Passage of the

Higher Education Governance (Scotland) Bill 2015

SPPB 236
Passage of the

Higher Education Governance (Scotland) Bill 2015

SP Bill 74 (Session 4), subsequently 2016 asp 15

SPPB 236

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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “As Introduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. An exception is the groupings of amendments for Stage 2 and Stage 3 (a list of amendments in debating order was included in the original documents to assist members during actual proceedings but is omitted here as the text of amendments is already contained in the relevant marshalled list).

Where documents in the volume include web-links to external sources or to documents not incorporated in this volume, these links have been checked and are correct at the time of publishing this volume. The Scottish Parliament is not responsible for the content of external Internet sites. The links in this volume will not be monitored after publication, and no guarantee can be given that all links will continue to be effective.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:
• Introduction, followed by publication of the Bill and its accompanying documents;
• Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
• Stage 2: the Bill returns to a committee for detailed consideration of amendments;
• Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.

After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available free of charge on the Parliament’s website (www.parliament.scot).

The series is produced by the Legislation Team within the Parliament’s Chamber Office. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The oral and written evidence received by the Education and Culture Committee at Stage 1 was originally published on the web only. That material, along with extracts of the minutes of the relevant meetings of the Committee, is included in this volume after the Stage 1 Report.

The reports at Stage 1 by the Delegated Powers and Law Reform Committee on the delegated powers provisions in the Bill, and the Finance Committee on the Financial Memorandum, are also included in this volume. In the case of the Finance Committee report, written evidence and extracts from the minutes and the Official Reports of the relevant meetings are also included. The Delegated Powers and Law Reform Committee did not take evidence on the Bill and agreed its report without debate. No extracts from the minutes or the Official Reports of the relevant meetings are, therefore, included.
At its meeting on 10 November 2015, the Delegated Powers and Law Reform Committee considered a response from the Scottish Government to its report at Stage 1. The papers incorporating that response are included in this volume. The Committee noted the response without debate and so no extracts from the minutes or the Official Reports of the meeting are included.

The Delegated Powers and Law Reform Committee also considered the delegated powers in the Bill after Stage 2, and agreed its report without debate. No extracts from the minutes or the Official Report of the relevant meeting of the Committee are, therefore, included in this volume.
Higher Education Governance (Scotland) Bill
[AS INTRODUCED]

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Higher Education Governance (Scotland) Bill

[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the composition of and appointment to the governing bodies and academic boards of higher education institutions; and to revise provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.

PART 1

GOVERNANCE ARRANGEMENTS

CHAPTER 1

GOVERNING BODIES

Chairing of governing body

1 Appointment as chairing member

(1) The chairing member of the governing body of a higher education institution is to be appointed in accordance with a process set out in regulations made by the Scottish Ministers.

(2) Regulations under this section may include (in particular) provision for—

(a) periods of appointment (and whether reappointment is possible),

(b) means of selection for appointment, for example through—

(i) public advertisement,

(ii) criteria for selection,

(iii) interview of candidates,

(iv) shortlisting of candidates,

(v) holding an election from among candidates,

(c) reimbursement of candidates’ expenses incurred in the process.
Remuneration to be payable

(1) The Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by a higher education institution to the chairing member of the governing body of the institution.

(2) Regulations under this section may include (in particular) provision that—
   (a) specifies or limits the circumstances in which sums must be offered,
   (b) requires sums to be reasonable given the responsibilities of the chairing member,
   (c) delegates to other persons the function of determining sums in particular cases.

Consultation for sections 1 and 2

Before making regulations under section 1 or 2, the Scottish Ministers must consult—
   (a) each higher education institution to which the regulations relate,
   (b) such other persons as the Scottish Ministers consider appropriate.

Membership of governing body

Composition of governing body

(1) The membership of the governing body of a higher education institution is to be composed of—
   (a) the person appointed as the chairing member as mentioned in section 1(1),
   (b) 2 persons appointed by being elected by the staff of the institution from among their own number,
   (c) 1 person appointed by being nominated by a trade union, recognised in relation to the academic staff of the institution, from among the academic staff of the institution who are members of a branch of a trade union that has a connection with the institution,
   (d) 1 person appointed by being nominated by a trade union, recognised in relation to the support staff of the institution, from among the support staff of the institution who are members of a branch of a trade union that has a connection with the institution,
   (e) 2 persons appointed by being nominated by a students’ association of the institution from among the students of the institution,
   (f) 2 persons appointed by being nominated by a graduates’ association of the institution from among the graduates of the institution,
   (g) such other persons as are appointed—
      (i) by virtue of an enactment, or
      (ii) in accordance with the governing document of the institution.

(2) For the purposes of paragraphs (c) and (d) of subsection (1), a trade union is recognised in relation to a category of staff if the higher education institution—
   (a) so recognises it as described in section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992, or
(b) otherwise recognises it as representative of the category of staff.

(3) In paragraph (f) of subsection (1), the reference to the graduates of the institution includes the graduates of any former institution that the governing body of the current institution considers for the purpose of this subsection to be a predecessor to that institution (for example, by virtue of a reconstitution, take-over or merger).

5

Elections to governing body

(1) This section applies in relation to an election of members to the governing body of a higher education institution for the purpose of paragraph (b) of section 4(1).

(2) The election process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—

(a) different provision for different vacancies,

(b) provision defining “staff” for section 4(1)(b) as—

(i) academic staff,

(ii) support staff, or

(iii) all staff.

(4) Where the number of eligible candidates in a category is equal to or fewer than the number of vacancies in that category, those candidates are deemed to be elected.

6

Nominations to governing body

(1) This section applies in relation to a nomination of members to the governing body of a higher education institution for the purpose of each of paragraphs (c) to (f) of section 4(1).

(2) The nomination process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—

(a) provision specifying who may exercise the rights of nomination (whether individually or jointly),

(b) different provision for different vacancies.

(4) Before making or modifying rules under subsection (2), the governing body must consult the representatives of anyone—

(a) with a right of nomination under the proposed rules, and

(b) affected by the proposed rules or (as the case may be) modification.

7

Validity of body’s proceedings

The validity of any proceedings of the governing body is not affected by any—

(a) vacancy in membership (or category of membership),

(b) defect in the appointment of a member.
8 **Power to modify section 4**

The Scottish Ministers may by regulations modify—

(a) the categories of membership in section 4(1),

(b) the number of persons to be appointed under a particular category in that section.

9 **Size of academic board**

The academic board of a higher education institution is to consist of no more than 120 members.

10 **Composition of academic board**

(1) The membership of the academic board of a higher education institution is to be composed of—

(a) the principal of the institution,

(b) the heads of school of the institution,

(c) persons appointed by being elected by the academic staff of the institution from among their own number,

(d) persons appointed by being elected by the students of the institution from among the students of the institution,

(e) such other persons as are appointed—

(i) by virtue of an enactment,

(ii) in accordance with the governing document of the institution, or

(iii) in accordance with a decision of the governing body of the institution.

(2) The academic board is to be constituted in such a way that—

(a) more than 50% of its members fall within subsection (1)(c) or (d),

(b) at least 10% of its members fall within subsection (1)(d).

11 **Elections to academic board**

(1) This section applies in relation to an election of members to the academic board of a higher education institution for the purpose of each of paragraphs (c) and (d) of section 10(1).

(2) The election process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—

(a) provision specifying the number of appointments to be made,

(b) different provision for different vacancies.
(4) Where the number of eligible candidates in a category is equal to or fewer than the number of vacancies in that category, those candidates are deemed to be elected.

12 **Validity of board’s proceedings**

The validity of any proceedings of the academic board is not affected by any—

(a) vacancy in membership (or category of membership),
(b) defect in the appointment of a member.

13 **Power to modify sections 9 and 10**

(1) The Scottish Ministers may by regulations modify the number of members specified in section 9.

(2) The Scottish Ministers may by regulations modify—

(a) the categories of membership in section 10(1),
(b) the number or percentage of persons to be appointed under a particular category in that section.

(3) Modification under subsection (1) or (2)(b) may be made by way of specifying—

(a) a fixed number or percentage, or
(b) a maximum or minimum (or both).

**CHAPTER 3**

**REGULATIONS AND DEFINITIONS**

14 **Procedure for regulations**

(1) Regulations under the preceding provisions of this Part are subject to the affirmative procedure.

(2) Regulations under the preceding provisions of this Part may—

(a) make different provision for different purposes,
(b) include supplemental, incidental, consequential, transitional, transitory or saving provision.

15 **Meaning of higher education institution**

(1) In this Part, “higher education institution” has the same meaning as in the Further and Higher Education (Scotland) Act 2005 except that it—

(a) includes an institution only if the institution is listed in schedule 2 (fundable bodies) to that Act,
(b) excludes The Open University.

(2) The Scottish Ministers may by regulations modify the definition in subsection (1) so as to include or exclude a particular institution.

(3) Regulations under subsection (2) are subject to the negative procedure.
16 **Meaning of governing document**

(1) In this Part, “governing document”—

(a) in the case of an older university, means its ordinances made under the Universities (Scotland) Acts 1858 to 1966,

(b) in the case of an institution established by royal charter, means its charters together with the statutes (if any) made under them,

(c) in the case of a designated institution—

(i) if it is a registered company and no orders of the Privy Council are in force with respect to it, means its articles of association,

(ii) otherwise, means the orders of the Privy Council that are in force with respect to it,

(d) in any other case, means the instruments that establish the higher education institution or govern the composition of its governing body or academic board.

(2) In this section—

“designated institution” has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992,

“older university” is to be construed in accordance with section 16(1) of the Universities (Scotland) Act 1966,

“registered company” means a company registered under the Companies Acts as defined in section 2 of the Companies Act 2006.

17 **Meaning of governing body**

In this Part, “governing body” has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992.

18 **Meaning of academic board**

(1) In this Part, “academic board” in relation to an institution means the body which—

(a) is responsible for the overall planning, co-ordination, development and supervision of the academic work of the institution, and

(b) discharges that responsibility subject to the general control and direction of the governing body of the institution.

(2) For the avoidance of doubt, the body described by subsection (1) is the one sometimes known as the Senate, Senatus or Senatus Academicus.

## PART 2

**ACADEMIC FREEDOM**

19 **Upholding academic freedom**

(1) The Further and Higher Education (Scotland) Act 2005 is amended as follows.

(2) For section 26 (academic freedom) there is substituted—
“26 Academic freedom

(1) A post-16 education body 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.

(2) The matters are—

(a) appointments held or sought, and

(b) entitlements or privileges enjoyed,

at the post-16 education body by those relevant persons.

(3) In this section, “relevant persons” in relation to a post-16 education body
means persons engaged in—

(a) teaching, or the provision of learning, at the body, or

(b) research at the body.

(4) For the purposes of this section, “academic freedom” in relation to relevant
persons includes their freedom within the law to do the following things—

(a) hold and express opinions,

(b) question and test established ideas or received wisdom,

(c) develop and advance new ideas or innovative proposals,

(d) present controversial or unpopular points of view.”.

PART 3
GENERAL PROVISIONS

Ancillary and consequential

Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental,
consequential, transitional, transitory or saving provision as they consider necessary or
expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—

(a) are subject to the affirmative procedure if they add to, replace or omit any part of
the text of an Act (including this Act),

(b) otherwise, are subject to the negative procedure.

Consequential modifications

The schedule makes consequential modifications.

Commencement and short title

Commencement

(1) This section and section 23 come into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—
   (a) appoint different days for different purposes,
   (b) include transitional, transitory or saving provision.

23 **Short title**

The short title of this Act is the Higher Education Governance (Scotland) Act 2016.
SCHEDULE
(introduced by section 21)

CONSEQUENTIAL MODIFICATIONS

The Universities (Scotland) Act 1858

1 (1) The Universities (Scotland) Act 1858 is amended as follows.

(2) In section 4 (university courts to be constituted)—

(a) the words “consist of the members and” are repealed,
(b) the words from “, and of which” to the end are repealed.

(3) In section 5 (powers of the senatus academicus and principal)—

(a) the words from “consist of” to “discipline of the University, and” are repealed,
(b) for the words “its property” there is substituted “the University’s property”.

The Universities (Scotland) Act 1889

2 (1) The Universities (Scotland) Act 1889 is amended as follows.

(2) In section 5 (which makes provision about University Courts)—

(a) in subsection (1), the words before “Seven” are repealed,
(b) in subsection (2), the words “Chancellor or” are repealed in each place where they occur,
(c) in subsection (5), for the word “rector” there is substituted “chairing member”,
(d) after subsection (5) there is inserted—

“(5A) In subsection (5), “chairing member” means the person appointed as mentioned in section 1(1) of the Higher Education Governance (Scotland) Act 2016.”.

The Universities (Scotland) Act 1966

3 (1) The Universities (Scotland) Act 1966 is amended as follows.

(2) In section 2 (constitution of university courts)—

(a) in subsection (1), after the words “Subject to the provisions of section 17 of this Act” there is inserted “and Chapter 1 of Part 1 of the 2016 Act”,
(b) subsection (6) is repealed.

(3) Section 7 (constitution of senates) is repealed.

(4) In section 11 (university staff ineligible to become rector, or assessor on court except in certain circumstances), at the end of the proviso following paragraph (b) there is inserted “or the right of a person to be appointed in accordance with section 4(1)(b) to (d) of the 2016 Act”.

(5) In section 16 (interpretation), at the beginning of the list of defined expressions in subsection (1) there is inserted—

“‘the 2016 Act’ means the Higher Education Governance (Scotland) Act 2016;”.
(6) In Part I (powers exercisable by ordinance) of Schedule 2, for paragraph 4 there is substituted—

“4. To provide for—

(1) the term of office of members of the Senatus Academicus,

(2) the manner of election of members of the Senatus Academicus, except those elected in accordance with rules made under section 11(2) of the 2016 Act.”.
Higher Education Governance (Scotland) Bill  
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about the composition of and appointment to the governing bodies and academic boards of higher education institutions; and to revise provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.

Introduced by: Angela Constance  
On: 16 June 2015  
Bill type: Government Bill
These documents relate to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS
As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Higher Education Governance (Scotland) Bill introduced in the Scottish Parliament on 16 June 2015:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government statement on legislative competence; and
- the Presiding Officer’s statement on legislative competence.

