

Consultation Response

Consultation Paper on a Higher Education Governance Bill Response from the Scottish Charity Regulator

1. Background

1.1 The Scottish Charity Regulator

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,600 charities registered in Scotland, and this includes Universities and other higher education institutions.

OSCR welcomes this opportunity to comment on the proposals for a Higher Education Governance Bill. Our approach as regulator is to be positive, preventative and proportionate. Our strategic objectives and their link to our statutory functions are set out in our [Corporate Plan](#). Underpinning all we do (and therefore our response to this consultation) is our overall vision of “**charities you can trust and that provide public benefit**”. If you have any questions about our response, please contact Nicola McBain, Engagement Manager (Policy and Partnerships) on nicola.mcbain@oscr.org.uk

2. Consultation response

2.1 Context

In considering the proposals in this consultation OSCR has reviewed how they would work alongside the 2005 Act. Universities, as charities, are subject to the requirements of the 2005 Act, and as members of their governing body are charity trustees they are subject to particular duties under the 2005 Act. The two areas specifically considered are the proposals’ alignment with section 7(4) (b), which relates to Ministerial powers of direction and control over charities, and section 66, which sets out the duties of charity trustees.

2.2 Ministerial control

The consultation states that the proposals for legislative change are aimed at enhancing and improving governance in higher education institutions in Scotland, and not to increase Ministerial control over the institutions.

As charities, higher education institutions must meet the charity test as set out in section 7 of the 2005 Act. Under this, to be registered as a charity an organisation must pursue only charitable purposes and it must provide public benefit. Under section 7(4) (b) an organisation will however not meet the charity test if its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities. OSCR has reviewed the set of proposals. While they would allow Ministers to require changes in the governance of higher education institutions, in our view they would not affect the constitutions of higher education institutions in ways that would give Ministers the power to direct or control these institutions’ activities in terms of section 7(4)(b) of the 2005 Act. They should not therefore impact on the institutions’ charitable status.

2.3 Privy Council

OSCR notes the proposal to transfer the Privy Council's role, in relation to higher education governance, to a new Scottish-based committee subject to the scrutiny of Parliament in order to simplify the current process for making amendments to the existing governance instruments.

We would advise that the Privy Council role in such matters is not unique to Universities. Other charities that have to seek Privy Council approval in such matters include some older established and cross-border¹ charities.

Charities must seek OSCR's consent to change their name or purposes or to dissolve themselves (under sections 11 and 16 of the 2005 Act) and must notify us of other changes (under section 17). At the moment, OSCR liaises with the Privy Council in cases where charities including Universities must also seek the Privy Council's approval to make changes. While this liaison is generally effective, the established rules and procedures of the Privy Council can mean that the process of making changes is longer than for other types of charity. The aim of the proposed change is to expedite the undertaking of these amendments more quickly and efficiently, and OSCR would welcome any change with this effect.

As Universities will continue to be subject to the consent and notification requirements under the 2005, we anticipate that we would work with any new committee formed under the proposals.

2.4 Academic Freedom

We have no comments on this proposal.

2.5 Role of Principals

We have no comments on this proposal.

2.6 Chairing of Governing Bodies

The legislative intention of this proposal is that all chairs are appointed at the culmination of a transparent process including for example a job description, public advertisement and competitive selection for shortlisting.

OSCR has no comment on the specific proposal; however the consultation publication has an insert from the Scottish Code of Good Higher Education Governance that we would comment on. It states "*The chair shall be responsible for the leadership of the governing body, and be ultimately responsible for its effectiveness.*"

Putting ultimate responsibility for effectiveness specifically on chairs does not align well with charity law. The general duties of charity trustees set out in section 66 do not apply more strictly or strongly to a chair of trustees, or to any other specific trustee on account of a particular office they may hold; rather, the charity trustees collectively and individually are responsible for the management and control of a charity, and ultimately therefore for its effectiveness.

2.7 Membership of Governing Bodies

¹ Cross-border charity refers to a charity registered by OSCR and Charity Commission for England and Wales.

The legislative intention of this proposal is to state requirements on membership of University governing bodies, such as having a minimum of two students and two staff members. It states this will ensure a more effective representation of internal stakeholders and will help create a more inclusive environment within the institution.

Any member of a University governing body is also a charity trustee and has duties and responsibilities set out in section 66 of the 2005 Act. OSCR recommends to charities that a key to an effective governing body is having the right skill set and mix. While we recognise the importance of having balanced representation of stakeholders on the governing body, it is vital that there should be a balance of skills and trustees should be well informed. This is also already outlined in the Scottish Code of Good Higher Education Governance.

Furthermore s66 of the 2005 Act states that charity trustees must, in exercising functions in that capacity, act in the interests of the charity. So, although a member may have been nominated by the student association/union, their role on the governing body will be to act in the interest of the charity (the University), not the areas they were nominated from.

2.8 Composition of Academic Board and Appointment of Members

We have no comment on this proposal.

2.9 Conclusion

OSCR welcomes the opportunity to respond to this consultation. Good governance is critical to the effective running of charities, and insofar as these proposals seek to support Universities and other higher education institutions to develop and refine governance systems they are welcome. OSCR would note, however, that members of University governing bodies are also charity trustees and have duties under the 2005 Act, and it is important that these duties are considered carefully alongside any planned legislative change.