This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Higher Education Governance (Scotland) Bill introduced in the Scottish Parliament on 16 June 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 74–EN.

POLICY OBJECTIVES OF THE BILL

2. The Scottish Government aims to strengthen governance arrangements across the higher education sector. The Higher Education Governance (Scotland) Bill ("the Bill") will support this and the national outcome that public services are high quality, continually improving, efficient and responsive to local people's needs. It will also support the Scottish Government's key aim of creating an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance.

3. The Scottish Government is committed to excellence in higher education in Scotland. The principal objective of the Bill is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.

4. There are 19 higher education institutions[1] ("HEIs") in Scotland which are publicly funded. These are commonly divided into three groups: ancient universities; chartered universities; and post-1992 'new' universities and 'small specialist institutions'. Different groups of HEIs in Scotland are regulated by various statutes, statutory instruments and royal charters. The governance structures within the different institutions have evolved over the decades and centuries, creating a range of diverse approaches to governance.

[1] The 19 HEIs are the universities of Aberdeen, Abertay, Dundee, Edinburgh, Edinburgh Napier, Glasgow, Heriot-Watt, Stirling, St Andrews, Strathclyde, and Glasgow Caledonian University, Queen Margaret University, SRUC (Scotland's Rural College), Robert Gordon University, Glasgow School of Art, the Royal Conservatoire of Scotland, University of the Highlands and Islands, University of the West of Scotland, and the Open University in Scotland.

5. In June 2011, the Cabinet Secretary for Education and Lifelong Learning commissioned an independent review of how Scotland's universities are governed. The Review of Higher Education Governance in Scotland was prompted by concern that the existing models were in need of update, not because they had failed, but because the time was right to consider their on-going fitness for purpose. Scottish HEIs receive a substantial amount of public investment, with budgeted spend of over £4 billion since 2012/13, and have a well-deserved national and international reputation for excellence. The public rightly expects the highest standards of governance and accountability to be followed by institutions in Scotland.

6. The provisions set out in this Bill are informed by the Report of the Review of Higher Education Governance in Scotland[2] ("the Review"), published in January 2012. The provisions of Part 1 of the Bill will apply to HEIs. The definition of an HEI in the Bill is a higher education institution (within the meaning of the Further and Higher Education (Scotland) Act 2005 ("the 2005 Act") provided that it has also been listed as eligible for public funding under that Act, but excluding the Open University. The Open University is excluded on the basis that it is a single institution established elsewhere and operating across multiple jurisdictions which might otherwise be made subject to conflicting governance requirements. However, the provisions on academic freedom will apply to the Open University in Scotland and will also apply to publicly funded colleges of further education as the new section 26 of the 2005 Act (as inserted by section 19 of the Bill) applies to all post-16 education bodies in Scotland (as defined in section 35(1) of the 2005 Act).

7. A number of the Review recommendations have been taken forward through the development of the Scottish Code of Good Higher Education Governance[3], developed on behalf of the Committee of Scottish Chairs of HEIs by a steering group chaired by Lord Smith of Kelvin, and published in July 2013.

8. Specifically, the Bill:

- Requires HEIs to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers. Regulations may include provision for periods of appointment and means of selection for appointment (for example through public advertisement of the position, selection criteria, interview of candidates, short listing of candidates and holding an election from among candidates shortlisted as suitable for appointment). The regulations may also require HEIs to make available to candidates reimbursement of reasonable expenses incurred as a result of attending an interview, should a pre-selection process operate, and to make available to chairs remuneration commensurate with the responsibilities of carrying out the functions of office. The Bill also requires the Scottish Ministers, before making regulations, to consult with HEIs to which the regulations relate and other such persons that the Ministers consider appropriate.
- Requires HEIs to include within the membership of their governing bodies: the person appointed as chairing member, two directly elected staff members, one

[2] http://www.gov.scot/Resource/0038/00386780.pdf

[3] http://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2013/07/Scottish-Code-of-Good-HE-Governance.pdf

member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students association, and two graduates of the HEI nominated by the graduates' association.

- Requires HEIs to ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending ex officio; a majority of elected members representing staff and students; and a minimum of 10% student representation. The Bill also ensures that all board members appointed under the Bill's election process for staff and students are elected by the constituency that they represent.
- Replaces the current definition of academic freedom in section 26 of the 2005 Act, with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals.

