

SPICe Briefing

Higher Education Governance (Scotland) Bill – Stage 3

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Stage 3 proceedings on the Higher Education Governance (Scotland) Bill are scheduled to take place on 8 March 2016.

This briefing sets out the progress of the Bill to date. It provides details on the recommendations made by the Education and Culture Committee in its stage 1 report and the Scottish Government response to these. It also summarises the main amendments that were agreed at stage 2 and considers the main amendments that were not agreed to.

[SPICe briefing SB 15/54](#) (Macpherson, 2015) provides an overview of the Bill as introduced.



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EXECUTIVE SUMMARY

The intention of the Higher Education Governance (Scotland) Bill is to “enable a framework for higher education governance that is more modern, inclusive and accountable” (Scottish Parliament, 2015; p.1). To this end, the main proposals in the Bill at introduction focused on:

- The process to be used to appoint the chair of the governing body of a higher education institution (HEI).
- The composition of the governing body of a HEI.
- Election and nomination of members of the governing body of a HEI.
- Remuneration of the chair of the governing body of a HEI
- The size, composition and election of members of the academic board of a HEI.
- Revision to the definition of academic freedom.

The main amendments at stage 2 were:

- Removal of regulation making powers in the Bill relating to the—
 - process to be used in appointing the chair of the governing body;
 - approach to remuneration and amounts to be paid to the chair of the governing body;
 - number of members of the governing body and category of statutory member; and
 - size and composition of the academic board.
- Establishment of a process, set out on the face of the Bill, as to how the senior lay-member of the governing body should be selected and elected and how remuneration of the person in that role should operate.
- Provisions to allow members of the governing body to accept the resignation or instigate the removal of the chair of the governing body.
- Removal of the previously proposed cap of 120 members on an academic board and inclusion of a stipulation that academic boards do not have to have more than 30 students represented.

INTRODUCTION

The Higher Education Governance (Scotland) Bill was introduced in the Scottish Parliament on 17 June 2015 by Angela Constance, Cabinet Secretary for Education and Lifelong Learning. The Education and Culture Committee was assigned as the lead committee on the Bill.

The Bill seeks to make more explicit the requirements on higher education institutions (HEIs) regarding membership of the HEIs governing body and academic board. The Bill also revises the working definition of academic freedom as applied to publicly funded HEIs and colleges in Scotland. The Policy Memorandum states that the intention of the Bill is to: “enable a framework for higher education governance that is more modern, inclusive and accountable” (Scottish Parliament, 2015; p.1).

[SPICe briefing SB 15/54](#) offers information on the background to this Bill and its provisions on introduction.

PARLIAMENTARY CONSIDERATION

Table 1 sets out the timetable for parliamentary consideration of the Bill throughout stages 1 and 2. Stage 3 proceedings are scheduled to take place on 8 March 2015.

Table 1: Timetable of Parliamentary Consideration (Stages 1 and 2)

Bill introduced	17 June 2015
Stage 1 – general principles	
Education and Culture Committee	6 October 2015 10 November 2015
Finance Committee	16 September 2016
Delegated Powers and Law Reform Committee	8 September 2015
Stage 1 report published	17 December 2015
Scottish Government response to Stage 1 report	11 January 2016
- Additional information on ONS reclassification	11 January 2016
Stage 1 debate	14 January 2016
Stage 2 – detailed consideration	
Marshalled List of Amendments for Stage 2	5 February 2016
Groupings of Amendments for Stage 2	5 February 2016
Education and Culture Committee	9 February 2016
Amended bill published	10 February 2016

The Bill as introduced included provisions on:

- The process to be used to appoint the chair of the governing body of a HEI.
- Remuneration of the chair of the governing body
- The composition of the governing body.
- Election and nomination of members of the governing body.
- The size, composition and election of members of the academic board of a HEI.
- Revision to the definition of academic freedom.

STAGE 1 COMMITTEE SCRUTINY

In its stage 1 report, the Education and Culture Committee (“the Committee”) notes that, while the Bill contains relatively few provisions, it has: “generated a considerable amount of comment and criticism.”

