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Director  
Universities Scotland

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Dear Alastair

Thank you for your email of 13 August to Rebekah Widdowfield regarding the Higher Education Governance (Scotland) Bill ("the Bill"). Firstly I would like to offer my sincere apologies for the delay in responding to you on this matter. As a wide range of issues were raised in your correspondence it has taken time to collate a response.

You asked a number of specific questions in respect of the Bill which I have addressed in turn below.

### **ONS Classification**

*What legal advice did Scottish Government take on the Bill's potential impact on the ONS classification of higher education institutions?*

*What advice have Scottish Government taken directly from ONS about the potential impact of the Bill?*

The Scottish Ministerial Code provides that Scottish Ministers may not reveal the source or content of any legal advice. However, we can confirm that, in respect of ONS classification, as explained by officials during the Finance Committee evidence session on 16 September, assessment of this risk was conducted prior to introduction of the Bill in June. Key to this assessment was the level of government control over higher education institutions (HEIs) activities, based on the Eurostat European System of Accounts published guidance on classification from 2010. The guidance has been examined carefully, with each of the indicators considered in turn and how they relate, or not, to the provisions in the Bill. It is the view of the Scottish Government that the content of the Bill is compliant with the indicators of control.

As was also set out by officials during the evidence session on 16 September, there have been no formal discussions with the Office for National Statistics in respect of the Bill.

## Charity law: Charitable status of institutions

Have the Scottish Government taken advice from OSCR about the implications of the Bill for institutions' charitable status?

If so, what advice was offered by OSCR?

The Scottish Government has not taken direct advice from the Office of the Scottish Charity Regulator ("OSCR") about the implications of the Bill for the charitable status of HEIs. OSCR did however respond to the Consultation Paper on a Higher Education Governance Bill ("the Consultation") raising no concerns about the Bill's provisions as set out in the Consultation, stating that *"...in our view they would not affect the constitutions of higher education institutions in ways that would give Ministers the power to direct or control these institutions' activities."*

Further, OSCR raised no concerns about the Bill's provisions, as introduced, in their response to the call for evidence issued by the Education and Culture Committee. In that response, OSCR set out its consideration of the proposals in the Bill and analysed how those proposals would work alongside the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"). OSCR specifically considered the alignment of the proposals with section 7(4)(b) of the 2005 Act, which relates to Ministerial powers of direction and control over charities.

OSCR's overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs. OSCR stated that *"Our view is that the provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4) (b) of the 2005 Act."*

## Charity law: role of members

Have the Scottish Government taken advice from OSCR about the difficulties which nominated members may have in complying with the general duty on charity trustees and the requirements of the HE governance code?

If so, what advice was offered by OSCR?

What is the Scottish Government's policy intention about the nomination of members of the governing body in the circumstances outlined above?

The Scottish Government has not taken direct advice from OSCR about any difficulties which nominated members may have in complying with the general duty on charity trustees and the requirements of the Scottish Code of Good Higher Education Governance ("the Code"). However, in their response to the call for evidence issued by the Education and Culture Committee, OSCR also considered how the proposals in the Bill would work alongside the 2005 Act given that members of HEI governing bodies are also charity trustees and, therefore, subject to duties under section 66 of the 2005 Act.

OSCR concluded that “it is not particularly unusual for charities to have charity trustees nominated by other bodies or groups” and, given the overall size and composition of governing bodies as provided for in the Bill, there is nothing to prevent any conflicts of interest which do arise from being dealt with in a way that enables members of governing bodies from meeting their duties as charity trustees.

Furthermore, as set out in the Policy Memorandum to the Bill and in line with the duties and responsibilities set out in section 66 of the 2005 Act, it is the Scottish Government’s intention that governing body members, as charity trustees and given the aspects of the Code that you quote in your question, will be required to act in the best interest of the HEI, as opposed to any constituency which nominated them.

## **Charity law: Skills and expertise**

What analysis have Scottish Government made of the specific impact of the Bill on each institution’s ability to meet the requirements of the code set out above?

What policy consideration did Scottish Government give to whether the provisions in the Bill were consistent with the requirements on institutions under the code?

The Scottish Government reviewed the provisions of the Bill in the context of Main Principles 9 and 10 of the Code, against the existing composition of HEI governing bodies. The Scottish Government acknowledges the requirements placed on HEI governing bodies by the Code and their interaction with the requirements of the Bill; while the requirements of the Bill stipulate a number of required positions within the membership, they do not prescribe the full membership of the governing body, that remains a matter for each individual HEI. It will therefore be a matter for each institution to determine how the requirements of the both the Code and the Bill are best accommodated in their HEI.

