

HE Governance bill: Education Committee evidence

Introduction

NUS Scotland has, for many years now, been calling for increased democracy, transparency and accountability within Scottish universities (and colleges, where student representation, particularly, saw some great successes through a much more inclusive approach to developing a code of good governance than was seen in universities), and we were a full member of the von Prondzynski review of higher education governance, and very supportive of that report's recommendations.

While the Post 16 Education (Scotland) Act, and the legal requirement that gave for universities to adhere to principles of good governance as a condition of grant, and the Scottish Code of Good HE Governance that resulted from that, were a move towards better governance structures and processes, we believe the latter fell short of introducing a strong enough framework for ensuring that basic democratic principles are followed by all HEIs, across the board. We fully endorse the notion of 'responsible autonomy', but believe that the balance has tipped too far away from responsibility. It is absolutely right that our universities are in receipt of over a billion pounds of public funding each year, but we must see greater public responsibility in return for this.

In summary:

- We believe the Bill presents an opportunity, through legislation, to address three main shortcomings with higher education governance: a lack of a genuine democratic culture in governing bodies; a lack of transparency and accountability over how decisions are made, and who makes them; and, a lack of fair representation and diversity on governing bodies.
- An attempt at voluntary, self-regulation—through the Scottish Code of Good HE Governance—has failed to result in the changes in culture and practice we believe are necessary to address the above shortcomings, and legislation is now required.
- Defined places on governing bodies for staff and student unions is to be welcomed, enhancing the representativeness and transparency of governing bodies.
- We wholly support the principle of elected chairs of governing bodies. Far from abolishing rectors, or diminishing the democracy of our institutions, elected chairs would ensure a genuine, democratic say, for staff and students, in the leadership of the governing body, who should be working on their behalf.
- We remain unconvinced of the need for an election/selection panel, and would not want to see unnecessary bars or limits placed on any candidate. However, if there is to be any sort of panel, there must be a triple lock protection: full transparency around that panel and their decisions; no institutional involvement; and, it should not attempt to identify preferred candidates.

- The Bill still falls short of the original von Prondzynski review in two key regards: improving the diversity of, and fair representation on, governing bodies, and tackling senior level pay.

What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?

The von Prondzynski review (2012) clearly stated in its opening paragraphs that despite the complex legal framework on the status of HEIs in Scotland, our HEIs are independent public bodies, and therefore are not accountable to private shareholders, but to students, staff and wider society. Our universities are, rightly, in receipt of well over a billion pounds of public funding each year, however, we believe they could and should do much more to evidence their public good in return for this funding.

NUS Scotland believes that the best way to ensure this accountability is to open HEI governance to democratic participation. Students and trade union representatives should be involved at every level of institutional governance, and decisions should be made transparently to ensure opportunities for public scrutiny. We work closely with member students' associations, and have identified a number of shortcomings in the current governance arrangements of HEIs in these areas. These include: a lack of a genuine democratic culture in governing bodies; a lack of transparency and accountability over how decisions are made, and who makes them; and, a lack of fair representation and diversity on governing bodies.

Lack of democratic culture on governing bodies

Through our work with member students' association, we have consistently come across problems with associations being able to genuinely engage in the governance of their institutions. While many students' association are able to take part in university court meetings, many student representatives feel that these meeting act merely as a rubber-stamp exercise to validate decisions that have already been taken by the Principal or at committee level.

This problem is often reinforced by the appointment process for chairs and lay members of the court. Chairs, whose role ought to be to foster informed debate, are often appointed with little scrutiny or input. At present there is a trend within institutions to simply appoint from within the governing body, which we believe should never necessarily be the standard. While it may at times might be fully appropriate to appoint from within, particularly at turbulent times, universities are ever evolving places, and this should include the evolution of the role of chair, ensuring that fresh talent is brought in. To do otherwise means we run the risk of creating a revolving door.

Too often, senior managers will make up a majority of those in attendance at meetings, and as such the majority of conversation. While we recognise they are non-voting, we are unaware of any major instances of votes actually being taken at governing bodies, and they do retain full rights to

speak to agenda items. It is vital that the lay members and staff and student representatives are the ones who set the tone and direction of meetings.

Lack of transparency over decisions

In addition to a lack of participation and democratic culture on governing bodies, there is a distinct lack of transparency over governance decisions. This leaves little opportunity for genuine democratic decision-making where a multitude of views are taken into account. The impact of this type of decision-making is exemplified by the ever-increasing principals' pay packages in Scottish HEIs.

