Higher Education Governance (Scotland) Bill
Submission to the Scottish Parliament’s Education & Culture Committee
by the Committee of Scottish Chairs

Introductory Comments

We are writing as the Chairs of the governing bodies of Scotland's universities to advise the Education and Culture Committee of significant concerns we have regarding aspects of the Higher Education Governance Bill.

Scotland's universities are one of the nation's success stories and effective governance has played a part in making them so. It is surprising therefore that, without providing evidence of poor governance, the Government has decided to legislate in this area. The Governance Bill proposes a substantial increase in the level of control Ministers will exercise over the universities. As a general approach, we think this is unwise, and that it will constrain the dynamism and ambition that have made Scotland's universities one of the nation's great successes. It may also threaten the universities’ status as a force in public life that is separate from government, promoting the public good but free to speak truth unto power.

Before responding to the questions asked in the Call for Evidence, we would like to highlight three particular concerns:

1. **Unintended consequences: ONS Classification and Charitable Status**

   The Bill proposes that a Minister will in future specify the composition of university governing bodies, the method of appointment and level of remuneration of their Chairs, and the composition of Senates and academic boards which have responsibilities for academic standards. This degree of increased ministerial control - when added to the requirements already placed on Scottish universities by Outcome Agreements and by the Post-16 Education Act - may lead to their being reclassified by the Office of National Statistics (ONS) as an arm of central government. Should this happen, it would have very serious adverse consequences. It would: prevent universities from retaining income which would in other circumstances be rolled forward for future use, including investment; place a severe restriction on their ability to borrow funds; inhibit their ability to work with commercial partners; and reduce philanthropic support. In addition, as the Bill would give Ministers wide Regulation-making powers, there is a risk that future Regulations might result in the loss of charitable status, which would have negative tax consequences and would further reduce philanthropic support.

   These developments would remove the incentive for universities to engage in entrepreneurial activity and would put Scotland's universities at a competitive disadvantage when compared with those in the Rest of the UK and beyond. They would also have a catastrophic impact on Scottish universities' infrastructure development plans, which are principally funded by astute revenue management from one year to another, and by borrowing and philanthropic support.
2. **Institutional diversity and the Governance Code**

The Bill makes specific proposals on the composition of universities' governing bodies, and of their Senates/Academic Boards. This prescriptive approach shows no understanding of the diversity of Scotland's higher education institutions, or appreciation of the commitment the universities themselves have made, with Ministerial support, to promote good governance. The 2013 Scottish Code of Good HE Governance, with which the universities comply as a condition of public funding, enforces principles of good governance but takes account of the diversity of practice that is essential among institutions of different sizes and which have distinct institutional missions. It provides for governance practice to be continually improved, with a 3-yearly review undertaken in consultation with the universities' stakeholders. We have started preparations for the Code Review planned for 2016, but it will not be possible to consult stakeholders until the effect of the Bill is clear. When it takes place, the Review will be evidence-based and will provide an opportunity for stakeholders to comment on current governance issues.

3. **Inadequate consultation**

The Government has provided no explanation of why it considers that additional Ministerial powers are desirable. Nor have these proposals been subject to adequate public discussion. The potential substantial encroachment of political control was not included in the Consultation on this Bill and is quite contrary to the statements made in that consultation by the Cabinet Secretary for Education, that 'for universities to be successful ... they need to be autonomous institutions', and that 'The Scottish Government does not want to increase Ministerial control over universities.'

It is regarded as being well established that:

- to be proper, a consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken; and that

- any consultation embarked upon must satisfy these requirements, even if there was no legal obligation to engage in a consultation exercise. [Per the Court of Appeal in R v. North and East Devon Health Authority, ex parte Coughlan [2001] QB 213 and R (Eisai) v. National Institute for Health and Clinical Excellence [2008] EWCA Civ 438 respectively].

