This response sets out the views of the University of Stirling on the Higher Education Governance (Scotland) Bill. There are concerns that, in its current form, the Bill will have a serious, detrimental impact on the effectiveness of universities in terms of good governance, academic development and our contribution to the economy and public life.

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?

Universities in Scotland are already working to the good practice guidelines in the Scottish Code of Good HE Governance (the Code) which has strengthened good governance across the sector. We are not aware of any evidence that demonstrates that there is a significant problem with higher education governance that would require primary legislation.

2. The extent to which the Bill (a) will improve higher education governance, particularly in the areas above

We do not believe that the Bill will improve higher education governance. One of the declared objectives of the Bill is to modernise higher education governance but there is a real danger that it will have the opposite effect. By putting governance requirements into legislation there will be much less flexibility and agility to modernise and improve in the future.

Our concerns include:

- Election of the chair: it is essential for good governance that the chair be directly accountable to the governing body, and that the governing body has full confidence in the chair; this cannot be achieved if the electorate is any other grouping than the governing body itself. There is in any case the practical difficulty of establishing an appropriate electorate that will not have interviewed the candidates, and whose choice would therefore be based on superficial evidence;
- Procedures for the removal of a chair from office, if the governing body is not responsible for the appointment;
- The impact of remuneration of the chair in terms of their independence and impartiality.

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

The Bill introduces new provisions (which were not the subject of consultation) giving Scottish Ministers power to regulate on issues including:

- The process for appointing the chair of the governing body
- The remuneration and allowances payable to the chair
- The categories of governing body members and the number of members
- The size of the academic board
- The ability to exclude a particular institution covered by the legislation

All these powers currently rest with individual higher education institutions. Taking these powers away seriously erodes the autonomy of universities. We are concerned that this will have a significant, detrimental impact on our effectiveness in terms of academic independence, business development, income generation and our contribution to the wider economy and society.

We are concerned that the implementation of the Bill could impact on the charitable status of HEIs in the future. Whilst the changes the proposed Bill imposes on HEI governance structures may not currently be sufficient to impact on the charitable status, the powers given to Scottish Ministers in the
Bill to make further changes could still result in a change to charitable status in the future. The loss of charitable status could impact on university relationships with business and the ability to obtain charitable and philanthropic funding.

We are very concerned that the increased powers of ministers will lead to the Office of National Statistics classifying higher education institutions as ‘Central Government’, given the significant change in the level of institutional autonomy arising from the operational intervention by central government. If the university sector were re-classified this could have a significant financial impact and would be extremely damaging to the Scottish higher education sector.

The proposed Bill would impose additional financial burdens on universities. The University of Stirling has submitted a separate response to the Finance Committee in relation to this but has estimated an additional £180,000 over a four year cycle. These funds would have to come at the detriment of supporting other activities such as improvements to learning and teaching, enhancing the student experience and increasing research competitiveness.

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

We are concerned about the threat to our status as an independent body, and the academic freedom of the university community, that is represented by the proposed degree of control and direction by ministers. The proposed Bill has a provision to allow Scottish Ministers to modify the definition of ‘higher education institution’ to include or exclude a particular institution. There is a danger that this power could be used in a discriminatory way.

The section on consultation states that before making regulations regarding appointing a chair or the remuneration payable, that they will consult with each HEI and ‘other persons as the Scottish Ministers consider appropriate’. We are concerned how this clause could be used to engineer the balance of stakeholder opinion.

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.

3. Has the correct balance been struck between legislative and non-legislative measures?

No. We believe the best way to ensure good governance is via a Code of Good Governance. The existing Code was developed in consultation with Scottish Universities and key stakeholders and had the input from people with expert knowledge and direct experience of university governance. The Code will be kept under regular review thus allowing the flexibility of intervention in the future when required. All HEIs are expected to comply with the code as a condition of funding in accordance with the Further and Higher Education (Scotland) Act 2005. On the rare occasion when an institution does not comply they are expected to explain and justify the non-compliance. We believe this approach more appropriate than trying to control governance via legislation.

Are any further measures needed?

No

Specific proposals

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

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

- 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

This proposal conflicts with the current provisions in the Code. The Bill states that the chair of the governing body is to be appointed in accordance with a process set out in regulations. As the
regulations have not been developed yet, it leaves a high degree of uncertainty. In particular there are concerns about whom the electorate will be that will be entitled to vote on candidates.

As already expressed above we believe the only viable electorate would be the members of the governing body as the Chair must be accountable to the governing body members.

The requirement to hold elections for the position of Chair will impose an additional financial and administrative burden on universities (as outlined above). The University of Stirling already reimburses candidate expenses. However, the scope of the provision in the Bill could include candidates’ election expenses which could be significant, particularly if there is a wide electorate or large number of candidates.