BACKGROUND

Legal background

9. The legal basis for the governance arrangements for each HEI differs according to the type of HEI:

- Governance arrangements for the "ancient" universities are contained in the Universities (Scotland) Acts 1858 to 1966 and in ordinances made under these Acts by the universities' governing bodies and approved by the Privy Council.[4]
- The "chartered" universities are those HEIs established by royal charter and their charters provide that the relevant governing bodies may make statutes, ordinances and regulations regarding their governance arrangements. Changes to the charters and statutes of these HEIs require Privy Council approval.[5]
- The "post-1992" HEIs are designated institutions under the Further and Higher Education (Scotland) Act 1992 ("the 1992 Act") and, as such, governance orders (Orders of Council) for those HEIs can be made and amended by the Privy Council.[6]

The Review of Higher Education Governance in Scotland

10. In June 2011, the Cabinet Secretary for Education and Lifelong Learning asked Professor Ferdinand von Prondzynski, Principal of Robert Gordon University, to chair a panel to review the governance of Scottish HEIs. The panel's membership included representatives from a wide

[4] The "ancient" universities are the universities of Aberdeen, Edinburgh, Glasgow and St Andrews.

[5] The "chartered" universities are the universities of Dundee, Heriot-Watt, Stirling and Strathclyde.

[6] The "post-1992" HEIs which are designated institutions are the universities of Abertay, Edinburgh Napier, Glasgow Caledonian, Queen Margaret Edinburgh, Robert Gordon, the University of the West of Scotland and the University of the Highlands and Islands ("UHI") as well as the Glasgow School of Art, Royal Conservatoire of Scotland and SRUC (Scotland's Rural College). All of these except for UHI and SRUC have governance orders made by the Privy Council under section 45 of the 1992 Act. UHI is a registered company and certain of its Articles of Association can only be changed with the approval of the Privy Council. SRUC is also a registered company and the consent of Scottish Ministers (rather than the Privy Council) is required for any changes to its Articles of Association.

range of stakeholder interests from across the higher education sector and included a university Rector, the President of the National Union of Students Scotland, a trade union representative and a representative of the Chairs of University Courts.

11. The panel was invited to identify and examine proposals for change which would recognise the benefits of an autonomous sector but which would also consider the importance of transparency, as well as the effectiveness of management and governance, the clarity of strategic purpose and its efficient implementation. This included looking at where governance worked well, where it could work better, and what standards of good practice all governing bodies should observe.

12. The panel invited and considered written and oral evidence from a wide range of interests and experience including members of the public, academics, staff and student representatives in Scotland and from across Europe and the USA. The panel's report was published in January 2012 and contained 17 recommendations aimed at strengthening the higher education sector in Scotland. These included recommendations that there should be elected chairs of court, a Scottish Higher Education Advisory Forum and a new Scottish Code of Good Governance for HEIs.

Scottish Code of Good Higher Education Governance

13. As already set out, the Scottish Code of Good Higher Education Governance[7] ("the Code") was developed on behalf of the Committee of Chairs of Scottish HEIs by a steering group chaired by Lord Smith of Kelvin, and published in July 2013. Although the Code has no statutory basis, the Scottish Further and Higher Education Funding Council ("SFC") requires compliance with the Code as a term and condition of funding provided to HEIs. Section 9A of the 2005 Act[8] provides that the Scottish Ministers may impose, as a condition of grant to the SFC under section 9(2) of that Act, a condition that the SFC must, when making a payment to an HEI, require that HEI to comply with principles of good governance which appear to the SFC to constitute good practice. Scottish Ministers have chosen to impose this condition in the grant awarded to the SFC for 2014/2015 and intend to do so again for 2015/2016. The SFC's Financial Memorandum with Higher Education Institutions[9], which sets out the requirements with which HEIs must comply as a term and condition of grant, provides that governing bodies of HEIs must comply with the principles of good governance set out in the Code.

14. The Code is not a prescriptive set of rules; it is a set of Main Principles supported by guidelines and examples of good practice. It comprises 18 Main Principles which address areas including the governing body, legal obligations, conduct of members, conduct of meetings, frequency of meetings, responsibilities of members, the chair, the head of the institution and effectiveness. However, the Code notes that "given the diversity of Scottish Higher Education Institutions it is possible that certain of the Main Principles can be met by means different to

[7] http://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2013/07/Scottish-Code-of-Good-HE-Governance.pdf

[8] Section 9A was inserted by the Post-16 Education (Scotland) Act 2013.

[9] http://www.sfc.ac.uk/web/FILES/Guidance_Governance/Financial_Memorandum_with_higher_education_institutions_-_1_December_2014.pdf

those envisaged in the Guidelines"[10]. This indicates that the Code will be insufficient in securing the level of consistency across the sector that is sought by the provisions in the Bill.