Given that there are provisions in the Bill which were neither consulted upon nor could reasonably be anticipated from the submissions in response to the consultation it seems clear the requirements for proper consultation have not been satisfied.
Our comments below respond to the questions asked in the Committee’s Call for Evidence. We have also annexed the submission that we made to the Government’s recent consultation exercise, and refer at points to parts of that submission.

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

Effective governance has contributed to the success of Scotland’s universities. Good governance is required as a condition of public funding and governance practice is reviewed regularly. Neither the Government’s consultation paper, nor the policy memorandum accompanying this Bill, have cited evidence of significant problems that would require legislation.

Higher education is a field in which Scotland excels, with universities that compete with the best internationally. Important elements of that success have been a high degree of institutional autonomy and effective governance.

Institutional autonomy encourages dynamism and ambition, and the healthy competition that exists between our universities and those beyond Scotland has had a beneficial impact on Scotland’s economic and social wellbeing. For many years, Scotland’s universities exercised their autonomy within the framework of a UK-wide Code of Governance Practice. However in 2013 the Scottish Chairs, following extensive consultation with the universities’ stakeholders, introduced a new Scottish Code of Good HE Governance. This proposed improvements particularly in relation to diversity, inclusiveness and accountability. The 2014 Report, *The Scottish Code of Good HE Governance: One Year into Implementation* demonstrates that the Code has been effective and has resulted, for example, in new measures to:

- address gender equality, as seen also in a joint commitment in 2015 by the Scottish University chairs;
- include staff and students in the arrangements for appointing Principals, Chairs and independent members;
- include staff and students in arrangements for appraising the performance of Principals and of Chairs; and
- require governing bodies to commission externally-facilitated reviews of their effectiveness, whose outcomes are published.

The 2014 Report also demonstrates that governing bodies are highly inclusive. All have staff and student governors, and a majority of independent members who, as pp. 9-12 of the Report illustrate, are drawn from a wide range of backgrounds; business enterprises, industrial firms, the professions, public sector bodies, charities, cultural bodies, Scottish-based and international.
The universities have committed to review the Code every three years, in consultation with their stakeholders. Compliance with the principles set out in the Code is a condition of public funding.

In summary: effective governance has always been essential to the success of Scotland's universities; governance has been strengthened in recent times with the adoption and implementation of the Code; and the universities are committed to a regular review of the Code, in consultation with their stakeholders, so that their governance practice will remain effective and relevant to changing times.

2 The extent to which the Bill

a will improve higher education, particularly in the areas above

b may alter the higher education sector's current level of autonomy

c may affect lines of autonomy between the Scottish Government, relevant public bodies and the higher education sector.

We do not believe this Bill will improve higher education governance. On the contrary, we believe it will do much damage, particularly in so far as it increases political control over the way our universities are governed.

The Bill proposes to give significant new powers to a Minister to impose governance practice on universities. The areas in which increased Ministerial powers are proposed are:

- deciding on the process for appointing Chairs of university governing bodies (Section 1 (1)), on remuneration to be paid to Chairs (Section 2 (1)) and on their terms of office (Section 1 (2));

- deciding on the composition of universities' governing bodies (Section 8); and

- deciding on the composition of the internal academic boards that have responsibilities relating to universities' curriculum and academic standards (Section 13).

This proposed increase in Ministerial powers:

- will reduce the independence of the universities and the diversity which is one of the sector's strengths;

- runs the risk that a future administration would take far-reaching decisions on university governance without adequate parliamentary scrutiny;

- directly contradicts the Cabinet Secretary's commitment - in the Governance consultation document - that 'for universities to be successful ... they need to be autonomous institutions' and that 'The Scottish Government does not want to increase Ministerial control over universities'.

4
may result, as with Scotland's FE sector, in the Office of National Statistics (ONS) determining that universities are arms of central government, a change that would have a catastrophic impact on entrepreneurial activity in the universities and would remove their ability to retain income to invest in their infrastructure.

