

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL: a response to the Scottish Parliament's Education and Culture Committee

Summary

- *The strength and vitality of Scotland's Higher Education (HE) sector have long been recognised nationally, including by the Scottish Government, and internationally. The sector is already modernising its governance and recent developments have increased its accountability to the Scottish Funding Council and other public bodies. The Royal Society of Edinburgh (RSE) has seen no evidence of the need for legislation or that the provisions of the Bill would enhance governance.*
- *The RSE considers that the Bill undermines the principles of institutional independence and autonomy. These are key pillars of a dynamic and successful sector, allowing institutions to maintain the flexibility required to compete on a fast-moving global stage. There must be a clear distinction between receiving public funding from various sources and being a public sector body. Treating Higher Education Institutions (HEIs) as the latter will lead to unintended consequences and affect their ability to compete. Governmental intervention of this scale is a retrograde step.*
- *The provisions set out a detailed 'one size fits all' approach to the governance of the sector. They fail to recognise the rich diversity of Scotland's HEIs and the benefits flowing from this diversity. The Bill confuses consistency of approach with consistency of standards. It is right for the Scottish Government and Parliament to demand consistently high standards across the sector, but this will not be achieved by enforcing one approach for all.*
- *The RSE is concerned that a number of provisions would undermine, rather than strengthen, Higher Education governance in Scotland.*
- *The RSE re-emphasises that the election of the chair by any electorate broader than that of the governing body itself could undermine good governance. It would have the potential to "politicise" the role and damage the crucial trust and confidence that the members of the governing body must have in their chair, if the body is to be effective.*
- *The selection process through which the chair of a governing body is appointed is both a key and controversial element of the Bill. It is inappropriate*

and undesirable that the process is not set out in the Bill but deferred to the drawing up of regulations on which MSPs will have limited influence.

- *We also re-emphasise our concern that prescribing that a trade union representative is to be a member of the governing body may lead to significant conflict of interest, where the union is rightly in opposition to the governing body. The Bill and its accompanying documents offer no solution to this issue.*
- *A well-functioning academic board is vital to the continued success of an institution. As HEIs review their governance in light of recent developments, it may be timely to review arrangements and agree changes with the academic board. The detailed 'one size fits all' approach of the Bill, however, is inappropriate and potentially unworkable for some HEIs.*

Introduction

- 1 The Royal Society of Edinburgh (RSE) has previously commented on the proposals for a Higher Education Bill as set out by the Scottish Government in its consultation of January 2015. That response was prepared by a Working Group of Fellows with substantial experience of and expertise in governance and management issues, including in the Higher Education (HE) sector. The same group has prepared this submission to the Education and Culture Committee's call for evidence and the response been approved by RSE Council. The group does not include any serving HE Principals or chairs of governing bodies. The RSE would be happy to provide oral evidence on the Bill, if the Committee would find it useful.
- 2 The RSE's position on the proposals now reflected in the Bill has not changed. The RSE considers that the Bill represents entirely inappropriate and unjustified intervention by the Scottish Government into the governance of an autonomous sector that has proved itself a success for Scotland. Further, the RSE continues to raise concerns that a number of the provisions contained within the Bill are counter to current understanding of good governance.