Decisions on senior management pay are usually taken in remuneration committees, which more often than not comprise solely of members appointed from the governing body, and the Principal themselves, in some instances even remaining in committee during discussions related to their own pay. This means there is little oversight, few opportunities for scrutiny by the wider community and often non-existent involvement of staff and students. Because there is no legislative requirement to allow student and staff participation on all committees, student officers have to often spend a considerable amount of time arguing for their right to participate in these committees. For example, the University of Aberdeen Students' Association only secured an observer place on the university's remuneration committee after a number of years' of asking to be included.

Furthermore, even where institutions publish information on decisions as an exercise to increase transparency, students and staff are often unable to scrutinize the work of committees or working groups prior to when decisions are made. For example the student-led campaign that called on the University of Edinburgh to divest from armaments and fossil fuel companies struggled to find information on the university's investment review and decision on divestment. More pressingly, in a context of governance reform, as discussed below, NUS Scotland believes that staff and students should have a seat on remuneration committees, to provide greater transparency and representation when it comes to senior pay. A freedom of information request to all Scottish universities revealed some extremely worrying trends, including 70% of universities refusing to release the full minutes of remuneration committee meetings where principal pay was decided.

Lack of fair representation and diversity on governing bodies

We believe that all governing boards would benefit from a balanced membership that reflects the composition of the group of people the body takes decision on behalf of. As highlighted by research conducted by NUS Scotland in 2014, despite recommendations made through the HE Code of Good Governance, university courts are still dominated by men¹. We do not believe the current approach of self-regulation is sufficient to ensure fair representation on boards, and will be calling on the Scottish Government to legislate on 50% women representation on all boards of public institutions.

¹ <http://www.bbc.co.uk/news/uk-scotland-28513539>

Governing bodies also suffer from a lack of diversity in terms of wider protected characteristics, and a failure to properly reflect the diversity of the populations they serve. Despite a recommendation from the code of good governance that institutions should monitor and report on the diversity of their governing bodies, there is no statistical evidence currently held and many of our member students' associations have also raised concerns over the lack of diversity of professional backgrounds of court members.

The extent to which the Bill will improve higher education governance

Elected chairs of governing bodies

NUS Scotland recognises that the Chair of the governing body holds an important role in the governance of our HE institutions. We believe that as leaders of our institutions, chairs should come from diverse backgrounds, have the confidence of the institution's most important stakeholders (staff and students), and be elected in a democratic manner.

In order to ensure that the Chair is chosen in a democratic and transparent way, and that they will represent the interests of all key stakeholder of an HE institution, students and trade union representatives must lead every stage of the selection process. We fully support increased transparency and democracy of governing bodies, and welcome the proposals to move to electing chairs or HE institutions. We believe that this process should be transparent and democratic, and led by students and staff every step of the way.

We recognise that some institutions have expressed concerns over how the introduction of elected chairs would impact the role of the rector in ancient universities. We believe that when functioning well, the rector role is very similar to that of an elected chairs – it ensures the chair of the governing body exercises their role with a sensitivity to the views of the key stakeholder of the institution (students and staff), and that they are accountable to those stakeholders. Therefore, rather than threatening the role of the rector, rolling out elected chairs throughout Scottish HEIs would extend and strengthen the proud democratic history of Scottish universities' rectorship. It is worth noting that the proposal for elected chairs in the Von Prondzynski review were also based on extending the benefits of the rector model beyond the ancient institutions.

Student and trade union representation on governing bodies

NUS Scotland believes it is crucial the governing bodies of HE institutions are representative of an institution's stakeholders. Students and staff are a vital part of our institutions, and must be a part of the decision-making process of these institutions. This view is also set out in the Scottish Code of Good HE Governance, which described one of the main purposes of HE Governance to be "promoting an appropriate participation of its key constituents, including students and staff".²

² <http://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2013/07/Scottish-Code-of-Good-HE-Governance.pdf>

Section 4 of the draft Bill includes provisions for a minimum of two elected staff representatives, one trade union representative from academic staff, one trade union representative from support staff and two representatives appointed by the students' association, as well as two representatives appointed by the graduates' association. While many institutions already include student and staff representatives in their governing bodies as recommended in the Code of Good HE Governance, these provisions in the Bill would secure staff and student representation through legislation. NUS Scotland are strongly supportive of this proposal, and fully endorse its inclusion in the final Bill.

The extent to which the Bill may alter the higher education sector's current level of autonomy

While we fully recognize the need of any further regulation to fully respect the autonomy of Scotland's HEIs, we do not believe the proposals set forward in the current bill alter that autonomy in a notable way. The proposed changes would not require institutions to implement any substantive policy changes; rather, they address the processes through which decisions on substantive issues are taken. We fully endorse the notion of 'responsible autonomy' for our institutions. Where we have concerns is around the weight lent to both aspects of that, and are of the view that there has not been enough responsibility in return for the significant sums of public funding our institutions rightly receive.