A Policy Memorandum is published separately as SP Bill 74–PM.
EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. The Bill makes provision to improve and modernise aspects of the governance of higher education institutions (HEIs). The Bill contains provision covering four areas:

- **Appointment of the chairing member of the governing body within an HEI**: A power is conferred on the Scottish Ministers, through regulations, to stipulate how the process for appointment of a chairing member of a governing body should be conducted by an HEI. In addition, the Scottish Ministers may make provision in such regulations for remuneration and allowances to be payable to chairing members.

- **Membership of the governing body within an HEI**: A requirement is placed on each HEI to ensure that the membership of its governing body includes a chairing member appointed in accordance with the process stipulated by the Scottish Ministers in regulations; two members who are directly elected from the HEI’s staff; one member nominated by a trade union representing academic staff; one member nominated by a trade union representing support staff; two student members nominated by a students’ association of the HEI; and two members nominated by a graduates’ association of the HEI.

- **Composition of an HEI’s academic board**: A requirement is placed on HEIs to ensure that academic boards do not consist of more than 120 members. In addition, all staff and student board members appointed under the Bill’s election process for staff and students, with the exception of any members attending ex officio, must be elected by the constituency they represent; and the elected members must comprise more than 50% of the total membership of the academic board. Overall, at least 10% of the academic board must be made up of elected student members.

- **Academic freedom**: Section 26 of the Further and Higher Education (Scotland) Act 2005, which makes provision for the protection of academic freedom by post-16 education bodies, is replaced with a new section. The new section strengthens the obligation on post-16 education bodies to require that such bodies must aim to uphold the academic freedom of persons engaged in teaching, the provision of learning or research at the body, and expands the definition of academic freedom to include the freedom to develop and advance new ideas or innovative proposals.
Throughout these Explanatory Notes various terms and abbreviations are used; the most important are as follows:

- “the 1992 Act” means the Further and Higher Education (Scotland) Act 1992;
- “the 2005 Act” means the Further and Higher Education (Scotland) Act 2005;
- “academic board” means the body within the HEI which is charged with dealing with and making decisions on academic and research matters; some HEIs refer to the academic board as the Senate;
- “designated institution” means an institution designated under section 44 of the 1992 Act;
- “HEI” means an institution which is a university or designated institution (with the exception of the Open University), and which is listed in schedule 2 to the 2005 Act; these institutions are institutions based in Scotland which provide higher education within the meaning of section 38 of the 1992 Act and which are eligible for funding from the Scottish Further and Higher Education Funding Council;
- “post-16 education body” means a body listed in schedule 2 to the 2005 Act and a college that is assigned to a regional strategic body under section 7C of the 2005 Act;

COMMENTARY ON SECTIONS

The Bill has the following three Parts:

- Part 1 is concerned with governance arrangements for HEIs and is separated into three chapters. The first chapter deals with appointment of a chairing member of a governing body of an HEI and membership of that governing body more broadly. The second chapter addresses the composition of academic boards in HEIs. The third chapter deals with relevant definitions and regulations associated with the provisions in chapters 1 and 2.
- Part 2 replaces the statutory definition of academic freedom as set out in section 26 of the 2005 Act.
- Part 3 addresses general provisions.

PART 1: GOVERNANCE ARRANGEMENTS

Chapter 1: Governing bodies

Section 1: Appointment as chairing member

Chapter 1 concerns the appointment of a chairing member of a governing body of an HEI and membership of that governing body more broadly. Section 1(1) confers on the Scottish Ministers the power to set out in regulations the process by which an HEI must appoint the chairing member of its governing body. By virtue of section 1(2)(a) and (b) the regulations may, in particular, include provision about the length of term an appointed chair can serve and whether reappointment is possible, as well as provision about the means of selection for
These documents relate to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

appointment including, for example, through public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment. Section 1(2)(c) allows the regulations to make provision for reimbursement of candidates’ expenses incurred in any process set out by the Scottish Ministers.

Section 2: Remuneration to be payable

7. Section 2(1) and (2)(a) to (c) provide that the Scottish Ministers may by regulations provide that remuneration and allowances are payable to chairing members of governing bodies of HEIs. The Scottish Ministers may delegate, to another person, the function of establishing the level of any sums payable to chairing members. The Scottish Ministers may also specify or limit the circumstances in which sums must be offered and require those sums to be reasonable, given the responsibilities of the chairing member, thus ensuring that meaningful remuneration is offered.

Section 3: Consultation for sections 1 and 2

8. Section 3 requires that, prior to making regulations under section 1 or 2 of the Bill, the Scottish Ministers must consult with the HEIs to which the regulations relate and such other persons as the Scottish Ministers consider appropriate. For example, these could include groups or persons appearing to represent the interests of staff, trade unions, current students and alumni of HEIs, as well as wider stakeholder groups.

Membership of governing body

Section 4: Composition of governing body

9. Section 4 sets out the composition of the membership of an HEI’s governing body. This provision is intended to introduce greater consistency in the basic composition of the governing bodies of HEIs. Section 4(1) provides that each governing body must include the following members:

- a chairing member appointed in accordance with the process stipulated by the Scottish Ministers in regulations made under section 1 of the Bill (section 4(1)(a));
- two members directly elected by the staff of the HEI from among the staff of the HEI (section 4(1)(b));
- two members nominated by trade unions. Both members must be members of staff of the HEI in question and must be members of a branch of a union that has a connection with the HEI. One member is to be nominated by a trade union which is recognised by the HEI in relation to the academic staff of the HEI and one member is to be nominated by a trade union which is recognised by the HEI in relation to the support staff of the HEI (section 4(1)(c) and (d));
- two members nominated by a students’ association of the HEI (section 4(1)(e)). The student nominees must be students of the HEI;
- two members nominated by a graduates’ association of the HEI from among the graduates of the HEI (section 4(1)(f)); and
These documents relate to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

- other persons appointed in accordance with the governing instruments of the HEI or any related enactment (section 4(1)(g)). This leaves the governing body to appoint the remaining members as it wishes, provided that this is in line with its governing instruments or any applicable legislation, for example the Universities (Scotland) Acts or individual governance orders made under section 45 of the 1992 Act.

10. Section 4(2) provides that a trade union is recognised in relation to a category of staff of an HEI if it is recognised for collective bargaining purposes by that HEI (as described in section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 or if the HEI otherwise considers the union to be representative of the category of staff.

Section 5: Election to governing body

11. Section 5 makes provision for the election of staff members appointed under section 4(1)(b). Section 5(2) states that the election is to be conducted according to rules made by the governing body of the HEI. While the rules required under this section deal only with the election process, HEIs will remain free to make provision for matters such as removal of members under their own governing documents. Section 5(3) clarifies that the rules may make different provision for different vacancies (which means that different rules could be made by an HEI to apply to different categories of membership of the governing body if the HEI considers that to be appropriate) and may define “staff” as academic staff, support staff or all staff in order to specify the electorate and eligible candidates for a particular vacancy. Section 5(4) makes it clear that when eligible candidates are equal to or fewer than the number of staff members being sought in any category of staff, those candidates are deemed to be elected.

Section 6: Nominations to governing body

12. Section 6 makes provision for the nomination of the members of the governing body appointed by being nominated under section 4(1)(c) to (f). Section 6(2) requires that the nomination process is conducted according to any rules on nomination made by the governing body of the HEI. The rules required under this section deal only with the nomination process, although HEIs will remain free to make provision for matters such as removal of members under their own governing documents (noting that the Bill provides that the role of nominating bodies is to nominate, and not a more extensive role which might include the recall of nominees). Section 6(3) provides that the rules may determine who can exercise the right of nomination (for example, where there is more than one body which meets the criteria for making a nomination under section 4) and that different provision might be made for different vacancies on the governing body.

13. Section 6(4) sets out that before making or changing any existing rules under section 6(2), the governing body must consult the representatives of anyone who has both a right of nomination under the proposed rules (section 6(4)(a)) and who is affected by the proposed new rules or by any proposed amendment to existing rules (section 6(4)(b)). Accordingly, if only part of the rules are revised, there will be no requirement to consult with bodies that have a right to make a nomination if the rules that are applicable to that body are not subject to any changes.
Section 7: Validity of body’s proceedings

14. Section 7 ensures that the validity of proceedings of the governing body of an HEI is not affected by any vacancy arising in membership or category of membership (section 7(a)). This means that, in the event of an unexpected vacancy arising, the HEI can continue to function pending the appointment of a new member under section 4. Further, this validity is not affected by any defect in the appointment of a member of the relevant governing body (section 7(b)).

Section 8: Power to modify section 4

15. Section 8 gives the Scottish Ministers a power to amend, by regulations, the categories of governing body membership set out in section 4(1) or the number of persons to be appointed under a particular category.

Chapter 2: Academic boards

Section 9: Size of academic board

16. Section 9 requires that the number of persons on an HEI’s academic board must be no more than 120 members.

Section 10: Composition of academic board

17. Section 10(1) sets out the composition of the membership of an academic board of an HEI. Each academic board must include the following members:

- the principal of the HEI (section 10(1)(a));
- heads of school, who are the individuals who are the most senior academics in a particular department within an HEI (section 10(1)(b));
- academic staff elected from among their own number (section 10(1)(c));
- students elected from among their own number (section 10(1)(d)); and
- other persons appointed by virtue of a related enactment (section 10(1)(e)(i)) or in accordance with the governing instruments of the HEI (section 10(1)(e)(ii)) or in accordance with a decision made by the governing body of the HEI (section 10(1)(e)(iii)).

18. Section 10(2)(a) provides that more than 50% of the membership of the academic board members must be persons elected by staff or students. Section 10(2)(b) provides that at least 10% of the membership of the academic board members must be persons elected by students. The proportions that will be required (just over 50%, and 10%, respectively) are generally reflected in the composition of the majority of existing academic boards. Election, rather than nomination, of student members to academic boards will be new to the majority of HEIs.

Section 11: Elections to academic board

19. Section 11 makes provision for the conduct of elections of members appointed under section 10(1)(c) or (d). Section 11(2) provides that the election is to be conducted in accordance
with rules made by the governing body of the HEI. Under section 11(3) the rules may determine the number of appointments to be made (paragraph (a)), and make different provision for different vacancies (paragraph (b)) (which means that the rules for the election of staff members could be different to the rules for the election of student members).

20. Section 11(4) provides that where the number of eligible candidates in one of the categories in section 10 is equal to or fewer than the number of vacancies available in that category, those candidates will be deemed to be elected.

Section 12: Validity of board’s proceedings

21. Section 12 ensures that the validity of proceedings of the academic board of an HEI is not affected by any vacancy in membership or category of membership (paragraph (a)). It further provides that this validity is not affected by any defect in the appointment of a member of the relevant academic board (paragraph (b)).

Section 13: Power to modify sections 9 and 10

22. Section 13(1) gives the Scottish Ministers a power to amend, by regulations, the number of members of the academic board specified in section 9. Section 13(2) gives the Scottish Ministers the power to amend, by regulations, the categories of membership of the academic board set out in section 10(1) and to amend the number and percentage of members to be appointed under a particular category. By virtue of section 13(3) they can amend the number of members in section 9 or the number or percentage of persons to be appointed under a particular category of section 10(1) by specifying a fixed number or percentage, or a maximum or a minimum.

Chapter 3: Regulations and definitions

Section 14: Procedure for regulations

23. Section 14 sets out that any regulations made under Chapters 1 and 2 of the Bill are subject to the affirmative procedure.

24. Section 14(2) provides the Scottish Ministers with the power, when making any regulations under Chapters 1 and 2 of the Bill, to make different provision for different purposes and to include in such regulations any supplemental, incidental, consequential, transitional, transitory or saving provision.

Section 15: Meaning of higher education institution

25. Section 15(1) provides a definition of the term “higher education institution” which applies for the purposes of Part 1 of the Bill. Section 15(1) provides that the term has the same meaning as in the 2005 Act, but that it includes an institution here only if it is also listed in schedule 2 to the 2005 Act. The definition of HEI, however, explicitly excludes the Open University (subsection (1)(b)).
26. The 2005 Act definition of “higher education institution” is found in section 35(1) of that Act where it is defined as (1) a university or (2) a designated institution within the meaning of section 44(2) of the 1992 Act. In practice, the only non-universities which are currently designated under that section are:

- the Royal Conservatoire of Scotland (which was designated by SI 1992/1025 under its former name, the Royal Scottish Academy of Music and Drama),
- Glasgow School of Art (which was also designated under SI 1992/1025), and
- SRUC, or Scotland’s Rural College (which was designated by SSI 2008/177 under its former name, the Scottish Agricultural College).

27. Any institution listed in schedule 2 to the 2005 Act is a fundable post-16 education body, meaning that it is currently eligible to receive funding from the Scottish Further and Higher Education Funding Council. However, the further education colleges listed under the first italic heading in that schedule will not be caught, as they are not covered by the definition of higher education institution in section 35(1) of the 2005 Act.

28. The effect of the definition is to capture institutions which provide higher education in Scotland only if they are eligible for public funding, while excluding the Open University on the basis that it is a single institution established elsewhere and operating across multiple jurisdictions which might otherwise be made subject to conflicting governance requirements.

29. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition of “higher education institution” in subsection (1). This would enable the Scottish Ministers to include or exclude a particular HEI (including the Open University itself) from that definition. Section 15(3) provides that such regulations will be subject to the negative procedure.

Section 16: Meaning of governing document

30. Section 16 sets out the meaning of the term “governing document” used in Part 1 of the Bill. Section 16(1)(a) confirms that in the case of an older university this means any ordinances made under the Universities (Scotland) Acts. Under the same subsection, paragraph (b) confirms that for an HEI established by royal charter, a governing document is any of its charters and any statutes made under them (paragraph (b)).

31. Section 16(1)(c) confirms that in the case of a “designated institution”, a governing document will be any orders of the Privy Council which are in force with respect to the HEI, except where the HEI is a registered company under the Companies Acts and it has no orders of the Privy Council in force in relation to it. In such cases the governing document is the articles of association of the HEI. Section 16(2) clarifies that the term “designated institution” means an institution designated under Part II of the 1992 Act (where the definition is found in section 44).