The stage 1 report highlights that some of the concerns raised during stage 1 were not directly about the provisions in the Bill, but rather about the implications and potential unintended consequences arising from the provisions in the Bill. In recognition of this, the Committee’s Stage 1 report offers conditional support for the Bill’s general principles while asking the Scottish Government to give further consideration to a number of issues prior to Stage 2.

Scrutiny of the Bill at stage 1 was made more challenging for the Committee by the lack of detail and definition on some of the provisions brought forward. The comments and recommendations made by the Committee in its stage 1 report are informed by this lack of clarity.

The Committee notes in its stage 1 report that evaluating the Bill’s success is likely to be challenging as there has not been any evidence brought forward of deficiencies in existing governance structures, “nor has it stated whether any of the specific problems identified by advocates of reform would be less likely to occur in the future” as a result of the changes made. The Cabinet Secretary has confirmed that it will be important to monitor the impact of the Bill within the wider context of the sector as a whole.

The stage 1 report noted that mention had been made during stage 1 deliberations of a university sector advisory board. This board was intended to offer: “a renewed focus on governance, monitoring impact and measuring success and impact”. The report also noted the intention in 2017 for the Scottish Code of Good Higher Education Governance to be reviewed. Governing bodies are also expected to review their effectiveness annually. All of these measures to monitor performance and progress are noted by the Committee as positive.

STAGE 1 – COMMITTEE RECOMMENDATIONS AND SCOTTISH GOVERNMENT RESPONSE

Table 2 summarises relevant recommendations from the Education and Culture Committee’s Stage 1 report (Scottish Parliament, Education and Culture Committee, 2015) and the Scottish Government’s response to these issues (Scottish Government, 2016).

Table 2: Summary of relevant Education and Culture Committee recommendations at Stage 1 and Scottish Government response

Paragraph in report	Committee Comment or Recommendation	Scottish Government response
Regulation making powers		
34	<p>Concern was raised about the risk that the regulation making powers set out in the Bill leave HEIs open to the risk of being reclassified as public bodies, with resultant adverse financial implications for the sector.</p>	<p>The reclassification of Scottish HEIs is a risk that has been considered throughout the progress of the Bill. The Scottish Government do not believe the provisions in the Bill advance the risk of reclassification. While confident that the provisions in the Bill do not amount to government control as set out in the current ‘indicators of government control’ used by ONS, the Scottish Government proposes putting forward amendments at Stage 2 to remove sections 8 and 13 of the Bill. These provisions would have given Scottish Ministers a regulation making power to modify the make-up of the governing body (section 8) and the size and composition of the academic board (section 13)/ In addition, the Scottish Government also proposes putting forward amendments that would reduce or remove the need for regulation-making powers in sections 1 and 2 of the Bill, which are concerned respectively with the appointment of the chair and remuneration.</p>
Appointment of the chair of the governing body		
54-55	<p>The Committee supported measures that would potentially increase the pool of suitable candidates for the post of chair and agreed that openness, transparency and consistency in the appointment process are desirable. However, it requested more detail on the process envisaged, such as whether there will be a pre-selection of candidates before an election; who will be responsible for conducting that process; and who will form the electorate for the election of chair.</p>	<p>Further engagement with stakeholders in the sector has led to plans for amendments to be brought forward at stage 2, which will change the current provisions in section 1. The intention is to set out on the face of the Bill a two stage process involving first selection and then election of the senior lay member of the governing body (the chair). Key features of the approach will be an open advertisement, interview and selection of electoral candidates by a nomination committee (involving both staff and students) and finally an election where the franchise is all staff and students.</p>

