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29 October 2015

Dear Laura,

Higher Education Governance (Scotland) Bill

Thank you for your letter of 16 October in response to mine of 13 August.

There are some issues in that letter where Universities Scotland does not believe that the Scottish Government has yet made a full and evidence-based response to our concerns.

Universities Scotland will welcome further constructive exploration with Scottish Government of ways of improving the Bill that respond to our concerns.

ONS classification

The fullest articulation we have seen of the Scottish Government's reasoning is in the Cabinet Secretary's letter of 5 October to the Scottish Parliament's Finance Committee.

In Universities Scotland's view, supported by our legal advice, the Scottish Government has not yet made an adequate assessment of the risks of ONS reclassification of higher education institutions. The legal advice which we have shared with the Scottish Parliament states that:

Our advice is that the Bill, based on an assessment of the range of factors that ONS would consider as part of an assessment of the classification of HEIs, heightens the risk of HEIs being reclassified by the ONS as being within the General Government category. We think that, when considered cumulatively with other existing government controls over HEIs, the provisions in the Bill would take HEIs into "borderline" territory in terms of their current ONS classification, for the reasons set out in this note of advice.

I attach that advice in full for your consideration. Universities Scotland has also had the benefit of further advice, having seen the rationale set out by the Scottish Government in their letter of 5 October, and this is reflected below.

In summary, reasons why the Scottish Government's analysis appears insufficient include:

- The Scottish Government's approach to assessing the additional risk of ONS reclassification arising from the Bill appears to be based on the application of 8 indicators of control set out at (a) to (h) of paragraph 2.38 of ESA 2010, which are indicators that ONS would use as the "main factors to consider in deciding whether a corporation is controlled by government" (see page 33, ESA 2010). In doing so, the Government has not made reference to the additional guidance on these "main factors" set out at paragraphs 20.309 of ESA 2010, nor has it noted that each classification will be "judged on its own merits and some of these indicators may not be relevant to the individual case" (paragraph 20.310, ESA 2010).
- The Scottish Government has placed weight on its application of some indicators in 2.38 of ESA 2010 that are not relevant to HEIs when assessing government control. However, recent correspondence with ONS suggests that any reconsideration of the current ONS classification of a non-profit institution (NPI), such as an HEI, should take into account the 5 indicators of control listed at (a) to (e) in paragraph 2.39 of ESA 2010 specifically provided for the consideration of NPIs, together with the relevant guidance in chapter 20 of ESA 2010 and in the Manual on Government Deficit and Debt.¹
- The Scottish Government's risk assessment in relation to ONS reclassification appears, from the content of the letter dated 5 October 2015 from the Cabinet Secretary to the Convener of the Finance Committee, to have completely overlooked the 5 specific indicators of control for non-profit institutions (such as HEIs) contained in paragraph 2.39 of ESA 2010, as developed in paragraphs 20.13 to 20.16 of ESA 2010 and supplemented by the guidance in MGDD 1.2.3 (paragraphs 15 to 20 – 'Control of Non-Profit Institutions' and 'Control of educational units'). Consideration of these 5 indicators for NPIs has informed the external legal advice given to Universities Scotland (see attached external legal advice for details of the 5 indicators of control from ESA 2010 used for NPIs). However, no explanation has been provided in correspondence from the Scottish Government to either the Scottish Parliament or Universities Scotland as to why the Government considers that the specific indicators of control for NPIs in ESA 2010 and

¹ By email dated 30 September 2015 from ONS to US's legal advisers, when asked whether ONS would only apply the specific NPI criteria at para 2.39 of ESA 2010 when making an assessment of whether an NPI fell within the 'NPI within general government' classification, or whether they would also apply the general criteria at para 2.38 of ESA 2010 to decide whether an NPI was controlled by government, ONS confirmed that: "for all NPIs, ONS would review their classification based on the NPI criteria in ESA 2010 paragraph 2.39 supplemented by Manual on Government Deficit and Debt guidance in Part 1.2 'Criteria for classifying units to the general government sector'".

the relevant guidance in the MGDD should not form the basis for the Scottish Government's risk assessment in relation to the Bill and ONS reclassification.