32. Section 16(1)(d) explains that a governing document, aside from the cases set out in section 16(1)(a) to (c), means any instrument which establishes the HEI or which governs the composition of its governing body or academic board.
33. In addition to defining “designated institution”, section 16(2) provides that, “older university” is to be construed in accordance with section 16(1) of the Universities (Scotland) Act 1966. These are the University of Aberdeen, the University of Edinburgh, the University of Glasgow and the University of St. Andrews. It also provides that “registered company” means a company registered under the Companies Acts as defined in section 2 of the Companies Act 2006.

Section 17: Meaning of governing body

34. Section 17 states that, in Part 1 of the Bill, the term “governing body” has the same meaning as in Part II of the 1992 Act (where the definition is found in section 56(1)).

Section 18: Meaning of academic board

35. Section 18 states the meaning of the term “academic board” in the context of an HEI. Section 18(1)(a) and (b) explains that the term means the body of persons with responsibility for overall planning, co-ordination, development and supervision of the academic work of the HEI but that the academic board discharges that responsibility subject to the general control and direction of the governing body of the HEI.

36. Section 18(2) clarifies that the “academic board” is also known in some HEIs as the Senate, Senatus or (and in the case of the older universities, in the Universities (Scotland) Acts) Senatus Academicus.

PART 2: ACADEMIC FREEDOM

Section 19: Upholding academic freedom

37. Section 19 of the Bill substitutes a new section 26 into the 2005 Act. The new section strengthens the obligation on post-16 education bodies by providing that such bodies must aim to uphold the academic freedom of persons engaged in teaching, the provision of learning or research at that body (section 26(1)(a)). Specifically, the new section 26(1)(b) provides that post-16 education bodies must aim to ensure that appointments of such persons (whether held or sought) and any entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of their academic freedom. The new section 26(4) expands the current definition of academic freedom to clarify that it includes the freedom, within the law, to develop and advance new ideas or innovative proposals. This adds to the existing freedom to hold and express opinions, question and test established ideas or received wisdom, and present controversial or unpopular points of view.

PART 3: GENERAL PROVISIONS

Section 20: Ancillary regulations

38. Section 20(1) gives the Scottish Ministers the power, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Act. Section 20(2)(a) provides that these regulations will be subject to the affirmative procedure when they
These documents relate to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

add to, replace, or omit any part of the Act or any other Act. Section 20(2)(b) provides that, in all other circumstances, regulations will be subject to the negative procedure.

Section 21: Consequential modifications

39. Section 21 introduces a schedule to the Bill making a number of consequential amendments to, or modifications of, other enactments as a result of the Bill. Paragraph 1 of the schedule makes consequential amendments to the Universities (Scotland) Act 1858. Paragraph 2 of the schedule makes consequential amendments to the Universities (Scotland) Act 1889. Finally, paragraph 3 makes consequential amendments to the Universities (Scotland) Act 1966. The consequential amendments are necessary as a result of the Bill’s provisions on the appointment of chairs of governing bodies, the composition of governing bodies of HEIs and the composition of academic boards.

Section 22: Commencement

40. Section 22(1) brings sections 22 and 23 into force on the day after Royal Assent. Section 22(2) provides that the other provisions in the Act come into force on a day appointed by the Scottish Ministers in regulations. Section 22(3)(a) allows the Scottish Ministers by regulations made under subsection (2) to bring the other provisions of the Bill into force on different days for different purposes and section 23(3)(b) allows the Scottish Ministers to include transitional, transitory or saving provision in those regulations.
INTRODUCTION

1. This document relates to the Higher Education Governance (Scotland) Bill (“the Bill”) introduced in the Scottish Parliament on 16 June 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.2 of the Parliament’s Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament. The Memorandum summarises the cost implications of the Bill.

OVERVIEW

2. The Scottish Government aims to strengthen governance arrangements across the higher education sector. The Bill will support this. It will also support the Scottish Government’s key aim of creating an inclusive, strong and sustainable economy by enabling more transparent, accessible and inclusive participation in higher education governance.

3. The principal objective of the Bill is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.

CONTENTS

4. The Memorandum summarises the cost implications of the Bill. The Bill:

- Requires higher education institutions (“HEIs”) to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers. Regulations may include provision for periods of appointment and means of selection for appointment (for example, through public advertisement of the position, selection criteria, interview of candidates, short listing of candidates and holding an election from among candidates shortlisted as suitable for appointment). The regulations may also require HEIs to make available to candidates reimbursement of reasonable expenses incurred as a result of attending an interview, should a pre-selection process operate, and to make available to chairs remuneration commensurate with the responsibilities of carrying out the functions of office. The Bill also requires the Scottish Ministers, before making regulations, to consult with HEIs to which the regulations relate and other such persons that Ministers consider appropriate.

- Requires HEIs to include within the membership of their governing bodies the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students’ association, and two graduates of the HEI nominated by the graduates’ association.

- Requires HEIs to ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of School attending ex officio; a majority of elected members representing staff and students; and a minimum of 10%
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student representation. The Bill also ensures that all board members appointed under the Bill’s election process for staff and students are elected by the constituency that they represent.

- Replaces the current definition of academic freedom in section 26 of the Further and Higher Education (Scotland) Act 2005, with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals.

FUNDING

5. The analysis and estimates contained in this Memorandum draw on a variety of sources including:
   - Discussions with partners and stakeholders for whom there may be modest financial implications, to be absorbed within existing budgets,
   - Discussions with Scottish Government finance and analytical specialists, and
   - Consideration as part of preparing the draft Business Regulatory Impact Assessment (BRIA).

6. This document should be read in conjunction with the Policy Memorandum which sets out the reasoning behind the Bill more fully.

COSTS ON THE SCOTTISH ADMINISTRATION

7. It is expected that when the Bill comes into force there will be a small resource requirement attributable to the Scottish Government, as HEIs will be obliged to amend their governing instruments to align with the changes to primary legislation. These adjustments will be made over a transitional period and the negligible additional costs associated with Scottish Government staff time will be met from within existing Scottish Government budgets and have not, therefore, been highlighted as new costs in this Memorandum. The typical resource cost associated with consideration of subsequent amendments to HEIs’ governing instruments and charters arising from the provisions in this Bill would involve two to three days’ working time per legislative change for between two and four Scottish Government officials.

8. The Higher Education and Learner Support Division (HELS), working primarily with colleagues in the Scottish Government Legal Directorate (SGLD), advises Ministers on the governance changes being sought by HEIs through the Privy Council. This is an existing practice that will continue when governance changes are sought in response to the Bill and the costs involved will be absorbed by the Scottish Government without the need for additional funding.

COSTS ON LOCAL AUTHORITIES

9. There are no anticipated costs on local government arising from any of the provisions within the Bill.
COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Part 1 (Sections 1 to 3): Governance arrangements, governing bodies, chairing of governing body

10. The Report of the Review of Higher Education Governance in Scotland1 (“the Review”) highlighted the importance of a rigorous and transparent process for appointing a chair of a governing body and a number of its recommendations were taken forward through the Scottish Code of Good Higher Education Governance2 (“the Code”). In general, prior to the implementation of the Code, the chair was selected by the members of its governing body and it was uncommon for this position to be advertised externally. The exception to this was the ancient universities, where the rector has the right to chair the governing body (the universities of Aberdeen, Edinburgh, Glasgow and St. Andrews). However, the Code now requires that the process of appointment of a chair is managed by a nominations committee, that there is a full job description and that the vacancy is widely advertised both within and outwith the institution. The costs associated with this process are incurred by individual HEIs and are generally accepted as the standard costs of recruitment.

11. The Code One Year into Implementation report3 of 2014 concludes that, in relation to the six vacancies for chair which have arisen across the sector since the Code came into effect, each recruitment process has been compliant with the Code.

12. Depending on the content of eventual regulations made under the Bill, there may be additional costs for HEIs related to the election of chairs of the governing body and making available remuneration linked to carrying out the duties of the office, or reasonable expenses for individuals being interviewed for the role of chair. This latter cost would be relevant where there is a pre-selection interview process based on suitability for assuming the role before the chair of the governing body is elected or appointed from among the shortlisted candidates.

13. The potential selection of candidates for chair might involve open advertisement and selection of candidates based on suitability for the role of chair. This process already happens at most HEIs in line with the Code. As such, it is considered that any potential additional cost will be minimal and should be absorbed within existing institutional budgets. A chair of a governing body will normally retain the position for up to a period of four years and, if re-appointed, this can increase to a maximum of nine years. Analysis of available estimated costs has been compiled for the recruitment of a chair:

I. Recruitment exercise for appointing a chair of a governing body: Resource costs attributed to the individual HEI will largely take the form of staff time to process applications and hold interviews (assuming that an interview process is to operate). There is no information readily available to calculate staff costs associated with the recruitment of a chair; however, advice from Robert Gordon University suggested that the cost to an

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HEI would not exceed £3,000 per recruitment exercise. These costs would be absorbed within individual institutions’ existing budgets. For those institutions already adhering to the Code, such costs would not be new. The 18 HEIs affected by the new statutory requirement to appoint a chair via a process set out in regulations will typically replace the chairing member of their court or governing body once every four years. Based on an assumed cost of £3,000 per recruitment exercise, over the course of a four year cycle of chair replacements for the higher education sector in Scotland, the total cost of administering these recruitment exercises might be £54,000.

Another cost incurred in a recruitment exercise will be the cost of advertising the vacancy. HEIs can advertise board member vacancies through their individual websites as well as the public appointments website (www.appointed-for-scotland.org) with no upfront cost to individual HEIs. While the detail of the regulations is yet to be determined, they may require the vacancy to be publicised more widely. Accordingly, an examination of external advertising costs was carried out within both traditional newspaper advertising and social media outlets. It was calculated that publicising the vacancy through external services such as print and media would be likely to cost an HEI in the range of £750 to £2,000 per recruitment exercise. Assuming the maximum estimated advertising cost for each of the 18 HEIs affected, over the course of a four year cycle of chair member replacements for the higher education sector in Scotland, the cost of advertising the vacancies might total a maximum of £36,000.

II. **Appointment of chair:** The requirement for HEIs to run an election to appoint the successful candidate would present a new cost to individual institutions. Although costs will depend upon the nature and size of the electorate which features in the regulations, it is considered that the maximum cost of this election would be broadly equivalent to the cost of electing a rector within the ancient universities. The University of Aberdeen provides detailed guidance[^4] on the process of electing a rector and specifies the maximum permitted campaigning costs. During the election process, candidates and their proposers are limited to spending £500 in connection with promoting their own campaign. This includes expenditure on items such as posters, leaflets, advertisements and websites. The University subsequently reimburses expenditure of up to £300, subject to receipts being provided. Candidates may personally contribute or obtain sponsorship of up to a further £200. The cost of allowing candidates to campaign for election is, therefore, estimated at £500 per candidate. It is assumed that this cost would be met in its entirety from the existing budgets of HEIs. Table 1 assumes that there might typically be two candidates involved in an election for the role of chairing member of the governing body of an HEI. The 18 HEIs that the requirement to elect a chair would be relevant to, typically replace the chairing member of their governing body every four years. Based on these cost assumptions, over the course of a four year cycle of chair replacements for the higher education sector in Scotland, the cost of running chairing member elections might total £18,000, which would be met from existing budgets. This estimation of cost does not include information on the costs to institutions of conducting the election and ensuring its probity. These costs will be influenced by the final form of the franchise selected for election of a chairing member. However, it is expected that any additional

[^4]: Source University of Aberdeen Rector guidance
(http://www.abdn.ac.uk/infobhub/documents/Rectorial_Election_Rules_for_the_web.pdf)
costs will be minimal and able to be absorbed within existing institutional budgets. This conclusion has been reached based on the availability of relatively low cost ICT solutions, as well as free online platforms for voting and convening elections. Assuming the electorate is confined to the HEI in one form or another (be that its students, its staff, the members of its governing body, or a combination of these), the HEI is likely to have email addresses available to it for all potential voters. The use of ICT solutions should negate the need for investment in items such as postal charges or significant involvement of a Returning Officer over and above the existing duties they perform within an institution.

III. Provision of expenses to candidates invited to interview:- This is not current practice across HEIs, but the University of Glasgow has existing policies in place to provide reasonable interview expenses to candidates when attending interviews for staff positions (subject to qualifying criteria). The criteria set out by the University of Glasgow\(^5\) suggest a maximum of around £500 will be paid to interviewees travelling outwith a radius of 35 miles for attending an interview. During the typical four-year cycle of appointment, assuming that each of the 18 HEIs affected by the Bill is required to carry out an open recruitment process which involves the interview of potential candidates and a shortlisting process, it is estimated that up to four candidates might gain an interview at each HEI. Accordingly, the approximate maximum costs for providing reasonable interview expenses will be £2,000 per HEI. When multiplied by the 18 HEIs affected by this provision of the Bill, this would equate to around £36,000 per four year cycle of recruitment. This is a cost for individual HEIs which will be absorbed within their existing budgets. If the eventual regulations do not in fact require an interview process, no costs will arise under this heading. If the maximum costs for appointment of a chair (including costs associated with an election) are totalled for all 18 HEIs, then over a typical four year appointment cycle, these costs will amount to £144,000, or £8,000 per institution.

IV. Provision of reasonable remuneration to chair of governing body:- Again, it is anticipated that modest costs associated with this provision will be absorbed within existing budgets of HEIs. It is also anticipated that governing bodies will meet on average between four and six times per academic year. For illustrative purposes the Scottish Government has used the Public Sector Pay Policy for Senior Appointments Technical Guide 2013/2014 to estimate a maximum daily fee rate of £512. Attributing this to all HEIs (assuming the chair attends six meetings per year), would suggest a cost to an individual HEI of £3,072 per annum which, when multiplied by the 18 HEIs affected by this provision of the Bill, would equate to a total approximate cost of £55,296 per annum. This figure is considered a maximum, as it is unlikely that all chairs will request the remuneration available for taking the position. Where the chairs of certain HEIs are already receiving remuneration, the costs for those HEIs will not necessarily increase.

