Response from the University of Aberdeen

1 Introduction

1.1 The University of Aberdeen welcomes the opportunity to submit to the Education and Culture Committee its comments on the Higher Education Governance (Scotland) Bill. A detailed response to the Committee’s specific questions is enclosed. The University would, however, wish to make some overarching comments regarding the Bill and we have summarised here a number of specific concerns from our response which we consider to be of critical importance. Our two uppermost and most fundamental concerns are:

1) **Damage to our International Competitiveness**: That the Bill will damage the University’s international reputation and undermine our future international competitiveness to the wider detriment of the interests of the Scottish economy and Scottish society more generally. There is scant reference in the supporting information to the Bill as to the link between governance and the institutional innovation and flexibility which characterises the world’s best universities. We urge the Scottish Government and the Scottish Parliament to reflect on the fact that the model proposed takes Scotland’s universities in the opposite direction of travel to the world’s best higher education institutions.

2) **ONS Reclassification or Loss of Charitable Status**: That because of the extent of Ministerial control and loss of institutional autonomy proposed in the Bill, there is a significant risk of Office of National Statistics (ONS) reclassification as a public body and/or the loss of our charitable status. Either consequence would jeopardise the future financial sustainability of the University.

1.2 Impact on International Competitiveness

The University is concerned that the Bill, both through reduced autonomy and potential risk to our current ONS status or charitable status, will negatively impact upon our ability to maintain our position as an internationally competitive university, ranked amongst the Top 200 in the world. There is a demonstrable link between autonomy and the global success of a university. The Top 50 institutions of the Times Higher World Rankings is overwhelmingly dominated by universities whose governance is characterised by autonomy and a significant degree of independence from government. We consider the Bill to put the hard earned global reputation of Scottish higher education at risk for the following reasons:

1) **Reduced Autonomy**: The University considers autonomy, with appropriate levels of accountability for public funding, to be a key factor in our success as an institution operating at a global level. Over recent years the trend in University governance in Europe has been to increase autonomy rather than decrease autonomy. The European Commission (EC) stated its position on how best to modernise Europe’s universities. It recommended allowing universities greater autonomy and accountability, so that they can respond quickly to change (something which this Bill’s prescriptive approach would make much more difficult). In the USA, which is home to the majority of the world’s leading ranked universities, institutions are highly autonomous. The link between autonomy and highly performing universities has also been identified in a number of studies such as a 2010 study of European and US institutions which found that universities which have greater autonomy and are subject to greater levels of competition are more productive and effective (measured by patents and publications). Similarly, a 2011 report by the European University Association (EUA) explored the

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suggested link between income diversification and the degree of institutional autonomy of universities. It found that institutions that can enter freely into partnerships, or have the ability to create for-profit entities, or can borrow or raise money on the financial market, will be more successful in pursuing and developing additional funding streams. We also know that leading academics are attracted to Scottish higher education because they perceive it to be a system where institutions are not subject to political interference.

1.2 Loss of Charitable Status and ONS Reclassification as a Public Body: The University is concerned that the consequences of the Bill, in particular the addition of Ministerial powers over the internal governance of a charity, could lead to the loss of charitable status and/or reclassification by the Office of National Statistics as a public body, as happened with the Further Education sector. Either consequence would have far reaching and highly damaging consequences for the future financial sustainability of the University, for the following reasons:

- Reclassification/loss of charitable status would undoubtedly reduce the range of funders which would be open to universities as autonomous institutions, reducing in turn also the effectiveness of the Scottish Government’s spend on higher education. For the University of Aberdeen in 2014/15 we received £80m of funding from the Scottish Funding Council and a further £175m from other sources. Without this other income we would be financially unsustainable;
- Risk to fundraising/philanthropic income: loss of charitable status or ONS classification as a government/public body will at a stroke render the University far less attractive to donors most of whom do not wish to give to government bodies/non-charities. In 2013/14, the University benefitted from £6.4M in such income and is in the process of preparing for the launch of a major new fundraising campaign with a multi-million pound target which will build on a previous campaign that closed in 2010, and raised over £150M. This is a crucial income stream that we cannot afford to lose and, indeed, is one that we are encouraging;
- Restrictions on borrowing and the creation and use of surpluses – both are crucial to investment in world class facilities for our students and staff. At Aberdeen that equates to £273M of investment in our Estate over the past ten years and plans for £270M more over the next ten years;
- Loss of tax benefits such as non-domestic rates relief;
- Reduced partnerships with private sector/industry;

The consequential loss of income arising from such outcomes would put at risk our financial sustainability and the ability of the University to generate the surpluses and finance the borrowing it needs to invest in the infrastructure that is essential to maintain attractiveness to students and staff from around the world and maintain our competitive position with both universities in England (who are investing heavily by borrowing against tuition fee income) and the rest of the world. It is imperative that whatever else this Bill seeks to do, it does not jeopardise the University's financial sustainability.

