POLICY SUBMISSION

SUBMISSION TO THE EDUCATION AND CULTURE COMMITTEE’S CALL FOR EVIDENCE ON THE HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL
SCDI is an independent and inclusive economic development network which seeks to influence and inspire government and key stakeholders with our ambitious vision to create shared sustainable economic prosperity for Scotland.

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Introduction

1. SCDI is an independent membership network that strengthens Scotland's competitiveness by influencing Government policies to encourage sustainable economic prosperity. SCDI's membership includes businesses, trade unions, local authorities, educational institutions, and the voluntary sector.

2. Higher Education Institutions (HEIs) represent a significant economic and social strength for Scotland, and ensuring their ongoing success is a key concern for SCDI and its members. Delivering the right skills in the correct places at the appropriate time is essential for our businesses to compete and the research and innovation produced in our HEIs is of global economic significance to Scotland.

3. Scotland’s universities have continued to perform remarkably well in international rankings despite the increasing competitiveness of the sector at a global level. They have attracted investment in research infrastructure and talent from around the world, and opened bases and formed partnerships in overseas markets to the benefit of Scottish education and the Scottish economy. In addition, technological development is likely to drive significant changes in the way higher education is structured and delivered in future, and the ability of HEI leadership to respond to changes in demand and to identify, develop and focus resources on emerging opportunities is a critical aspect of the success of Scotland’s universities and this will only become more salient as competition increases.

4. HEI autonomy is an important concept which has allowed this continuing success on the international stage. It has supported the development of strong partnerships with businesses, and has been a driver for the development of the world-leading university sector in Scotland.

5. SCDI welcomes the Scottish Government’s focus on ensuring HEIs remain successful drivers of economic and social progress, however, the Higher Education Governance (Scotland) Bill does not demonstrate the need for introducing additional legislative change beyond the very recently established Scottish Code of Good HE Governance. This Code has already introduced requirements which enhance the role of students and staff in the appointment of the Chair, independent members and the Principal, and has already led to enhanced diversity of Chairs and governing body members. We are concerned the Bill’s proposals may hinder these reforms.

6. Finally, there are wider implications which must be considered relating to the appropriateness of Scottish Parliament legislating on the governance arrangements of autonomous institutions.

The Committee's questions

7. Governance in higher education meets all requirements of and is highly accountable to many organisations. As well as accountability for the funding from the Scottish Funding Council (SFC), they obtain funds from research councils, the European Union, business and charities, all of whom demand significant reporting. Further, courses have to meet standards set by the Quality Assurance Agency for Higher Education (QAA) as well as accreditation by learned societies and professional bodies. As charities, they have to meet the regulations of Office of the Scottish Charity Regulator (OSCR) whereas other
UK universities are exempt from the charities act. The accountability is therefore greater than many other bodies.

8. SCDI is very concerned that the Ministerial controls proposed in the Higher Education Governance (Scotland) Bill substantially heighten the risk that the Office for National Statistics (ONS) will reclassify higher education institutions as central government bodies. This would fundamentally damage the university sector’s capacity to support Scotland’s Economic Strategy.

9. Classification of higher education institutions by ONS as Central Government would comprehensively transform HEIs’ financial capabilities, through restrictions on borrowing, the inability to create surpluses, reduced investment in improving facilities, the loss of philanthropic income and an inevitable reduction of partnership with the private sector. This would profoundly affect HEIs’ ability to earn entrepreneurial income and to invest, with consequences for their ability to operate with success in a competitive global context. In aggregate, the Scottish university sector currently competes to earn 65% of its income from sources other than the core Scottish Government grant, including the creation of £1.3 billion of export earnings from outside Scotland. Its capacity to lever these additional resources into the Scottish economy would be severely compromised by ONS classification. It would put at risk the university sector’s £370 million annual investment in educational, research and innovation infrastructure, which is principally supported by investment of surpluses, borrowing and philanthropic support, which are the sources of funding most prejudiced by ONS reclassification.

10. The ONS reclassification risk has already been realised for further education colleges in Scotland. Its impact would be very much more severe for the university sector, which is substantially more reliant on its capacity to earn entrepreneurial income and to retain surpluses for capital investment.

11. ONS consider the degree of government influence and control over bodies when deciding whether to classify them as part of the public sector. In SCDI’s view, the Bill significantly heightens the risk of institutions’ reclassification as central government bodies through the additional controls it hands to Ministers. ONS are likely to look at these new controls cumulatively with the existing framework of control of institutions by government and its agencies, including detailed Ministerial guidance on the priorities for the higher education sector’s public funding through the binding Outcome Agreements between HEIs and the SFC and the statutory requirement to observe the higher education governance code as a condition of grant.

12. SCDI urges the Scottish Parliament to take a highly precautionary approach to legislation that may heighten the risk of ONS reclassification of higher education institutions. The risk to the university sector’s economic and social contribution is too severe, and the basis for the proposed changes too unclear, to let the Bill progress if its provisions increase the risk of the ONS reclassification of HEIs.

