Higher Education Governance (Scotland) Bill

A significant number of responses to the Consultation Paper on a Higher Education Governance Bill highlighted the unique position of the Conservatoire within Scottish higher education. Amongst others, respondents included the Conservatoire’s Student Union and sole trade union (EIS) representative, all five directors of Scotland’s national performing arts companies and the Director of the Edinburgh International Festival. The common theme of those responses was that the Conservatoire is a small and intimate artistic and academic community, different from any university not only in scale and disciplinary focus, but also in culture. Because of those significant structural and cultural differences, we believe that a “one-size-fits-all” approach to legislation for a diverse sector will diminish the quality of the Conservatoire’s governance, rather than enhance it. The strength of our governance arrangements is that they are tailored to our needs, within the terms of statute and the Scottish Code of Good Higher Education Governance, in a way that is relevant and proportional to the nature of the institution.

The Conservatoire is unique amongst Scottish HEIs because:

a. We are the only Conservatoire in Scotland - our peers and comparators are all furth of Scotland;

b. our focus is on one specific professional area and one vocational sector – the performing arts - and the “output” of the Conservatoire and its students is open to public scrutiny through the hundreds of performances we produce each year;

c. we are Scotland’s smallest HEI (the smallest of three small specialist institutions);

d. we have only some 40 full-time academic staff, but a very high proportion of part-time hourly paid staff drawn from the professions;

e. our Academic Board consists of a maximum of 15 members (including an external member from another HEI);

f. we enjoy constructive relationships with a number of trade unions (including the Musicians Union, Equity and EIS), but we do not recognise formally any trade union for negotiating purposes;

g. we have a unique structure in that we are a “not for gain” Company Limited by Guarantee, with shareholders. The shares are held in equal parts by elected staff and student Governors, the Principal, the Chairman
and one external shareholder. The AGM is open to all students, staff and other key stakeholders, any of whom are able to ask questions and hold the Board to account. Shareholders also have the opportunity to put resolutions to the meeting; and any member of staff or student has the right to attend and observe meetings of the Board of Governors.

In the light of the concerns expressed in this response, which represents the joint views of the Conservatoire’s Board of Governors, our Academic Board and our elected staff, student and Trade Union representatives, we would ask the Committee, and the Scottish Government, to consider the following questions:

- What are the shortfalls in the Conservatoire’s governance arrangements that this Bill seeks to address, in respect of the stated objective of enabling something “more modern, inclusive and accountable” and what identifiable benefits might be expected should the proposals in the Bill be adopted? The Conservatoire community shares the principal objectives of the Bill, but believes its current arrangements already meet them in a way tailored to the specific requirements of the institution.

- In view of the opposition to a number of the key proposals in the Bill across the Conservatoire community, which includes the democratically elected representatives of its key stakeholder groups, is the imposition of a sector-wide, “one-size-fits-all” model upon the Conservatoire by legislation genuinely warranted and truly in the spirit of democracy?

To ensure a “modern, inclusive and accountable” approach, we would suggest that, at a minimum, a "gateway" procedure be incorporated into the Bill in respect of the most contentious proposals, namely the direct election of a Chair and the nomination of Trade Union and other representatives to the Conservatoire’s Board of Governors. These proposed requirements could be made subject to confirmation through a referendum of staff or students as appropriate. Such an approach should be relatively straightforward to draft as a clause in the Bill and would surely meet its democratic intent.

What follows are responses to the Committee’s questions which, to reiterate, have been agreed by Conservatoire’s Board of Governors, our Academic Board and our elected staff, student and Trade Union representatives.
The Committee's questions

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

We believe that the Conservatoire’s current governance arrangements are fit for purpose. A particular strength of those arrangements is that they are substantially tailored to the specific needs of the Conservatoire within the terms of relevant statute (including charity and business law) and the Scottish Code of Good Higher Education Governance. Our touchstone in considering each of the questions posed by the Committee is whether prospective changes in such arrangements could improve on our existing model – clearly, we would be opposed to any measures that we believe would weaken governance.

The Conservatoire prides itself on its modern inclusiveness and on its accountability to its stakeholders. There are two elected student members of our Board of Governors, two elected staff members and an appointed member from the Academic Board. The lay members of the Board include a number from the performing arts community as well as those drawn from the various business professions and other walks of life. All students and staff have the right to attend and observe Board meetings. Shares in the Company are held in equal part by elected staff and student members, together with the Principal, the Chairman and an external member representing the family of the philanthropists who financed the Conservatoire’s antecedent institution, the Glasgow Athenaeum, which was set up as a Company Limited by Guarantee with shareholders – the shareholders being those individuals who provided philanthropic funding to set the organisation up. All students and staff, together with representatives of all key stakeholder groups, are invited to the Annual General Meeting and may ask questions of the Board. In addition, shareholders may put resolutions to the AGM. All this is, of course, in addition to our accountability to the Scottish Funding Council for the use of that element of our funding that comes from Government. As a charity we are accountable to OSCR and as a company we are subject to company law.