We would reject the assertion made by some in the sector that the Bill poses such a threat to institutional autonomy that it places the charitable status of institutions at risk, and raises the concern of ONS reclassification, as seen in our colleges. There has been no suggestion from ONS that this would be the case, with the scale and extent of reform seen in colleges being markedly different to that proposed for our universities, and in their submission to the original consultation on a HE governance bill, the Scottish Charity Regulator, OSCR, stated that the proposals "...should not therefore impact on the institutions' charitable status."

The correct balance been struck between legislative and non-legislative measures

With the development of the Scottish Code of Good Governance, undertaken by the Chairs of Scottish Courts, an attempt was made to make the majority of governance reform non-legislative; however, we believe that this simply did not go far enough, or result in a tangible and meaningful code or outcome and, as such, it is now necessary to seek reform through legislation. While many HEIs have voluntarily taken on board some of the measures proposed in the Scottish Code of Good HE Governance, others fall short of delivering on democratic, inclusive and transparent governance.

When it was announced that the Committee of Scottish Chairs would be undertaking the development of the proposed code, NUS Scotland raised serious concerns. Chief among these was the concern at the system of self-regulation being adopted, and the potential for a weakened code

as a result, which would now seem to have been a very real one. As we have stated in evidence before, we are wholly supportive of university governance being underpinned by 'responsible autonomy'. However, we have often felt that this balance was tipped firmly to the side of autonomy, with little responsibility.

Getting a much more transparent and democratic form of governance was vital to ensuring that institutions were demonstrating genuine public benefit for the public funding they receive. But the code did not do that. From the start of this process we were of the opinion that it was not the chairs' job to rewrite the original VonProndzynski report, but rather to find a way to take his recommendations and apply them across the sector through a code. Instead, it selectively picked those it wanted, ignored the ones it didn't, and watered down those it took on.

The appointment of chairs of governing bodies

As stated above, we believe electing chairs of governing bodies would be very beneficial for strengthening the democratic culture in university governing bodies. At its core, elected chairs provide a defined link between staff and students – who we would argue are the two single most important stakeholders an institution has – and the governing body. Moreover, two of the main arguments against elected chairs we have heard, would appear to be based on fallacies.

Firstly, it has been argued that by electing chairs we may get to a situation whereby the chair doesn't enjoy the 'confidence' of the governing body. However, while there is no evidence to suggest that would be the case, it also undermines the role of the chair and governing body. Governing bodies, as with all trustee boards (as the governing body essentially is, given the charitable status of our HEIs) should act as critical friends to institutions, on behalf of their stakeholders – staff and students. We would seriously question any governing body, and the role they are carrying out, that did not put their trust in a chair who had trust put in them by staff and students.

Secondly, it is often argued that there is no need for chairs elected by staff and students because staff and students already have representatives on the governing; however, this misrepresents the position of staff and student representatives. As institutions are (rightly) quick to point out – and a point entirely accepted, understood and respected by student representatives – when decisions come before a governing body, staff and student members do not have a representative role on governing bodies. They are there as full members, and bringing a representative role, as opposed to an independent one, into their membership of a governing body would go against the spirit, if not the actual letter, of trustee law. Essentially, staff and students do have a 'representative' role on the governing body. Elected chairs would not undermine this legal role as a trustee, but would ensure that staff and students are able to directly have a say in the person chairing the governing body, and an advocate the act on their behalf, instilled with their confidence and trust, in addition to the student representatives they send to a governing body.

At the same time, in recent weeks we have seen arguments against the proposals center around a notion that the Bill would remove rectors, which in turn would remove a vital link between, voice of, and advocate for students, by removing their right to chair court and sidelining them on court. However, this would seem to miss the role and responsibilities of rectors as they currently exist, and misinterpret the policy intention of the Bill. Most importantly, there have been repeated reassurances that the Bill would not abolish the role of rector, but instead seek to roll it out, and strengthen it, across all universities. Currently, each university that elects a rector also appoints from the governing body a 'senior governor', the role of whom is to chair court (normally, but not always, when the rector is unable to) but more worryingly, and against the spirit of rectors, act in all other ways as a chair of the governing body. The below details the specific circumstances at each of the universities where a rector exists.