CONSULTATION

15. Potential provisions for inclusion in the Bill were subject to public consultation in the Consultation Paper on a Higher Education Governance Bill[11] ("the Consultation"), which was published on 7 November 2014. The Consultation sought views on six proposals for legislation which intended to build on the strengths of the sector by introducing provisions which would modernise governance arrangements:

- **Privy Council -** transfer of the Privy Council's role in relation to higher education governance to a new Scottish based committee, comprising the First Minister of Scotland, the Lord Advocate and, for governance issues relating to the ancient universities, the Lord President of the Court of Session, in order to enable the Scottish Government to adopt a more flexible approach than the current process for making amendments to existing governance instruments.
- **Academic Freedom** - setting out in legislation a new definition of academic freedom which is more explicit than the current definition.
- **Definition of Principal** - clarifying that the role which the Principal has in an HEI is that of chief executive officer and involves the leadership, administration and management of the HEI.
- **Selection of Chair of Court** - creating a more transparent process for selecting the chair of an HEI's governing body, as well as making the position more accessible to a wider audience through open advertisement, competitive selection and election at the final stage of the selection process.
- **Membership of Governing Body** - ensuring the composition of the memberships of governing bodies are fully representative.
- **Composition of Academic Board -** ensuring that the composition of the academic board or senate is fully representative and that the board itself can function efficiently.

16. There were 131 responses to the Consultation. These were independently analysed. Informed by the analysis, the Bill will now take forward provision in four of the six areas: selection of chairs of court, membership of governing bodies, composition of academic boards and academic freedom.

17. After consideration of the evidence presented through the consultation and engagement with the sector, it was agreed that two of the proposals which were consulted on would not form part of the Bill. These are transfer of the Privy Council role to a new Scottish committee and the definition of the role of Principal as that of chief executive officer. It was also agreed that certain elements of the proposals on academic freedom, academic boards and chairs of court would also not form part of the Bill.

[10] Page 1 of the Code.
[11] http://www.gov.scot/Resource/0046/00462633.pdf

CONSULTATION PROPOSALS NOT PURSUED IN THE BILL

Privy Council

18. Responses to the Consultation on the role of the Privy Council varied across the sector. HEIs were divided in their opinion on the proposed changes to their role, with suggestion that greater consideration was needed on this issue prior to any decision being made. Following further consideration of the responses to the Consultation, it was determined that this issue should be reviewed more broadly, and not pursued in the Bill. As such, the broader proposal for changes to the role of the Privy Council will now be explored further with higher education stakeholders.

Definition of Principal

19. The recommendation that it should be set out in legislation that the role of the Principal is that of chief executive officer has been considered further. It is recognised that using the statute book to attach an alternative label to the role (without the imposition of any particular duties upon the office holder) has no value in legal terms. The Consultation analysis also showed near-unanimous rejection of this proposal. As such, legislation in this area was not considered necessary.

Academic freedom

20. The Consultation proposed replacing the current definition of academic freedom, as set out in section 26 of the 2005 Act, with a definition which contained a provision that "academic freedom" includes freedom to encourage the exploration of new ideas and making provision within the legislation to require HEIs to adopt a statement on their implementation of the statutory protection of academic freedom and present it to the SFC. This statement would then be enforced by SFC as a part of the terms and condition of grant funding.

21. After further consideration of this and the responses to the Consultation, and given that the duty in section 26 in relation to protection of academic freedom is a statutory duty already placed on all Scottish HEIs, it was concluded that the Bill should not require HEIs to adopt a statement on their implementation of the statutory protection of academic freedom and to present that statement to the SFC as part of the terms and conditions of grant funding. It was considered that would be at odds with the large number of other statutory requirements placed on Scottish HEIs which do not require a statement on their implementation.

Academic boards

22. The Review also recommended that the academic board should be the final arbiter on academic matters. This recommendation featured in the Consultation which asked "Do you agree that the academic board should be the final arbiter on all academic matters in all HEIs"?

23. However, the Universities (Scotland) Acts make it clear that the decisions of the academic boards (or "senates") of the ancient universities are subject to review by the university courts. Furthermore, if this proposal were to be pursued with the intention of excluding the university courts from any control or review of decisions made by the academic boards, it may

result in a breach of the duties imposed on the trustees of the institutions under charities legislation.

24. All of the HEIs covered by the Bill are charities registered with the Scottish Charity Regulator. The members of their governing bodies are charity trustees who are subject to the duties under the Charities and Trustee Investment (Scotland) Act 2005.

25. Should final responsibility for academic matters be passed to the academic boards, then the governing body members may not properly be able to fulfil those duties. Paragraph 3.9 of 'Guidance for Charity Trustees' published by OSCR states: "Charity trustees as a body are collectively or corporately responsible for all the activities of the charity. This means that all charity trustees are equally accountable for their organisation. They have a collective general duty of care for the charity, and they must all observe the requirements of the Act. Charity trustees are expected to act together as a board or committee to realise the values and purposes of the charity and to comply with legislative and regulatory requirements".

26. Generally, charity trustees cannot delegate their responsibilities to others, although they can delegate some of their functions. However, ultimate accountability remains with the trustees. Considering the matter further, it is the Scottish Government's view that the academic boards, although charged with supervision and regulation of the academic matters of an HEI, are still subject to the control of the governing body. As such it was considered that this proposal should not be pursued.