Current HE Governance

- 3 The vitality and strength of the HE sector in Scotland are well-recognised both nationally and internationally. The sector attracts some 15 per cent of the UK Research Councils' investment in research and innovation, despite Scotland representing only eight per cent of the UK population¹. Under the recent Research Excellence Framework exercise, 77 per cent of the Scottish research submitted was judged as world-leading or internationally excellent, and over 85 per cent was judged to have an outstanding or very considerable impact², both above the equivalent UK average figures. The Scottish Government itself notes that the sector has "*a well-deserved reputation world-wide for providing high-quality and reputable higher education*"³.
- 4 This evidence of success suggests that the sector has been broadly well-governed to date. In contrast, neither the Scottish Government nor the Von Prondzynski report on which the Government has based much of its rationale for the Bill, has set out any evidence of significant deficiencies in governance that require to be rectified through legislation.
- 5 We do not suggest that there have not been specific instances of challenge in the governance of Scotland's Higher Education Institutions (HEIs), nor that the sector need not heed on-going developments in the understanding of good governance. Rather, we point to the progress that has been and is continuing to be made in modernising the governance arrangements of HEIs, for example through the Post-16 Education (Scotland) Act 2013 and the introduction of the Scottish Code of Good HE Governance (the Code) in 2013. We question the need for this progress to be overlaid by additional legislation.
- 6 The principles set out in the Code already address transparency, accountability, representation and equality, the same issues as are put forward in justification of the Bill. The Scottish Funding Council has made compliance with the Code a condition of grant, stimulating each HEI to review its existing arrangements and holding them accountable for maintaining a consistently high standard of governance. This process is on-going and the Code will be subject to review in 2016.
- 7 Issues of gender equality and inclusion have become increasingly high profile across the sector in recent years, as they have across society. HEIs have established and embedded their own principles on

these matters into their policies, strategies and the membership of committees, as appropriate for their own circumstance, within the framework of the Code. Progress is being made, as evidenced by the number of awards attained across the sector under the Athena SWAN programme, and by the increasing numbers of female principals, vice-principals and chairs of governing bodies. While there remains room for further development, there is no need for legislation to overlay current efforts. A 'one size fits all' approach would likely deter, rather than support, change.

- 8 The RSE recognises that, to date, the Scottish Government has been a strong and constructive supporter of the HE sector. We suggest that the resources of both Government and Parliament would have significant impact if directed at supporting HEIs to meet some of the fundamental challenges of the day: tackling diverging policies on tuition fees and funding; the impact of the digital revolution on teaching, learning and research; how to effectively contribute to communities; maintaining research leadership on an increasingly competitive global stage. The provisions of the Bill, however, neither recognise nor address the challenging dynamic context in which Scotland's HEIs operate.

The impact of the Bill on governance, autonomy and accountability

- 9 We have seen no evidence, provided by the Scottish Government or others, that the provisions of the Bill would lead to enhanced modernity, inclusion or accountability. Our concerns centre around three key issues: that the Bill undermines the sector's autonomy and independence; that the wide election of chairs may disrupt the functioning of governing bodies; and that the representation of trade unions on governing bodies raises potential for serious conflict of interest. We note that the Scottish Government, in the policy memorandum accompanying the Bill, states that it "*does not consider that the policy aims of this Bill could be satisfactorily met by the current Code or by an amended Code*". It fails, however, to provide either justification for this claim or evidence that the provisions of the Bill will lead to more modern, inclusive or accountable HE governance. In particular, it fails to address or attempt to allay the concerns raised at the earlier consultation stage that a number of the provisions are inimical to good governance.

¹ Higher Education in Scotland: our values and our value added, Universities Scotland, December 2013, <http://www.universities-scotland.ac.uk/uploads/HE%20Our%20Values%20and%20our%20Value%20Added.pdf>

² Research Excellence Framework 2014: The Results, December 2014, <http://results.ref.ac.uk>

³ Scottish Government website, <http://www.gov.scot/Topics/Education/UniversitiesColleges/16640/academicquality>

