Scotland’s higher education institutions (HEIs) share the Scottish Government’s commitment to good governance, wide access to university based on ability regardless of socio-economic background, and efficient provision which meets learners’ needs. We welcome the Scottish Government’s affirmation to the Parliament⁰, that universities’ responsible autonomy is an informing principle of their policy.

We do not see a need for the higher education provisions in the Bill, which create new and in some cases quite extensive and unspecific powers over higher education institutions. Scottish HEIs are already proud to be delivering important economic, social and cultural benefits in line with the Scottish Government’s aspirations for the nation’s wellbeing. There is much the sector can achieve for Scotland when working autonomously with Government. HEIs are already robustly accountable for their use of public resources through the funding regime operated by the Scottish Funding Council (recently supplemented by the introduction of Outcome Agreements to further ensure that public investment is directed at delivering priority outcomes in line with Ministerial priorities), and through multiple lines of accountability to other funders and regulators.

While universities are keen to continue to work with the Scottish Funding Council to widen access by under-represented groups, the Bill gives the impression that there is a problem which needs to be addressed through legislation, which in our view is not necessary. The Bill’s purposes can already be achieved through conditions of grant and through Ministerial guidance to the Scottish Funding Council, and we are concerned that the proposed legislation as currently drafted may give future administrations powers which are susceptible to misuse.

However, if the Scottish Government is committed to legislating, we believe there are important refinements which must be made to the Bill which are consistent with its overall purposes, but which are required appropriately to define the respective roles of Ministers, the Scottish Funding Council and of institutions to safeguard the vital principle of responsible autonomy upon which the continuing success of the sector depends.

In proposing these amendments we have particular regard to the principle of 'responsible autonomy', i.e. that universities and other HEIs are responsible for delivering public benefit in return for public investment, but are best able to succeed in this and in their wider missions when they are operating within a framework of clear institutional autonomy.

Our emphasis on responsible autonomy is founded on the international evidence that university sectors which enjoy robust autonomy are best able to make a successful contribution to the economic and social wellbeing of their nations. This is recognised in

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⁰ Oral evidence by Scottish Government to Education & Culture Committee, 15 January
multiple studies e.g. ‘The governance and performance of universities: evidence from Europe and the US’ (Aghion et al, 2009) and Financially Sustainable Universities II: European universities diversifying income streams, EUA (Estermann & Pruvot, 2011).

This concept is further articulated in two separate articles published by the World Bank:

‘…institutions that have complete autonomy are also more flexible because they are not bound by cumbersome bureaucracies and externally imposed standards, even in light of the legitimate accountability mechanisms that do bind them. As a result, they can manage their resources with agility and quickly respond to the demands of a rapidly changing global market.’

The Challenge of Establishing World-Class Universities (Salmi, 2009)

‘The basic principle behind institutional autonomy is that institutions operate better if they are in control of their own destiny. They have an incentive to change if they can directly benefit from their actions; they can be entrepreneurial and reap the rewards… If a group of institutions in a university system is given autonomy to respond to national policy goals as they think fit, there is a reasonable chance that they will choose different ways of reaching the same goal… Had they been centrally directed, this variety would have been unlikely.’

Global Trends in University Governance (Fielden, 2008)

The trend across Europe is now towards increased university autonomy as a means of generating success, and European Commission policy is an affirmation of responsible autonomy:

‘Universities should have the freedom and the responsibility to set their own missions, priorities and programmes in research, education and innovation; to decide on their own organisation and on the bodies necessary for their internal management and the representation of society’s interests; to manage their own physical, financial and intellectual assets for research and education, their budgets (including fundraising) and their partnerships with academia and industry; to recruit and set the compensation rules for their permanent and temporary staff and to target their collective efforts towards institutional priorities in research, teaching and services. In doing so, universities need to accept that they are fully accountable to society at large for their results, including the cost-efficiency with which these are achieved.’

[EC Memo 06/190]

We organise our comments according to the relevant sections of the Bill. Specific proposed amendments are outlined in Annex A.
Section 2: Higher education institutions: good governance

We support the objective outlined in the policy memorandum of embedding the intended Scottish Code of Higher Education Governance as a standard of good practice expected of HEIs. Compliance with good practice in institutional governance is already required by the Scottish Funding Council as a condition of grant (through the financial memorandum defining SFC’s relations with institutions). This is currently achieved through the compliance by all institutions (on a ‘comply or explain’ basis) with the existing Committee of University Chairs’ Governance Code of Practice and similar compliance with a new Scottish code (currently being developed by a working group established by the Chairs of Court) could be secured in the same way through conditions of grant without the need for specific legislation.