2 Summary of Further Main Issues from our Response

2.1 Impact on the Autonomy of Universities, Ministerial Control and the Relationship between Universities and the State

2.1.1 The University welcomed that the Scottish Government's press release announcing the Bill highlighted the success of Scotland’s universities and, in particular, that four were ranked among the top 200 in the world. Equally in the pre-Bill consultation document, the University welcomed a similar statement which acknowledged the success of Scotland’s universities at a global level and the need to ensure this continued. That consultation document also highlighted the diversity of higher education institutions and the importance of institutional autonomy to their success. The University shares this view of autonomy as being a core principle and essential prerequisite for universities to succeed, particularly in the context of increasing global competition and the flexibility and responsiveness this demands. The clear statement in the
consultation document that the Scottish Government did not wish to increase Ministerial control over universities was also welcomed, and was taken as an understanding of the importance of universities as a cornerstone of a free and democratic society, independent of Government.

2.1.2 The University was, however, concerned that the commitment of these high level statements was not supported by several of the proposals within the consultation which appeared not to respect the autonomy of universities and indeed, proposed the introduction of highly specific and, in our view, inappropriate interventions in the internal governance arrangements of institutions. In particular, they seek to apply a ‘one size fits all’ approach to governance which disregards the diversity of Scotland’s HE institutions.

2.1.3 Despite the assurances and statements of the Scottish Government referred to above, having considered the Bill as published, the University continues to have deep concerns that the Bill will fundamentally erode institutional autonomy. Indeed, in a number of key respects the University's concern has been heightened by the Bill’s proposals to introduce Ministerial control over the internal governance of charitable organisations, which were not included in the consultation paper. The University urges the Committee to consider not only the detrimental impact that a fundamental change to the autonomous status of universities will have on their national and global competitiveness, their ability to generate income and foster productive partnerships with industry and philanthropy, but also the changed relationship between State and university that Ministerial control over the governance of higher education institutions, both corporate and academic, brings. That is not to suggest that the current Scottish Government is anything other than well intentioned to the sector but it is possible that others in the future might not be so benign. The current principle of autonomy has characterised Scottish higher education for hundreds of years and is broadly considered to have served Scottish society well. The principle of autonomy, therefore, matters not only to Scottish universities, but to Scottish society. As currently drafted, the University considers the Bill to fundamentally alter that relationship between society, Government and Scotland’s universities.

2.2 Existing Accountability, the Evidence Base for the Bill and outcome of the Consultation exercise

2.2.1 The University, together with other universities, has embraced the Scottish Code of Good HE Governance and has used this as the basis for a review of its governance arrangements. The recently introduced Post-16 Education (Scotland) Act 2013 includes provisions around Higher Education governance, which we understand were intended to strengthen accountability for public funding, and included powers enabling the Scottish Funding Council (SFC) since September 2014 to make compliance with the Scottish Code of Good HE Governance a condition of grant. The consultation does not adequately explain why, only two years since the Act came into effect and only less than a year since the Funding Council made compliance with the Code a condition of grant, the Scottish Government considers further legislation, which proposes a fundamentally different model of higher education governance, to be necessary.

2.2.2 The University is also concerned that the proposals around Chairs and Trade Union membership of governing bodies have been taken forward despite there being significant opposition to these in the pre-legislative consultation exercise. As reported in the Scottish Government’s own analysis of the results, 78 per cent of respondents opposed the proposal to legislate to require the selection process for the Chair of the governing body to be an election; while 67 per cent were opposed to legislating to reserve seats for students, staff, alumni and trade union representatives.

2.3 Appointment of Chairing Member

The University of Aberdeen is strongly opposed to the Bill resulting in chairs being elected rather than appointed by the Governing Body and that Ministers should exercise the power to determine and vary the process of appointment. We provide further detailed comments on our position at section 4.
2.4 Membership of Governing Bodies

2.4.1 The University does not support the proposals regarding the membership of governing bodies in general. In particular, the University does not support the specific proposals that would:

1. require trade union nominated members of governing bodies;
2. require a limit of two alumni representatives.

2.4.2 It is inappropriate for Ministers to prescribe the composition of the board of what is an autonomous charity. These are matters that are properly and best determined by the governing body itself taking into account its own particular circumstances.
Response to Committee Questions

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

Governance and Accountability

1.1 The University recognises that good governance and accountability to our stakeholders are essential to retain public confidence and for our successful operation. It is also essential to delivering the future success of institutions in the globally competitive context which we operate. Maintaining and improving the competitive position of Scotland’s universities within the UK and internationally is vital if they are to serve our economy well and their governance arrangements must be able to meet that challenge. In support of this, the University regularly reviews its governance arrangements and prior to the publication of the Scottish Code of Good HE Governance, did so against the Financial Reporting Council’s Code and the CUC Guide for Members of Higher Education Governing Bodies. The University’s Governance and Nominations Committee, which includes the President of the Students’ Association and representatives of academic staff, was established with delegated standing responsibility from Court to monitor and report on issues of governance and effectiveness.

