

Ms Deborah Cook  
Assistant Clerk to the Delegated Powers and Law Reform Committee  
Scottish Parliament  
Room T1.01



22 September 2015

Dear Ms Cook

### **Higher Education Governance (Scotland) Bill at Stage 1**

Thank you for your letter of 8 September, which was addressed to James Hynd, Head of Cabinet, Parliament and Governance Division.

Having considered the points in your letter, the Scottish Government would respond as follows:-

#### Paragraph 3

#### **The Committee asks the Scottish Government:**

**(a) to explain why it is considered appropriate for the basic framework for the appointment of chairing members to be postponed to secondary legislation; and**

**(b) to consider whether the basic framework for the appointment of chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail of the process to be set out in regulations.**

In respect of point (a), as set out in the Delegated Powers Memorandum, it was considered crucial that the Bill included the minimum requirement to have a chairing member of the governing body of a higher education institution (HEI) appointed in accordance with a statutory process. It was not considered necessary to set out the detailed process of appointment of the chairing member in primary legislation. The regulations could potentially include a considerable level of detail about the process that could be better provided for in secondary rather than in primary legislation. It is also considered that the power would allow the Scottish Ministers the flexibility to modify any process regarding the appointment of chairing members to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

With regard to point (b), influenced by continuing dialogue with stakeholders on this matter, Scottish Government is considering whether it might be appropriate to bring forward an amendment at Stage 2 that set out a provision on the face of the Bill for a single model for the appointment of elected chairs, although it might still be more appropriate for some details of the process to be left to regulations.

## Paragraph 6

**The Committee asks the Scottish Government:**

**(a) to explain why it is considered appropriate for the principle and basic framework of remuneration for chairing members to be postponed to secondary legislation; and**

**(b) to consider whether the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail to be set out in regulations.**

In respect of point (a), since this power is very closely associated with the power in section 1 of the Bill, Scottish Government considered it appropriate that the basic framework for remuneration for chairing members should be set out in regulations as it would not be appropriate to include provisions in relation to remuneration and allowances in primary legislation due to the potentially considerable level of detail necessary. It is also considered that the power would allow the Scottish Ministers the flexibility to modify any provisions on remuneration to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

With regard to point (b) Scottish Government has noted the Committee's suggestion, but still considers that the provisions on remuneration would be more appropriately contained in regulations. If an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it.

## Paragraph 8

**The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.**

The Scottish Government notes this suggestion and will consider an amendment at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate. .

## Paragraph 10

**The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.**

The Scottish Government notes this suggestion and will consider an amendment at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

## Paragraph 14

### **The Committee asks the Scottish Government:**

**(a) for clarification as to why a power to include a higher education institution in the definition is required, since it appears that the definition in the Bill will already catch all universities and designated institutions (other than the Open University) which may receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005;**

The Scottish Government agrees that the definition in the Bill will capture all HEIs which receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005, and that would include any future HEIs added to the list of fundable bodies. On further reflection, it is considered that the power to include new institutions beyond fundable bodies may not be required since the policy intention is that only fundable bodies should be covered by the new requirements and the Scottish Government will therefore consider an amendment at Stage 2 to amend the power to change the definition so that it can be used only to exclude institutions from the definition.

**(b) for examples of when a power to include a higher education institution in the definition might be used;**

**(c) why the negative procedure is considered appropriate in this case, given the potential impact of a modification of the definition so as to include a particular higher education institution, on the institution in question; and**

With regard to points (b) and (c) the Scottish Government agrees that the above power at section 15 of the Bill to include an HEI may not be required, and therefore it is not considered that any response is required for these questions .

**(d) to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15, again given the potential impact on affected institutions, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.**

With regard to point (d) and in respect of the answer to (a) above, the use of the power is expected to be limited to those circumstances where a particular HEI needs to be excluded from the definition of “higher education institution”. The regulations will give Scottish Ministers the flexibility to make changes in the event of changed circumstances of a particular institution, which result in the institution needing to be excluded. The change will not impose any new requirements on the institution and will only apply to the particular excluded institution. As such, we consider that any use of the power is likely to be uncontroversial and consequently current provisions in the Bill are appropriate in the circumstances.

I hope you find the above information helpful.

Yours sincerely

Karen Frew