A review of universities' status is planned by the ONS, which will consider whether they should continue to be classified as 'Non-profit Institutions Serving Households', or whether that classification should be amended to 'Central Government.' ONS will undoubtedly consider closely the terms of the HE Governance Bill. Three years ago, it reclassified Scotland's Further Education Colleges as 'central government' as a result of high levels of Ministerial influence. In recent weeks it has made a similar decision in relation to the Aberdeen By-pass, and it is possible it will now reclassify Housing Associations in England as a result of increased Ministerial direction. There is a serious risk that ONS will determine that the changes proposed by the HE Governance Bill - when added to the requirements placed on Scottish universities by Outcome Agreements and by the Post-16 Education Act - should result in their being reclassified.

Reclassification has proved difficult for Scotland's Further Education Colleges. However, the impact would be a great deal more severe for the university sector, which has a much higher level of entrepreneurial activity. Reclassification would:

- prevent universities from rolling forward income essential to fund investment in the renewal and improvement of their estates;

- place a severe restriction on the universities' ability to borrow funds, bringing them within the constraints of public sector borrowing, and thus reducing investment in new and improved infrastructure;

- inhibit universities' ability to enter into productive partnerships with commercial bodies because of the issues associated with state aid; and

- have a severe impact on philanthropic income, which currently stands at over £50M per annum. Philanthropic giving supports a range of infrastructure initiatives, and also scholarship opportunities, including for students from disadvantaged backgrounds. Philanthropic income could be further reduced if the provisions of Bill as enacted and the Regulations made thereunder resulted in the loss of charitable status.

An example of the possible impact of ONS reclassification is provided by the University of Glasgow. In February 2015 the University's governing body approved a campus estates strategy involving new capital investment of £450M over the next 10 years. The scale of the investment will clearly have a substantial impact on the economy of the city as well as on the success of the University. The funding strategy for that investment programme is not reliant on Government capital funding. £250M is to be funded by historic and future operating surpluses, £100M by new borrowing,
£50M by philanthropic giving and £50M by property sales. Should the University be reclassified by the ONS then every penny of that funding strategy would be put at risk.

Given the severely detrimental financial impact which reclassification would have on the universities, and - by extension - on the Scottish economy, it would be very ill-advised for the Government to press ahead with the proposed legislation without having first obtained a categorical assurance from the ONS that the new Ministerial powers will not lead to universities being reclassified as 'Central Government.'

3 Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

A healthy balance between legislative and non-legislative measures currently exists in Scottish higher education and is effective in promoting good governance. In 2013, the universities adopted a Scottish Code of Good Governance in Higher Education. Through it, they commit to comply with 18 principles of good governance practice, and to observe closely the supporting guidelines. They have also committed to review the Code regularly, in consultation with their stakeholders. The Post-16 Education Act has made compliance with principles of good governance a condition of public funding for the higher education institutions. Current arrangements therefore strike a balance between legislative measures - requiring compliance with good governance principles - and non-legislative measures in the shape of a governance code that respects institutional diversity and requires that institutions apply the principles in a manner appropriate to their distinct missions and cultures.

In November 2014, the Scottish universities published 'The Scottish Code of Good HE Governance: One Year into Implementation'. This report provides clear evidence of good governance practice throughout the Scottish universities and demonstrates that the Code has enabled the universities to build on existing good practice in areas such as diversity, inclusivity, transparency, accountability and effectiveness.

A robust governance framework therefore exists (see also Page 11 of the Annex), and the Governance Bill and its Policy Memorandum do not provide an explanation as to why further measures are needed at this time, or of any benefits the proposed measures will bring. On the contrary, the proposal to place significant new powers in the hands of a Minister, has serious risks, as discussed in 2 above.

4 The Bill proposes a number of specific changes to higher education governance:

- To require higher education institutions to appoint a chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers
- To require HEIs to include various persons within the membership of their governing bodies
- To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons

Please provide your views on the merit of each of these proposals.