However, if the Parliament chooses to legislate in this area, we seek amendments which are consistent with the stated policy intention and with the principle of responsible autonomy.

The amendments focus on four specific areas:

1. The role of the Scottish Ministers. In our view it is not Ministers’ role to determine what constitutes good HEI governance in an autonomous sector. Ministers have a legitimate interest in ensuring that public funds are committed to well-governed institutions, but it is not appropriate for them to be the arbiters of what constitutes good governance. It would be more consistent with responsible autonomy, with existing charity legislation\(^2\), and with the long-established principle that universities should not be subject to political direction, if the Scottish Funding Council had the power which the section currently assigns to the Scottish Ministers. Significantly, the Von Prondzynski review of higher education governance recommended a role for the Council, rather than Ministers, in relation to introducing a new Scottish code of governance.

2. The breadth of the power to require compliance with ‘any principles...which appear...to constitute good practice’ is also of concern since it gives a very wide discretion to prescribe at any time what those principles may be. If the intention is to require observance of whatever specific code of governance may for the time being be in force, this should be stated more clearly. It would be of major concern to universities if Ministers had a power which could in future be used arbitrarily to prescribe ‘good practice’; the development of standards of good practice needs to be owned by the governing bodies who are responsible for its implementation.

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\(^2\) Consideration needs to be given to whether the powers sought by the Scottish Ministers in the Bill would jeopardize the charitable status of HEIs. The Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act") at section 7(4)(b) provides that:

"(4) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if -...(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities."

If the new Bill, once enacted, is taken to form part of the constitution of a higher education institution within the meaning of section 106 of the 2005 Act, then further scrutiny must be given to whether the Ministers' proposed new powers will prejudice charitable status.
3. The reference to ‘management’ is inappropriate and should be removed. Governing bodies are responsible for ensuring that the institution is managed in a way which successfully implements the institution’s mission and strategy. The senior managers of the institution are accountable to the governing body for achieving this. These principles and responsibilities are fundamental to good governance and reflect the principles and practices which apply to other bodies and institutions in receipt of public funds, and are consistent also with the respective accountabilities of Boards of Directors and senior managers in the corporate sector. They would be seriously undermined if Ministers (or the Council) assumed responsibility for determining how universities should be managed.

4. As with the existing Committee of University Chairs governance guidance, it should be possible for the Council to require compliance on a ‘comply or explain’ basis. There may be particular legitimate reasons which the Council can accept for why compliance with a specific requirement of the Code by a specific institution at a particular time is not required, e.g. in relation to requirements for particular committees/committee membership. This may particularly be the case for small specialist institutions or the Open University in Scotland, which do not fit the general model of HEIs. The ‘comply or explain’ principle is the trademark of corporate governance across the UK, as recognised by the UK Corporate Governance Code, which applies to HEIs on this basis.

Section 3: Widening access to fundable higher education

All Scottish HEIs are committed to widening access. The Universities Scotland publication Delivering for Scotland includes a commitment from all Principals that:

“I strongly believe in widening access to our universities. University should be equally open to any learner with the appropriate academic potential to benefit, regardless of their social or economic circumstances. It is of equal importance that those learners are properly supported to complete their studies successfully and fulfill their potential. Each university is able to point to its own distinctive and considerable achievements already made in these areas. I am committed to delivering progress in the next few years and, in so doing, contributing to an improvement in the university sector in Scotland’s record on widening access and retention. Principals share the determination that universities should play the fullest role possible in the pursuit of these goals, working in partnership with schools, colleges and others. This is the spirit in which I will lead work within my institution to meet the outcomes on access and retention that have been agreed with the Scottish Funding Council.”

We do not believe that legislation in this area is necessary, since the SFC can use existing powers in relation to conditions of grant/development of funding instruments to achieve the policy objective. However, we recognise that the Scottish Government has a manifesto commitment in this area. We are therefore seeking specific amendment of the Bill provision to ensure that the regime it describes is more accurately aligned with the Outcome Agreements process. A revised section is proposed in the Annex.
Specifically:

9B(1): The power here is wider in scope than is consistent with the policy intention to enable ‘widening access agreements’, and should be framed more specifically to deliver this. It also creates a confusion or duplication between the duties of Ministers and the Council in relation to widening access, with the cumulative effect of 9(B)(1)-(3) giving both Ministers and the Council detailed roles in determining widening access requirements.