\(^5\) Source: http://www.gla.ac.uk/services/humanresources/recruitment/selection/expenses/
Table 1. Costs to individual HEIs for carrying out appointment of chair

<table>
<thead>
<tr>
<th></th>
<th>Assumed cost per candidate / unit of activity</th>
<th>Number of candidates / unit of activity</th>
<th>Assumed cost per recruitment drive</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Recruitment exercise (estimated administration costs)</td>
<td>£3,000</td>
<td>1 recruitment drive</td>
<td>£3,000</td>
</tr>
<tr>
<td>(ii) Recruitment exercise (assumed external publicity costs)</td>
<td>£2,000</td>
<td>1 recruitment drive</td>
<td>£2,000</td>
</tr>
<tr>
<td>(iii) Election process of chair (assumed minimum two candidates)</td>
<td>£500 per candidate</td>
<td>2 candidates</td>
<td>£1,000</td>
</tr>
<tr>
<td>(iv) Interview expenses</td>
<td>£500 per candidate</td>
<td>4 candidates</td>
<td>£2,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td><strong>£8,000</strong></td>
</tr>
</tbody>
</table>

Note: this total estimated cost will be incurred once every typical four year recruitment cycle.

Table 2. Assumed annual cost to HEIs for remuneration of chair

<table>
<thead>
<tr>
<th></th>
<th>Assumed Daily Rate</th>
<th>Number of meetings per year (max)</th>
<th>Assumed total cost per institution per year</th>
<th>Assumed cost per 18 institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(i) Remuneration of reasonable expenses</strong></td>
<td>£512</td>
<td>6</td>
<td>£3,072</td>
<td>£55,296</td>
</tr>
</tbody>
</table>

**Source: public sector pay policy for senior appointments, technical guide 2013/14 (page 29)**

Part 1 (Sections 4 to 8): Governance arrangements, governing bodies, membership of governing body

14. These sections require HEIs to include within the membership of their governing bodies the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students’ association/union, and two graduates of the institution nominated by a graduates’ association.

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15. The requirement on each HEI to hold an election for two staff members is a new requirement and, therefore, may require alternative processes to be set up for appointing board members, which may incur additional costs. However, HEIs already hold elections for staff members for positions on academic boards (the costs of which are met from within HEIs’ existing budgets). There is no information available to determine the anticipated costs of staff elections for governing bodies, but it is likely that the systems that HEIs already have in place could be adapted relatively easily. The costs to HEIs of conducting the election and ensuring its probity are therefore expected to be minimal and will be absorbed within existing institutional budgets. All HEIs are likely to have systems in place to manage the various internal elections that they already conduct.

16. There is no requirement to allow staff membership candidates for election to campaign but, should HEIs wish to do so then, similar to the requirement for elections to select a chairing member of the governing body, an estimate can be made based on the University of Aberdeen guidance on election of rectors. The estimate is that the election of two staff members to the governing body of an HEI may cost in the region of £500 per candidate, although in practice a lower cap may well be imposed given that the position is not that of the chairing member. However, if four candidates are reimbursed at this level, this would equate to a maximum cost per HEI of £2,000, or £36,000 for all HEIs affected by this provision of the Bill. As with the chair of the governing body, appointments are typically for a period of four years, and so the costs would only arise once in each four year appointment cycle. Any additional cost attributed to the Bill would be absorbed by the existing budgets of HEIs.

17. Rights of nomination are granted by the Bill to staff unions, students’ associations, and graduates’ associations. In each case, the nomination process must be conducted in accordance with rules set down by the governing body of the HEI. Accordingly, it is possible that an HEI might either require or permit its nominating organisations to hold elections in order to select their nominees. In such a case, the cost to the nominating organisation would depend upon the precise details of the rules set down by the HEI, although the nominating organisations are likely to already have processes in place for the election of their own office bearers. It is expected that these processes could be adapted with relative ease and at minimal or no cost. However, there is no requirement to compel the nominating organisations to hold an election in order to select their nominees. For example, a nominating organisation could be permitted simply to nominate its own office bearers to the relevant position on the HEI’s governing body. Given that each HEI is under an obligation to consult with its nominating organisations before making rules, it is expected that the costs of any nominating process will factor heavily in the decision as to which approach is adopted, and that an election will only occur where either the costs are minimal or it is in line with the wishes of the nominating body. Overall, it is therefore considered that there are no anticipated additional costs on other bodies, individuals or business.

Part 1 (Sections 9 to 13): Governance arrangements, academic boards

18. These sections require HEIs to ensure that their academic boards are comprised of no more than 120 people and include principals and heads of school attending ex officio; a majority of elected members representing staff and students; a minimum of 10% student representation, and to ensure that all staff and student members elected under the Bill’s election procedures are elected by the constituency that they represent. The Review indicated that the majority of academic boards within HEIs include elected staff representation and at least the student
association President, who is generally an ex officio member. The requirement in section 10 that the majority of members of the academic board be elected by the constituency they represent and that at least 10% of board members should be students, may require additional elections to be held which may lead to additional costs for HEIs. However, as the costs of existing elections are already absorbed within individual HEIs’ budgets, it is expected that any further elections required as a consequence of the Bill will also be absorbed within existing budgets. As with the election of staff to governing bodies, the costs to the institutions of conducting the election and ensuring its probity are expected to be minimal. All HEIs are likely to have systems in place to manage the various internal elections that they already conduct, and HEIs already hold elections for staff members for positions on academic boards so while the detail of the election process may be new, the holding of elections itself is not. It is not expected that any campaigning would be carried out other than the circulation by the HEI of a brief biography for each candidate, so no campaigning costs have been allocated here.

**Part 2 (Section 19): Academic freedom**

19. There are no anticipated additional costs on other bodies, individuals and business in relation to academic freedom. Alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs. However, no additional costs are expected to arise.
SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

On 16 June 2015, the Cabinet Secretary for Education and Lifelong Learning (Angela Constance MSP) made the following statement:

“In my view, the provisions of the Higher Education Governance (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

On 16 June 2015, the Presiding Officer (Rt Hon Tricia Marwick MSP) made the following statement:

“In my view, the provisions of the Higher Education Governance (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Higher Education Governance (Scotland) Bill introduced in the Scottish Parliament on 16 June 2015. It has been prepared by the Scottish Government to satisfy Rule 9.3.3 of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 74–EN.

POLICY OBJECTIVES OF THE BILL

2. The Scottish Government aims to strengthen governance arrangements across the higher education sector. The Higher Education Governance (Scotland) Bill (“the Bill”) will support this and the national outcome that public services are high quality, continually improving, efficient and responsive to local people’s needs. It will also support the Scottish Government’s key aim of creating an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance.

3. The Scottish Government is committed to excellence in higher education in Scotland. The principal objective of the Bill is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.

4. There are 19 higher education institutions¹ (“HEIs”) in Scotland which are publicly funded. These are commonly divided into three groups: ancient universities; chartered universities; and post-1992 ‘new’ universities and ‘small specialist institutions’. Different groups of HEIs in Scotland are regulated by various statutes, statutory instruments and royal charters. The governance structures within the different institutions have evolved over the decades and centuries, creating a range of diverse approaches to governance.

¹ The 19 HEIs are the universities of Aberdeen, Abertay, Dundee, Edinburgh, Edinburgh Napier, Glasgow, Heriot-Watt, Stirling, St Andrews, Strathclyde, and Glasgow Caledonian University, Queen Margaret University, SRUC (Scotland’s Rural College), Robert Gordon University, Glasgow School of Art, the Royal Conservatoire of Scotland, University of the Highlands and Islands, University of the West of Scotland, and the Open University in Scotland.
5. In June 2011, the Cabinet Secretary for Education and Lifelong Learning commissioned an independent review of how Scotland’s universities are governed. The Review of Higher Education Governance in Scotland was prompted by concern that the existing models were in need of update, not because they had failed, but because the time was right to consider their ongoing fitness for purpose. Scottish HEIs receive a substantial amount of public investment, with budgeted spend of over £4 billion since 2012/13, and have a well-deserved national and international reputation for excellence. The public rightly expects the highest standards of governance and accountability to be followed by institutions in Scotland.

6. The provisions set out in this Bill are informed by the Report of the Review of Higher Education Governance in Scotland\(^2\) (“the Review”), published in January 2012. The provisions of Part 1 of the Bill will apply to HEIs. The definition of an HEI in the Bill is a higher education institution (within the meaning of the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”)) provided that it has also been listed as eligible for public funding under that Act, but excluding the Open University. The Open University is excluded on the basis that it is a single institution established elsewhere and operating across multiple jurisdictions which might otherwise be made subject to conflicting governance requirements. However, the provisions on academic freedom will apply to the Open University in Scotland and will also apply to publicly funded colleges of further education as the new section 26 of the 2005 Act (as inserted by section 19 of the Bill) applies to all post-16 education bodies in Scotland (as defined in section 35(1) of the 2005 Act).

7. A number of the Review recommendations have been taken forward through the development of the Scottish Code of Good Higher Education Governance\(^3\), developed on behalf of the Committee of Scottish Chairs of HEIs by a steering group chaired by Lord Smith of Kelvin, and published in July 2013.

8. Specifically, the Bill:

   - Requires HEIs to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers. Regulations may include provision for periods of appointment and means of selection for appointment (for example through public advertisement of the position, selection criteria, interview of candidates, short listing of candidates and holding an election from among candidates shortlisted as suitable for appointment). The regulations may also require HEIs to make available to candidates reimbursement of reasonable expenses incurred as a result of attending an interview, should a pre-selection process operate, and to make available to chairs remuneration commensurate with the responsibilities of carrying out the functions of office. The Bill also requires the Scottish Ministers, before making regulations, to consult with HEIs to which the regulations relate and other such persons that the Ministers consider appropriate.

   - Requires HEIs to include within the membership of their governing bodies: the person appointed as chairing member, two directly elected staff members, one


This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students association, and two graduates of the HEI nominated by the graduates’ association.

- Requires HEIs to ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending ex officio; a majority of elected members representing staff and students; and a minimum of 10% student representation. The Bill also ensures that all board members appointed under the Bill’s election process for staff and students are elected by the constituency that they represent.

- Replaces the current definition of academic freedom in section 26 of the 2005 Act, with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals.

BACKGROUND

Legal background

9. The legal basis for the governance arrangements for each HEI differs according to the type of HEI:

- Governance arrangements for the “ancient” universities are contained in the Universities (Scotland) Acts 1858 to 1966 and in ordinances made under these Acts by the universities’ governing bodies and approved by the Privy Council.4

- The “chartered” universities are those HEIs established by royal charter and their charters provide that the relevant governing bodies may make statutes, ordinances and regulations regarding their governance arrangements. Changes to the charters and statutes of these HEIs require Privy Council approval.5

- The “post-1992” HEIs are designated institutions under the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”) and, as such, governance orders (Orders of Council) for those HEIs can be made and amended by the Privy Council.6

The Review of Higher Education Governance in Scotland

10. In June 2011, the Cabinet Secretary for Education and Lifelong Learning asked Professor Ferdinand von Prondzynski, Principal of Robert Gordon University, to chair a panel to review the governance of Scottish HEIs. The panel’s membership included representatives from a wide

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4 The “ancient” universities are the universities of Aberdeen, Edinburgh, Glasgow and St Andrews.
5 The “chartered” universities are the universities of Dundee, Heriot-Watt, Stirling and Strathclyde.
6 The “post-1992” HEIs which are designated institutions are the universities of Abertay, Edinburgh Napier, Glasgow Caledonian, Queen Margaret Edinburgh, Robert Gordon, the University of the West of Scotland and the University of the Highlands and Islands (“UHI”) as well as the Glasgow School of Art, Royal Conservatoire of Scotland and SRUC (Scotland’s Rural College). All of these except for UHI and SRUC have governance orders made by the Privy Council under section 45 of the 1992 Act. UHI is a registered company and certain of its Articles of Association can only be changed with the approval of the Privy Council. SRUC is also a registered company and the consent of Scottish Ministers (rather than the Privy Council) is required for any changes to its Articles of Association.
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range of stakeholder interests from across the higher education sector and included a university Rector, the President of the National Union of Students Scotland, a trade union representative and a representative of the Chairs of University Courts.

11. The panel was invited to identify and examine proposals for change which would recognise the benefits of an autonomous sector but which would also consider the importance of transparency, as well as the effectiveness of management and governance, the clarity of strategic purpose and its efficient implementation. This included looking at where governance worked well, where it could work better, and what standards of good practice all governing bodies should observe.

12. The panel invited and considered written and oral evidence from a wide range of interests and experience including members of the public, academics, staff and student representatives in Scotland and from across Europe and the USA. The panel’s report was published in January 2012 and contained 17 recommendations aimed at strengthening the higher education sector in Scotland. These included recommendations that there should be elected chairs of court, a Scottish Higher Education Advisory Forum and a new Scottish Code of Good Governance for HEIs.

Scottish Code of Good Higher Education Governance

13. As already set out, the Scottish Code of Good Higher Education Governance7 (“the Code”) was developed on behalf of the Committee of Chairs of Scottish HEIs by a steering group chaired by Lord Smith of Kelvin, and published in July 2013. Although the Code has no statutory basis, the Scottish Further and Higher Education Funding Council (“SFC”) requires compliance with the Code as a term and condition of funding provided to HEIs. Section 9A of the 2005 Act8 provides that the Scottish Ministers may impose, as a condition of grant to the SFC under section 9(2) of that Act, a condition that the SFC must, when making a payment to an HEI, require that HEI to comply with principles of good governance which appear to the SFC to constitute good practice. Scottish Ministers have chosen to impose this condition in the grant awarded to the SFC for 2014/2015 and intend to do so again for 2015/2016. The SFC’s Financial Memorandum with Higher Education Institutions9, which sets out the requirements with which HEIs must comply as a term and condition of grant, provides that governing bodies of HEIs must comply with the principles of good governance set out in the Code.

14. The Code is not a prescriptive set of rules; it is a set of Main Principles supported by guidelines and examples of good practice. It comprises 18 Main Principles which address areas including the governing body, legal obligations, conduct of members, conduct of meetings, frequency of meetings, responsibilities of members, the chair, the head of the institution and effectiveness. However, the Code notes that “given the diversity of Scottish Higher Education Institutions it is possible that certain of the Main Principles can be met by means different to

8Section 9A was inserted by the Post-16 Education (Scotland) Act 2013.
those envisaged in the Guidelines\textsuperscript{10}. This indicates that the Code will be insufficient in securing the level of consistency across the sector that is sought by the provisions in the Bill.