We do not believe that the proposals will improve current practice:

.1 Appointment of the chair of a governing body (Section 1(1))

As required by the Scottish Governance Code, Chairs of governing bodies are now selected through an open and transparent process, with public advertisement of the position and participation by staff and students in the selection. The final part of the process involves a recommendation being made to the governing body. It is essential that this final decision rests with the governing body, so that the Chair will have authority with that body and indeed with the institution's executive officers, and will be accountable to it. Similarly, the governing body has a responsibility to appraise the chair's performance: if a chair is not performing satisfactorily, then the governing body must have the right to replace the chair. A chair mandated by a constituency other than the governing body would be hard to remove. We would draw the Committee's attention to the points made in Section D of the Annex (pp. 14 - 16).

.2 Membership of governing bodies

The Bill includes several specific proposals (Section 8) on the composition of university governing bodies. We have four particular concerns about this Section of the Bill:

- the proposal (Section 4 (1) (c), (d)) that members should be appointed as nominees of trade unions runs contrary to good governance. Governing bodies throughout Scotland already include trade union members, and in some cases trade union officials. However, in each case, that person's membership of the governing body results from their being elected by university staff. The presence of members in the capacity of nominees of a trade union (or of any other similar interest group) would be contrary to good governance. Reflecting a well established principle, the Governance Code states that 'all members shall exercise their responsibilities in the interests of the institution as a whole rather than as a representative of any constituency'. It is essential that all members of governing bodies are in a position to comply with this requirement.
the proposal Section 4 (1) (e) that student members of the governing body should be nominees of a students' association is anti-democratic, removing the existing right of students to elect a representative to the governing body.

taken together, the proposals in Section 4 will result in conflicts between the proposed Act, institutions' current governance instruments, and the terms of the Governance Code, which is a condition of public funding. If all elements of Section 4 are to be adopted within a 25-member governing body, as required by the Code, then one consequence, for example, may be that governing bodies will include fewer staff representing the academic interest.

the prescriptive approach adopted in Section 4 fails to recognise the diversity of the university sector in Scotland.

Section E of the Annex (pp. 16-18) shows the points we made on membership of governing bodies, when responding to the recent consultation exercise.

.3 Membership of academic boards

It is a matter of concern that a Minister would choose to determine the composition of a university's academic board or Senate (Sections 9, 10 and 13). These are bodies, comprised largely of academic staff, whose responsibilities focus on core academic issues such as curriculum, pedagogy and academic standards. Why does Government consider that this is an area in which it should legislate? Academic decision-making is fundamental to the principle of university autonomy and an area in which political intrusion is quite inappropriate.

In addition, see Section F of the Annex (pp 18-19).

.4 Role of the Rector

A final point we would draw to the Committee's attention is that the schedule of legislative amendments accompanying the Bill involves removing the right of students at the ancient universities to elect a Rector to preside at meetings of the governing body (Page 9, Consequential Modifications, Sections 1 and 2). This is a retrograde step in terms of inclusion and accountability. It is also a development that was not proposed in the Consultation, and is not discussed - or even referred to - at any point in the paperwork accompanying the Bill.

Academic Freedom

Please provide your views on the following:
The likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

Are there likely to be any significant constraints - other than legal constraints - on academic freedom? For example, the particular ethos within an institution; funding pressures; institutions' policies on equality and diversity, etc.

Are the situations in which relevant persons can exercise their academic freedom clear? For example, should academic freedom be limited to their work within an institution, as opposed to views they may express outwith the institution?

Academic freedom is essential to the work of a university. The law currently requires all Scottish universities to have regard to the desirability of ensuring academic freedom and the 2013 Scottish Code requires each governing body to 'ensure the protection of academic freedom of relevant staff in compliance with relevant legislation'. The universities are required to address that duty as a condition of public funding.

The new Bill:

- proposes a longer definition of academic freedom so as to refer to 'freedom to encourage the exploration of new ideas'. We have no issue with this wording. However, the current definition was approved by the Scottish Parliament as recently as 2005 and we believe it is already understood to encompass the exploration of new ideas. We would therefore question the need for a new definition.