1.2 Notwithstanding this, following its publication the University has used the Scottish Code of Good HE Governance as the basis for an extensive review of its governance arrangements over the past two years that has resulted in the implementation of a number of measures to improve governance.

1.3 The Post-16 Education (Scotland) Act 2013 includes provisions around Higher Education governance, which we understand was intended to ensure accountability for public funding, and included powers enabling the Scottish Funding Council since September 2014 to make compliance with the Scottish Code of Good HE Governance a condition of grant. Given it is only two years since the Act came into effect and less than a year since the Funding Council made compliance with the Code a condition of grant, the University remains unclear why the Scottish Government considers further legislation on higher education governance to be necessary.

1.4 The current balance of institutional autonomy and accountability for public funding, is one we believe that is appropriate and which has served Scotland well. The primary mechanism through which that accountability is exercised is through the relationship of institutions with the Scottish Funding Council. The SFC Financial Memorandum with individual institutions provides for fiduciary accountability, while the SFC Outcome Agreements, Strategic Dialogue and institutional visits help to ensure institutions’ strategic plans are aligned with Scottish Government priorities. These existing channels of accountability for public funds, and through the Scottish Public Services Ombudsman, the Office of the Scottish Charity Regulator, and now the Auditor General for Scotland, are appropriate and effective. Universities are of course also subject to many other governance and statutory reporting requirements such as the Quality Assurance Agency for HE in Scotland (QAA) and Higher Education Statistics Agency (HESA). The University of Aberdeen receives 35% of its income from non-public sources and 35% of our income comes from the Scottish Funding Council core grant, with a further 9% from SAAS fee funding. Funding from the Scottish public purse, is and will continue to be, critical to the University’s sustainability and future ambitions but it must also be acknowledged that the Scottish HE sector’s accountability for funding, both public and private, extends beyond Scottish stakeholders.

1.5 Good governance must ensure there is transparency and accountability for funding whether public or private. It must also, however, ensure there is effective decision making and be flexible enough to enable the institution to be adaptive to change and to respond new priorities and opportunities. If there is a difficulty for institutions it is in being constrained in their ability to change or reform aspects of their governance arrangements quickly and in diverting resources from academic activity to comply with increasing reporting, regulation and bureaucracy. The University does not consider that the extension of Ministerial/State
control over significant matters of institutional governance that is proposed in this Bill will support greater innovation and entrepreneurialism in higher education or respond to the complex international global competitive challenge that we face. In our responses to the Review of Higher Education Governance in Scotland (the ‘von Prondzynski Review’) and in the pre-legislative consultation for this Bill, the University has stressed the need for consideration of the direction of travel of higher education governance best practice internationally, particularly with our key competitors in USA and Europe, including England who dominate international league tables. That trend is towards greater institutional autonomy rather than less.

**Inclusion and Engagement of Stakeholders**

1.6 While we believe autonomy to be important, the success of a university is rooted in its ability to engage effectively with the many communities of interest that a modern and diverse institution such as Aberdeen serves. The significant involvement of students and staff, including trade unions, across our governance arrangements has, we believe, added considerable value to a number of key university initiatives. The involvement of representatives of the local community, business and industry, and our alumni are also key. This is embedded not only in our formal governance structures but across a range of institutional activities. However, stakeholders will evolve over time and institutions must adapt their governance arrangements to reflect changes therein. For example, at Aberdeen the growth of our international student community has led us to actively consider additional representation for students in our governance structures.

1.7 The University seeks to address stakeholder engagement through a variety of routes. A key element, however, is the representation of all key stakeholders in the composition of our Court of 28 members (defined by Ordinance). Our current arrangements provide for significant representation of the academic community through six senate assessors elected to Court by the Senate and who, importantly, are independent of the senior management team. In addition, the University Court has traditionally appointed a member drawn from the University’s non-academic staff to one of its co-opted positions. The student community is represented on Court through the Rector, who may also appoint a Rector’s Assessor, (who can be a student) and by the President of the Aberdeen University Students’ Association. Our alumni are represented on Court by four General Council Assessors (elected by alumni and certain categories of staff and former staff) but also within the co-opted lay membership. The composition of Court also provides for the appointment of two local authority representatives (one each from Aberdeen City Council and Aberdeenshire Council), enabling engagement with the University’s immediate wider communities. Finally, further individuals from the wider community with specific business experience are engaged through seven co-opted members which the Court appoints directly. The Court is in the process of seeking Privy Council approval to amend its composition to include a further student member and, pending that change, a second student representative has been participating in meetings of the Court on a non-voting basis.

1.8 In addition, key stakeholders are also involved across the University’s formal and informal committee structure where members of committees will include alumni, staff, students and lay governors. There are also routes for the representation of recognised Trade Unions at a range of levels, but in particular via the Partnership and Negotiating Consultative Committee, which is part of the formal governance committee structure of the Court.