CONSULTATION

15. Potential provisions for inclusion in the Bill were subject to public consultation in the Consultation Paper on a Higher Education Governance Bill\textsuperscript{11} ("the Consultation"), which was published on 7 November 2014. The Consultation sought views on six proposals for legislation which intended to build on the strengths of the sector by introducing provisions which would modernise governance arrangements:

- **Privy Council** - transfer of the Privy Council’s role in relation to higher education governance to a new Scottish based committee, comprising the First Minister of Scotland, the Lord Advocate and, for governance issues relating to the ancient universities, the Lord President of the Court of Session, in order to enable the Scottish Government to adopt a more flexible approach than the current process for making amendments to existing governance instruments.

- **Academic Freedom** - setting out in legislation a new definition of academic freedom which is more explicit than the current definition.

- **Definition of Principal** - clarifying that the role which the Principal has in an HEI is that of chief executive officer and involves the leadership, administration and management of the HEI.

- **Selection of Chair of Court** - creating a more transparent process for selecting the chair of an HEI’s governing body, as well as making the position more accessible to a wider audience through open advertisement, competitive selection and election at the final stage of the selection process.

- **Membership of Governing Body** - ensuring the composition of the memberships of governing bodies are fully representative.

- **Composition of Academic Board** - ensuring that the composition of the academic board or senate is fully representative and that the board itself can function efficiently.

16. There were 131 responses to the Consultation. These were independently analysed. Informed by the analysis, the Bill will now take forward provision in four of the six areas: selection of chairs of court, membership of governing bodies, composition of academic boards and academic freedom.

17. After consideration of the evidence presented through the consultation and engagement with the sector, it was agreed that two of the proposals which were consulted on would not form part of the Bill. These are transfer of the Privy Council role to a new Scottish committee and the definition of the role of Principal as that of chief executive officer. It was also agreed that certain elements of the proposals on academic freedom, academic boards and chairs of court would also not form part of the Bill.

\textsuperscript{10} Page 1 of the Code.
\textsuperscript{11} http://www.gov.scot/Resource/0046/00462633.pdf
CONSULTATION PROPOSALS NOT PURSUED IN THE BILL

Privy Council

18. Responses to the Consultation on the role of the Privy Council varied across the sector. HEIs were divided in their opinion on the proposed changes to their role, with suggestion that greater consideration was needed on this issue prior to any decision being made. Following further consideration of the responses to the Consultation, it was determined that this issue should be reviewed more broadly, and not pursued in the Bill. As such, the broader proposal for changes to the role of the Privy Council will now be explored further with higher education stakeholders.

Definition of Principal

19. The recommendation that it should be set out in legislation that the role of the Principal is that of chief executive officer has been considered further. It is recognised that using the statute book to attach an alternative label to the role (without the imposition of any particular duties upon the office holder) has no value in legal terms. The Consultation analysis also showed near-unanimous rejection of this proposal. As such, legislation in this area was not considered necessary.

Academic freedom

20. The Consultation proposed replacing the current definition of academic freedom, as set out in section 26 of the 2005 Act, with a definition which contained a provision that “academic freedom” includes freedom to encourage the exploration of new ideas and making provision within the legislation to require HEIs to adopt a statement on their implementation of the statutory protection of academic freedom and present it to the SFC. This statement would then be enforced by SFC as a part of the terms and condition of grant funding.

21. After further consideration of this and the responses to the Consultation, and given that the duty in section 26 in relation to protection of academic freedom is a statutory duty already placed on all Scottish HEIs, it was concluded that the Bill should not require HEIs to adopt a statement on their implementation of the statutory protection of academic freedom and to present that statement to the SFC as part of the terms and conditions of grant funding. It was considered that would be at odds with the large number of other statutory requirements placed on Scottish HEIs which do not require a statement on their implementation.

Academic boards

22. The Review also recommended that the academic board should be the final arbiter on academic matters. This recommendation featured in the Consultation which asked “Do you agree that the academic board should be the final arbiter on all academic matters in all HEIs”?

23. However, the Universities (Scotland) Acts make it clear that the decisions of the academic boards (or “senates”) of the ancient universities are subject to review by the university courts. Furthermore, if this proposal were to be pursued with the intention of excluding the university courts from any control or review of decisions made by the academic boards, it may
result in a breach of the duties imposed on the trustees of the institutions under charities legislation.

24. All of the HEIs covered by the Bill are charities registered with the Scottish Charity Regulator. The members of their governing bodies are charity trustees who are subject to the duties under the Charities and Trustee Investment (Scotland) Act 2005.

25. Should final responsibility for academic matters be passed to the academic boards, then the governing body members may not properly be able to fulfil those duties. Paragraph 3.9 of ‘Guidance for Charity Trustees’ published by OSCR states: “Charity trustees as a body are collectively or corporately responsible for all the activities of the charity. This means that all charity trustees are equally accountable for their organisation. They have a collective general duty of care for the charity, and they must all observe the requirements of the Act. Charity trustees are expected to act together as a board or committee to realise the values and purposes of the charity and to comply with legislative and regulatory requirements”.

26. Generally, charity trustees cannot delegate their responsibilities to others, although they can delegate some of their functions. However, ultimate accountability remains with the trustees. Considering the matter further, it is the Scottish Government’s view that the academic boards, although charged with supervision and regulation of the academic matters of an HEI, are still subject to the control of the governing body. As such it was considered that this proposal should not be pursued.

Selection of Chair of Court

27. Within the Consultation, the proposals around the selection and election of chairs of court were relatively detailed. The Consultation proposal included that:

- “All chairs are appointed at the culmination of a transparent process which includes development of a job description and essential criteria for the position including skills and attributes, public advertisement, competitive selection including shortlisting, interview, and finally election by a balanced and representative electorate. The job specification and essential criteria should be made publicly available. The selection process should be transparent and a panel structure should be used when interviewing candidates. The interview panel should contain both lay members of the governing body and other university stakeholders, including staff and students”.

- “The chair should ultimately be elected from a pool of shortlisted candidates who were successful at interview. The final stage of the selection process should be an election whereby the chair, selected from the aforementioned pool, would be elected by appropriate persons from within the university and potentially representatives of external stakeholders. In order to reflect the democratic ideal of the sector, votes would be weighted to ensure that staff and students are effectively represented in the election process”.
28. The policy aim of this was to establish a required minimum level of openness, transparency and consistency across all HEIs by setting out a number of key elements that must be a feature of every appointment process for a chair of a governing body.

29. The responses to the Consultation revealed that the majority of those who addressed the issue agreed that a pool of candidates for the position of chair of the governing body should always be selected through an open and transparent process.

30. It was also generally agreed by respondents that the position of chair should be advertised openly and that this would help to attract a wider pool of candidates, although a few respondents emphasised that care should be taken to place adverts appropriately in order to reach potential candidates from protected characteristic categories. There was much opposition to the proposal that the selection process for chair should culminate in an election by a group of representatives of key stakeholders both internal and external to the university. Overall, over three quarters of those providing a view did not agree with this proposal.

31. A common view amongst unions, student representative bodies and individuals was that all staff and students should be given one vote each in an open election for chair. They expressed concern that prior selection of candidates by a panel other than staff and students could result in candidates going forward for election who are not those preferred by staff and students.

32. The Code states “When selecting a new chair, a full job specification including a description of the attributes and skills required… shall be produced… The selection process shall include a formal interview of short-listed candidates. When vacancies arise in the position of the chair… they shall be widely publicised both within and outside the Institution”.

33. Careful consideration was given to all consultation responses, particularly the clear difference in stakeholder opinion. As a result it is not proposed that the Bill will feature specific detailed provisions at introduction. Instead, the detail will be set out in eventual regulations made under section 1 of the Bill, following further discussion on co-design with key stakeholders (in accordance with section 3 of the Bill which requires consultation with HEIs and other appropriate persons), and agreement by the Scottish Parliament.

34. A recurring theme among some responses to the consultation, in relation to the proposal on the selection of the chair of court, was that legislation was not required to ensure that the pool of candidates for the position of chair should be selected through an open and transparent process in legislation as it was already addressed in the Code. However, having considered this, and while the detail to be included in regulations will be developed in due course, it was determined that the selection of the chair of the court, as part of the overall process, was too crucial to strengthening the consistency and inclusivity of governance for it not to be addressed in legislation.

**POLICY OBJECTIVES: SPECIFIC PROVISIONS**

35. The policy objectives of the four areas of provision in Bill are set out below: each section describes the proposals consulted on in relation each area of provision of the Bill and what is in the Bill.
Part 1 of the Bill

Chapter 1: Appointment of chairing member of governing body (sections 1 to 3)

“We propose that all chairs are appointed at the culmination of a transparent process which includes development of a job description and essential criteria for the position including both skills and attributes, public advertisement, competitive selection including shortlisting, interview, and finally election by a balanced and representative electorate.... The final stage of the selection process should be an election whereby the chair, selected from the aforementioned pool, would be elected by appropriate persons from within the university and potentially representatives of external stakeholders. Furthermore, to enable this position to be more accessible to prospective candidates it is proposed that universities are given a lever to offer a ‘reasonable’ remuneration to elected chairs to cover their expenses during their term.”

Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014

36. The Review highlighted the importance of a rigorous and transparent process for appointing a chair of a governing body. This was also addressed in the Code. While implementation of the Code has, to some extent, increased the level of transparency across the sector in relation to appointing a chair, there remains no guarantee of consistency across the sector and, in practice, HEIs have adopted different approaches.

37. The Consultation set out the Scottish Government’s legislative proposals in this area. In response, many in the higher education sector referred to what they saw as a potential infringement on the autonomy of charitable HEIs which would be detrimental to the effective operation of their governing bodies. Some in the sector felt that introduction of elections would disincentivise some candidates from applying for these positions and could also lead to conflict between governing bodies and chairs, with a concern being that chairs could point to a mandate provided by an electorate, rather than embracing a primary duty to work with the governing body in a collective manner.

38. The Bill aims to establish a required minimum level of openness, transparency and consistency across all HEIs. Section 1 of the Bill requires all HEIs to have a chair appointed in accordance with the process set out in regulations by the Scottish Ministers. Such regulations may make provision for periods of appointment and means of selection for appointment (including requirements for public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment). Section 1(2)(c) allows such regulations to make provision for reimbursement of candidates’ expenses incurred in any process. That could include interview expenses.

39. Section 2 provides that Ministers may make regulations that require HEIs to make available to the chairing member of an HEI, remuneration and allowances. Any remuneration that may be required to be made available to candidates is intended to reflect the work carried out by the chair and the term remuneration is to be interpreted as a payment to perform the functions of the role on those days that this is required, rather than a salary.
40. The regulations may specify or limit the circumstances in which any sums are to be payable to the chairing member and provide that any sums payable are to be reasonable (to ensure that payments are sufficiently meaningful) given the chairing member’s responsibilities. Section 3 of the Bill also requires Scottish Ministers, before making regulations on the appointment of chairing members of governing bodies, to consult with any HEIs to which the regulations relate, and other such persons that Scottish Ministers consider appropriate. These could include groups or persons appearing to represent the interests of staff, trade unions, current students and alumni of HEIs, as well as wider stakeholder groups.

Chapter 1: Membership of governing body (sections 4 to 8)

“It is key to the effectiveness of the governing body that its membership should be fully representative. Consistency in approach to this will increase transparency and democracy within the governance of institutions across the sector. With regards to this we propose that it should be set out in legislation that... the governing body should provide positions for a minimum of two students, nominated by the student association/union. There should be at least two directly elected staff members, as well as one member nominated by academic and related unions and one by administrative, technical or support staff unions. Governing bodies should also have up to two alumni representatives. Prescribing membership of governing bodies in legislation will ensure more effective representation of internal stakeholders and will help to create a more inclusive environment within the institution. Greater consistency of approach will also be achieved across all institutions.” Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014

41. Currently, the legal basis for the composition of the governing bodies of HEIs differs according to the type of institution (ancient, charter, or post-1992 – see paragraph 9 above) and the composition of the membership itself is different in each institution. The measures in this Bill seek to ensure effective representation of internal stakeholders on the governing bodies of all HEIs in order to help create a more inclusive environment within the institutions and to embed a level of consistency across the institutions.

42. The Review considered that a fully representative membership is key to the effectiveness of an HEI’s governing body. It made a number of findings and recommendations about the role, composition and appointment of governing bodies, including the recommendation that the governing body membership should contain two directly elected staff members, two student members, two trade union members and up to two alumni. These recommendations were reflected in the Consultation proposals.

43. Some of the Review’s recommendations have been reflected in the Code, which sets out the main principles of good governance and provides commentary on the appointment of governing body members. Main Principle 9 of the Code provides the following: “There shall be a balance of skills and experience among members sufficient to enable the governing body to meet its primary responsibilities and to ensure stakeholder confidence”.

44. Main Principle 10 of the Code provides that there should be a clear majority of independent members and that a governing body of no more than 25 members represents a
benchmark of good practice. Main Principle 11 sets out good practice to be followed in relation to the appointment of governing body members.

45. While the composition of the governing body is addressed to some extent within the Code, there is no explicit provision specifically stipulating the required composition of the governing body in all HEIs. As such, it is considered that the Code does not go far enough and that it is too crucial to the achievement of good and consistent governance for the composition of governing body membership not to be addressed directly by legislation.

46. One particular aspect of the Consultation proposal, the inclusion in the governing body membership of two persons to be nominated by trade unions, is strongly opposed by the Committee of Scottish Chairs of Court which had responsibility for development of the Code. This feature is also opposed by HEIs in general. Of those who responded to the question “do you agree with the proposed requirement outlined for membership and composition of the governing body?”, 67% opposed it. More specifically, analysis of the Consultation revealed that “the argument raised most frequently against the proposal was that trade unions should not be involved in nominating staff for membership of governing bodies.” A key rationale given for this was that “staff nominated in this way would in effect be representing the interests of the union which nominated them, rather than bringing their independent staff perspective to the table”.

47. However, as members of the governing body (and, as such, as charity trustees), trade union representatives (in common with all other members of the governing body including students and alumni) would be required to act in the best interest of the HEI, as opposed to any individual constituency which nominated them.