- states that HEIs 'must aim to ensure' academic freedom, whereas the current legislation says that they 'must have regard to the desirability of ensuring academic freedom'. It is difficult to see what the Government is trying to achieve through these new words. It is of concern, however, that its stated intention is to strengthen an obligation on the universities, when it has not explained what impact this strengthened obligation would have, and why it sees the new obligation as more desirable than the old.

- proposes these measures while simultaneously seeking to establish Ministerial control over the composition of University governing bodies and academic boards. Academic freedom will not be served well by increased political control of universities' decision-making bodies.

Section B of the Annex (p.13) is the input we made on the subject of Academic Freedom in response to the Government's recent consultation paper.
Concluding Comments

As Chairs of university governing bodies, we are strongly committed to effective higher education governance.

We believe the Government's proposals, far from improving higher education governance, will do it great damage, through establishing greater political control over the universities, reducing their capacity to act as dynamic autonomous bodies, and risking the very serious consequences of ONS reclassification and the loss of philanthropic support.

This danger arises from the proposal to increase Ministerial powers, a matter that was not the subject of public consultation and which appears to have been inserted into the draft legislation as an ill-considered afterthought.

In view of the lack of public debate on the matter of Ministerial powers, it is essential that there be thorough Parliamentary scrutiny of this Bill.

CSC, 3.9.15

Note 1 - *The Scottish Code of Good HE Governance: One Year into Implementation* is available at:

With the approval of the then Cabinet Secretary for Education, the Chairs of Scotland’s HEIs published a Scottish Code of Good Governance (‘the Code’) in July 2013. It was compiled following consultation with student, staff and independent governors and with the trade unions. We started from a strong position, because the long-standing success of Scotland’s universities reflects, in part at least, their high standards of governance.

The adoption of the Code has now improved an already strong position, and we believe Scotland’s approach to university governance compares well with that of any university sector in the world. Compliance with the principles of good governance has been established by the Post-16 Education Act as a condition of public funding, and to that end the Funding Council has endorsed the Code as reflecting good governance practice. As the compliance review, published in November 2014, demonstrated, all of Scotland's HEIs have engaged positively with the Code, and many actions have been taken to improve governance practice in relation to diversity, inclusiveness, transparency, accountability and effectiveness. Governance practice develops, and CSC has therefore committed to a 3-yearly review of the Code. The first review is scheduled to take place in the first half of 2016.

We would like, as in the past, to engage constructively with the Scottish Government to discuss how best to maintain and improve higher education governance. We welcome the Government’s acknowledgement, restated most recently in the Ministerial Foreword to the Consultation Paper, that ‘for Universities to be successful, and in order to avoid undue influence from outside, they need to be autonomous institutions’, and the clear statement that ‘the Scottish Government does not want to increase Ministerial control over universities’. We also welcome the Government’s recognition of the diversity of institutions that make up the higher education sector. A great merit of the Code is that it achieves a sector-wide commitment to broad principles of good governance, with the flexibility for individual institutions to tailor their application to their circumstances.

Our guiding principle in considering the Government’s consultation is whether the proposed legislation will strengthen the governance of HEIs as autonomous institutions with diverse missions. We support proposals which we believe will do just that, and oppose others which we believe will weaken governance. We have also identified several proposals which we think are better incorporated in a review of the Code, rather than in primary legislation.

The following comments reflect our support for the submission by Universities Scotland, while raising issues that are properly of particular interest to the Chairs.
A. PRIVY COUNCIL

1. Do you think that the mechanism for approving governance changes through the Privy Council should be retained?

2. Do you agree that the functions of the Privy Council, as set out above, should be transferred to a committee which operates entirely in Scotland?

3. Do you agree that any such committee to which those current functions of the Privy Council as already set out should comprise the First Minister, Lord Advocate and the Lord President of the Court of Session?

   No  √

4. Do you agree that any such committee, to which those current functions of the Privy Council as already set out are transferred to, should be subject to the scrutiny of the Scottish Parliament?

