance of the institution.</p> <p>This amendment provides the 'safety valve' that a chair in whom the governing body does not have confidence can be removed.</p>
After section 1	59-62	Liz Smith	Election as chairing member of the Royal Conservatoire of Scotland	ACCEPT	These amendments exempt the Royal Conservatoire from the Scottish Government's proposed mechanism for the election of chairs.
Section 2 Remuneration to be payable	31	Liz Smith	Payment of remuneration or allowances to chairing member	ACCEPT	<p>This amendment requires decisions about remuneration of chairs to be made in accordance with current and evolving best practice set out in the higher education governance code, based on the need for remuneration or allowances to enable someone to discharge the role and the circumstances of the institution. Through compliance with the code it allows for payment based on compensation for additional costs incurred/income foregone by the chair (e.g. enabling payment of childcare costs), or payment to the chair's employer in compensation for loss of their time.</p> <p>It is less open to abuse than the Scottish Government amendment, which is based on payment on demand rather than on need.</p>
Section 2	13 & 14	Angela Constance	Leave out section 2. Leave out section 3.	ACCEPT	Consequential from the removal of section 1
Section 4 Composition of the governing body	15	Angela Constance		ACCEPT IF amendments 3-8 are passed	ACCEPT as a necessary consequential IF amendments 3-8 are passed

Section 4 Compositi on of the governing body	32-34	Liz Smith		ACCEPT	<p>These protect the democracy of staff elections to governing bodies. Unlike the Scottish Government proposals:</p> <ul style="list-style-type: none"> - They protect the capacity of academic boards or senates to elect members of governing bodies. The Scottish Government proposals would require these elected staff to be displaced at a range of institutions to make room for trade union nominees if institutions are to observe the required good practice of having a maximum size of 25 members on the governing body and an independent majority. - They give the trade unions a democratic role in the election of staff members from a constituency of all staff, rather than undemocratic nomination by trade unions typically representing less than one-third of staff.
Section 4 Compositi on of the governing body	35-36	Liam McArthur		ACCEPT	<p>These correct that patronising assumption that staff other than academics are simply 'support staff'.</p> <hr/>
Section 4 Compositi on of the governing body	37-38	Liz Smith		ACCEPT	<p>These are more democratic than the Scottish Government's proposals since they allow direct election of members of the governing body by students</p>
Compositi on of the governing body	16	Angela Constance		ACCEPT	<p>Removes the requirement for membership of the governing body form nominees of 'graduate associations', which do not exist at some institutions.</p>
Compositi on of the governing body	39	Liam McArthur		ACCEPT	<p>Removes the anomaly of giving 'recognised trade unions' the right to nominate governing body members in institutions that do not have 'recognised trade unions'.</p>

Composition of the governing body	17	Angela Constance		ACCEPT	A consequential from amendment 16.
Section 5 Elections to governing body	40	Liam McArthur		ACCEPT	As for amendments 35-36
Elections to governing body	41	Liz Smith		ACCEPT	A consequential from amendments 32-34.
After section 5	63	Chic Brodie	Resignation or removal of ordinary members of governing body	ACCEPT	An important safeguard if Scottish Government succeeds in increasing the proportion of governing body members selected by interest groups: it allows for removal of members who fail to manage the conflict of interest between their role as charity trustees and the expectation of their interest groups that they will prioritise the interest group mandate over that wider responsibility.
Section 6 Nominations to governing body	42, 18	Liz Smith		ACCEPT	Consequentials of changes to section 4.
Section 8 Power to modify section 4	1	Angela Constance	Leave out section 8.	ACCEPT	Removes a contentious Ministerial power.
Section 9 Size of academic board	19	Jim Eadie supported by Liz Smith	Leave out section 9.	ACCEPT	Removes the cap on membership of the academic board
Section 10 Composition of academic board	43	Liam McArthur		ACCEPT	Corrects the title of the executive head of one institution.