- 10** The principles of independence and autonomy are fundamental pillars of a vibrant and successful HE sector. The most successful HE sectors in the world, in the US and the UK⁴, are also amongst the most independent of government. However, the extent to which the Bill prescribes governance arrangements for Scottish HEIs undermines the independence and autonomy of the sector in Scotland and contradicts the Scottish Government's own claim that the aim of the Bill *"is not to seek increased ministerial control over our institutions"*⁵. This is a retrograde step.
- 11** The Bill limits the ability of Scotland's HEIs to adapt to an ever-evolving environment. Their continued success in the highly competitive global context depends upon maintaining the flexibility to respond to opportunity and need in the most appropriate manner for each individual institution, true to its own ethos. The Scottish Government has previously recognised the diversity of the sector as a strength but its desire for consistency of approach, rather than for consistency of standards, takes no heed of the historic and practical differences in governance and strategic and operational management of each institution. For example, it cannot be practical for the University of the Highlands and Islands, a federal institution composed of 13 diverse academic partners and covering half of Scotland's geography, to implement the same governance arrangements as the Royal Conservatoire of Scotland.
- 12** The HE sector attracts substantial funding from various public sources, but it is important to maintain a clear distinction between receiving public funding and being a public sector body. HEIs are not public sector bodies. Treating them as such will lead to unintended consequences, for example with regard to their actual or perceived independent charitable status and ability to raise funds from elsewhere; and affect their ability to compete, especially when universities in the rest of the UK maintain their autonomy.
- 13** Nevertheless, the HE sector must, of course, be answerable for the publicly-funded support it receives. HEIs are currently accountable to the Scottish Funding Council through a number of mechanisms, including the SFC Financial Memorandum with individual institutions and SFC Outcome Agreements, Strategic Dialogue and institutional visits which ensure that institutions' strategic plans are in-keeping with Scottish Government priorities. Other governance and statutory requirements are in place with the Office of the Scottish Charity Regulator (OSCR), the

Quality Assurance Agency for HE in Scotland (QAA), the Higher Education Statistics Agency (HESA), the Scottish Public Services Ombudsman, the Information Commissioner and the Auditor General for Scotland. These mechanisms currently strike an appropriate balance between autonomy and accountability.

The wider package of HE Governance reform

- 14** The Scottish Parliament, when passing the Post-16 Education (Scotland) Act in 2013, agreed that the HE sector should continue to be responsible for ensuring its own high standards of governance, regulated at arm's length by the SFC. It is not clear why, in the absence of any change of circumstances, the Scottish Government is now proposing additional legislation that directly intervenes in the governance arrangements of HEIs.
- 15** The Scottish Code of Good HE Governance has already led to significant modernisation of the governance arrangements of Scotland's HEIs. Implementation of the Code is being monitored and the Code itself will be subject to review in 2016. We suggest that this would be an appropriate point at which to re-assess the need for further measures, legislative or otherwise.

Appointment of chairs of governing bodies

- 16** The lack of detail on the process by which HE institutions would be required to appoint a chair of the governing body is a key failure of the Bill. As the Scottish Government notes in the Policy Memorandum that accompanies the Bill, there was much opposition to earlier proposals around the selection of chair and marked differences in stakeholder opinion⁶.
- 17** We recognise that section 3 of the Bill places a duty on Scottish Ministers to consult on the regulations that will set out the selection process. Nevertheless, the Ministers would have the final say as to what goes in the regulations and, under the affirmative procedure, the Parliament would be limited to affirming or rejecting the regulations as a whole, with no option to amend them. We consider arrangements for the selection of the chair of the governing body, which will have significant impact on the performance of the governing body, to be a fundamental feature of the proposals rather than a minor detail. As such, they should be clearly defined within the Bill before members of the Scottish Parliament are asked to vote on its passage.

⁴ The US and the UK hold all 10 of the top 10 and 46 of the top 100 university rankings in the world. QS World University Rankings, 10th Edition (2014/15), QS Quacquarelli Symonds Ltd, September 2014

⁵ Consultation paper on a Higher Education Governance Bill, Scottish Government, November 2014, p3 and p6

⁶ Higher Education Governance (Scotland) Bill, Policy Memorandum p6, Scottish Government, June 2015, http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20%28Scotland%29%20Bill/b74s4-introd-pm.pdf