The proposed remuneration of chairs would not only be a financial burden but could conflict with the status of the chair being a charity trustee. Charities law states that trustees must not be remunerated except in special circumstances where they provide a specific service for the charity or where remuneration is provided for in an enactment. The Scottish Government has not made it clear whether it intends to legislate on this. We believe that remuneration of chairs should be left to be determined on a case by case basis by HEIs as autonomous and independent bodies.

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

The membership requirements specified in the Bill are inconsistent with the existing legislative framework applying to the University of Stirling as a Chartered university. The Bill does not make it clear how these conflicting provisions should be addressed (the Bill does not include express provision to amend the Charter and Statutes of Chartered institutions). It is not clear whether the intention is to implement secondary legislation to make consequential amendments. If the intention is for HEIs to make any consequential amendments to their own governance instruments there is a risk that this may not be possible as it requires the participation of the Privy Council. The cost of making these amendments was not addressed in the Financial Memorandum accompanying the Bill.

The Bill proposes that 8 members of the governing body are representatives of particular interest groups. It is a fundamental principle of good governance that governors carry out their duties in the interests of the institution and do not act as representatives of any interest group or have a mandate from any particular group. Having representatives on Court is contrary to the Nolan Committee principles of public life and is contradictory to the Code, and principles of good governance more generally. As charity trustees, members of the governing body must comply with the general duties under the Charities and Trustee Investment (Scotland) Act 2005 which includes acting in the interests of the charity as a whole and putting the interests of the charity before the interest of the persons responsible for their appointment as a trustee.

The University of Stirling Court currently includes 6 members of staff appointed by Academic Council. These members provide a link between Academic Council and Court. If staff members were appointed directly to Court this important and effective link would be lost.

In order to accommodate the additional members required by the Bill i.e. trade union representatives and alumni representatives, the number of ordinary staff members on Court would have to be reduced. This would be the only way of staying within the Code guidance of having no more than 25 members overall and a majority of independent lay members. Staff members are currently nominated from a much wider pool of people than trade union representatives would be (only a small minority of staff are trade union members).

There is a proposal to require one trade union representative from academic staff and one from support staff. There is no guidance on how this should be managed where there are more than two unions represented on campus (currently three unions include members of staff in professional service roles). In addition it is not clear what is meant by support staff and whether that is supposed to include or exclude senior non-academic staff.

The appointment of two alumni representatives nominated by the Alumni Association would be very problematic for Stirling as our Statutes and Ordinances are set up for Court to appoint the president of the Alumni Association and there are no other office holders from whom to seek a nomination.
The proposed Bill states that other members of the governing body can be appointed in accordance with the governing documents of the institution. However, it does not recognise that these documents are inconsistent with the membership prescribed and no explanation is provided for how this can be resolved.

As stated above the increased number of elections for members of Court will add an additional financial and administrative burden on the University.

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

We feel that the existing assortment in the sizes of academic boards in the sector reflects the highly diverse scale and mission of institutions in Scotland. This is not something that should be legislated on as institutions need to be able to evolve their own internal structures.

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

We would like to express concern that the definition of Academic Freedom in the Bill is different from the one put forward in the consultation on the Higher Education Governance Bill. We are not aware of any incidents since the Further and Higher Education (Scotland) Act 2005 came into force where the proposed definition would have added to the protection of academic freedom. The principle of academic freedom rightly prevents academic staff being disciplined, dismissed or unduly influenced for holding and expressing opinions or testing established ideas.

The Bill purports to enhance academic freedom by changing the definition. However, the increased ministerial control of institutions and the erosion of autonomy will only be detrimental to academic freedom. Innovation and ideas are more likely to flourish in an institution not directly stipulated by government.

The implementation of this proposed change in wording would impose a change to Article 19 of our Charter (and related Ordinance), requiring Privy Council approval.

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.

We are not aware of any significant constraints.

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?“
The University of Stirling has procedures within our Ordinances for considering cases where staff believe their academic freedom has been adversely affected. This can only be considered on a case by case basis and the limitations of when it might apply should not be defined in legislation.

**How to submit your views**

The closing date for responses is **Friday 4 September 2015**. Please keep your response as concise as possible. All responses should be sent to the Committee Clerk at HEGBill@scottish.parliament.uk (we would prefer to receive submissions in Microsoft Word). Alternatively, you may use the following address: Clerk to the Education and Culture Committee, Room T3.40, The Scottish Parliament, Edinburgh, EH99 1SP.

We will handle responses in accordance with the Parliament’s policy for the treatment of evidence, which is available on the Parliament’s website at [www.scottish.parliament.uk/treatment-of-evidence](http://www.scottish.parliament.uk/treatment-of-evidence).

- See more at: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90819.aspx#What the Committee would like your views on](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90819.aspx#What the Committee would like your views on)