Paragraph in report	Committee Comment or Recommendation	Scottish Government response
The role of rector		
64	<p>The Committee regretted that the position of rector had not been clarified to date, including there being no substantive discussion of this issue in the Bill or accompanying documents. However, the Committee welcomed the Scottish Government’s reassurance that the role of rector will not diminish. Noted that the final model proposed by the Scottish Government must ensure that there is no ambiguity about the role of elected chair and that of elected rector; that both are able to work together for the good of the institution.</p>	<p>Recognition of the role played by rectors in those HEIs that have one and committed to continuing with this arrangement. The view of the Scottish Government is that proposals relating to election of the chair will not result in any alteration to the statutory underpinning of the role played by rectors. However, amendments will be brought forward at stage 2 to remove consequential modifications in the Bill’s schedule, which if retained would have removed the right of rectors to preside at meetings of the governing body in those HEIs where there is currently a rector in place.</p> <p>The relationship between the role of the rector and the elected senior lay member (the chair) “will primarily be a matter for each of our autonomous HEIs [that] appoint a rector” as it is at present in those HEIs that have a rector in place and also a senior lay member as chair.</p>
Remuneration		
68	<p>The von Prondzynski review recommended that the chair should receive “some form of reasonable remuneration”. The Committee, however, remained unclear why the Scottish Government was bringing forward a statutory power to make regulations about remuneration when HEIs already have powers to remunerate chairs.</p>	<p>After listening to stakeholders’ views, the Scottish Government said that an amendment would be lodged at stage 2 to replace the regulation making power currently in section 2 with requirements laid out on the face of the Bill. The provision establishes a requirement for HEIs to provide reasonable remuneration to the chair in connection with carrying out that role. This provision is intended to contribute to widening access to the role and should be seen as remuneration for expenses and allowances, rather than a salary. On reflection, the Scottish Government’s view is that it is not necessary to have Ministerial powers to set the level of remuneration or delegate this to other persons outside the HEI.</p>
Composition of the governing body		
84	<p>Assurances were sought from the Scottish Funding Council (SFC) that no institution would be forced,</p>	<p>The Scottish Government note that it should be a matter for the governing body to determine how best to accommodate new statutory members. The governing</p>

Paragraph in report	Committee Comment or Recommendation	Scottish Government response
	<p>as a result of the provisions in the Bill, to remove existing members of the governing body in order to meet the requirement to have only 25 people represented; and that there would be no detrimental effect on university management if membership exceeded 25.</p>	<p>body will have a transitional period (of approximately 4 years following the Bill's enactment) to do this. The transition period for the Bill is aimed, amongst other things, at ensuring that HEIs will not be required to remove existing members of their governing bodies; rather that compliance with the Bill can be addressed alongside the natural turnover of membership of the governing body. The SFC further states: "I can confirm that... during the transitional phase, we will not require any institution to remove existing members of its governing body and there will be no sanction if the membership of the governing body exceeds 25 as a result of the legislation. Our primary concern is that independent (lay) members remain clearly in the majority on the governing body"</p>
85	<p>The Committee noted that some HEIs did not currently have provisions in place to allow them to comply with specific membership requirements e.g. participation of graduates or trade union members in the governing body. The cost of making changes necessary to comply with the Bill would in some cases be onerous. Given the diversity of the HEI sector the Committee sought confirmation from the Scottish Government that all HEIs would be able to comply with the requirements in section 4 of the Bill.</p>	<p>The Scottish Government proposes amending the Bill to reduce the number of statutory members to seven: two trade union, two staff, two students, and the elected chair (senior lay member). This would remove the requirement for there to be two graduate association members. Given that most HEIs are likely to have five of the seven statutory members already in place; this provision should not be difficult to comply with. New members can be introduced in a phased approach over the transition period.</p>
86	<p>The Committee was informed that elected student representatives (the student president and vice president) would not be eligible to serve on the university court because they are on sabbatical; so technically not a student. It sought clarification from the Scottish Government on this point.</p>	<p>At the time of its response, the Scottish Government was still reviewing this matter with a view to putting an amendment forward at stage 2 to clarify that relevant student representatives who are on sabbatical leave from their studies will be able to serve on the governing body.</p>