5. Could individual institutions be afforded greater autonomy to make changes to their governance without seeking permission from the Privy Council, or a replacement Scottish Committee? If so, what functions might this cover?

   Yes  √

The consultation proposes to transfer to a Scottish committee the current functions of the Privy Council in relation to higher education governance. We would welcome arrangements which were more accountable and efficient and would:

- be transparent in their operation;
- be suitably resourced, so that matters can be expedited promptly;
- operate on a non-political basis, with decisions reflecting the advice of impartial experts in higher education governance and in public administration; and
- improve efficiency by delegating to individual HEIs the ability to modernise matters of internal organisation that currently require Privy Council approval.

We would advise that, in framing detailed proposals, the Government consult with the Scottish university secretaries, who have substantial experience of working with the Privy Council and therefore a practical understanding of the processes which the Government’s proposals seek to improve.

It is our understanding that, whatever new approach may be considered, there will be a continuing requirement for the Chartered institutions to have Her Majesty’s approval to changes in their constitution.
B. ACADEMIC FREEDOM

6. Do you agree that the principle of ‘academic freedom’ currently defined in legislation should explicitly refer to freedom to encourage new ideas?

7. If you do agree, what might the risks be?

8. Do you agree that HEIs should be required by legislation to adopt a statement on their implementation of the statutory protection of academic freedom which they should present to the SFC and which would be treated as a condition of grant?

    No √

9. Do you think there are any further measures which should be included in a new definition of academic freedom?

Academic freedom is essential to the work of a university, and the 2013 Scottish Code requires each governing body to ‘ensure the protection of academic freedom of relevant staff in compliance with relevant legislation’. HEIs are required to address that duty as a condition of public funding.

The consultation contains a proposal that HEIs ‘should be required by legislation to adopt a statement on their implementation of the statutory protection of academic freedom which they should present to the SFC and which would be treated as a condition of grant’. This suggested approach would effectively repeat the practice already set out in the Code, and it is therefore difficult to see why it is being proposed.

The consultation also proposes that the definition of academic freedom, per the 2005 Further and Higher Education (Scotland) Act, should be altered to refer to ‘freedom to encourage the exploration of new ideas’. We have no issue with this wording, but we believe that academic freedom is already understood to encompass the exploration of new ideas, and so would question the benefit of a new legislative definition. We are not aware of any concern that the current definition is inadequate or that there is a problem which requires to be addressed. That being said, this is a matter on which evidence could be sought, including from academic governors and trade unions, through the 2016 review of the Governance Code.
C. ROLE OF PRINCIPALS

10. Do you agree that a provision to describe the head of the university as the ‘chief executive officer’ should be introduced in legislation?

No √

11. If the role of the Principal is set out in legislation as chief executive officer do you agree that the working job title should continue to be ‘Principal’?

12. If you do not agree, what do you think the head of the university should be called?

Among the duties required of a governing body by the 2013 Code is that of ‘appointing the Head of the Institution (The Principal) as chief executive officer’. That duty expresses neatly the current position within our universities, where the Head of the Institution is widely referred to as 'The Principal', and the Principal's duties are understood - by the governing body and by the Funding Council - to be those of a chief executive officer.

The consultation paper suggests that legislation should prescribe that the head of the University should be described as the 'chief executive officer'. We are not aware of any evidence that this change is required and we believe that it is unnecessary, and inappropriate, and that it would be of concern to the University's students, staff and stakeholders. It is unnecessary, because the role of chief executive officer is already understood. It is inappropriate, because surely it is for an employer, rather than the government, to determine an employee's formal job title. And it would cause concern because the titles 'Principal' and 'Vice-Chancellor' (which in some cases have been used for several centuries to describe the Head of a Scottish University) are widely recognised by the University communities, and by business and philanthropists in Scotland and internationally.

D. CHAIRING OF GOVERNING BODIES

13. Do you agree that a pool of candidates for the position of chair of the governing body should always be selected through an open and transparent process?