48. Section 4 of the Bill requires each HEI to ensure that the membership of its governing body, includes:
- the person appointed as chairing member of the governing body,
- two staff members of the HEI elected by the staff of the HEI,
- one member of staff of the HEI nominated by academic and related unions which are recognised in relation to academic staff of the HEI provided that the staff member is a member of a branch of a union which has a connection with the HEI,
- one member of staff of the HEI nominated by support staff unions which are recognised in relation to support staff of the HEI provided that the staff member is a member of a branch of a union which has a connection with the HEI,
- two students of the HEI, nominated by their students’ association,
- two graduates of the HEI nominated by a graduates’ association of the HEI,
- such other members as are appointed by virtue of an enactment or in accordance with the HEI’s governing documents.

49. It will be for the HEIs, through their procedures for enrolment of students, to determine who is a student of a particular HEI and when this status begins and ends. However, all students (including any students serving as office bearers of the students’ association) will be eligible for nomination by the students’ association to a student position on the governing body.
50. In more general terms, of the prescribed members set out at paragraph 48:

- the chair is appointed in accordance with the process set out in regulations made under section 1;
- the elected staff members are elected in accordance with rules made by the HEI as provided for in section 5;
- the members nominated by trade unions, students’ associations and graduates’ associations are nominated in accordance with rules made by the HEI as provided for in section 6; and
- the other members are to be appointed in accordance with the HEI’s governing documents.

51. As there is no external organisation to nominate on behalf of an HEI’s staff, the Bill requires, as set out above, that the process of the appointment of staff is to be undertaken by election, rather than nomination. This will ensure that, in the absence of a formal organisation to undertake the nomination of individuals to undertake these positions, a transparent and democratic process will be implemented.

52. The appointments made under section 4 of the Bill, are to be regulated in the normal way in accordance with each HEI’s governing documents. The requirements in this Chapter of the Bill that relate to the criteria and ability to select an individual as a member of the governing body apply only at the point of nomination or election. They do not extend to the term of the individual’s membership and are not relevant to the removal of the individual as a member of the governing body. The terms and conditions of the appointment (including provisions on termination of appointment) are to be determined by the governing body in accordance with the HEI’s governing documents. The elections and nominations processes in respect of section 4 of the Bill are to be conducted in accordance with rules made by the governing body of the HEI, as set out in sections 5 and 6 of the Bill.

Chapter 2: Academic boards (sections 9 to 13)

The consultation proposed that “with the exception of the Principal and the Heads of School (or equivalent) who should attend ex officio, all other members of the academic board should be elected by the constituency that they represent, and elected members should form a majority of the total membership...[and] we propose that overall, academic boards should not have more than 120 members. Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014.

53. The Review noted that the academic board sets the academic tone for the institution stating that “to be effective, the academic board must retain the confidence of those it represents, it must provide oversight of academic quality and provide necessary co-ordination with university governing bodies to ensure that decision making at all levels is properly informed”. Currently the legal basis for the composition of the academic boards of the various HEIs differs according to the type of institution. The number of members of academic boards also varies widely between the institutions: one HEI’s academic board has only 35 members while the boards of other HEIs have hundreds of members. The Review further noted that academic boards that were too large displayed evidence of “dysfunctionality”.
54. The Review made the following recommendations in relation to the role and composition of the academic board within an institution and these were reflected in the Consultation proposals:

- The academic board should be the final arbiter of academic matters within an institution;
- The academic board should have a maximum of 120 members, with only Principals and Heads of Schools attending ex officio;
- The majority of members of the academic board should be elected by the constituency they represent and there should be significant student representation on the academic board.

55. The Code makes only passing reference to the academic board and offers no guidance on the role or composition of academic boards within HEIs. It places no duties on institutions to ensure that their academic boards meet the recommendations of the Review.

56. Responses to the Consultation showed that views were relatively evenly divided over whether, with the exception of the Principal (the most senior member of staff in an institution) and the Heads of School (the most senior academics in a particular department in an HEI, also known as Deans or Heads of Faculty) who should attend ex officio, all other members of the academic board should be elected by the constituency that they represent and a maximum membership of 120 should be set. A majority of those who provided a view were in favour of the proposal that elected members should form a majority of the total membership of the academic board.

57. Section 9 of the Bill requires HEIs to ensure that all academic boards must have a maximum of 120 members, as recommended in the Review. Section 10 requires that the membership of each academic board must include the principal and heads of school of the HEI, attending ex officio; staff members elected by the staff of the HEI; and student members elected by the students of the HEI. It further provides that the elected members must form the majority of members of the academic board, and that a minimum of 10% of the membership of the academic board must be comprised of students. Legislation in this area will embed a level of consistency across all academic boards and will ensure they are both effective and representative in their decision making. As set out in section 11 of the Bill, elections to the academic board are to be conducted in accordance with rules made by the governing body of the HEI.

Part 2 of the Bill

Upholding academic freedom (section 19)

“Our intention would be to replace the current definition of academic freedom with a definition which contains a provision that ‘academic freedom’ includes freedom to encourage the exploration of new ideas, alongside the testing of received wisdom and the expression of points of view whether controversial or otherwise. Our aim would be to remove any threat to academic freedom within the law, and hence to freedom of intellectual enquiry and expression thus enhancing the protection currently offered to academic staff.” Consultation Paper on a Higher Education Governance Bill, Scottish Government, 7 November 2014
58. The current law on academic freedom as set out in section 26 of the 2005 Act provides that a post-16 education body must have regard to the desirability of ensuring the academic freedom of persons engaged in teaching, the provision of learning or research at the HEI and ensuring that any appointments held or entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of academic freedom. This includes the freedom to hold and express opinions; question and test established ideas and received wisdom and present controversial or unpopular points of view. This section applies to all post-16 education bodies where they are publicly funded (either directly by the SFC or by a regional strategic body).

59. The Review considered that the definition of academic freedom contained in section 14 of the Irish Universities Act 1997 expresses more comprehensively the full significance of academic freedom and recommended that “a definition of academic freedom be incorporated…, based on the definition contained in Ireland’s Universities Act 1997, and applying to ‘relevant persons’ as under the existing 2005 Act”.

60. The Code makes reference to academic freedom in Main Principle 1 (governing bodies), which provides that a governing body shall, in discharging its responsibilities, “ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments”. Main Principle 2 provides that the governing body shall ensure compliance with appropriate legal obligations. The Supporting Guidelines to Main Principle 2 advise that “the governing body should regularly review its policies relating to compliance with statutory and other duties, including the defence of academic freedom”.

61. The Consultation paper sought views on whether the legal definition should be extended to include “encourage the exploration of new ideas”. Half of those who responded to this question were not in favour of this proposed change to the definition, considering any change to be unnecessary. However, 45% of those who responded were in support of change; these were mainly student bodies and representative organisations.

62. The question of whether the principle of “academic freedom” as currently defined in legislation should explicitly refer to freedom to encourage the exploration of new ideas received a fairly evenly divided response in the consultation, as detailed in paragraph 61. Many respondents stated that they found the proposal unobjectionable, while others argued that the current definition had served the test of time and already allows for new ideas to be encouraged. Further consideration of this issue determined that amending the existing definition of academic freedom was a proportional response which would achieve the intended policy aims.

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12 A post-16 education body is defined in section 35(1) of the 2005 Act and means a body listed in schedule 2 to the 2005 Act or a college assigned to a regional strategic body under section 7C of that Act. This includes the Open University in Scotland. Section 19 on academic freedom is the only provision in the Bill that will apply to the Open University.

13 Section 14 of the Irish Universities Act 1997 reads: ‘A member of the academic staff … shall have the freedom, within the law, in his or her teaching, research and any other activities in or outside the university, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions, and shall not be disadvantaged, or subject to less favourable treatment by the university, for the exercise of that freedom.’
63. While the definition in section 26 of the 2005 Act, with which post-16 education bodies are required to comply, does not necessarily exclude the freedom to develop and advance new ideas and innovative proposals, the policy aim of this provision in the Bill is to expand the current definition and to strengthen the protection of academic freedom. Consequently section 19 of the Bill replaces the existing section 26 of the 2005 Act with a new section which includes an expanded definition of academic freedom and requires that a post-16 education body must aim to uphold the academic freedom of all relevant persons. The definition of academic freedom as expanded explicitly includes the freedom to develop and advance new ideas and innovative proposals. This is to ensure that, going forward, the protection of academic freedom is more comprehensive and transparent.

ALTERNATIVE APPROACHES

64. The wider policy context within which this Bill sits covers a broad programme of reforms across higher education governance. This reform programme will provide for a stronger framework of governance for the higher education sector now and for the future. Much of this has been progressed without the need for legislation.

65. As already described, the Review report was published in January 2012 containing 17 recommendations. The Cabinet Secretary for Education and Lifelong Learning, in a statement to the Parliament on 28 June 2012, said “The most effective approach to implementing the recommendations is to do so in three distinct ways: first, by engaging key sector stakeholders as implementing partners; secondly, by engaging the sector itself in implementing the recommendations by agreement and adapting them as necessary to reflect existing good practice; and, thirdly, by employing legislation as required”.

66. The Scottish Government has given detailed consideration to how the recommendations could be taken forward by non-legislative means by key sector stakeholders, and by the sector itself. This has been wholly successful in some areas and successful to an extent in others, including the establishment of the University Sector Advisory Forum and the development and implementation of the Code. While much has been achieved, in particular through the Code, in order to meet with the desired policy objectives and, most importantly, to secure a guaranteed and consistent application of a more modern, inclusive and accountable approach to governance in higher education, it is considered that legislation is now required.

67. The Code is voluntary, although HEIs are required to comply with it as a condition of SFC funding. As set out by Lord Smith of Kelvin, the Chair of the steering group which developed the Code on behalf of the Committee of Scottish Chairs of HEIs, the Code “was designed to be a stimulus to reflection and enhancement”. While the Main Principles set out in the Code do address a number of areas of provision set out in the Bill, they are not far reaching enough to meet the desired policy objectives. HEIs and chairs of court have demonstrated clear opposition to certain areas of provision of the Bill; however, having considered this, the Scottish Government is clear that it does not consider that the policy aims of this Bill could be satisfactorily met by the current Code or by an amended Code.

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68. On chairs of court, membership of the governing body and academic boards, careful consideration was also given to whether the policy objectives could be met through non-legislative means by imposing a requirement on the SFC that it must require HEIs, as part of the terms and conditions of the grant funding which it imposes on HEIs, to meet the relevant requirements. However, in practical terms the performance of the SFC is reviewed against a broad range of measures rather than individual measures, and failure to meet required performance standards and sanctions are addressed similarly. As such, the Scottish Government concluded that it would be disproportionate to impose sanctions on the SFC in relation to its performance in ensuring HEIs adhere to these particular requirements and not in relation to all individual requirements imposed on the SFC by the Scottish Government.

69. On academic freedom, consideration was given to alternative approaches to strengthening the understanding and protection of academic freedom including the implementation of a non-statutory requirement, similar to that consulted on for inclusion in the Bill, that HEIs should adopt a statement on their statutory protection of academic freedom. However, as the current definition is set out in legislation and the Code requires, at Main Principal 1, that a governing body shall, in discharging its responsibilities, “ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments” and, at Main Principle 2, that “the governing body shall ensure compliance with appropriate legal obligations”, it was concluded that the most effective method of strengthening the protection of academic freedom would be to do so by strengthening the existing definition rather than by imposing additional non-legislative requirements on HEIs.

70. The alternative option of not introducing legislation is considered by the Scottish Government to increase the risk substantially that the desired policy outcome of a guaranteed and consistently more transparent, inclusive and accountable system of governance for the higher education sector in Scotland now and for the future would be significantly jeopardised.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

71. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website at [http://www.scotland.gov.uk/Publications/Recent](http://www.scotland.gov.uk/Publications/Recent). The EQIA indicated that the Bill is likely to have moderate to no significant direct impact on individuals. However, indirectly, the Bill may have a positive impact as the improvements that the Bill makes to transparency and consistency between HEIs will help to advance equality of opportunity for those seeking to become involved in HEI governance. The Bill will do so equally across all protected characteristics under the Equality Act 2010.

72. The Scottish Government considered the potential impacts, both positive and negative, across the protected characteristics and concluded that the Bill’s provisions are neither directly nor indirectly discriminatory on the basis of age, disability, race, religion or belief, sex, sexual orientation or gender reassignment.
73. The Scottish Government has considered whether the provisions in Part 1 of the Bill on the composition of governing bodies (section 4) and the composition of academic boards (section 10) raise any issues in relation to the European Convention on Human Rights (“the Convention”) in relation to current members of these bodies. The intention is that these requirements would come into force after a period of four years in order to allow current governing body and academic board members to finish their terms of office, which are an average length of three to four years. As a consequence of these transitional arrangements, the provisions of the Bill would not affect the Convention rights of current members of governing bodies and academic boards.

74. The Scottish Government has also considered whether section 19 of the Bill on academic freedom, which substitutes a new section 26 into the 2005 Act, raises any issues in relation to the Convention. While section 26 clearly engages article 10 of the Convention (freedom of expression), the Scottish Government considers that it strengthens the protection of this right by requiring that post-16 education bodies must aim to uphold the academic freedom of persons involved in teaching and research at institutions; the previous duty required post-16 education bodies to have regard to the desirability of ensuring academic freedom. The Scottish Government considers that the change to the duty in section 26 strengthens the existing protection further, as well as making explicit that the definition of academic freedom includes the freedom to put forward new ideas. The Scottish Government considered if privacy implications would arise as a result of the Bill and whether there was a need to develop a Privacy Impact Assessment on the Bill. A privacy impact checklist was completed and it was concluded that there is no requirement to undertake a full scale privacy impact assessment for this Bill.

75. The Scottish Government does not anticipate any significant impact on Island Communities.

76. The Scottish Government does not anticipate any significant impact on Local Government.

77. The need to develop a Strategic Environmental Assessment (SEA) on the Bill was considered in the context of the Environmental Assessment (Scotland) Act 2005 and published guidance on Strategic Environment Assessments (SEAs). The Scottish Government considered any potential environmental impacts against defined criteria in a SEA pre-screening report, which will be published separately via the SEA Gateway database.