Paragraph in report	Committee Comment or Recommendation	Scottish Government response
87	The Committee noted that the Cabinet Secretary has stated that one of the student representatives on the governing body should be the president and at least one a women. As the Bill does not appear to contain such requirements, the Committee sought further clarification.	The requirement set out within the Bill is that there are two student members of the governing body nominated by the students of the institution from among the students of the institution. No additional requirements will apply to these two positions. The Bill leaves it to individual HEIs to determine the rules which will apply to the nomination process.
88	The Committee sought clarity from the Scottish Government as to whether, where relevant, one person could represent two or more categories of membership e.g. graduate and trade union representative.	The membership of each of the categories of governing body member is intended to be mutually exclusive. As noted earlier, there is a proposal being considered for an amendment to the Bill at stage 2 to remove the statutory obligation to have two alumni members on the governing body.
Academic boards		
98	The Committee noted concern about the lack of evidence of a need for changes to academic board membership. It asked the Scottish Government to explain the need for legislation in this area, notably on the cap in membership at 120 representatives.	The cap on membership was proposed in the von Prondzynski review. However, giving consideration to the evidence received, a proposal to remove the cap on numbers is likely to be forthcoming through stage 2 amendments. While the view is that academic boards need to be of a manageable size and efficiently run, the Scottish Government recognises that for some HEIs this can be achieved by a larger academic board.
99	The Committee previously asked the Scottish Government to set out the benefits expected from requiring student membership on academic boards. It now requested evidence of more tangible benefits than simply “help[ing] to advance equality on the academic board”.	“The specific improvements and benefits expected will flow from all parts of the HEI community having the ability to make their voices heard as part of the governance structures guiding an HEI. We envisage that the more inclusive approach proposed by the Bill will strengthen unity and the sharing of responsibility between different parts of the community within HEIs. Students can help mould the academic ethos within an organisation, and ensure that their voice is heard.”

Paragraph in report	Committee Comment or Recommendation	Scottish Government response
Academic freedom		
117	The Committee welcomed commitments from Scottish Government officials to investigate whether the definition of academic freedom could be extended to protect students as well as academic staff.	Work to explore the potential extension of the definition to include students is on-going. The main issue is the safeguarding of staff in the context of their work for the college or HEI. As such, some students (e.g. postgraduate /PhD students) that are involved in teaching should benefit from the same protection in relation to this teaching activity. In light of evidence before the Committee, the Scottish Government is considering the final form of the relevant provisions with a view to possible amendment at stage 2.
118	The Committee invited the Scottish Government's views on UCU Scotland's suggestion that academic freedom should also apply to academic and related support staff.	The construction of the definition of academic freedom in the Further and Higher Education (Scotland) Act 2005 has been reviewed. This focuses solely on academic staff. There is no strong justification for extending the definition beyond this as the intention is to protect views relating to the teaching, learning or research that a staff member is directly engaged in; to avoid stifling academic debate. Accordingly, the Scottish Government does not consider it necessary to extend this further to academic and related support staff.
Financial memorandum		
123	The Finance Committee raised concerns that account had the Financial Memorandum had not taken account of the costs to HEIs of amending governing instruments in alignment with legislative requirements. The Committee asked the Cabinet Secretary to examine these concerns with a view to perhaps introducing an amended Financial Memorandum at Stage 2.	"The Scottish Government will update the Financial Memorandum following Stage 2 in accordance with the Scottish Parliament's Standing Orders."

MAIN AMENDMENTS AGREED TO AT STAGE 2

Stage 2 consideration of the Bill took place on [9 February 2016](#) at which time the Education and Culture Committee discussed a number of amendments arising from discussions and evidence-taking at stage 1. Table 3 provides a summary of the amendments agreed to at stage 2, the majority of which were lodged by the Cabinet Secretary for Education and Lifelong Learning (“the Cabinet Secretary”).

Table 3: Summary of Amendments Agreed to at Stage 2

Issue	Effect of amendments
Position of senior lay member of governing body	
Amendments 3, 4 and 4b	These amendments, lodged by the Cabinet Secretary and Stewart Maxwell MSP, propose changes to section 1 of the Bill to remove the regulation making powers therein. These amendments also seek to protect the position of rector as complementary to the senior lay member, where there is an elected rector in place.
Appointment and remuneration of senior lay member of governing body	
Amendments 5-15 and Amendment 31	Amendments 5-15, by the Cabinet Secretary, remove sections 1-3 of the Bill as introduced. These are replaced by amendments setting out a single model for the process to be used in appointing the senior lay member of the governing body and remuneration of that person. Amendment 31, by Liz Smith MSP, delegates the responsibility for deciding the amount of remuneration to the governing body.
Resignation and removal of the chair and ordinary members	
Amendments 30 and 63	These amendments, by Liz Smith MSP and Chic Brodie MSP, introduce provisions allowing the governing body to accept the resignation or to instigate the removal of the chair and ordinary members of the governing body.
Composition of governing body	
Amendments 16-18	Amendments 16-18, by the Cabinet Secretary, remove the requirement for there to be two graduate members represented on the governing body.
Size of academic board	
Amendments 19 and 20 and Amendment 2	Amendment 19, lodged by Jim Eadie MSP, removes section 9 of the Bill (so removing the provision restricting the number of members of the academic board to 120 people). Amendment 20, lodged by the Cabinet Secretary, revises the requirement for academic boards to have ten per cent of members from the student body; instead stipulating that academic boards do