It is the view of the Scottish Government, that the members required by the Bill could be accommodated by all 18 institutions to which the Bill applies.

## **How to deal with conflict between the requirements proposed in the Bill and the requirements of institutions’ own governing documents?**

What consideration the SG gave to the extent to which:-

- the composition of each governing body already reflected the various groups who would have a right to appoint members of that governing body under S4; and
- the introduction of members in implementation of section 4 would put governing bodies in breach of the Code unless they removed members appointed under their existing statutes.

As set out above, the Scottish Government reviewed the requirements of the Bill in the context of the Code and the existing composition of the governing bodies and academic boards of HEIs, as set out in their governance instruments. It was evident from that analysis that the majority of HEIs already include staff and student members and that there are no existing positions specifically allocated to members of trades unions.

The Scottish Government is aware that in order for each institution to meet with both the requirement for new members as set out in the Bill and Main Principle 10 of the Code (which requires that “The governing body shall have a clear majority of independent members, defined as both external and independent of the Institution. A governing body of no more

than 25 members represents a benchmark of good practice”), HEIs may need to review the overall composition of their governing body in order to accommodate new statutory members. We address the fact that governance instruments may have to be updated below.

More generally, what consideration has the Scottish Government given to the conflict between the provisions of the Bill and the requirements on each institution under the various governance instruments outlined above?

How does the Scottish Government believe these conflicts can be resolved if no provision for this is made in the Bill?

The Scottish Government has reviewed the requirements of the Bill in respect of the existing governance instruments of HEIs and is aware that the requirements of the Bill are, as was the case with the Code, likely to create conflicts with HEIs’ existing governance instruments. It is anticipated that over a period of transition HEIs will amend their governing instruments in line with the new statutory requirements. As these will be statutory requirements, there is no need for the Bill to explicitly require HEIs to update their governance instruments.

What relationship is envisaged between ‘rules’ proposed in the Bill (sections 5, 6, 11) and existing governance instruments?

Sections 5, 6, and 11 of the Bill provide that the election and nomination processes in respect of both governing bodies and academic boards are to be conducted in accordance with rules made by the governing body of each HEI. These provisions ensure that, beyond the minimum requirements of sections 4 and 10 about composition and the provisions about the appointment of a chair, it will be for each individual HEI to determine the election and nomination processes in accordance with their own rules. It will be for each HEI to amend as necessary their existing governance instruments in order to meet with the requirements of the Bill over a transition period and it will then be for HEIs to make the rules referred to in sections 5, 6 and 11 in accordance with their governance instruments. The Bill does not propose to change the existing relationship between rules and governance instruments.

Has the Scottish Government made any estimate of the costs to institutions if existing governance instruments require change?

Specific analysis of the costs to institutions of updating governance instruments in light of the Bill’s provisions has not been undertaken. Updating governance as part of the compliance with the Code, as well as many other decisions that HEIs make, is part of mainstream business, and the provisions of the Bill will be staggered in their implementation. Given that all HEIs have different numbers of staff and legal advisers; it is difficult to estimate the costs of making the necessary changes to governance documents.

Has the Scottish Government consulted the Privy Council Office about processes for changing existing governance instruments, and if so what advice was given by the Privy Council?

The Scottish Government has consulted with the Privy Council Office in respect of the Bill. The actual process for making changes to governance instruments in order for HEIs to meet with the requirements of the Bill will remain unchanged. As set out above, it is the intention of the Scottish Government that the requirements of the Bill will be commenced over a

suitable period of transition, however it is also acknowledged that there may be some periods of higher than usual activity in terms of changes to existing governance instruments.

*What timescale does the Scottish Government envisage for any action to make existing governance instruments consistent with the requirements set out in the Bill?*

It is anticipated that a period of transition of approximately 4 years will follow the enactment of this Bill. However it is likely that the transition period for some specific elements of the Bill will be shorter than others. For example: the provision about academic freedom is likely to be commenced more quickly than provisions that will require changes to existing governance instruments such as the provisions about the membership of governing bodies.

In respect of the Bill in general, the Cabinet Secretary and officials will continue to, listen carefully to the views of Universities Scotland and other stakeholders and to consider all constructive suggestions raised in evidence and as the Bill is debated in Parliament.

I hope you find this information helpful.

**Laura Duffy**  
**Higher Education and Science Division**