Selection of Chair of Court

27. Within the Consultation, the proposals around the selection and election of chairs of court were relatively detailed. The Consultation proposal included that:

- *"All chairs are appointed at the culmination of a transparent process which includes development of a job description and essential criteria for the position including skills and attributes, public advertisement, competitive selection including shortlisting, interview, and finally election by a balanced and representative electorate. The job specification and essential criteria should be made publicly available. The selection process should be transparent and a panel structure should be used when interviewing candidates. The interview panel should contain both lay members of the governing body and other university stakeholders, including staff and students".*
- *"The chair should ultimately be elected from a pool of shortlisted candidates who were successful at interview. The final stage of the selection process should be an election whereby the chair, selected from the aforementioned pool, would be elected by appropriate persons from within the university and potentially representatives of external stakeholders. In order to reflect the democratic ideal of the sector, votes would be weighted to ensure that staff and students are effectively represented in the election process".*

28. The policy aim of this was to establish a required minimum level of openness, transparency and consistency across all HEIs by setting out a number of key elements that must be a feature of every appointment process for a chair of a governing body.

29. The responses to the Consultation revealed that the majority of those who addressed the issue agreed that a pool of candidates for the position of chair of the governing body should always be selected through an open and transparent process.

30. It was also generally agreed by respondents that the position of chair should be advertised openly and that this would help to attract a wider pool of candidates, although a few respondents emphasised that care should be taken to place adverts appropriately in order to reach potential candidates from protected characteristic categories. There was much opposition to the proposal that the selection process for chair should culminate in an election by a group of representatives of key stakeholders both internal and external to the university. Overall, over three quarters of those providing a view did not agree with this proposal.

31. A common view amongst unions, student representative bodies and individuals was that all staff and students should be given one vote each in an open election for chair. They expressed concern that prior selection of candidates by a panel other than staff and students could result in candidates going forward for election who are not those preferred by staff and students.

32. The Code states "When selecting a new chair, a full job specification including a description of the attributes and skills required… shall be produced…The selection process shall include a formal interview of short-listed candidates. When vacancies arise in the position of the chair… they shall be widely publicised both within and outside the Institution".

33. Careful consideration was given to all consultation responses, particularly the clear difference in stakeholder opinion. As a result it is not proposed that the Bill will feature specific detailed provisions at introduction. Instead, the detail will be set out in eventual regulations made under section 1 of the Bill, following further discussion on co-design with key stakeholders (in accordance with section 3 of the Bill which requires consultation with HEIs and other appropriate persons), and agreement by the Scottish Parliament.

34. A recurring theme among some responses to the consultation, in relation to the proposal on the selection of the chair of court, was that legislation was not required to ensure that the pool of candidates for the position of chair should be selected through an open and transparent process in legislation as it was already addressed in the Code. However, having considered this, and while the detail to be included in regulations will be developed in due course, it was determined that the selection of the chair of the court, as part of the overall process, was too crucial to strengthening the consistency and inclusivity of governance for it not to be addressed in legislation.

POLICY OBJECTIVES: SPECIFIC PROVISIONS

35. The policy objectives of the four areas of provision in Bill are set out below: each section describes the proposals consulted on in relation each area of provision of the Bill and what is in the Bill.

Part 1 of the Bill

Chapter 1: Appointment of chairing member of governing body (sections 1 to 3)

> *"We propose that all chairs are appointed at the culmination of a transparent process which includes development of a job description and essential criteria for the position including both skills and attributes, public advertisement, competitive selection including shortlisting, interview, and finally election by a balanced and representative electorate…. The final stage of the selection process should be an election whereby the chair, selected from the aforementioned pool, would be elected by appropriate persons from within the university and potentially representatives of external stakeholders. Furthermore, to enable this position to be more accessible to prospective candidates it is proposed that universities are given a lever to offer a 'reasonable' remuneration to elected chairs to cover their expenses during their term."* **Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014**

36. The Review highlighted the importance of a rigorous and transparent process for appointing a chair of a governing body. This was also addressed in the Code. While implementation of the Code has, to some extent, increased the level of transparency across the sector in relation to appointing a chair, there remains no guarantee of consistency across the sector and, in practice, HEIs have adopted different approaches.

37. The Consultation set out the Scottish Government's legislative proposals in this area. In response, many in the higher education sector referred to what they saw as a potential infringement on the autonomy of charitable HEIs which would be detrimental to the effective operation of their governing bodies. Some in the sector felt that introduction of elections would disincentivise some candidates from applying for these positions and could also lead to conflict between governing bodies and chairs, with a concern being that chairs could point to a mandate provided by an electorate, rather than embracing a primary duty to work with the governing body in a collective manner.