9B(2): The current drafting is unclear about the role of the Scottish Ministers. We would accept the premise that Ministers should in general terms be able to guide the Council to develop widening access agreements with institutions as a condition of grant to institutions, though this is achievable through the guidance which Ministers annually give to the Council on an administrative basis and does not require legislation. However, the current drafting can be interpreted as giving Ministers the power to specify the content of a widening access agreement for a particular institution, which would be directly contrary to the principle of responsible autonomy and would represent a direct political intervention in a university’s admissions decisions, which are an important element of academic independence. This must be resolved by amendment. The current drafting can also be interpreted as enabling Ministers to prescribe in detail the generic form of a widening access agreement, which would be a level of political direction at odds with responsible autonomy. We believe it should be for the Council, working with institutions, to specify the detailed form of a widening access agreement, within the general guidance from Scottish Ministers that such an agreement may be required. A consequential amendment to the Bill’s Schedule is also proposed in the Annex.

9B(3): The description of ‘widening access agreement’ is inaccurate in the light of the policy intention that it should form part of the Outcome Agreements which are negotiated between institutions and the Council as a condition of grant. Specifically, Outcome Agreements cannot be characterised as ‘an agreement under which a higher education institution is to take actions specified by the Council…’. In line with the principle of responsible autonomy, and reflecting the policy and practice on Outcome Agreements, the initiator in defining the content of an Outcome Agreement is the institution itself. So it would be more accurate to define the widening access agreement as ‘an agreement under which an HEI is to take actions proposed by the institution and agreed with the Council for the purposes of…’.

Section 4: Fee cap: students liable for higher education fees

We are content with the policy of this section. We propose technical amendment to ensure that the policy intention is delivered: as currently drafted it is unclear in relation to the fees levels which may be charged to Welsh-domiciled students, for whom the Welsh Assembly Government has put arrangements in place to entitle them to receive grant support for the difference between the maximum Welsh university fee for Welsh-domiciled students (£3,465) and the fee they are liable for if they choose to study at a UK university outside Wales. The new section 9C(3)(b) proposed in the Bill could be
read as restricting the fee charged to these students by Scottish universities to the maximum Welsh university fee.

Section 14: Review of further and higher education

We recognise the existing role of the Council in securing coherent provision and the obligation on Ministers and the Council to ensure that public funds are being used efficiently and effectively. In practice, we believe the Council already has the necessary capacity to do this, through its duty under section 3 of the 2005 Act to secure ‘coherent provision’ and through conditions of grant. We are concerned that the provisions as drafted are inconsistent with responsible autonomy, and that provisions which have been conceived in regard to the college sector are being applied inappropriately to the university sector. This section should be removed or very substantially amended in relation to HEIs.

Particular issues include:

14(2)(a): We do not believe it is the Council’s responsibility to decide on the number of fundable higher education institutions. These are autonomous institutions, and as long as they meet the criteria and conditions of grant for funding by the Council they should be eligible for receipt of funding. Also, if it was known that the future of an HEI as a fundable body was under review, that institution would face particular competitive difficulties in attracting and retaining staff, and in securing research funding and building relationships with industry, and in competing in international student recruitment markets.

14(2)(c): As drafted, this provision is contrary both to responsible autonomy and to academic freedom. It is the responsibility of institutions themselves to decide what ‘types of programmes of learning or courses of education’ to provide, a role in which the Senate or equivalent body, representative of the academic community, has an important voice which was affirmed by the Von Prondzynski Review. While the Council has a legitimate role in discussing with institutions whether provision appears coherent, this role can be discharged without the necessity for this legislative measure.

14(6): In relation to HEIs, any report by the Council would have to be to the governing bodies of the institutions concerned, not to the Scottish Ministers since Ministers are not responsible for academic provision by autonomous institutions. This separation of responsibility is an important safeguard against decisions as to what should be taught where, the content of provision, and the standards to be applied, being subject to political expediency and change every time a new administration assumes office.

Section 15: Duty to provide information to Skills Development Scotland

From discussion with Scottish Government we understand that this section is not intended to create new duties on higher education institutions, since existing data collection and sharing is assumed to be adequate. We will, however, give very careful scrutiny to any order proposed under section 15(1).
Specific Universities Scotland proposals for amendments.

Section 2 Higher education institutions: good governance

Proposed revised section 2:

2 Higher education institutions: good governance

After section 9 of the 2005 Act insert—

“9A Higher education institutions: good governance

(1) The Scottish Ministers may, under section 9(2), impose a condition that the Council must, when making a payment to a higher education institution under section 12(1), require the institution, subject to subsection (2), to comply with the Code of Good Governance for Scottish Higher Education Institutions, or such other code of governance as agreed between the Council and higher education institutions for the time being in force.