- **Edinburgh:** Has developed a 'Statement on the role of the rector and vice-convenor of court'³ which states that *"The role of the Vice-Convenor of Court is similar to that of Chair of institution in many other Universities in that the Vice-Convenor is responsible for the leadership of the University Court and will preside at Court meetings in the absence of the Rector."*
- **St Andrews:** According to their website, at St Andrews the role of senior-governor is to: *"...preside over meetings of Court in the Rector's absence but, more importantly, to undertake all the other responsibilities expected of a chairman. This involves ensuring that the Court fulfils its objectives in a proper and effective manner, reviewing the performance of the Principal and convening various committees."*⁴
- **Dundee:** Under their own regulations, the rector has no right to chair and instead they have a chairperson *"...elected from among its members who are not students or salaried staff of the University."*⁵ A 'governance and nominations committee' determines the process for this election, with that committee being chaired by the chair of the governing body.
- **Aberdeen:** According to their own 'Guidelines for court meetings' *"The Senior Governor is responsible for the leadership of the Court and plays a key role in securing good working relationships with the Principal/and the Senior Management Team. In common with the other "Scottish Ancients", the right to preside at meetings of the Court is preferred to the Rector by the University's (Scotland) Act. The recent practice has been for the Senior Governor to chair Court"*⁶
- **Glasgow:** The governing body appoints a convenor who *"...is responsible for the leadership and effectiveness of Court and for ensuring that the University is well connected with its stakeholders"* and is *"the key liaison between Court and the University senior management."*⁷

³ <http://www.docs.sasg.ed.ac.uk/GaSP/Governance/RoleofRector.pdf>

⁴ <https://www.st-andrews.ac.uk/about/governance/key-officials/senior-governor/>

⁵ http://www.dundee.ac.uk/media/dundeewebsite/pgla/documents/court/layadvert/court_members_handbook.pdf

⁶ http://www.abdn.ac.uk/staffnet/documents/policy-zone-governance-and-compliance/COURTGUIDELINES_2014-2015_updated_17.04.2015_CURRENT.pdf

⁷ http://www.gla.ac.uk/media/media_414679_en.pdf

As can be seen from the existing practice around rectors, while there is a strong, and proper, democratic ideal in having an advocate for staff and students elected by staff and students, in reality the actual role of being a true 'chair' of court (going wider than the simply chairing court meetings) is taken on by a member of the governing body, appointed from within and by the governing body. Rather than limiting, if not outright abolishing (as some have argued), the democracy and representation that comes with a rector, we believe the Bill gives an opportunity for democracy and representation to be strengthened by having a genuinely elected chair of the governing body, not simply a figurehead with the actual role being carried out by an unelected lay member of the governing body.

In terms of processes for election, we would maintain our support for the original von Prondzynski review, with a constituency of all staff and students of the institution. Students' associations already have the systems in place for elections, the vast majority, if not all, now having quick, simple to use and cheap online voting systems in place. While we fundamentally do not believe there should be any bar or limit place on candidates for election (as the von Prondzynski review also stated must be the case) we would be willing to work across the sector to reach a consensus on some form of pre-election panel process, to draw up the list of election candidates. However, while we remain unconvinced of the need for any attempt to 'shortlist' candidates, if an election panel were to be taken forward there must, as a bare minimum, be a triple lock on the process of:

- 1. Selection criteria:** Selection should not be done to try and identify preferred candidates, but simply to ensure all candidates would be able to undertake the role if elected. This was a recommendation of the von Prondzynski review.
- 2. Representation:** In order to ensure a degree of 'independence' from the institution—as a governing body should—any selection panel should not consist of any institutional members. Instead, it should be made up of the three governing body constituencies – staff, students, and lay members.
- 3. Transparency:** In order to maintain some sort of confidence in the process, any election panel must produce a final report which details all the election candidates considered any the reasons for any candidates not being put forward for election.

Finally, and as we have long argued for, we are supportive of a general principle contained within the Bill that chairs should receive some form of compensation. While chairing stops short of a full-time role, it is entirely right that no candidate is dissuaded from putting themselves forward for the role, or committing a reasonable amount of time, because it is entirely unremunerated. Similarly, there is a strong case to be made for ensuring lay members are reimbursed for expenses incurred, including lost wages. The alternative is to continue with the status quo of chairs and lay members coming from the same backgrounds – financially secure, often retired, and predominantly from business. We recognise concerns around remuneration of chairs, and the relationship this could

create between chair and institution; however, we would argue that if the chair is an appropriate (and appropriately independent) one, then this should not be born out.