- The Scottish Government's risk assessment does not appear to have taken account of the Treasury's guidance on sector classification. The MGDD and the Treasury guidance identify government powers in relation to the 'enabling instruments' or constitutions of bodies as being indicators of government control which may lead to institutions' classification as government bodies. Ministers are clearly taking power over HEIs constitutions by creating powers which enable them to change the composition of governing bodies and academic boards; and to specify the means and duration of appointment of chairs of governing bodies and their remuneration.
- ESA 2010 states that, in relation to NPIs, a single indicator can be sufficient to establish control although, in most cases, a number of indicators will collectively indicate control (ESA 2010, paragraph 20.15). Overall, the Scottish Government's assessment of the additional risk of ONS reclassification arising from the Bill, as set out in the 5 October letter, is not adequate. It understates the risk created by Ministers' proposed powers over the composition of governing bodies and it has failed to take account of the existing controls on universities which represent a baseline level of risk prior to the introduction of the new Ministerial powers proposed in the Bill. The Bill effectively gives Ministers unlimited power to change the composition of governing bodies, which is highly likely to be seen as an indicator of control by ONS. The cumulative impact of the provisions in the Bill relating to appointments to HEIs, taken together with existing controls exercised by Ministers and the Scottish Funding Council over HEIs, underpins Universities Scotland's view in relation to the additional risk posed by the Bill to the current classification of HEIs as Non-Profit Institutions Serving Households.

ONS remain committed to a review of universities' classification in the first half of 2016.

I would be grateful if you could share with Universities Scotland the Scottish Government's reasoned assessment of the evidence we have presented about the heightened risk of HEIs' reclassification by the ONS.

Charitable status

OSCR have been clear that the exercise of the Ministerial powers proposed in the Bill could give rise to a risk to charitable status, on the basis that HEIs are subject to Ministerial powers of direction and control. OSCR's stage 1 evidence submitted to the Scottish Parliament explicitly states that:

Section 8 of the Act gives Ministers the power to make regulations to modify the categories of membership set out in section 4 and the numbers in each category. Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions these amounted to ministerial control. Similarly, Section 20 of the Act gives Scottish Ministers wide power to make such further regulations 'as they consider necessary or

expedient for the purposes of or in connection with this Act'. Should such regulations be made in respect of Part 1 of the Bill when enacted we would have to consider to the impact of these measures with respect to ministerial control.

Charity law: role of members: conflicts of interest

We note the policy intention that all members of governing bodies should be required to act in the best interest of the HEI, as opposed to any constituency which nominated (or elected) them. We would welcome expression of this intention in the drafting of the Bill.

Governing body composition

Universities Scotland is disappointed that the Scottish Government has presented no evidence of analysis of the impact of the Bill on the composition of the governing body of individual institutions. We had expected to see analysis of how institutions could accommodate the membership proposed in section 4 of the Bill while complying with the Higher Education Governance Code's requirements for a majority of independent members and a maximum membership of 25.

The fact is that, for the majority of institutions, this cannot be done unless existing members are removed. The members who would typically have to be removed to maintain an independent majority and a membership no higher than 25 would be staff representatives elected from categories not set out in the Bill (e.g. elected by the Senate or academic board), or members elected by all staff additional to two elected staff members prescribed in the Bill.

The impact of the Bill on institutions' membership is set out in **Annex A**.

Some specific examples of this impact may be useful. For instance, Queen Margaret University has commented to Universities Scotland that:

Were the Bill to pass into legislation in its current form, the University Court would need to consider either increasing its total membership (in breach of the Scottish Code), or reviewing the other current categories of staff membership.

The University of St Andrews has noted that:

Our Court is limited by statute to 23. This includes 3 student representatives (4 if you count the Rector); 4 Assessors elected by the academic community; one Assessor elected by the non-academic staff; the Principal and Deputy Principal; and 12 non-executive members. To preserve a majority of non-executives whilst accommodating the requirements of the Bill, we would have to replace the Assessor directly elected by the entire non-academic staff of the University with one of Trade Union nominee. The other Trade Union nominee would have to replace either one of the student representatives or one of the elected Academic assessors.

Written submissions to the Education & Culture Committee made similar points, e.g.:

University of Aberdeen

The University of Aberdeen Court has a maximum of 28 members at present but the Court had recently agreed proposals to reduce its size to 25 and to amend its composition to provide a guaranteed majority of independent members. Without making any other changes to the existing composition of 28, these proposals would increase the size of Court to 32 and a majority of independent members would require either the addition of further members or cutting other constituencies on Court eg staff.