(2) The Council may agree with a higher education institution that the application of provisions of the code be varied in particular circumstances proposed by the institution.”

Draft Amendment:

In section 2, page 1, line 15, at the beginning insert <(1)>.

In section 2, page 1, line 17, leave out from <any> to end of line 19 and at end insert <the Code of Good Governance for Scottish Higher Education Institutions, or such other code of governance as agreed between the Council and higher education institutions for the time being in force.>

In section 2, page 1, line 19, at end insert—

<(2) The Council may agree with a higher education institution that the application of provisions of the code be varied in particular circumstances proposed by the institution.>
Section 3 Widening access to higher education

Proposed revised section 3:

3  Widening access to higher education

After section 9A of the 2005 Act, inserted by section 2, insert—

“9B Widening access to fundable higher education

(1) The Scottish Ministers may, under section 9(2), impose a condition that the Council must, when making a payment under 12(1), impose a condition on a higher education institution requiring compliance by that institution with a widening access agreement.

(2) A widening access agreement is an agreement under which a higher education institution is to take actions proposed by the institution and agreed with the Council for the purposes of enabling, encouraging or increasing participation in fundable higher education provided by the institution by persons belonging to socio-economic groups which are under-represented in fundable higher education (either generally or in such education provided by the institution).

(3) For the purposes of this section, a socio-economic group is to be treated as under-represented in fundable higher education if participation in such education by persons in that group is disproportionately low.”

Draft amendment:
In section 3, page 1, line 23, leave out from <terms> to end of line 26 and at end insert <a condition that the Council must, when making a payment under 12(1), impose a condition on a higher education institution requiring compliance by that institution with a widening access agreement.>

In section 3, page 2, line 1, leave out subsection (2)

In section 3, page 2, line 6, leave out <specified by> and insert <proposed by the institution and agreed with>

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3 Renumbering of sub-sections (3) and (4), as (2) and (3), required.
Section 4 Fee cap: students liable for higher education fees

Proposed revised section 4:

4 Fee cap: students liable for higher education fees

After section 9B of the 2005 Act, inserted by section 3, insert—

"9C Fee cap: students liable for higher education fees

(1) The Scottish Ministers may, under section 9(2), impose a condition that the Council must, when making a payment under section 12(1)—

(a) where the payment is made to a fundable post-16 education body which provides fundable higher education, impose on that body a condition that it complies with the requirement set out in subsection (2);

(b) where the payment is made to a regional strategic body, impose on that body a condition that it must, when making a payment under section 12B(1) to any of its colleges which provides fundable higher education, impose on the college a condition that it complies with the requirement set out in subsection (2).

(2) The requirement is that the post-16 education body to whom the payment is made is to secure that the fees paid to it—

(a) by persons in respect of whom it is authorised or required to charge higher fees by virtue of regulations made under section 1 of the Education (Fees and Awards) Act 1983 (c.40) (or by such class of such persons as the Scottish Ministers may by order specify);

(b) in connection with their attending such courses of education as the Scottish Ministers may by order specify,

do not exceed such amount as the Scottish Ministers may by order specify.

(3) The Scottish Ministers, when making an order under this section, must seek to ensure—

(a) that, subject to any exceptions which they consider appropriate, it applies only in relation to fees payable by persons who have a connection with the United Kingdom; and

(b) that the amount of fees payable by a person attending any course of education provided by a post-16 education body in any particular academic year does not exceed the maximum amount of fees, as prescribed in any enactment, payable in respect of any course of education provided elsewhere in the United Kingdom during that year, whether payable by the person attending the course of
education elsewhere in the United Kingdom or by any other person\(^4\) or public authority.

(4) The Scottish Ministers may not specify courses under subsection (2)(b) in such a way as to discriminate between different courses which are—

(a) for the training of persons preparing to be teachers; and
(b) open only to persons holding a degree,

on the basis of the subject in which such training is given.

(5) References in this section to the United Kingdom include references to the Channel Islands and the Isle of Man.

**Draft amendments to section 4:**
In section 4, page 3, line 3, leave out <which that person would by virtue of any enactment be liable to pay if attending any higher education course> and insert <, as prescribed in any enactment, payable in respect of any course of education>.

In section 4, page 3, line 6, after <year> insert <, whether payable by the person attending the course of education elsewhere in the UK or by any other person\(^5\) or public authority>.

\(^4\) Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 contains a definition of a “person” as including “a body of persons corporate or unincorporated and a partnership constituted under the law of Scotland”. It does not specifically include a reference to a public body or government department, for example, the Welsh Assembly Government, and so the words ‘public authority’ have been included in the amendment.