**Equality and Diversity on Governing Bodies**

1.9 The University is also committed to its governing body reflecting the diversity of the University and external communities. The University is supportive of the need, in particular, for gender balance within governing body membership. The Scottish Code of HE Good Governance requires institutions to review and determine their approach to diversity in their membership. In 2014, the Court at Aberdeen undertook a review specifically with regard to this issue. As a result, the Court has adopted a Statement of Intent on Diversity in its membership with the goal of achieving female membership of 40% or more (it is currently 32%) and is part of the Committee of Scottish Chairs’ ‘40:40:20’ policy commitment. The
Court also recognises, however, the barriers to achieving gender balance when a significant number of its members are elected or externally appointed by external bodies. The Bill’s proposals for the composition of governing bodies would make the achievement of greater diversity in governing body membership more difficult, as it introduces greater numbers of elected members or members not appointed by the governing body. This is one of the main practical issues that the University currently faces in ensuring diversity in its membership. For this reason, and as part of a wider reform of its composition and membership, the Court agreed to increase the proportion of its membership appointed by Court rather than being elected or externally appointed. This has, however, been put on hold given the potential impact of proposals within this Bill.

2. **The extent to which the Bill**

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

   The University has concerns that some of the proposals contradict long established principles of good governance – specifically (a) the proposals for the Chair to be appointed by election rather than by the governing body which renders him or her unaccountable to the governing body; and to (b) require trade union membership within the body which is the legal employer of staff. We have outlined our concerns regarding these proposals in more detail at section 4 below.

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

   The University is concerned that the Bill proposes Ministers taking significant new powers over the governance of institutions which fundamentally reduce the current level of institutional autonomy. These concerns are in addition to the further concerns we have regarding the actual proposals. We refer specifically to the following sections of the Bill where Ministers take powers exercisable through secondary legislation below but we would also wish to emphasise two potential consequences from the loss of autonomy and any increase in Ministerial Control:

   - **Loss of Charitable Status**: The University is concerned that the consequences of the Bill, in particular the addition of Ministerial powers over internal governance, could lead to the loss of charitable status. Our charitable status is of fundamental importance to our ability to attract funding and philanthropic support. The loss of that status would have major and far reaching consequences for the future financial sustainability of the University.

   The basis for our concern here is as follows. Section 7(1) of the Charities and Trustee Investment (Scotland) Act 2005 includes the ‘charity test’. Section 7(4) of the Act provides that an organisation which may otherwise meet the terms of Section 7 (1) does not meet the charity test, however, if its constitution expressly permits the Scottish Ministers to direct or otherwise control its activities. As the Bill gives new Ministerial powers over the governance of universities and which might be deemed to be a significant degree of control, we would wish assurance that the Bill will not result in a loss of charitable status.

   We are aware that OSCR has confirmed in its response to the Committee that the Bill will amend the Universities (Scotland) Act 1966 which is the current statutory basis of the University and that under the Charities Act, the 1966 Act would be deemed to represent our constitution. We are also aware that Section 20 of the Act leaves open the potential for future amendments to Part 1 of the Act which OSCR would have to further review and which might, therefore, give rise to further issues for charitable status in the future. For this reason, the University considers that specific assurances regarding the charities test of Ministerial control for the ‘older’ universities are necessary.
ONS Reclassification as a Public Sector Body: The University is aware of the problems which arose following reform of the Scottish Further Education sector with Colleges being reclassified as public sector bodies by the ONS due to the increased powers given to Ministers in the Post-16 Education (Scotland) Act. Given the increased powers to Ministers that are proposed in this Bill, the University is concerned that a similar reclassification of higher education institutions could take place. Such a reclassification could result in higher education institutions being unable to retain surpluses, remove our ability to borrow to invest in the modernisation of our facilities for students and staff, which would be disastrous for universities. It would cause significant damage to our ability to work with business and our role in driving innovation and supporting the economic growth of Scotland. It would also potentially remove philanthropy as an income stream as donors generally do not tend to give to government bodies.

The basis of our concern in this regard is because:

- We understand that as part of its priorities, the ONS intends to review the classification of higher education institutions as Non-Profit Institutions Serving Households;
- A key factor for ONS in such reviews is the extent of public sector powers over the institutions;
- In addition to any impact the Bill might have, other factors that might be considered to be indicators of governmental control, such as Outcome Agreements, would also likely form part of any ONS review. The collective impact as well as that of the Bill alone is, therefore, also of concern.
- Recent examples of reclassification taking place, for example, to the Scottish Further Education sector and the Scottish Futures Trust illustrate that reclassification does happen;

Sections 1-3 Appointment as Chairing Member, Remuneration to be Payable, Consultation for Sections 1 and 2;

2.1 The University is concerned at the extent of the power being given to Ministers to both determine and amend in future through regulations the appointment arrangements for the Chair of an institution which is a charitable organisation, not a public body. The University is also concerned that the process prescribed by Ministers for appointment has not been specified (although we note the Scottish Government press release announcing the Bill referred to it enabling the introduction of elected chairs) but that it will be through regulations which will only be subject to a yes/no approval by Parliament rather than amendment. In introducing the Bill, the lack of clarity as to the policy intention of Ministers regarding the method of appointment of the Chair, inhibits Parliamentary scrutiny at this critical early stage of the Bill.