78. Based on this evaluation, the Scottish Government concluded that the provisions of the Bill are likely to have no environmental effects, and that a SEA was not required. The pre-screening report is available within the SEA database: http://www.scotland.gov.uk/Topics/Environment/SustainableDevelopment/14587/SEAG.
INTRODUCTION

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament’s Standing Orders, in relation to the Higher Education Governance (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The Scottish Government is committed to excellence in higher education in Scotland and aims to strengthen governance arrangements across the higher education sector. A key aim of the Scottish Government is to create an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance.

4. The principal objective of the Higher Education Governance (Scotland) Bill (“the Bill”) is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.

5. Specifically, the Bill:
   - Requires higher education institutions (“HEIs”) to appoint the chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers.
   - Requires HEIs to include within the membership of their governing bodies the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students’ association, and two graduates of the HEI nominated by the graduates’ association.
This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

- Requires HEIs to ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending ex officio; a majority of elected members representing staff and students; and a minimum of 10% student representation. The Bill also ensures that all board members appointed under the Bill’s election process for staff and students are elected by the constituency that they represent.

- Replaces the current definition of academic freedom in section 26 of the Further and Higher Education (Scotland) Act 2005, with a view to strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals.

6. Further information on the Bill is contained in the Explanatory Notes, Financial Memorandum and Policy Memorandum published separately as SP Bill 74-EN and SP Bill 74-PM.

RATIONALE FOR SUBORDINATE LEGISLATION

7. The Bill contains delegated power provisions which are explained in more detail below. In deciding whether the provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered carefully the importance of each matter against the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances without having to resort to primary legislation;

- anticipate the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament; and

- make proper use of valuable parliamentary time.
This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

DELEGATED POWERS

Part 1 of the Bill

Chapter 1: Governing Bodies

Section 1 – Appointment as chairing member

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
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Provision

8. Section 1(1) confers on the Scottish Ministers the power to set out in regulations the process by which an HEI must appoint the chairing member of its governing body. By virtue of section 1(2)(a) and (b) the regulations may, in particular, include provision about the length of term an appointed chair can serve and whether reappointment is possible as well as provision about the means of selection for appointment including, for example, through public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment. Section 1(2)(c) allows the regulations to make provision for reimbursement of candidates’ expenses incurred in any process set out by the Scottish Ministers.

Reason for taking power

9. The Bill aims to establish a required minimum level of inclusivity, transparency and consistency across all HEIs. While the Scottish Ministers consider that it is crucial that the Bill includes a minimum requirement to have a chairing member of the governing body of an HEI appointed in accordance with a process set out in regulations made by them, it is not considered necessary to set out the detailed process of appointment of the chairing member in primary legislation and therefore the regulation-making power is required. As will be seen from section 1(2), the regulations could potentially include a considerable level of detail about the process and it is thought that this could be better provided for in secondary legislation rather than in primary legislation. The regulations could include details regarding the length of term an appointed chair can serve (and whether reappointment is possible) and provision about the means of selection for appointment including, for example, through public advertisement of the position, selection criteria, interview of candidates, shortlisting of candidates and holding an election from among candidates shortlisted as suitable for appointment. In making provision in regulations about selection of candidates by election, the Scottish Ministers might include a requirement that candidates are to be interviewed first to assess suitability for election and might also include provision as to the electorate. Regulations under section 1 could also include provision about reimbursement of candidates’ expenses. So the regulations could include a substantial amount of detail.

10. In making any regulations under section 1, Scottish Ministers are, however, required (under section 3 of the Bill) to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate. Those might be any
This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

groups or persons appearing to represent the interests of staff, unions, current students and alumni of institutions, as well as any wider stakeholder group considered appropriate. Therefore there will be significant consultation about the process for appointment of the chairing member before the power is exercised. The power will also allow the Scottish Ministers the flexibility to modify any process regarding the appointment of chairing members to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

Choice of procedure

11. The regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill. Section 14(1) applies the affirmative procedure to any regulations that are made under those provisions of the Bill that precede section 14 (which in practice means Chapters 1 and 2 of Part 1 of the Bill). It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a higher level of scrutiny of these regulations which will set out the process for appointing the chairing members of HEIs’ governing bodies. This will be a key process for HEIs and therefore it is important that adequate parliamentary scrutiny is ensured.

Section 2 - Remuneration to be payable

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

12. Section 2(1) confers on the Scottish Ministers a power to provide by regulations that remuneration and allowances are payable to chairing members of governing bodies of HEIs. Under section 2(2)(a) and (b) the Scottish Ministers may specify or limit the circumstances in which sums must be offered or require those sums to be reasonable, given the responsibilities of the chairing member. Under section 2(2)(c) the Scottish Ministers are given the power to delegate, to another person, the function of establishing the level of any sums payable to chairing members.

Reason for taking power

13. The regulation-making power seeks to allow the Scottish Ministers to make provision for remuneration and allowances to be payable to the chairing member of the governing body of an HEI. At the moment most, if not all, governing bodies do not pay any remuneration to their chairing members. The Scottish Ministers consider that remuneration and allowances should be available to chairing members in order to increase the potential range of candidates applying for such positions. This power is very closely related to the power in section 1 which allows the Scottish Ministers to set out a process by which a chairing member is to be elected. As with that power, it is considered important to empower the Scottish Ministers to make provision for remuneration and allowances of chairing members when that is considered appropriate, but that it would not be necessary to set out the details in relation to remuneration and allowances for chairing members in primary legislation. Such detail is considered to be more appropriate for secondary legislation and therefore the regulation-making power is required. It will also allow Scottish Ministers the flexibility to change the provisions on remuneration and allowances to reflect changing practices within the higher education sector without having to resort to primary legislation.
legislation. The power also provides Ministers with a specific power to delegate to any other person the function of determining the sums payable in particular cases. This power is necessary in case Ministers wish, for example, to allow each governing body of an HEI to determine the sums payable to its chairing member.

14. As with regulations under section 1, in making regulations under section 2 the Scottish Ministers are also required (under section 3 of the Bill) to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

Choice of procedure

15. As above, the regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill which specifies the relevant regulation making procedure for Chapters 1 and 2 of Part 1 of the Bill. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a higher level of scrutiny, given the potential impact that the exercise of the power could have on HEIs. This will be an important issue for HEIs and therefore it is important that adequate parliamentary scrutiny is ensured. Given that the exercise of this power is likely to be closely related to the exercise of the power under section 1, it is also considered appropriate that both powers are subject to the same level of parliamentary scrutiny.

Section 8 – Power to modify section 4

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

16. Section 8 confers on the Scottish Ministers a power to modify, by regulations, the categories of governing body membership set out in section 4(1) (composition of governing body) and the number of persons to be appointed under a particular category in that section.

Reason for taking power

17. The regulation-making power seeks to allow for prompt and effective change to be made to the categories of governing body members and the number of persons to be appointed under a particular category in order to respond to any changes in future practice in the higher education sector and to any relevant developments in good governance principles which lead the Scottish Ministers to conclude that the provisions in section 4 are no longer appropriate in their present form.

Choice of procedure

18. The regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a high level of scrutiny, given that the power is a power to amend significantly the
effect of primary legislation and given also the potential impact that the exercise of the power could have on HEIs and their governing bodies.

Chapter 2: Academic Boards

Section 13 – Power to modify sections 9 and 10

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative

Provision

19. Section 13(1) confers on the Scottish Ministers a power to amend, by regulations, the number of members of the academic board specified in section 9. Section 13(2) confers on the Scottish Ministers a power to amend, by regulations, the categories of membership of the academic board set out in section 10(1) and to amend the number or percentage of members to be appointed under a particular category. By virtue of section 13(3), regulations made under section 13(1) or 13(2) can amend the number of members in section 9 or the number or percentage of persons to be appointed under a particular category in section 10(1) by specifying a fixed number or percentage, or a maximum or a minimum (or both).

Reason for taking power

20. The regulation-making power seeks to allow for a prompt and effective change to be made to the categories of academic board members and the number and percentage of persons to be appointed under a particular category in order to respond to any changes in future practice in the higher education sector and to relevant developments in good governance principles.

Choice of procedure

21. The regulations are subject to the affirmative procedure by virtue of section 14(1) of the Bill. It is considered appropriate that this power is subject to affirmative procedure to allow Parliament a high level of scrutiny, given that the power is a power to amend significantly the effect of primary legislation and given also the potential impact that the exercise of the power could have on HEIs and their academic boards.
Chapter 3: Regulations and definitions

Section 15 – Meaning of higher education institution

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Negative

Provision

22. Section 15(2) confers on the Scottish Ministers a power to modify by regulations the definition of “higher education institution” in section 15(1). This definition applies to Part 1 of the Bill only (which means that the definition is not relevant to the section on academic freedom, as section 19 forms Part 2 of the Bill). Such modifications may include a particular HEI in that definition or may exclude a particular HEI from that definition.

Reason for taking power

23. The policy intention is that all publicly funded HEIs should be subject to the provisions in Part 1 of the Bill. However, the policy intention is also that an HEI operating in more than one jurisdiction (which is primarily based and governed elsewhere) should, even where publicly funded, be excluded from the definition in order to avoid a single institution potentially being made subject to conflicting requirements in different jurisdictions. The definition in section 15(1) achieves this aim. The power to amend the definition of “higher education institution” gives the Scottish Ministers flexibility to include or exclude a particular HEI from that definition in the event of changed circumstances (for example, if another cross-border HEI similar to the Open University begins operating in Scotland and receives public funding).

Choice of procedure

24. The regulations are subject to the negative procedure by virtue of section 15(3). This is considered to be appropriate given that section 15(2) empowers the Scottish Ministers only to include or exclude a particular HEI from the definition and does not permit them to give the term an entirely new meaning. It is thought that the negative procedure would therefore allow sufficient parliamentary scrutiny of any modification of the definition of an HEI. The inclusion or exclusion of a particular HEI should not be controversial as it would merely be used to implement the current policy of the Bill and apply it to future cases. Further, the limited way that the regulation making power has been framed in section 15(2) means that any regulations which are laid will be of a very straightforward and non-technical nature: they would merely name a particular institution and state whether it was being included or excluded. Accordingly, no real scrutiny of the detail will be required, and the timescales attached to the negative procedure should also be unproblematic. The negative procedure is therefore considered to be appropriate.
Part 3 of the Bill

General Provisions

Section 20 – Ancillary and consequential provisions

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: Affirmative procedure if adding to, replacing or omitting text in an Act; otherwise negative procedure

Provision

25. Section 20(1) gives the Scottish Ministers the power, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Bill.

Reason for taking power

26. As with any new law, the Bill may give rise to a need for a range of ancillary provisions. The power to make ancillary provision is considered necessary in order to ensure that the policy intentions of the Bill are achieved. For example, it is possible that unforeseen issues will arise which require further provision to be made or the further modification of the existing law. This power would allow such provision to be made without the need to make further primary legislation.

27. The Bill already includes a number of consequential amendments to related legislation (see schedule) but the power would allow the Scottish Ministers to make further changes should a need be identified, or change be expedient. It may, however, be that further provision is necessary in order fully and properly to implement the Bill’s provisions. The Scottish Government considers that the regulation-making power is necessary to allow for this flexibility. Without this power, it might be necessary to make further primary legislation to deal with a matter which is clearly within the policy intentions of the Bill. Scottish Ministers consider that this would not be an effective use of resources by the Parliament or the Scottish Government.

28. This power might be useful for phased implementation along with staged commencement. It is also possible that the need for transitional and savings provisions may be identified after the commencement of particular sections and associated with exercise of other ancillary powers, when the power in section 22 will no longer be available. In addition, it is appropriate for significant transitional, transitory or saving provision (as opposed to routine provision regarding commencement) to be subject to parliamentary procedure.

29. The power, while potentially wide, is limited to the extent that it can only be exercised if the Scottish Ministers consider it necessary or expedient for the purposes of, or in connection with, provision made by the Bill. Any such regulations will therefore be closely and directly linked to the substance of this Bill.
This document relates to the Higher Education Governance (Scotland) Bill (SP Bill 74) as introduced in the Scottish Parliament on 16 June 2015

Choice of procedure

30. Regulations made under section 20 which add to, replace or omit any part of the text of any Act are subject to the affirmative procedure, as is consistent with previous practice. In all other situations they are subject to the negative procedure and it is considered by the Scottish Government that this would provide an appropriate level of scrutiny.

Section 22 – Commencement of the Bill

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: The Order must be laid before the Parliament under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010

Provision

31. Section 22(1) brings sections 22 and 23 into force on the day after Royal Assent. Section 22(2) provides that the other provisions in the Act come into force on a day appointed by the Scottish Ministers in regulations. Section 22(3)(a) allows the Scottish Ministers by regulations made under subsection (2) to bring the other provisions of the Bill into force on different days for different purposes and section 23(3)(b) allows the Scottish Ministers to include transitional, transitory or saving provision in those regulations.

Reason for taking power

32. Sections 22 and 23 of the Bill are to be commenced on the day after Royal Assent. The Scottish Ministers consider it appropriate for the other provisions of the Bill to be commenced at such a time as they appoint. It is usual practice for such commencement provisions to be dealt with by subordinate legislation to allow the Scottish Ministers to plan commencement appropriately with stakeholders and make appropriate transitional, transitory or saving provision where necessary.

Choice of procedure

33. The power is subject to the requirement in section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 that the regulations should be laid as soon as practicable after making (and in any event, before they are due to come into force), as is normal procedure for commencement.
Education and Culture Committee

Stage 1 Report on the Higher Education Governance (Scotland) Bill
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## Conclusions

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The remit of the Committee is to consider and report on matters falling within the responsibility of the Cabinet Secretary for Education and Lifelong Learning; matters relating to youth employment, skills and employment training, implementation of the recommendations of the Commission for Developing Scotland’s Young Workforce, Skills Development Scotland and other matters falling within the responsibility of the Cabinet Secretary for Fair Work, Skills and Training, and matters relating to culture and the arts falling within the responsibility of the Cabinet Secretary for Culture, Europe and External Affairs.
Committee Membership

Convener
Stewart Maxwell
Scottish National Party

Deputy Convener
Mark Griffin
Scottish Labour

George Adam
Scottish National Party

Colin Beattie
Scottish National Party

Chic Brodie
Scottish National Party

Gordon MacDonald
Scottish National Party

Liam McArthur
Scottish Liberal Democrats

John Pentland
Scottish Labour

Mary Scanlon
Scottish Conservative and Unionist Party
Introduction

1. The Higher Education Governance (Scotland) Bill was introduced by the Scottish Government on 16 June 2015.¹

2. According to its Policy Memorandum, the Bill will support the Scottish Government’s aim of strengthening governance arrangements across the higher education sector. The Policy Memorandum also says the principal objective of the Bill is—

   “... to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.”²

3. Our role at Stage 1 of the legislative process is to scrutinise and report on the Bill’s general principles, and we thank everyone who contributed to our task. All the oral evidence and written submissions provided are available on our website, along with links to reports by other committees and further information provided by the Scottish Government.³

The quality of HE governance

4. This section briefly considers some of the over-arching issues arising from our scrutiny and also provides some context to the Bill. We then consider specific topics in more detail.