In accordance with the Code (and its own long-standing convention), the Board of Governors conducted an externally facilitated review of its effectiveness, which reported in January 2014. The conclusions of the external facilitator were:

It is evident from both the responses to the questionnaire and the extensive interviews on a one-to-one basis that the Board is highly effective. There is much good practice and a strong sense of shared purpose and commitment to the values of the Conservatoire. Also, by any standards of comparison across Scottish HEIs, the level of expertise and experience represented on the Board is outstanding.

Equally, what constitutes good practice is constantly evolving, and the new Scottish Code reflects this. It is hoped that the commentary above will assist the Board in identifying how it might further improve its own effectiveness so as to ensure that the Conservatoire continues to thrive in the future.
Against that background, it is difficult to see how any further legislation could improve upon the structure and processes that are already in place.

**The extent to which the Bill**

**(a) will improve higher education governance, particularly in the areas above**

We believe that the provisions of the Bill will weaken the Conservatoire’s governance, rather than improve it. The Conservatoire’s success has not been achieved by chance - it has benefitted greatly from its current governance arrangements. Governance should be judged on what it delivers and, on that basis, we would fundamentally question the need for new legislation in respect of the Conservatoire’s governance. We believe that the case for this Bill has not been made.

**(b) may alter the higher education sector’s current level of autonomy**

We believe that the provisions of the Bill will significantly diminish current levels of autonomy – particularly in respect of proposals for the appointment of the Chair of the Conservatoire’s Board of Governors and in determining its membership. We are particularly concerned about both the extent to which these arrangements will be determined by Scottish Ministers and the extent to which they will be prescribed in an inappropriately detailed way.

**(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector**

We share the sector’s concern that the Bill introduces a risk of ONS reclassification of higher education institutions and that it endangers HEIs’ charitable status. We would emphasise the catastrophic impact on our ability to manage our finances and to ensure the Conservatoire’s financial sustainability if those risks were realised, particularly in respect of our ability to retain surpluses generated through entrepreneurial activities, to attract philanthropic giving and all of the financial and other implications that would flow from the loss of our charitable status.

The Bill is part of a wider package of recent reforms to higher education governance, including the development of a Scottish Code of Good Higher Education Governance.

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

No and no. We do not believe that the case for new legislation has been made – it is not at all clear what problem these proposals are seeking to solve. We believe that blanket legislation for a sector that includes institutions as different one from the other as the University of Edinburgh, UHI and the Conservatoire would lead to compromised and less effective governance, rather than achieve the desired aim of enhancing governance. We also believe that unintended consequences would inevitably flow from an attempt to legislate on a “one-size-fits-all” basis for such a healthily diverse sector - we are, in fact, perplexed by Scottish Government’s desire
to impose a 'level of consistency across the sector' beyond that already assured by the Scottish Code of Good Higher Education Governance. The preface to this response sets out some of the unique characteristics of the Conservatoire which distinguish it from the Universities.

A more effective approach to ensuring good governance surely lies in the development and application of the Scottish Code of Good Higher Education Governance. Every Scottish higher education institution is required to comply with the Code as a condition of public funding. It therefore has the force of legislation, but without the complexities, inflexibility, unintended consequences and costs associated with “one-size-fits-all” legislation. We believe that the Code offers the Conservatoire, and the sector, the flexibility that we all need to ensure effective and responsive governance and, in doing that, it also addresses the legitimate interests of our stakeholders.

**Specific proposals**

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

- To require higher education institutions to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers.

The Scottish Code of Good Higher Education Governance requires that the search and selection process for a Board Chair should include open advertisement and interview based on an agreed role specification, with direct student and staff involvement at all stages in the process. All of the bodies involved in that process – the Nominations Committee, the selection panel and, of course, the Board of Governors itself – must have student and staff members.

We believe (and in accordance with the Scottish Code of Good Higher Education Governance) that the Chair of the Conservatoire’s Board of Governors should be appointed on the basis of a democratic and inclusive process. We also believe that our Chair should be appointed by our Board of Governors which, of course, includes elected staff and students and has independent Governors in the majority.

The Chair does not only chair meetings. The role is intense, strategic and needs to be tailored to the individual circumstances of the Conservatoire and take account of the personal chemistry between the Principal, the Chair and the entire membership of the Board. The Chair of the Board must have the confidence of the Board and be accountable to it for her/his performance. S/he must also maintain a position of authority with the Board and with the Conservatoire’s senior management and stakeholders. The best way to ensure those essential outcomes is for the Chair to be appointed by the Board - no other process could deliver a Chair in a way that would both engender the Board’s confidence in its Chair and ensure the Chair’s accountability to the Board. In the extreme case of a Chair whose performance was considered to be unsatisfactory, presumably the Board would not have the authority to remove the Chair from post if s/he had been appointed by some other body e.g. by an electorate other than the Board itself? That scenario would be intolerable.
We note that the Financial Memorandum that accompanies the Bill significantly underestimates the commitment required of a Chair, which we would conservatively estimate to be one day per week. It is of concern that the Financial Memorandum should so significantly underestimate that commitment – it could be reasonably inferred from that that Scottish Government is not as well-informed about HE governance as it should be.