38. The Bill aims to establish a required minimum level of openness, transparency and consistency across all HEIs. Section 1 of the Bill requires all HEIs to have a chair appointed in accordance with the process set out in regulations by the Scottish Ministers. Such regulations may make provision for periods of appointment and means of selection for appointment (including requirements for public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment). Section 1(2)(c) allows such regulations to make provision for reimbursement of candidates' expenses incurred in any process. That could include interview expenses.

39. Section 2 provides that Ministers may make regulations that require HEIs to make available to the chairing member of an HEI, remuneration and allowances. Any remuneration that may be required to be made available to candidates is intended to reflect the work carried out by the chair and the term remuneration is to be interpreted as a payment to perform the functions of the role on those days that this is required, rather than a salary.

40. The regulations may specify or limit the circumstances in which any sums are to be payable to the chairing member and provide that any sums payable are to be reasonable (to ensure that payments are sufficiently meaningful) given the chairing member's responsibilities. Section 3 of the Bill also requires Scottish Ministers, before making regulations on the appointment of chairing members of governing bodies, to consult with any HEIs to which the regulations relate, and other such persons that Scottish Ministers consider appropriate. These could include groups or persons appearing to represent the interests of staff, trade unions, current students and alumni of HEIs, as well as wider stakeholder groups.

Chapter 1: Membership of governing body (sections 4 to 8)

> *"It is key to the effectiveness of the governing body that its membership should be fully representative. Consistency in approach to this will increase transparency and democracy within the governance of institutions across the sector. With regards to this we propose that it should be set out in legislation that… the governing body should provide positions for a minimum of two students, nominated by the student association/union. There should be at least two directly elected staff members, as well as one member nominated by academic and related unions and one by administrative, technical or support staff unions. Governing bodies should also have up to two alumni representatives. Prescribing membership of governing bodies in legislation will ensure more effective representation of internal stakeholders and will help to create a more inclusive environment within the institution. Greater consistency of approach will also be achieved across all institutions."* ***Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014***

41. Currently, the legal basis for the composition of the governing bodies of HEIs differs according to the type of institution (ancient, charter, or post-1992 – see paragraph 9 above) and the composition of the membership itself is different in each institution. The measures in this Bill seek to ensure effective representation of internal stakeholders on the governing bodies of all HEIs in order to help create a more inclusive environment within the institutions and to embed a level of consistency across the institutions.

42. The Review considered that a fully representative membership is key to the effectiveness of an HEI's governing body. It made a number of findings and recommendations about the role, composition and appointment of governing bodies, including the recommendation that the governing body membership should contain two directly elected staff members, two student members, two trade union members and up to two alumni. These recommendations were reflected in the Consultation proposals.

43. Some of the Review's recommendations have been reflected in the Code, which sets out the main principles of good governance and provides commentary on the appointment of governing body members. Main Principle 9 of the Code provides the following: "There shall be a balance of skills and experience among members sufficient to enable the governing body to meet its primary responsibilities and to ensure stakeholder confidence".

44. Main Principle 10 of the Code provides that there should be a clear majority of independent members and that a governing body of no more than 25 members represents a

benchmark of good practice. Main Principle 11 sets out good practice to be followed in relation to the appointment of governing body members.

45. While the composition of the governing body is addressed to some extent within the Code, there is no explicit provision specifically stipulating the required composition of the governing body in all HEIs. As such, it is considered that the Code does not go far enough and that it is too crucial to the achievement of good and consistent governance for the composition of governing body membership not to be addressed directly by legislation.

46. One particular aspect of the Consultation proposal, the inclusion in the governing body membership of two persons to be nominated by trade unions, is strongly opposed by the Committee of Scottish Chairs of Court which had responsibility for development of the Code. This feature is also opposed by HEIs in general. Of those who responded to the question "do you agree with the proposed requirement outlined for membership and composition of the governing body?", 67% opposed it. More specifically, analysis of the Consultation revealed that "the argument raised most frequently against the proposal was that trade unions should not be involved in nominating staff for membership of governing bodies." A key rationale given for this was that "staff nominated in this way would in effect be representing the interests of the union which nominated them, rather than bringing their independent staff perspective to the table".

47. However, as members of the governing body (and, as such, as charity trustees), trade union representatives (in common with all other members of the governing body including students and alumni) would be required to act in the best interest of the HEI, as opposed to any individual constituency which nominated them.

48. Section 4 of the Bill requires each HEI to ensure that the membership of its governing body, includes:

- the person appointed as chairing member of the governing body,
- two staff members of the HEI elected by the staff of the HEI,
- one member of staff of the HEI nominated by academic and related unions which are recognised in relation to academic staff of the HEI provided that the staff member is a member of a branch of a union which has a connection with the HEI,
- one member of staff of the HEI nominated by support staff unions which are recognised in relation to support staff of the HEI provided that the staff member is a member of a branch of a union which has a connection with the HEI,
- two students of the HEI, nominated by their students' association,
- two graduates of the HEI nominated by a graduates' association of the HEI,
- such other members as are appointed by virtue of an enactment or in accordance with the HEI's governing documents.