2.2 With regard to Section 2 on Remuneration, the University of Aberdeen agrees that there may be circumstances in which it would be helpful to provide some form of remuneration or stipend to Chairs. These might include situations where remuneration or recompense is required to ensure candidates who might otherwise not be able to undertake the role of chair are not put off from doing so due to financial circumstances, for example, through loss of wages from their employment or for provision of care costs. The University does not, however, agree that remuneration should be a mandatory requirement in legislation, particularly as there may be circumstances where that would deter candidates from applying.

2.3 The decision as to whether to remunerate a Chair should be a matter for governing bodies to determine with regard to their own particular context and circumstances. There is already guidance on when remuneration of governors should be considered in the Scottish Code of
Good HE Governance. Given the existing guidance in the Code and its status as a condition of grant, it is not evident that legislation is required on this matter.

Section 4 Composition of Governing Body; and Section 8 Power to Modify Section 4

2.4 The University is concerned that the Bill gives Scottish Ministers the power to make regulations to change the composition of governing bodies. This changes the current position where the University by Ordinance of the Privy Council proposes changes to its membership. While Parliament has at certain points through the Universities Acts of 1858 onwards made certain specifications regarding the membership of governing bodies, including the University of Aberdeen, it has not given Ministers the power to do so. The University is concerned that the Bill now gives Ministers the power to do so. The current approach, application to Privy Council by Institutions, is an appropriate balance between being institution led while also providing through the Privy Council the ability of Scottish Ministers to safeguard the public interest.

Sections 9-13 Academic Boards

2.5 As with Sections 1-3 and Section 4 of the Bill, Ministers will take powers to determine and vary by regulations the composition and size of our Academic Board (the Senate). We repeat the concern we expressed with regard to Section 1-3 and 4. This would change the principle of self-regulation by academic communities which includes determining which parts of that community should be represented on the Senate. For the reason stated above, the University considers the current procedure of seeking change through the Privy Council to be an appropriate safeguard of the public interest.

Section 14 and 20 Regulation making powers and procedures

2.6 For the reasons outlined above, the University is concerned at the broad powers being given under these sections to Ministers to amend primary legislation and make regulations subject only to the affirmative procedure (which any majority government would be expected to secure)

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

2.7 As has been outlined above, the Bill will fundamentally change the relationship between the Scottish Government, the Scottish Funding Council and universities. It will transfer powers from institutions to Ministers, exercisable through secondary legislation, for example to decide on what categories of person should be on governing bodies, how they should be appointed and their terms of office – and to subsequently change that at Ministerial initiative.

3. The Bill is part of a wider package of recent reforms to higher education governance, including the development of a Scottish Code of Good HE Governance. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

3.1 No. A number of the proposals are already principles contained within the Scottish Code of Good HE Governance and are already being followed by the University and are a condition of grant. The achievement of similar policy outcomes could be better and more effectively achieved through the mechanism introduced under the Post-16 Education (Scotland) Act 2013 as described in our response to Q1. The approach of the Bill is a highly prescriptive one, which seeks to create a one size fits all approach to a very diverse sector. For these reasons, we do not accept there will be any benefit to be gained from legislation or that the proposed approach to both the autonomy and diversity of the sector is an appropriate one.
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
- 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

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

Appointment of Chairs

4.1 Notwithstanding the position of Rectors as chair in some Scottish universities including Aberdeen, the University of Aberdeen is strongly opposed to the Bill resulting in chairs being elected rather than appointed by the Governing Body.

4.2 Before outlining the University's comments regarding this section of the Bill, it may be helpful to the Committee to explain the distinction between the role of the Rector and that of the Senior Governor at Aberdeen. The Rector is elected by students of the University. He or she cannot be a member of staff but could be a student. The formal position of the Rector is defined by statute which includes that the Rector shall be the ordinary president at meetings of the University Court with a deliberative and casting vote. The Senior Governor is, however, formally regarded by the Court as responsible for the leadership of the Court and for its effective governance, notwithstanding the present statutory position of the Rector. The SFC and other stakeholders recognise the Senior Governor as the primary contact in matters of governance and as the individual who appraises the Principal. This reflects widely accepted good governance guidance that the Chair should be appointed by the governing body and be responsible for its leadership and its effectiveness. The Rector's role amongst others is to be a champion for the student community, and has not in practice undertaken the aspects of the role of a 'Chair' as might be more broadly understood in other institutions. While the University has worked with many dedicated Rectors, the attendance of some at Court in the past has been inconsistent.