Requiring HEIs to include various persons within the membership of their governing bodies

As mentioned above, NUS Scotland has concerns over student and staff members' ability to genuinely take part in the decision-making at their institution under current governance regulation. We believe securing places for student, staff and trade union representatives would be very beneficial to increasing transparency and democracy in HEIs, and would enable key stakeholders to better contribute to debate over key-decisions at their institution. We believe that having representatives of these stakeholders on governing bodies will go a long way to ensuring that our institutions are run to the benefit of students, staff and the wider community.

However, we believe that student, staff and trade union representatives should also have representation on key committees of the institution. Currently, the governing body may often act merely as a "rubber-stamp exercise", where decisions have effectively been made at committee level or well in advance of governing body meetings. Student and trade union representation on all governing body sub-committees would further foster a culture of democracy and transparency in HEIs. This is particularly the case for any nominations committees (for either members of the governing body, or for the principal) and remuneration committees.

Key issues not covered by the Bill

While we are strongly supportive of the above two proposals, we would like to highlight that in its current form, the HE Governance bill does not address two key issues of concern to NUS Scotland, both of which were raised as areas for action by the von Prondzynski review.

Fair representation and diversity

At the moment, the draft bill does not address the serious concerns over a lack of diversity among governing body members. NUS Scotland has long been supportive of moves to increase the representation of women – including through the use of quotas – within our institutions, given they make up the majority of our campuses yet remain underrepresented in positions of leadership, particularly on governing bodies. Equally, the need to make serious progress on the issue of fair representation of boards is one shared by the then Cabinet Secretary for Education, Mike Russell, who stated, during the debate at stage 3 of the Post 16 Education (Scotland) Act, that:

"No one is defending the woeful record of university and college boards. The boards themselves have accepted that the gender balance on them is atrocious—indeed, in some cases, it is more than atrocious. We need to get that situation changed quickly."

The use of quotas as a means to achieve fairer representation of women on governing bodies gained prominence in 2012, with the publication of the VonProndzynski, which was explicit in its preference to see the introduction of quotas for governing bodies. At the time this was strongly welcomed by NUS Scotland and staff trade unions, and, along with the wider report, was endorsed by the Scottish Government. NUS Scotland had strongly urged the adoption of such a recommendation in our submission to the review on the basis that women make up the majority of our universities, yet are hugely underrepresented on governing bodies and we believed that quotas were (and are) necessary to ensure that we translate legal equality between men and women into de facto equality by guaranteeing women's presence in leadership, where too often they go underrepresented.

NUS Scotland has previously undertaken research, via a freedom of institution request, on the numbers of women members appointed to their governing bodies. Of those institutions who responded the figures showed that 32% of appointed members of governing bodies were women, worryingly low in itself but also masking large disparities across the sector, including some institutions with figures as low as 14%.

On the issue of wider diversity, and perhaps more worryingly, only 40% of institutions had set targets for increasing the wider equality and diversity of their governing bodies, and only 30% were issuing regular reports on progress on equality and diversity targets with regards to governing body membership. Both of these were requirements of the Scottish Code of Good HE Governance, showing that voluntary, self-regulation has thus far failed to yield success across the sector. We believe all institutions should do all the can (not least under their existing equalities duties) to do more to promote and extend the diversity of their governing bodies, across all protected characteristics, making them representative of the communities they serve.

Senior management pay

While ensuring that students and trade unions are represented on governing bodies and committees will go some way in increasing accountability over senior management pay, we do not believe these measures to be sufficient to address the unreasonable pay increases in the sector over the past few years. We would call on the Scottish Government to examine the possibilities to legislate on a defined pay ratio between the highest and the lowest paid members of staff; to bring senior management on to the same pay scale as other staff members (as recommended by the von Prondzynski review); and to ensure senior management do not receive pay increases above those awarded to the rest of the staff (also recommended by von Prondzynski).

At the same time, it is vital that, as we seek to extend the transparency and accountability of governing, that we do the same with governing body sub-committees, and particularly those dealing with senior level pay. By having staff and student representatives as full members would result in a greater diversity on panels, balancing opinions and stakeholders; this was something also recommended by the Hutton Report of Fair Pay. That report found that university principals

have the highest pay ratio on the entire public sector (15.35). Follow up research by NUS Scotland found that in Scotland this ratio goes up to 16.10, that there are 88 individuals at Scottish universities who earn more than the First Minister (£140,000), and only one university Principal earns less than this.

It is clear from these figures, and given the backdrop of tight financial circumstances across the public sector, the higher education sector needs to take strong action to tackle inflated senior pay. Similarly, attempts by the University and College Union to, via freedom of information request, obtain minutes and details of remuneration committee meetings have proved difficult, with very little transparency from many institutions.

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