49. It will be for the HEIs, through their procedures for enrolment of students, to determine who is a student of a particular HEI and when this status begins and ends. However, all students (including any students serving as office bearers of the students' association) will be eligible for nomination by the students' association to a student position on the governing body.

50. In more general terms, of the prescribed members set out at paragraph 48:

- the chair is appointed in accordance with the process set out in regulations made under section 1;
- the elected staff members are elected in accordance with rules made by the HEI as provided for in section 5;
- the members nominated by trade unions, students' associations and graduates' associations are nominated in accordance with rules made by the HEI as provided for in section 6; and
- the other members are to be appointed in accordance with the HEI's governing documents.

51. As there is no external organisation to nominate on behalf of an HEI's staff, the Bill requires, as set out above, that the process of the appointment of staff is to be undertaken by election, rather than nomination. This will ensure that, in the absence of a formal organisation to undertake the nomination of individuals to undertake these positions, a transparent and democratic process will be implemented.

52. The appointments made under section 4 of the Bill, are to be regulated in the normal way in accordance with each HEI's governing documents. The requirements in this Chapter of the Bill that relate to the criteria and ability to select an individual as a member of the governing body apply only at the point of nomination or election. They do not extend to the term of the individual's membership and are not relevant to the removal of the individual as a member of the governing body. The terms and conditions of the appointment (including provisions on termination of appointment) are to be determined by the governing body in accordance with the HEI's governing documents. The elections and nominations processes in respect of section 4 of the Bill are to be conducted in accordance with rules made by the governing body of the HEI, as set out in sections 5 and 6 of the Bill.

Chapter 2: Academic boards (sections 9 to 13)

The consultation proposed that *"with the exception of the Principal and the Heads of School (or equivalent) who should attend ex officio, all other members of the academic board should be elected by the constituency that they represent, and elected members should form a majority of the total membership…*[and] *we propose that overall, academic boards should not have more than 120 members*. ***Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014.***

53. The Review noted that the academic board sets the academic tone for the institution stating that "to be effective, the academic board must retain the confidence of those it represents, it must provide oversight of academic quality and provide necessary co-ordination with university governing bodies to ensure that decision making at all levels is properly informed". Currently the legal basis for the composition of the academic boards of the various HEIs differs according to the type of institution. The number of members of academic boards also varies widely between the institutions: one HEI's academic board has only 35 members while the boards of other HEIs have hundreds of members. The Review further noted that academic boards that were too large displayed evidence of "dysfunctionality".

54. The Review made the following recommendations in relation to the role and composition of the academic board within an institution and these were reflected in the Consultation proposals:

- The academic board should be the final arbiter of academic matters within an institution;
- The academic board should have a maximum of 120 members, with only Principals and Heads of Schools attending ex officio;
- The majority of members of the academic board should be elected by the constituency they represent and there should be significant student representation on the academic board.

55. The Code makes only passing reference to the academic board and offers no guidance on the role or composition of academic boards within HEIs. It places no duties on institutions to ensure that their academic boards meet the recommendations of the Review.

56. Responses to the Consultation showed that views were relatively evenly divided over whether, with the exception of the Principal (the most senior member of staff in an institution) and the Heads of School (the most senior academics in a particular department in an HEI, also known as Deans or Heads of Faculty) who should attend ex officio, all other members of the academic board should be elected by the constituency that they represent and a maximum membership of 120 should be set. A majority of those who provided a view were in favour of the proposal that elected members should form a majority of the total membership of the academic board.

57. Section 9 of the Bill requires HEIs to ensure that all academic boards must have a maximum of 120 members, as recommended in the Review. Section 10 requires that the membership of each academic board must include the principal and heads of school of the HEI, attending ex officio; staff members elected by the staff of the HEI; and student members elected by the students of the HEI. It further provides that the elected members must form the majority of members of the academic board, and that a minimum of 10% of the membership of the academic board must be comprised of students. Legislation in this area will embed a level of consistency across all academic boards and will ensure they are both effective and representative in their decision making. As set out in section 11 of the Bill, elections to the academic board are to be conducted in accordance with rules made by the governing body of the HEI.