Yes √

14. Do you agree that the recruitment process should include open advertisement of the position?

Yes √
15. Do you agree that open advertisement of the position would help to attract a wider pool of candidates?

Yes √

16. Do you agree that the selection process should culminate in an election by a group of representatives of key stakeholders both internal and external to the university?

17. What do you think the composition of the group of representatives that elect the chair should be?

See comments after Q 19.

18. Would you welcome universities offering suitable remuneration for elected chairs?

19. Do you have any other comments you wish to add?

The HEIs have recently adopted a method of appointing chairs as set out in the Code. It is transparent and involves public advertisement. It requires student and staff participation, a robust interview process and a formal decision by the full governing body. And it has been endorsed by the Funding Council as reflecting good governance practice. The consultation document does not demonstrate awareness of the changes introduced by the Code, nor of the impact which these have had on university practice as evidenced in the compliance report which we published in November 2014. Here is what the Code states:

'Appointment of the chair ... shall be managed by a nomination committee ... which includes at least one appointed staff member ... and one student member of the governing body.

When selecting a new chair, a full job description including a description of the attributes and skills required, an assessment of the time commitment expected and the need for availability at unexpected times shall be produced. In developing such a job description arrangements shall be put in place to consult staff and students before it is finalised. The selection process shall include a formal interview of short-listed candidates.

When vacancies arise in the position of the chair ... they shall be widely publicised both within and outside the institution.'

We agree with the consultation that chairs should be selected through an open and transparent process, that this should include public advertisement of the position,
and that key stakeholders (i.e. staff and students) should be involved. However, we oppose legislation in this area, since we have a recently established approach that is robust and is followed by all of Scotland’s HEIs as a condition of public funding.

From the perspective of ensuring good governance, the decision on the appointment of the chair must rest with the governing body itself. It is because a chair is selected by the governing body that s/he has authority with that body and indeed with the institution's executive officers. Similarly, as the Code makes clear, the governing body must make arrangements to appraise the chair’s performance: if a chair were not performing satisfactorily, then the governing body would have the right and the duty to replace the chair. In this context, we are very concerned about text in the consultation that refers to the election of a chair.

The meaning of the consultation’s proposal that ‘the selection process should culminate in an election by a group of representatives of key stakeholders both internal and external to the University’ is not clear. Nor is it clear how elections would be made to work in practice. If the nature of the election was that the preferred candidate would require to be endorsed by the full governing body - including, as it does, staff, student and independent members - then we would support the proposal, which could be clarified in the forthcoming review of the Code. However, the text could be interpreted as implying election by a much wider group. Such an approach would be damaging to effective governance and would serve to diminish the role of the chair. It would create the possibility that a chair might be elected in whom the governing body did not have confidence, and would make it extremely difficult for a governing body to take action where a chair failed to address the responsibilities of the role. Chairs have to be accountable to the body which they chair. Additionally, we are concerned that an electoral process involving a large electorate would serve to politicise the leadership of the governing body, and in doing so would deter many well-qualified people who are willing to contribute to university governance as a matter of public service, but who would not wish their application to be public knowledge or part of an electoral process. For all these reasons we strongly oppose the appointment of the chair of a governing body other than by the members of that body.

E. MEMBERSHIP OF GOVERNING BODIES

20. Do you agree with the proposed requirement outlined for membership and composition of the governing body?

No    √
21. Is there any representative/body not currently proposed for inclusion in membership of the governing body that you believe should be represented?

   No   ✓

22. If there is a representative/body you believe should be included in the membership of the governing body, what do you believe they would bring to the governing body that isn’t already there?

23. By what means do you think that the principle of equality should be embedded in establishing the membership of governing bodies?