not have to have more than 30 students represented.

Amendment 2, lodged by the Cabinet Secretary, removes section 13, which proposed giving Scottish Ministers power through regulations to modify the size and composition of academic boards.

References to students

Amendments 23-23A These amendments, lodged by the Cabinet Secretary, are intended to clarify that Sabbatical Officers of a students' association / student union are not excluded from participating fully in the governance of their institution, even if they are not technically matriculated students during their period of office.

Upholding academic freedom

Amendments 53 and 55 These amendments, lodged by Stewart Maxwell MSP, propose a small wording change intended to qualify the duty on post-16 education bodies as set out at section 19(2) of the Bill to uphold the academic freedom of any of its staff engaging in teaching and research; to ensure that the appointments and privileges of those persons engaged in teaching and research are not adversely affected by exercising their academic freedom.

Regulation making powers on governing body membership categories and numbers

Amendment 1 Amendment 1, lodged by the Cabinet Secretary, removes the power at section 8 enabling Scottish Ministers to amend, by regulations, the categories of governing body membership set out at section 4(1) and the number of people to be appointed within particular categories. Removal of section 8 addresses the concerns raised at stage 1 of risk of HEIs being reclassified as public bodies by the Office of National Statistics.

Procedure for regulations

Amendment 21 Amendment 21, lodged by the Cabinet Secretary, removes section 14, which established the regulation making powers relating to this Bill

MAIN AMENDMENTS NOT AGREED TO AT STAGE 2

There were a number of amendments considered at stage 2 that were not agreed to. A summary of the main amendments not agreed is provided below:

- Liam McArthur MSP lodged amendments focusing on the process to be used in appointing the senior lay member of the governing body. The provisions intended to offer HEIs some discretion in the arrangements made to elect the senior lay member of the governing body, drawing on the existing Code of Good Higher Education Governance and including provision for staff and students to be represented in the selection of candidates to the position of chairing member of the governing body (Amendments 27-29).
- Liz Smith MSP lodged a number of amendments relating to the Royal Conservatoire of Scotland. These focused on the approach to be used in the election of the chairing member, notably narrowing the electorate only to members of the governing body. These amendments were in recognition of the small scale of the institution and its current working practices. (Amendments 59-62).
- Liz Smith MSP and Sandra White MSP lodged amendments to the Bill to include a chapter on the theme “small specialist institutions”. The proposals were that the Scottish Funding Council report to the Scottish Ministers recommending whether the provisions in this legislation should apply to small specialist institutions. In light of this report, regulations could be made (and consulted on) by Scottish Ministers to exclude small specialist institutions from the provisions in this legislation (Amendments 48, 48A, 64 and 65).
- Liam McArthur MSP lodged a number of amendments to the Bill to replace references to “support staff” with the term “professional staff”. Tavish Scott MSP, standing in for Liam McArthur at the Committee session, suggested that the term “support staff” seemed to be “somewhat strange and patronising” by characterising “some staff as simply ‘support’ rather than being professional in their own right” (Amendments 35, 36, 40 and 50).
- In the name of Liam McArthur MSP, Amendment 66 proposed introducing exemptions by individual HEIs to provisions in the legislation. To gain exemption, HEIs would be required to write to Scottish Ministers requesting exemption from the specific provision.
- Chic Brodie MSP proposed inserting a section in the Bill on the theme of post-legislative scrutiny. The proposal was that a Scottish Parliament Committee be designated responsibility to review the impact of this legislation on the effectiveness of higher education institutions governance (Amendment 67).

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