Part 2 of the Bill

Upholding academic freedom (section 19)

"Our intention would be to replace the current definition of academic freedom with a definition which contains a provision that 'academic freedom' includes freedom to encourage the exploration of new ideas, alongside the testing of received wisdom and the expression of points of view whether controversial or otherwise. Our aim would be to remove any threat to academic freedom within the law, and hence to freedom of intellectual enquiry and expression thus enhancing the protection currently offered to academic staff." ***Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014***

58. The current law on academic freedom as set out in section 26 of the 2005 Act provides that a post-16 education body[12] must have regard to the desirability of ensuring the academic freedom of persons engaged in teaching, the provision of learning or research at the HEI and ensuring that any appointments held or entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of academic freedom. This includes the freedom to hold and express opinions; question and test established ideas and received wisdom and present controversial or unpopular points of view. This section applies to all post-16 education bodies where they are publicly funded (either directly by the SFC or by a regional strategic body).

59. The Review considered that the definition of academic freedom contained in section 14 of the Irish Universities Act 1997[13] expresses more comprehensively the full significance of academic freedom and recommended that "a definition of academic freedom be incorporated…, based on the definition contained in Ireland's Universities Act 1997, and applying to 'relevant persons' as under the existing 2005 Act".

60. The Code makes reference to academic freedom in Main Principle 1 (governing bodies), which provides that a governing body shall, in discharging its responsibilities, "ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments". Main Principle 2 provides that the governing body shall ensure compliance with appropriate legal obligations. The Supporting Guidelines to Main Principle 2 advise that "the governing body should regularly review its polices relating to compliance with statutory and other duties, including the defence of academic freedom".

61. The Consultation paper sought views on whether the legal definition should be extended to include "encourage the exploration of new ideas". Half of those who responded to this question were not in favour of this proposed change to the definition, considering any change to be unnecessary. However, 45% of those who responded were in support of change; these were mainly student bodies and representative organisations.

62. The question of whether the principle of "academic freedom" as currently defined in legislation should explicitly refer to freedom to encourage the exploration of new ideas received a fairly evenly divided response in the consultation, as detailed in paragraph 61. Many respondents stated that they found the proposal unobjectionable, while others argued that the current definition had served the test of time and already allows for new ideas to be encouraged. Further consideration of this issue determined that amending the existing definition of academic freedom was a proportional response which would achieve the intended policy aims.

[12] A post-16 education body is defined in section 35(1) of the 2005 Act and means a body listed in schedule 2 to the 2005 Act or a college assigned to a regional strategic body under section 7C of that Act. This includes the Open University in Scotland. Section 19 on academic freedom is the only provision in the Bill that will apply to the Open University.

[13] Section 14 of the Irish Universities Act 1997 reads: 'A member of the academic staff … shall have the freedom, within the law, in his or her teaching, research and any other activities in or outside the university, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions, and shall not be disadvantaged, or subject to less favourable treatment by the university, for the exercise of that freedom.'

63. While the definition in section 26 of the 2005 Act, with which post-16 education bodies are required to comply, does not necessarily exclude the freedom to develop and advance new ideas and innovative proposals, the policy aim of this provision in the Bill is to expand the current definition and to strengthen the protection of academic freedom. Consequently section 19 of the Bill replaces the existing section 26 of the 2005 Act with a new section which includes an expanded definition of academic freedom and requires that a post-16 education body must aim to uphold the academic freedom of all relevant persons. The definition of academic freedom as expanded explicitly includes the freedom to develop and advance new ideas and innovative proposals. This is to ensure that, going forward, the protection of academic freedom is more comprehensive and transparent.

ALTERNATIVE APPROACHES

64. The wider policy context within which this Bill sits covers a broad programme of reforms across higher education governance. This reform programme will provide for a stronger framework of governance for the higher education sector now and for the future. Much of this has been progressed without the need for legislation.

65. As already described, the Review report was published in January 2012 containing 17 recommendations. The Cabinet Secretary for Education and Lifelong Learning, in a statement to the Parliament on 28 June 2012, said "*The most effective approach to implementing the recommendations is to do so in three distinct ways: first, by engaging key sector stakeholders as implementing partners; secondly, by engaging the sector itself in implementing the recommendations by agreement and adapting them as necessary to reflect existing good practice; and, thirdly, by employing legislation as required*[14]*".*

66. The Scottish Government has given detailed consideration to how the recommendations could be taken forward by non-legislative means by key sector stakeholders, and by the sector itself. This has been wholly successful in some areas and successful to an extent in others, including the establishment of the University Sector Advisory Forum and the development and implementation of the Code. While much has been achieved, in particular through the Code, in order to meet with the desired policy objectives and, most importantly, to secure a guaranteed and consistent application of a more modern, inclusive and accountable approach to governance in higher education, it is considered that legislation is now required.