- 18** We re-emphasise the overriding need for the governing body to have full confidence in the impartiality and leadership abilities of its chair, and for the relationship between the chair and Principal to be mutually supportive but challenging. A process culminating in an election by any electorate broader than the governing body itself cannot guarantee either of these two crucial elements. It risks “politicising” the role and increasing the influence of people with either a very temporary stake in the university or others with clear vested interest. It may result in a chair beholden to a particular constituency rather than one able to pursue the best interests of the institution as a whole. In addition, turning the process into an election campaign will be likely to narrow, rather than widen, the pool of candidates, deterring people who are not comfortable with public campaigning and self-promotion but who may be well qualified for the role.
- 19** For these reasons we reject the assertion that an election process would increase transparency and accountability, or that the unspecified weighting of votes referred to in the original consultation document would ‘reflect the democratic ideal’. The governing body could already be considered a ‘balanced and representative’ electorate, consisting of senior management, staff, student and lay members, all of whom are obliged to act in the best interests of the institution.

Membership of governing bodies

- 20** We refer again to the Scottish Code of Good HE Governance which sets out a number of Main Principles (9 – 11) on the composition and size of the governing body and the appointment of members to it. The Code sets high standards for good governance while respecting the rich diversity of Scotland’s HEIs. The Bill, in contrast, sets out requirements that are overly prescriptive, inappropriate and in some cases unworkable.
- 21** The central concern is the provision for the inclusion of trade union representatives on the governing body. The law is clear that, as charity trustees, members of the governing body are bound to act in the best interests of the organisation as a whole, not any one particular constituency. While the Policy Memorandum states that this would apply to trade union representatives, it fails to address how potential conflicts of interest on issues where the unions are rightly in opposition to the governing body would be resolved.
- 22** It is important to distinguish between the role of an organisation’s governing body, which requires a relatively small group of people with the right calibre and mix of skills, and the part played by representative bodies, such as trade unions, which can challenge the governing body on the composition and delivery of the institution’s strategy. This distinction has important implications for the capacity in which persons are appointed.

Academic boards

- 23** A well-functioning academic board that has a clearly-defined and constructive relationship with the governing body is crucial to the on-going delivery of high quality teaching and learning within an HEI. We recognise that the size and composition of academic boards vary across the sector, reflecting the history, traditions, current needs and legal frameworks of Scotland’s diverse HEIs.
- 24** However, we are concerned that the Scottish Government, in setting out prescriptive, detailed proposals for the size and composition of academic boards within the Bill, is once again confusing consistency of approach with consistency of high standards. Arrangements that are appropriate for one institution will not be appropriate for another and may undermine, rather than enhance, the functioning of the academic board and the institution more widely.
- 25** As HEIs consider their governance procedures following introduction of the Code, it may be timely for governing bodies to review these arrangements and agree changes with the academic board. However, it is neither desirable nor appropriate for prescriptive, ‘one size fits all’ legislation to overlay this process.

Academic Freedom

- 26** The RSE maintains that the proposal to replace the current definition of academic freedom with a new definition that includes provision to encourage exploitation of new ideas is unnecessary, with no evidence of the need for such a change. However, the concept is unobjectionable.

Additional Information

Advice papers are produced on behalf of RSE Council by an appropriately diverse working group in whose expertise and judgement the Council has confidence. This advice paper has been signed off by RSE Council.

In responding to this consultation the Society would like to draw attention to the following RSE publications which are relevant to this subject:

- The RSE’s submission to the Scottish Government, *Consultation on a Higher Education Governance Bill* (February 2015)
- The RSE’s submission to the Steering Group appointed by the Committee of Scottish University Chairs, *The Scottish Code of Good HE Governance* (January 2013)
- The RSE’s submission to the Scottish Parliament Education and Culture Committee, *Post-16 Education (Scotland) Bill* (January 2013)
- The RSE’s submission to the Scottish Government, *Report of the Review of Further Education Governance in Scotland* (February 2012)
- The RSE’s submission to the Review of HE Governance (‘Von Prondzynski Review’), *The Governance of Higher Education in Scotland* (September 2011)

Any enquiries about this Advice Paper should be addressed to Susan Lennox, RSE Policy Officer, slennox@royalsoced.org.uk. Responses are published on the RSE website www.royalsoced.org.uk Advice Paper (Royal Society of Edinburgh) ISSN 2040-2694

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