13. SCDI supported the development of a governance code for Scottish HEIs by the higher education sector and gave evidence to the Review of Higher Education Governance. At that time, we stated that HEIs should be subject to a code which is reviewed and amended periodically by HEIs with agreement of the SFC, and that adoption of a governance code was a matter best left to the Conditions of Grant from the SFC and did not require primary legislation to enact.
14. Further, there is the threat to the charitable status of HEIs. As charities, higher education institutions must meet the charity test as set out in section 7 of the 2005 Act. Under section 7(4) (b) an organisation may not meet the charity test if its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities. While OSCR\(^1\) believed that the proposals in the bill consultation should not impact on the institutions’ charitable status, the bill could unintentionally lead to a breach of OSCR’s regulations. To avoid such a scenario arising from the 2005 Act, legislation to remove Ministerial direction was then required for further education colleges. In England universities are classified in the schedule as charities which are exempt from the regulations. A clause could be included in the bill to give Scottish HEIs the same exemption to ensure HEIs continued charitable status.

**Specific proposals**

15. SCDI is concerned that the increased emphasis on regulation and governance will hinder HEIs’ contribution to economic growth and undermine the development of greater links between HEIs and industry. The proposed changes to governing bodies appear to lessen the influence of external organisations and business.

**Chairing of Governing Bodies**

16. SCDI agrees that the selection of a Chair must always be transparent; however, there is a risk that doing so through open election could disempower the Chair. The governing body must have confidence in the selection, and if they do not agree that the chosen candidate has the requisite skills or is the best choice this could diminish the Chair’s ability to effectively control the agenda and hold the governing body to account. This may also impact on diversity issues, limiting positions to those willing to stand and campaign in an election process as opposed to best able to chair the governing body.

17. If open elections are taken forward, it is important to recognise that there are many stakeholders in Scotland’s HEIs - for example businesses - and appropriate external stakeholders should be considered to ensure that the Chair is elected on a platform that considers the long-term institutional needs and contribution to wider civic society.

**Composition of Governing Bodies**

18. The Code of Governance agreed that that every higher education institution should be headed by “an effective governing body, which is unambiguously and collectively responsible for overseeing the Institution’s activities”. The proposed requirements outlined for the membership and composition of the governing body must ensure it can continue to fulfil this purpose as market demands and opportunities for the HEI change, and must address those areas where possible conflicts and confusion could arise.

19. While it is essential that members bring a wealth of experience and a broad range of views to the governing body, introducing representatives of interests groups with narrower interests than the collective wellbeing of the institution may create conflicts of interest and place strain on the good governance of the institution as well as on the member elected to fulfil the expectations of their specific interest group.

20. The governing bodies of Scottish institutions already include staff members, and SCDI supports this as an effective way of ensuring that the experience, expertise and interests of employees are heard and considered in HEI governing body decision-making. SCDI is
not aware of similar governance rules for institutions in other countries or proposals to introduce them; however, the risk of embedding a conflict of interest in governing body members has been demonstrated on certain corporate boards.

21. The election of staff (and in certain institutions a Rector to champion student’s voice), in addition to an elected Chair from the same electorate could confuse the accountability of the governing body. Likewise, appropriate support and a clear understanding of purpose would be essential if trade union representatives were made mandatory on boards, otherwise conflicts of interest may arise for these members who would become corporately responsible for the long-term needs of the institution while also performing a role representing a union.

22. Finally, it is important that these proposals do not lead to an unmanageable increase in the size of governing bodies. As the consultation recognises, the Scottish Code of Good Governance has identified 25 as being the maximum number of members which can effectively govern, however, the proposals do not address the impact of new mandatory posts on the size of the governing body.

Academic Freedom

23. Academic freedom is an important principle that any progressive society which values new ideas and innovation should seek to uphold. UNESCO defines academic freedom in its legal instrument on the Status of Higher-Education Teaching Personnel. Prior to the 2005 Act, Scotland did not meet the provisions of this instrument due to the anomaly that legislative academic freedom was not included in the statutory instruments of the HEIs instituted by the 1992 Act and this is still the case in the rest of the UK. The definition agreed for the 2005 Act was envisaged to be all-encompassing in terms of both staff and definition of academic freedom. It is unclear that the new clause is an enhancement, indeed the policy memorandum states that innovation and new ideas were not necessarily excluded previously. Without evidence of academic freedom being suppressed the appropriateness or need for this legislative amendment is questionable.

24. While SCDI believes innovation to be crucial role for HEIs, we are unsure of the need to include it specifically within a definition of academic freedom. Indeed, wider Scottish Government policy is to promote more knowledge exchange, for example between higher education and businesses, especially for innovation in key sectors of the economy. HEIs must be able to fulfil research strategies and their obligation as institutions in receipt of public funding to contribute to wider institutional and national objectives. Whether the amendment makes this more or less likely must be evaluated.

25. The previous definition did not explicitly state that academic freedom did not extend to views held beyond work within an institution; however the protections are only relevant to the academic institution. It has therefore applied only to work within the institution in practice and the same should apply to the new clause.

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