This response is being submitted on behalf of the Conservatoire’s Board of Governors, which includes 2 elected student Governors, 2 elected staff Governors and a staff Governor nominated by Academic Board. All 5 of those Governors wish to record their unequivocal support for the whole Board’s position in relation to the appointment of its Chair.

Finally, we do not believe that there should be any changes to current arrangements for the appointment of the Conservatoire’s Chair without the support of its staff and students.

- To require HEIs to include various persons within the membership of their governing bodies

We raise the following objections to these proposals against a background of a very positive relationship with our trade union representatives, who contribute positively to development of the Conservatoire through well-established processes.

The Conservatoire does not recognise formally any trade union for negotiating purposes, although the EIS has consultative rights. In the context of a unitary board structure, we believe that statutory trade union representation on our Board would run counter to good governance. Under current arrangements, there is nothing to prevent a trade union member or representative from standing for election to the Board (we have had that scenario in the past). However, elected staff Governors have precisely the same rights and responsibilities as all other Governors and therefore they should not act as if delegated by the group of staff to which they belong. There is a clear implication that trade union nominated Governors would be expected by their nominating trade unions to use their position on the Board to advance union policy, rather than to act in the overall interests of the Conservatoire. We believe that trade union appointed Governors would, quite simply, create a significant, continuous and irreconcilable conflict of interest – irrespective of what the Bill may eventually say on shared and corporate responsibility of all Governors.

Inevitably, union policies are developed with large universities in mind and they risk introducing to the Conservatoire an inappropriate, adversarial and politicised approach to employment relations (as, more generally, does the proposal for elected Chairs) that is alien to the culture of our small and intimate Conservatoire. A proposal that trade union members should have a preferential right to positions on the Board that are not open to non-trade union members is also undemocratic, particularly in the context of an institution in which a significant percentage of staff is not, as it happens, in trade union membership. The Conservatoire’s sole EIS representative fully supports the view expressed in this submission, believing that Board membership would compromise a representative’s ability to effectively promote the interests of her/his members.
We are extraordinarily proud of our alumni and have very positive relationships with them. They are engaged with the Conservatoire in myriad ways, from the strategic to the operational. However, the proposal to include two alumni as of right without reference to the skill set that they would bring to the Board represents an unnecessary imposition upon our autonomy. We welcome applications from alumni for our independent Board positions that, collectively, need to cover a wide range of cultural sector and general business skills and insights. However, it is in the interests of the Conservatoire that we remain free to appoint independent Governors on the basis of their match with the Board’s skill requirements and commitments to diversity and gender balance. We are also concerned that any process through which alumni would be appointed to the Board would have the potential to become politicised and divisive.

A further consideration is the opportunity cost of reserving Board positions to meet a central dictat. If we were to consider enlarging the Conservatoire’s Board and it needs to be kept to a manageable size, then categories exist with an arguably stronger claim to representation than those proposed e.g. part-time hourly paid staff (we employ significant numbers of part-time specialist instrumental teachers who, by and large, will also be professionally active as orchestral musicians).

- To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons.

The precise membership of Academic Board should be an internal matter and should reflect internal structures. It should also be able to evolve flexibly as those structures evolve; we believe that legislation would inhibit that evolutionary process. By way of example of our difference within the HE sector, and because of our size and the specialist focus of our curriculum, we invite a representative from another HEI to join our Academic Board. We have found that externality very useful and we would not want to lose it because of “one-size-fits-all” legislation framed with quite different sorts of institutions in mind. The Conservatoire’s Academic Board has a membership barely into double figures. To propose that the number of its members should be restricted to 120 underscores the folly of attempting to frame legislation to encompass a diverse higher education sector.

Members of Academic Board are collectively responsible for the quality and standards of the Conservatoire’s academic provision – they (including elected and nominated members) are not constituency representatives. That general principle of good governance provides an essential underpinning for the collegiate nature of Academic Board.

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

Academic freedom

The Bill will also replace the current legal definition of academic freedom “with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals”.
While the other provisions in the Bill only focus on higher education institutions, this provision will apply to publicly-funded colleges and all higher education institutions (collectively known as post-16 education bodies). Post-16 education bodies are to uphold the academic freedom (within the law) of all relevant persons i.e. those engaged in teaching, the provision of learning or research.

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

The Conservatoire already has a robust policy that protects and promotes academic freedom. Our institutional position is underpinned by the Scottish Code of Good Higher Education Governance and the provisions of section 2 of the Post-16 Education (Scotland) Act 2013. The practical effect of these provisions will therefore be nil.

The Bill states that academic freedom is to be exercised “within the law”.

6. Are there are 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.

No.

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

We believe that existing employment law and other legal provisions to protect and promote academic freedom are fit for purpose.