Abertay University

Abertay's governing body already includes two members elected by, and from among, all academic staff and all support staff. If we were required to add two members nominated by academic and other unions, [...] we would either have to remove positions currently held by independent members or other categories of member such as those nominated by Senate as we cannot increase the overall size of the current governing body, which is already a maximum of 25, in accordance with the Code. If existing staff members are to be replaced by union nominees it is hard to see how this increases accountability and inclusiveness when fewer than half of Abertay University's staff members are members of recognised trade unions.

University of Stirling

The University of Stirling Court currently includes 6 members of staff appointed by Academic Council. These members provide a link between Academic Council and Court. If staff members were appointed directly to Court this important and effective link would be lost. In order to accommodate the additional members required by the Bill i.e. trade union representatives and alumni representatives, the number of ordinary staff members on Court would have to be reduced. This would be the only way of staying within the Code guidance of having no more than 25 members overall and a majority of independent lay members. Staff members are currently nominated from a much wider pool of people than trade union representatives would be (only a small minority of staff are trade union members).

So the impact of the Bill, perversely, will be to reduce elected staff membership of a range of governing bodies.

Costs to institutions

Universities Scotland cannot accept the assertion that absorbing the costs of implementation of the Bill is 'mainstream business'. As we made clear to the Finance Committee, Universities Scotland was disappointed that there was no consultation with the sector about the costs of implementation.

Evidence presented by institutions to the Finance Committee shows that, even without ONS reclassification, significant new costs would have to be absorbed by HEIs, with consequent opportunity costs for spending on educational, research or innovation initiatives. These include:

- Significant staff time, estimated at the equivalent of at least one full-time senior member of staff per HEI for a year, to implement changes required by the Bill. (HEIs have already devoted significant resources to implementing change required by the Code.)
- At least £16,000 – £26,000 a year for each HEI to remunerate the Chair of the governing body, or £275,000 – £460,000 per annum for the sector.
- Significant costs to establish and run additional electoral processes for members and Chairs of governing bodies: for instance the University of Dundee noted in evidence to the Finance Committee that electoral processes had a significant cost:
 - *‘A recent election at the University of Dundee for the post of Graduates’ Assessor on Court which was outsourced to the Electoral Reform Society cost £21,000’.*
- Legal fees for changes to HEIs’ governing instruments, likely be a four-figure sum for each HEI.

Conclusion

Universities Scotland remains concerned that the Scottish Government has not made a sufficient appraisal of the risks, consequences and costs of this Bill. We look forward to further constructive exploration of how the Bill can be improved in a way that addresses our concerns.

You shared your letter with the Education & Culture Committee, and I am also sharing this further correspondence with them.

Yours sincerely,

Alastair Sim
Director

Annex A

Summary of the HE Governance Bill's effects on the size and balance of governing bodies

Based on the composition of governing bodies as of *September 2014*:

- Eight HEIs would be pushed over the 25 member limit by implementing Section 4 of the Bill. (NB. includes Aberdeen, which already had >25)
- Nine HEIs would have to make changes to restore a lay member majority, following implementation of Section 4. If this were achieved simply by adding lay members, a further four HEIs would be pushed over the 25 member limit.
- Therefore, **at least 12 HEIs would have to remove at least one current member of the governing body in order to maintain both a lay member majority and no more than 25 members.**

Details below:

Institution	Total Members	Additional Members needed for compliance	New percentage of lay members once additional members have been added
University of Aberdeen	27	1 union rep 1 student rep	45
Abertay University	25	2 union reps. 1 student rep. 2 alumni reps.	60
Edinburgh Napier University	22	2 union reps. 2 alumni reps.	54
Heriot-Watt University	25	2 union reps	48
University of the Highlands and Islands	25	2 union reps 2 alumni reps	48
Royal Conservatoire of Scotland	21	1 student rep 2 union reps 2 alumni reps.	58

University of Stirling	24	2 union reps 1 alumni rep	48
University of Strathclyde	24	2 union reps 1 alumni rep	48
University of Dundee	23	2 union reps	44
University of Edinburgh	23	2 union reps	48
University of Glasgow	23	2 union reps	44
University of St Andrews	22	2 union reps	45
Glasgow Caledonian University	19	2 student reps. 2 alumni reps	61
Glasgow School of Art	19	2 union reps 2 alumni reps 1 student rep	54
Queen Margaret University	21	2 union reps 2 alumni reps.	56
Robert Gordon University	17	1 student rep 2 union reps 2 alumni reps	55
SRUC	18	2 alumni reps. 2 staff reps 2 union reps	54
University of the West of Scotland	20	2 union reps 1 alumni rep	52