67. The Code is voluntary, although HEIs are required to comply with it as a condition of SFC funding. As set out by Lord Smith of Kelvin, the Chair of the steering group which developed the Code on behalf of the Committee of Scottish Chairs of HEIs, the Code *"was designed to be a stimulus to reflection and enhancement"*. While the Main Principles set out in the Code do address a number of areas of provision set out in the Bill, they are not far reaching enough to meet the desired policy objectives. HEIs and chairs of court have demonstrated clear opposition to certain areas of provision of the Bill; however, having considered this, the Scottish Government is clear 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.

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http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=7431&i=67739&c=1373515&s=recommendations

68. On chairs of court, membership of the governing body and academic boards, careful consideration was also given to whether the policy objectives could be met through non-legislative means by imposing a requirement on the SFC that it must require HEIs, as part of the terms and conditions of the grant funding which it imposes on HEIs, to meet the relevant requirements. However, in practical terms the performance of the SFC is reviewed against a broad range of measures rather than individual measures, and failure to meet required performance standards and sanctions are addressed similarly. As such, the Scottish Government concluded that it would be disproportionate to impose sanctions on the SFC in relation to its performance in ensuring HEIs adhere to these particular requirements and not in relation to all individual requirements imposed on the SFC by the Scottish Government.

69. On academic freedom, consideration was given to alternative approaches to strengthening the understanding and protection of academic freedom including the implementation of a non-statutory requirement, similar to that consulted on for inclusion in the Bill, that HEIs should adopt a statement on their statutory protection of academic freedom. However, as the current definition is set out in legislation and the Code requires, at Main Principal 1, that a governing body shall, in discharging its responsibilities, "ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments" and, at Main Principle 2, that "the governing body shall ensure compliance with appropriate legal obligations", it was concluded that the most effective method of strengthening the protection of academic freedom would be to do so by strengthening the existing definition rather than by imposing additional non-legislative requirements on HEIs.

70. The alternative option of not introducing legislation is considered by the Scottish Government to increase the risk substantially that the desired policy outcome of a guaranteed and consistently more transparent, inclusive and accountable system of governance for the higher education sector in Scotland now and for the future would be significantly jeopardised.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

71. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website at http://www.scotland.gov.uk/Publications/Recent. The EQIA indicated that the Bill is likely to have moderate to no significant direct impact on individuals. However, indirectly, the Bill may have a positive impact as the improvements that the Bill makes to transparency and consistency between HEIs will help to advance equality of opportunity for those seeking to become involved in HEI governance. The Bill will do so equally across all protected characteristics under the Equality Act 2010.

72. The Scottish Government considered the potential impacts, both positive and negative, across the protected characteristics and concluded that the Bill's provisions are neither directly nor indirectly discriminatory on the basis of age, disability, race, religion or belief, sex, sexual orientation or gender reassignment.

Human rights

73. The Scottish Government has considered whether the provisions in Part 1 of the Bill on the composition of governing bodies (section 4) and the composition of academic boards (section 10) raise any issues in relation to the European Convention on Human Rights ("the Convention") in relation to current members of these bodies. The intention is that these requirements would come into force after a period of four years in order to allow current governing body and academic board members to finish their terms of office, which are an average length of three to four years. As a consequence of these transitional arrangements, the provisions of the Bill would not affect the Convention rights of current members of governing bodies and academic boards.

74. The Scottish Government has also considered whether section 19 of the Bill on academic freedom, which substitutes a new section 26 into the 2005 Act, raises any issues in relation to the Convention. While section 26 clearly engages article 10 of the Convention (freedom of expression), the Scottish Government considers that it strengthens the protection of this right by requiring that post-16 education bodies must aim to uphold the academic freedom of persons involved in teaching and research at institutions; the previous duty required post-16 education bodies to have regard to the desirability of ensuring academic freedom. The Scottish Government considers that the change to the duty in section 26 strengthens the existing protection further, as well as making explicit that the definition of academic freedom includes the freedom to put forward new ideas. The Scottish Government considered if privacy implications would arise as a result of the Bill and whether there was a need to develop a Privacy Impact Assessment on the Bill. A privacy impact checklist was completed and it was concluded that there is no requirement to undertake a full scale privacy impact assessment for this Bill.

Island communities

75. The Scottish Government does not anticipate any significant impact on Island Communities.

Local government

76. The Scottish Government does not anticipate any significant impact on Local Government.

Sustainable development

77. The need to develop a Strategic Environmental Assessment (SEA) on the Bill was considered in the context of the Environmental Assessment (Scotland) Act 2005 and published guidance on Strategic Environment Assessments (SEAs). The Scottish Government considered any potential environmental impacts against defined criteria in a SEA pre-screening report, which will be published separately via the SEA Gateway database.

78. Based on this evaluation, the Scottish Government concluded that the provisions of the Bill are likely to have no environmental effects, and that a SEA was not required. The pre-screening report is available within the SEA database: http://www.scotland.gov.uk/Topics/Environment/SustainableDevelopment/14587/SEAG.

This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

POLICY MEMORANDUM

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