4.3 Governing bodies and their governors are ultimately responsible for the success or failure of their institutions. The role of the Chair is, therefore, of crucial importance to the future success and direction of an institution. As such, it carries with it significant and extensive responsibilities for the leadership of the governing body and the effective conduct of relationships with senior management.

4.4 The appointment of that individual is, therefore, fundamentally important. Universities are charities and autonomous institutions and as such the appointment of the Chair, provided that it is conducted through a robust, open and transparent recruitment process, which includes public advertising and due reference to the skills and experience required, should be a decision for the governing body which that individual will ultimately have to lead and have the confidence of. That responsibility and ability of the governing body to discharge its responsibilities for the success of the institution is severely comprised if the governing body does not appoint the Chair.

4.5 It would be incorrect to conclude, as was suggested in the consultation document, that there are substantive differences in practice regarding the appointment process for Chairs. The Scottish Code of Good HE Governance has, since 2013, required as a main principle the
use of public advertisement, role and person specifications, and the involvement of staff and student governors in the recruitment of Chairs. Compliance with the Code is a condition of grant from SFC. The University accorded with that transparent recruitment process in the appointment of our Senior Governor. The consultation did not accurately reflect the requirements of the Code in its description of current practice in the sector and the context in which the proposals in this Bill have come forward [Section D, p12 of Consultation Paper on a Higher Education Governance Bill, Scottish Government].

4.6 Neither the consultation nor the Bill address how effective the proposal for elected chairs would be in ensuring Scotland’s universities maintain their global competitiveness and deliver excellence for students and the wider community they serve. It is unclear whether the proposals reflects best practice as benchmarked against arrangements in the world’s most successful universities. The benefits of the proposal are, therefore, unclear, while the potential difficulties which might arise in practice are evident as explained below.

4.7 The proposal abandons a key principle of good governance which is that the Chair is able to lead Court in its fundamental duty to act in the collective interests of the institution and all its stakeholders. That would become much more difficult were the Chair being beholden to one or two particular sets of stakeholders for election and in such circumstances, would not be truly independent. The pre-legislative consultation document acknowledged the importance of the principle that there should be a majority of independent members on Courts defined as neither employed by, or students of, the institution, and the University considers that the Chair should reflect that principle. The election of the Chair by particular constituencies rather than appointment by the governing body compromises that independence.

4.8 An elected Chair will undermine good governance, not only because it is contrary to widely-recognised good governance practice, but also through its potential for creating conflict of interest, politicising the role into a ‘popularity contest’, discouraging many suitable individuals from serving as Chairs, inhibiting institutions from being able to choose the best candidate for the role and damaging the relationship with the Principal. Difficulties could also arise when dealing with a Chair who was ‘elected’ rather than appointed, who did not perform his or her duties adequately or otherwise lost the confidence and support of the Court. In this regard, we are cognisant that the Scottish Code of Good HE Governance emphasises the need for institutions to be able to remove any member from office should they breach the conditions of his or her appointment. It is unclear if the issue of removing a poorly performing Chair from office and where the responsibility for that would lie has been considered in framing the proposals in the Bill.

4.9 It has been suggested that a process of pre-screening potential candidates before being declared eligible to stand for election could be part of an appointment process. This could result in significant challenges from candidates who were rejected at that stage. There are significant practical issues here that could result in instability in the leadership of institutions which would be detrimental to effective management and governance.

4.10 **Clarification on role of Rectors:** There are additional circumstances to consider for those Scottish institutions such as Aberdeen who already have elected Rectors, who under respective current University Ordinances are the Court Presiding officers (Chairs). The University is not clear what the policy intention regarding Rectors is. The Bill proposes amendment to the Universities (Scotland) Act 1858 and proposes the removal at S4 of “the Rector shall be the ordinary president, with a deliberative and casting vote”. The Bill also proposes to removing the reference at S5 of the Universities (Scotland) Act 1889 to the Rector ‘presiding’ and substituting the ‘Chairing member’.

The Scottish Government should clarify this very important point as to whether the intention is to (a) remove the right of the Rector to ‘Preside’ and transfer that to the ‘Chairing Member’; (b) remove the Rector as a member of Court; or (c) remove the role of Rector altogether.

**Membership of Governing Bodies**
4.11 The University does not support the proposals regarding the membership of governing bodies in general. In particular, the University does not support the specific proposals that would:

(1) require trade union nominated members of governing bodies;
(2) require a limit of two alumni representatives.

4.12 At the general level, the University considers it inappropriate for Ministers to prescribe the composition of the board of what is an autonomous charity. That is a matter that is properly and best determined by the governing body itself taking into account its own particular circumstances. We do not agree that the rationale put forward regarding consistency of approach is beneficial to a sector where institutions differ in their scale and their respective missions. The diversity of the sector is a strength, which has underpinned its success, rather than a weakness.