Section 10	44	Liam McArthur		ACCEPT	Corrects the title of senior academic managers
	20	Angela Constance		ACCEPT	Means that the academic board doesn't have to have an unreasonably high proportion of students.
Section 10-12 Composition of & election to the academic board and validity of board's proceedings	45-47	Liz Smith		ACCEPT	Stops the Scottish Government from legislating on matters of internal academic governance.
Section 13 Power to modify sections 9 & 10	13	Angela Constance supported by Liz Smith	Leave out section 13	ACCEPT	Removes a contentious Ministerial power.
After section 13	48, 48a, 64	Sandra White, Liz Smith	Small, specialist institutions	ACCEPT	Exempts small specialist institutions from the 'one size fits all' requirements of the Bill.
Section 14 Procedure for regulations	21	Angela Constance	Leave out section 14.	ACCEPT	Consequential on the removal of Ministerial powers
Section 15 Meaning of higher education institution	65	Liz Smith		ACCEPT	Exempts small specialist institutions from the 'one size fits all' requirements of the Bill.
Section 15	22	Angela Constance		ACCEPT	Allows Ministers to exclude further institutions from the requirements of the Bill.
After section 18	23, 23A	Angela Constance	References to students	ACCEPT	Allows sabbatical officers to be student members of the governing body.

	49	Sandra White supported by Liz Smith	Meaning of small, specialist institutions	ACCEPT	BUT note the need at Stage 3 to include Scotland's Rural College as a 'small specialist institution'.
After section 18	50	Liam McArthur	Meaning of academic and professional staff	ACCEPT	Consequential from amendments 35-36.
	66	Liam McArthur	Exemptions	ACCEPT	Provides for exemptions wider than exemptions for small specialist institutions, e.g. if there is only one credible candidate for election as chair.
Section 19 Upholding academic freedom	51-57	51- 54, 56-57 Liz Smith 55 Stewart Maxwell		ACCEPT	These set out the appropriate balance between academic freedom and responsibility.
After section 19	67	Chic Brodie	Post-legislative scrutiny	ACCEPT	Requires post-legislative scrutiny of the impact of the legislation.
Section 20	68-69	Liam McArthur		ACCEPT	Removes Ministers' powers to use subordinate legislation to amend primary legislation: these powers have been of concern to OSCR
Schedule	24	Angela Constance		ACCEPT	Keeps the rector as 'president' of the court.
Schedule	58	Liz Smith		ACCEPT	Corrects a fault in the schedule that attributes the university's property to the Senate instead of the governing body.
	25	Angela Constance		ACCEPT	Provides for the senior lay member to preside in the absence of the rector.
	26	Angela Constance		ACCEPT	Simply explanatory.

ENDS

Annex B: Staff and student governors of Scottish higher education institutions

The governing bodies of all Scottish higher education institutions include staff and student governors. A breakdown is given in the table below. All have governors drawn from professional and support staff. Staff governors include governors elected by the Academic Board and others directly elected by the wider staff body.

	<i>Number of student governors</i>	<i>Number of staff governors</i>	<i>Notes</i>
University of Aberdeen	1	7	The university has applied to the Privy Council to add a second student governor. A second student attends governing body meetings in the meantime.
Abertay	1	3	The vice president of the student association also attends meetings.
Dundee	2	6	
University of Edinburgh	2	5	
Edinburgh Napier University	2	3	
Glasgow Caledonian University	1	3	
University of Glasgow	2	7	
Glasgow School of Art	1	3	
Heriot-Watt University	2	7	
Queen Margaret University	2	3	
Royal Conservatoire of Scotland	2	2	
Robert Gordon University	2	3	
SRUC	1	1	
University of St Andrews	3	5	
University of Stirling	2	6	
University of Strathclyde	2	6	
University of the Highlands and Islands	2	4	Student governors include one FE and one HE student. Staff governors include an FE Governor and a Specialist and Research Governor
University of the West of Scotland	2	4	