   While it is not part of the current consultation, the consultation document identifies the Government’s desire to improve gender balance on governing bodies. CSC are finalising a new and specific policy to do everything which we reasonably can to achieve gender balance in the membership of our governing bodies. We will measure success by the scale of progress by 2018, as vacancies arise. The commitment will be reviewed in the light of the ECU guidance expected later in the year and the forthcoming Code review. However, governing bodies can only manage this directly through the appointment of independent members. Staff and students are responsible for the gender balance of the members whom they elect to governing bodies, and we would hope to work constructively with the staff and student interests to help them to contribute to this overall goal of gender equality in governing body membership.

   The recently published compliance report identifies the good progress that has been made over the last year in improving the gender balance on our governing bodies. For example, women have filled five of the last six chair vacancies. It is worth noting that some of the successful female candidates (four of whom are now in post) would not have pursued this role had they been required to go through a public electoral process.

24. Do you have any other comments you wish to add?

   The Scottish Code states: that there should be a balance of skills and experience among governing body members, sufficient for it to meet its primary responsibilities and to ensure stakeholder confidence; that there should be a clear majority of independent members; and that there should be no more than 25 members. The consultation endorses these principles, and in addition proposes that governing bodies should have at least two student members, at least two elected staff members, two members nominated by trade unions; and up to two
alumni members.

University governing bodies are already inclusive of internal stakeholders: indeed the recent compliance report on the Code demonstrated that every HEI has at least one academic and one support staff member and at least one student on its governing body. In these circumstances, we consider it would be unwise to impose a single membership model on such a diverse range of institutions and so we think a legislative approach in this area is misguided. If further guidance is required, the 2016 review of the Code presents an opportunity to provide this.

We oppose strongly the suggestion that there should be trade union representatives on Court; 'one member nominated by academic and related unions and one by administrative, technical or support staff unions.' All Scottish universities have staff members on their governing body, something we strongly support, and trade union representation could have the inadvertent effect of reducing the staff voice if it meant a reduction in places for directly elected staff. In addition, the presence of members in the capacity of representatives of a trade union (or of any other similar interest group) would be contrary to good governance. Reflecting a well established principle, the Governance Code states that 'all members shall exercise their responsibilities in the interests of the institution as a whole rather than as a representative of any constituency,' and that, 'No member may be bound, when speaking or voting, by mandates given to him/her by others.' It is essential that all members of Governing Bodies are in a position to comply with these requirements.

F. COMPOSITION OF ACADEMIC BOARDS AND APPOINTMENT OF MEMBERS

25. Do you agree that the academic board should be the final arbiter on all academic matters in all HEIs?

   No   V

26. Do you agree that, with the exception of the Principal and the Heads of School (or equivalent) who should attend ex officio, all other members of the academic board should be elected by the constituency that they represent?

27. Do you agree that elected members should form a majority of the total membership of the academic board?

28. By what means do you think that the principle of equality should be embedded in establishing the membership of governing bodies?
29. Do you agree that academic boards should have no more than 120 members?

30. Do you agree that elected members should form a majority of the total membership?

31. Do you have any other comments you wish to add?

Senates in the ancient universities are required, by the 1889 Universities (Scotland) Act to 'superintend and regulate the teaching and discipline of the University'. In practice, they make decisions relating to academic standards, teaching practice, the curriculum, degree awards and student discipline. However, their decisions are formally subject to review by Court, and all decisions at a strategic level or involving resource considerations are decisions of the Court rather than the Senate. The Governance Code makes clear that each institution must have a single governing body which is unambiguously responsible for overseeing the institution's activities and which is responsible for taking all final decisions on matters of fundamental concern.

The consultation document proposes legislating to specify the size and shape of Academic Boards. We do not think this is appropriate when our higher education institutions are so diverse, nor do we believe there is a problem here that requires legislation. In addition, although the Consultation paper does not mention this, the Code not only requires that Governing Bodies ensure that regular effectiveness reviews of the senate/academic board and its committees are undertaken, but that the senate/academic board revises its structure and processes, in the light of that review. If there was evidence of a need to consider this issue further, it would be possible to include it within the review of the Governance Code in 2016.