\(^5\) Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 contains a definition of a “person” as including “a body of persons corporate or unincorporated and a partnership constituted under the law of Scotland”. It does not specifically include a reference to a public body or government department, for example, the Welsh Assembly Government, and so the words ‘public authority’ have also been added.
Section 14: Review of further and higher education

Proposed revised section 14:

14 Review of further education

After section 14 of the 2005 Act insert—

“14A Review of fundable further education

(1) The Council may, with the consent of the Scottish Ministers, review the extent to which fundable further education is being provided by post-16 education bodies in a coherent manner.

(2) A review may relate to fundable further education generally or to any particular aspect of such education and may, in particular, include a review of—
   (a) the number of post-16 education bodies who provide fundable further education or any particular aspect of such education;
   (b) the number of regional strategic bodies who provide funding for fundable further education or any particular aspect of such education;
   (c) the types of programmes of learning or courses of education provided by post-16 education bodies;
   (d) the efficiency or effectiveness of the arrangements for the funding or provision of fundable further education or any particular aspect of it;
   (e) whether the coherent provision of fundable further education can be improved by increasing collaboration between any persons involved in funding or providing it;
   (f) the funding or provision of fundable further education, or any particular aspect of it, in particular areas; or
   (g) any aspect of the legislation or administrative framework which governs the funding or provision of fundable further education.

(3) When seeking the consent of the Scottish Ministers to conduct a review, the Council must provide a case for review which—
   (a) describes the scope of the proposed review; and
   (b) explains why it is satisfied that any pre-conditions to conducting a review which the Scottish Ministers may determine are met in relation to the proposed review.

(4) The bodies to which this subsection applies must provide the Council with such information, and make available for inspection such accounts and other documents, as the Council may reasonably require for the purposes of conducting a review.
(5) Subsection (4) applies to—
   (a) post-16 education bodies; and
   (b) regional strategic bodies.

(6) On completing a review, the Council must provide a report of the review to the Scottish Ministers which—
   (a) sets out the conclusions which it has reached;
   (b) explains why it has reached those conclusions; and
   (c) makes any recommendations for action in consequence of those conclusions as it considers appropriate.

(7) The Council, when conducting and reporting on a review, must have regard to the importance of ensuring that public funds provided for fundable further education are used as economically, efficiently and effectively as possible.”

Draft amendment:
In section 14, page 26, lines 1 to 22, in subsection (2), leave out <or fundable higher education> each time it appears.
Paragraph 6(6)(i) of the Schedule to the Bill

Proposed revisals to paragraph 6(6)(i):

(6) In section 9—

(i) in sub-section (12)(a), after “(7)” insert “and in section 9C”,

Draft amendment:
In the Schedule, page 35, lines 7 to 8, after <(12)>, leave out

<i—in paragraph>

In the Schedule, page 35, leave out lines 9 to 13.

Note to amendment:
Paragraph 65 of the Explanatory Notes to the Bill states in line 3 that “Paragraph 6(6) of the schedule to the Bill makes various amendments to section 9 of the 2005 Act including inserting new section 9(5A) amending section 9(6).”. There is nothing else said about the amendment that will be made to section 9(12) of the 2005 Act by paragraph 6(6)(i) of the Schedule to the Bill.

Paragraph 6(6)(i) of the Schedule amends section 9(12) of the Further and Higher Education (Scotland) Act 2005 to permit the Scottish Ministers to impose terms and conditions of grant upon the Scottish Funding Council framed by reference to the criteria for the admission of students if such terms and conditions are in pursuance of the powers that Ministers propose to give themselves in the new Section 9B of the 2005 Act

The combination of section 9B and the amended section 9(12)(b)(ii) and 9(12)(c) gives the Ministers very considerable powers over university admissions, going beyond what would be considered consistent with the principles of responsible autonomy and academic independence for higher education institutions, and the schedule as currently drafted gives Ministers specific power to require institutions to comply with admissions criteria for students. This overturns a specific prohibition at section 9(12)(b) of the 2005 Act as currently in force, which prevents Ministers from setting conditions of grant which interfere with the selection or appointment of academic staff or the admission of students, since these are core areas of academic judgement. This is an unprecedented departure from the principle that political considerations should not be brought to bear on such matters.

In addition to the amendments proposed by Universities Scotland in respect of section 3 of the Bill (in respect of the new section 9B in the 2005 Act), we therefore seek the removal of the provisions contained in paragraph 6(6)(i) of the Schedule to the Bill.