4.13 Institutions should be able to amend their governance arrangements to meet their changing needs and that of their particular stakeholders. As an example, following a review of its composition, the University of Aberdeen Court has agreed to seek Privy Council approval to change its composition to include a second student member. Introducing legislation which makes very specific numerical requirements of the composition of a university’s governing body would result in structures which become more difficult to amend to meet changing needs. It is widely accepted that institutions should be regularly reviewing the effectiveness of their governance arrangements and the consultation’s proposals would create a legislative barrier to effecting continuous improvement in governance.

4.14 In immediate terms, the proposals would result in an increase in the size of the University Court at Aberdeen to beyond the maximum of 25 members recommended by the Scottish Code, if the principle of an independent majority were to be retained. The University of Aberdeen Court has a maximum of 28 members at present but the Court had recently agreed proposals to reduce its size to 25 and to amend its composition to provide a guaranteed majority of independent members. Without making any other changes to the existing composition of 28, these proposals would increase the size of Court to 32 and a majority of independent members would require either the addition of further members or cutting other constituencies on Court eg staff.

Diversity on Court

4.15 The University is committed to our Court achieving its stated aim of gender diversity in its membership. Over half the membership of Court is elected or appointed by bodies other than the Court itself. That the Court does not ultimately appoint all its members presents challenges to ensuring diversity. One of the potential consequences of introducing more elected or external representatives on governing bodies could be to inhibit the achievement of greater diversity in the membership of governing bodies.

Trade Union Nominations

4.16 Prescribing trade union membership of governing bodies is not appropriate or in-keeping with the principles of good governance and the need for members to be independent, and to take decisions on a collective basis and not as ‘mandated’ individuals. The proposal would also seem to be at odds with Scottish Charity Law which requires trustees to act independently (Section 66 1(c) (i) of the Charity and Trustee Investment (Scotland) Act 2005 states: “in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of a charity trustee – [the trustee] must put the interests of the charity before those of the other person”).

4.17 Most Scottish university governing bodies, including Aberdeen’s, already have significant staff representation (currently six Senate elected academics and one appointed non-academic staff member) and welcome the contribution that staff, both elected by the academic board or nominated/appointed from across the staff community, can bring.
4.18 We do not believe, however, there is a case for trade unions (of which not all staff are members) to have the right of specific representation on governing bodies. Trade unions have a central place within the wider formal governance committee structure of the University including representation on our Partnership, Negotiating and Consultative Committee and through engagement with management. Meetings to discuss the Court agenda are routinely held prior to each meeting of Court with Trade Union representatives to take into consideration any issues they wish to raise. Automatic membership of the governing body (which is the employer), however, gives rise to a conflict of interest at odds with widely accepted principles of good governance. It should also be recognised that only approximately 30% of staff at the University are members of a recognised trade union. A consequence, therefore, of adding trade union members could be a reduction in the representation of other staff members on Court in order to remain within the best practice size of 25, which potentially disadvantages the wider community of staff who are represented, for example, by Senate Assessors.

4.19 A further concern is how the proposals will work where more than one recognised trade union for academic or non-academic staff is recognised and additionally, where staff belong to a trade union that is not recognised by the employer.

Alumni Representatives

4.20 As a matter of principle, the University does not consider it appropriate for Government to legislate on the maximum number of alumni representatives that there should be on a university governing body. With regard to the specific proposal of there being a maximum of two alumni representatives, the current composition (under Ordinance) of the University Court provides for four representatives elected by the General Council which includes all alumni and certain categories of former and current staff. A limit of two such members would, therefore, impact upon the current composition of the University Court. The University would also highlight that at Aberdeen the four General Council members of Court are elected by certain categories of staff not just alumni.

4.21 We are also interpreting the proposal in the Bill not to be a suggestion that only two members of the governing body can be graduates of the University which would be wholly inappropriate and unworkable.

Membership of Academic Boards

4.22 The University’s Senate has considered and endorsed this specific section of our response (4.23 to 4.26).

4.23 Given the diversity of institutions within the Scottish sector and their autonomous nature, it is inappropriate for legislation to prescribe the composition and size of academic boards. This should be a matter for institutions themselves to determine so that their respective Senates can be as effective as possible and reflect the range of academic disciplines within particular institutions. The current mechanism of amending compositions via Ordinance and the Privy Council is appropriate and allows for Ministerial input. The University is concerned that an unintended consequence of the Bill may be to inhibit or restrict the ability of academic communities to determine who should be represented on their Senate, which would seem to be inconsistent with the Scottish Government’s commitment to protecting academic freedom.

4.24 In the case of the University, our Academic Board, the Senate, is currently larger than 120 members at 150. This size reflects the number and diversity of Schools and the need to give each of those constituencies an appropriate level of representation.

4.25 With regard to the membership of Academic Boards, as has been stated above, the University considers this to be a matter for institutions to determine rather than Ministers. The University is unclear if the proposals in the Bill restrict ex officio membership to the Principal and Heads of Schools. Currently our Senate includes (among others) as ex officio members Vice-Principals, College Directors of Teaching and Learning, Directors of Research and Heads of Graduate Schools. The effective conduct and consideration of the
business of Senate would be compromised if we lost the critical input from key members of senior management team and from other *ex officio* members. At present we have a 2:1 balance of elected members to *ex officio* members which provides for an appropriately balanced Senate.

4.26 In the case of student membership, our Senate currently includes *ex officio* positions for the Student President, the President for Education & Employability, the 13 School Conveners and three postgraduate representatives. These roles are all elected posts within our Students’ Association and are key positions within our student representative structure. The wording within the Bill suggests that this *ex officio* approach would no longer be permitted but rather that the student members of Senate would require to be directly elected from the student body. The University feels this approach would go against the strong partnership working between the University and the Students’ Association and would negatively impact the valuable representative role they provide. Directly elected student Senators, while able to bring their own viewpoint to any Senate debate, would not necessarily be linked into the wider student representative structures which would best enable them to represent the views of the student body in Senate debates.

**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”.

6. **Are there any 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.**

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?**

7.1 The University absolutely supports the need for academic freedom (within the law) to be upheld as a principle that is of importance to a democratic society and intrinsic to the success of intellectual communities. With that said, we had not considered the present definition contained in Section 26 of the Further and Education (Scotland) Act 2005 to be deficient. The protection of academic freedom is further enhanced at the University of Aberdeen through its revised ‘Model Statute’ Ordinance provisions and also through the terms and conditions of employment of the relevant staff.

7.2 The proposals in the Bill go beyond those included in the consultation paper. In particular the 2005 Act requires an HEI to *have regard to the desirability of*—

(a) ensuring the academic freedom of relevant persons; and

(b) ensuring that the matters mentioned in subsection (2) are not adversely affected by the exercise of a relevant person’s academic freedom”

7.3 The University notes that the Bill would amend this to require that the HEI “must aim to”—
(a) uphold the academic freedom of all relevant persons, and
(b) ensure that the matters mentioned in subsection (2) are not adversely affected by the exercise of academic freedom by any relevant persons

7.4 This represents a change to the obligations upon the institution and it would have been helpful for this to have been articulated in the consultation.

8 FURTHER COMMENTS
8.1 Removal of Chancellor’s Assessor
8.1.1 The University notes from review of the proposed legislative amendments that the Bill would amend Section 5 Subsection (2) of the Universities (Scotland) Act 1889 and we understand this to mean the removal of the office of Chancellor’s Assessor. At Aberdeen, the Chancellor’s Assessor is a member of Court under Ordinance. This was not proposed in the consultation document and the University has not been consulted regarding this change. It is not clear from the information accompanying the Bill as to the intention or reason for this change. We would, therefore, welcome clarification regarding whether the intention is to remove the office of Chancellor’s Assessor and the reasons for this change.

8.2 Costs of the Bill and Financial Memorandum
8.2.1 Advertisement of Chairs: The University already routinely advertises the position of Senior Governor (Chairperson) and other vacancies for independent members. The Financial Memorandum states (page 16) that the costs of external advertising range from “£750 to £2,000.” The cost to the University of Aberdeen of advertising a position for an independent member in a national UK newspaper in January 2015 was £6,000. We would, therefore, suggest that £2,000 should be the minimum estimate of cost of such external advertising in the media rather than the maximum.

8.2.2 Appointment of Chair by Election: The Financial Memorandum notes (page 17) that it has assumed that the costs of running a ballot will not be significant if the electorate is confined to staff or students of an institution. We would emphasise, however, that the cost of running an election will very much depend on who the electorate is and if it were to be extended to other parties that would incur potentially much more significant costs to institutions, particularly where data had to be gathered and/or only postal communication was possible. It may also be helpful to note that the cost incurred by the University of Aberdeen in running an election to Court for representatives of its General Council (Alumni) is approximately £30k. This does not include the cost of staff time.

8.2.3 Provision of Reasonable Remuneration to Chair of Governing Body: The Financial Memorandum’s estimate of the cost of remunerating assumes (page 17) that the time commitment expected of a Chair is six days a year which is based on attendance at six meetings of the governing body a year. The University of Aberdeen considers this to significantly underestimate the time commitment required of Chairs, the duties of which extend well beyond attending meetings of Court. The University of Aberdeen estimates that the time commitment of a Chair is around 50 days per year rather than six.

8.2.4 Implementation of the Bill: The Financial Memorandum has not referred to the cost of University staff time or legal fees that would be required to amend the University’s Ordinances, resolutions and other formal governance processes to comply with the Bill and to implement the consequential changes that would be required. We estimate this to be greater than the figure of 2-3 days per legislative change referred to at paragraph 7 of the Memorandum which is cited with regard to Scottish Government officials’ time.

Ends