5. The Bill is concerned with improving higher education governance, although the Scottish Government has not provided any examples of current deficiencies within the sector. Rather, the Cabinet Secretary for Education and Lifelong Learning, Angela Constance, said the Bill was about “continuous improvement” in university governance, while praising the quality of the sector overall.⁴

6. The Scottish Government has linked its interest in governance to the amount of public funding provided to higher education institutions (HEIs), noting an ongoing annual investment of £1 billion.⁵ The SPICe briefing on the Bill sets out the main funding sources for Scottish HEIs in 2013-14. Total income was £3.2 billion, of which approximately £2 billion came from public sector grants and fees including more than £1 billion from the Scottish Funding Council, with the remainder coming from the private sector, charities and “other income.”⁶

7. HEIs are firmly opposed to the draft legislation and we explore their specific concerns later in this report. In general, the sector does not consider legislation to be necessary, particularly as institutions are already seeking to improve governance through the voluntary ‘Scottish Code of Good Higher Education Governance’ (‘the Code’).⁷ The sector is also concerned that the Bill will increase
ministerial control over HEIs, thereby reducing their autonomy, and that it fails to take account of the diversity of the sector. Professor Timothy O’Shea, the principal of the University of Edinburgh, noted that “the success of UK universities in comparison with universities in other parts of Europe is put down to our autonomy and our ability to operate.”

8. Other organisations, for example, the Scottish Council for Development and Industry and the Institute of Directors, have also expressed concern with at least some parts of the Bill.

9. The written submissions from trade unions and the National Union of Students (NUS) Scotland provided support for the Bill and gave examples of what they considered to be poor governance, or poor decision-making, in higher education. For example, the written submission from the University and College Union (UCU) Scotland stated—

There is a problem with the way that our universities are governed which leads to a lack of robust questioning of strategic decision making of senior management. Our concern is this can lead to many institutions making demonstrably bad educational, financial and other decisions.

10. In oral evidence, the same organisation put such criticisms into context—

No one is questioning that Scottish universities are good—they are good. What we are saying is that they could be so much better if staff, students and trade unions were fully involved in how they operate.

11. Some supporters of the Bill also considered it does not go far enough in addressing their specific concerns. NUS Scotland’s written submission said the Bill was an opportunity to address three main shortcomings with higher education governance: “a lack of a genuine democratic culture in governing bodies; a lack of transparency and accountability over how decisions are made, and who makes them; and, a lack of fair representation and diversity on governing bodies”.

However, it then went on to say that the Bill “falls short” on “improving the diversity of, and fair representation on, governing bodies, and tackling senior level pay”.

12. The STUC disagreed with the view put forward by HEIs, that the Code had improved governance in the sector. It argued that the Code’s recommendations “are simply not significantly stretching to change practice for the better throughout the sector”.

13. Although HEIs have been vociferous in their criticisms of the Bill’s potential impact, the Cabinet Secretary has sought to put into context the scale of change being proposed—

The bill is a discrete bill with some discrete measures. It is certainly not looking at overhauling all aspects of university governance.
14. This is the second bill in three years\(^\text{15}\) that makes provision on HE governance and we discussed with officials the ultimate standard of governance the Scottish Government was seeking to achieve for the sector. We asked, for example, whether the Scottish Government had looked at any international comparators on governance in drafting the Bill. Officials replied—

> I do not think that the plan is to emulate any perfect model. The ambition is to move on with a modest set of proposals … rather than being inspired by a bar that has been spotted elsewhere.\(^\text{16}\)

15. The Scottish Government also confirmed it was content that the Code and the Bill addressed the core concerns raised by the von Prondzynski review (discussed below), and said it had no plans for further primary legislation in this area in the near future\(^\text{17}\).

**The Bill’s origins**

16. According to the Code, the overarching purpose of governance in HEIs is to “promote the enduring success, integrity and probity of the Institution as a whole”. Every HEI is headed by a governing body that is “unambiguously and collectively responsible for overseeing the Institution’s activities”. In discharging its responsibilities a governing body will, amongst other things, “take all final decisions on matters of fundamental concern to the Institution”\(^\text{18}\).

17. The Code’s development can be traced to a review of higher education governance chaired by professor Ferdinand von Prondzynski. The Bill’s provisions also originate from this review, which reported in January 2012\(^\text{19}\). A Scottish Government consultation on a draft bill was launched in November 2014\(^\text{20}\). The Scottish Government, through both the Bill’s Policy Memorandum and the evidence it provided to us, frequently justified its approach with reference to the findings and recommendations of the review (albeit not all recommendations were legislated on and some were adapted by the Scottish Government in drafting the Bill). However, we have provided examples of where we consider the Scottish Government should have provided its own justification and rationale.

18. The Policy Memorandum also repeatedly mentioned the importance of ‘consistency’ in HEIs, for example, in relation to the representation of stakeholders on governing bodies. However, the Bill also allows HEIs some flexibility (for example, in relation to certain nomination and election processes). We therefore asked the Scottish Government whether it was content that there was a minimal risk of any significant inconsistencies arising.

19. In response, the Scottish Government said it was aiming to introduce “a set of focused and discrete provisions to improve governance” and that it had “no intention of micromanaging autonomous institutions”\(^\text{21}\). We highlight this exchange as it is relevant to the Bill overall and, in particular, to the following section on the potential reclassification of Scottish HEIs.
ONS reclassification

20. The question of whether Scottish HEIs may be at risk of ‘reclassification’ emerged as one of the main topics of debate during our Stage 1 scrutiny. This issue was not mentioned in the Bill or its accompanying documents, and much of the detailed discussion was held outwith our Committee. HEIs’ concerns were first discussed in detail during the Finance Committee’s scrutiny of the Bill’s Financial Memorandum, and there has also been a separate chamber debate that covered this issue.

21. According to a note of advice commissioned by Universities Scotland, the Office for National Statistics (ONS) will be assessing the current classification of HEIs between January and June 2016. Universities Scotland asked for advice on whether the measures in the Bill, when considered cumulatively with other recent changes in legislation and policy, could increase the risk of Scottish HEIs being reclassified.

22. The note of advice said there is no specific reference to Scottish HEIs being included in the ONS’ assessment, but nor have they been specifically excluded. The note concluded—

“...Our advice is that the Bill, based on an assessment of the range of factors that ONS would consider as part of an assessment of the classification of HEIs, heightens the risk of HEIs being reclassified by the ONS .... We think that, when considered cumulatively with other existing government controls over HEIs, the provisions in the Bill would take HEIs into “borderline” territory in terms of their current ONS classification ...

23. HEIs are strongly opposed to this outcome and have identified very significant financial repercussions they believe would result from reclassification. For example, the University of Glasgow told the Finance Committee it could lose income of around £28.7m per annum, with an even greater impact expected for its capital investment programme. Professor Timothy O’Shea suggested the Bill may damage the international reputation of Scotland’s HEIs—

“...The discussion is not happening just in this room, and it is being observed around the world. The perception around the world is that the bill, if enacted, will reduce the autonomy of Scottish universities.

24. The discussion about the Bill’s impact on reclassification has strayed into quite technical areas. At its heart, however, the debate is about the legitimate level of ministerial control over HEIs and the degree to which this control may impinge on their autonomy. The note of advice referred to above is also helpful in setting out some of the “existing areas of government control over Scottish HEIs”, which provides some context to the wider discussions around autonomy and accountability in the HE sector.
The Scottish Government’s analysis

25. In oral evidence, the Cabinet Secretary said the Scottish Government “does not seek to advance ministerial control of our institutions”30, adding that the Bill “does not add to any existing risk of reclassification”31. The Scottish Government has made clear its opposition to reclassification and, in the event that it should occur, would seek to ensure the decision was reversed.

26. The Cabinet Secretary stressed that the issue of possible reclassification was considered in depth in the lead up to the Bill’s introduction, and noted the difficulties of getting a definitive view from the ONS at this point about the Bill’s implications. The Scottish Government has put into the public domain some of the analysis it undertook in considering the potential risk of reclassification32. It has also stated, in a letter to Universities Scotland, how it assessed the risk of reclassification prior to the introduction of the Bill—

Key to this assessment was the level of government control over higher education institutions (HEIs) activities, based on the Eurostat European System of Accounts published guidance on classification from 2010. The guidance has been examined carefully, with each of the indicators considered in turn and how they relate, or not, to the provisions in the Bill. It is the view of the Scottish Government that the content of the Bill is compliant with the indicators of control.33

27. However, Universities Scotland and others have questioned the quality of this analysis and the nature of the advice sought by the Scottish Government34.

28. In answer to a question about another occasion when the possibility of reclassification had arisen, the Cabinet Secretary justified a different approach by saying reclassification, in terms of the Bill, was “a statistical classification issue as opposed to a legal issue”35.

Regulations

29. A key issue in the reclassification debate concerns the various sections of the Bill that would grant Scottish Ministers the powers to make future regulations about governing bodies and the academic board. These powers are strongly opposed by the sector, for example, the University of St Andrews stated—

The proposals in the Bill go significantly beyond even what was envisaged in the Consultation exercise [the Scottish Government consultation on the Bill]. The extent of the proposed powers to be exercised through secondary legislation risks introducing a dangerous level of political influence and control over Universities. Sections 1, 8 and 13 allow Ministers to enable future changes to the makeup of University Courts and Senates through secondary legislation, without the safeguard of full Parliamentary scrutiny.36
30. The Scottish Government has maintained that the Bill’s regulation-making powers are intended to “future proof the content of the Bill, allowing minor adjustment as required, rather than to enable any radical alteration to its provisions”\(^{37}\). In oral evidence, the Cabinet Secretary confirmed she was “actively considering whether to amend or remove” the provisions in sections 8 and 13\(^{38}\).

31. As noted, it is not possible to get a definitive view from the ONS about the extent to which the Bill heightens the risk of reclassification. Given the strongly diverging views, it is therefore helpful to provide some independent contribution to the debate by considering the written submission from the Office of the Scottish Charity Regulator (OSCR).

32. It is important to note that this submission considered how the Bill may affect ministerial control but did not make any direct comment on reclassification. The submission made clear the complexity of the issues and should therefore be read in full. However, the following extracts are relevant to the debate—

> Our view is that the [Bill’s] provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4)(b) of the 2005 Act [which relates to Ministerial powers of direction and control over charities].

> Section 8 of the Bill gives Ministers the power to make regulations to modify the categories of membership set out in section 4 and the numbers in each category. Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions these amounted to ministerial control. Similarly, Section 20 of the Bill gives Scottish Ministers wide power to make such further regulations ‘as they consider necessary or expedient for the purposes of or in connection with this Act’. Should such regulations be made in respect of Part 1 of the Bill when enacted we would have to consider the impact of these measures with respect to ministerial control.\(^{39}\)

33. The Finance Committee and the Delegated Powers and Law Reform Committee both reported to us at Stage 1\(^{40}\) and both considered the Scottish Government could provide clarity on the regulation-making powers.

34. **We consider the reclassification of Scottish HEIs would be in no-one’s interests, given such a decision could cause very significant harm. We therefore consider all reasonable measures should be taken to minimise any risk of reclassification.**
35. Our scrutiny has taken into account not just the current Scottish Government’s intended approach, but also how the powers in question could be used by any future Scottish Government. **We therefore welcome the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions.** We expect this to mean the powers could not be used in a way that would unjustifiably increase ministerial control. We consider there should have been more productive discussions between the Scottish Government and the HEI sector about the intended purpose of these provisions, some of which are commonly found in legislation.

36. There has been considerable disquiet from Universities Scotland about the level of analysis undertaken by the Scottish Government on how the Bill may alter the risk of reclassification. **We therefore agree with the Finance Committee that the Scottish Government should publish, before the Stage 1 debate, the full analysis it has undertaken on this issue.**

37. The issues discussed above raise broader questions about the extent to which any future Scottish Government’s development of legislation, policy or funding relating to HEIs may, in effect, be constrained by the possible risk of reclassification. **We would welcome the Scottish Government's views on this issue.**

**Charitable status**

38. The OSCR quote in paragraph 32 is also relevant to a second financial issue raised by HEIs, namely the Bill’s possible impact on institutions’ charitable status. Universities Scotland said it was concerned “that increased Ministerial powers may be at odds with HEIs’ status as charities, since the law states that organisations do not meet the charity test if they are directed or controlled by Ministers.”

39. There has been an exchange of correspondence between Universities Scotland and the Scottish Government on this topic and both have cited OSCR’s written submission to us to support their case. With reference to the first half of the OSCR quote in paragraph 32, the Scottish Government concluded “OSCR’s overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs.” Universities Scotland, meanwhile, referred to the second part of the OSCR quote in paragraph 32 and concluded “OSCR have been clear that the exercise of the Ministerial powers proposed in the Bill could give rise to a risk to charitable status, on the basis that HEIs are subject to Ministerial powers of direction and control.”

40. The Finance Committee’s report – which predated the most recent letter from Universities Scotland to the Scottish Government on this issue – noted the concerns raised by HEIs about charitable status then concluded it was “satisfied
that these [concerns] were addressed in OSCR’s submission to the lead committee.\textsuperscript{44}

41. The charitable status issue is connected to the question of whether the Bill increases ministerial control over HEIs, and, in particular, Scottish Ministers’ powers to make future regulations (as discussed above). \textbf{We therefore reiterate our support (in paragraph 35) for the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions, as we consider this would also remove any potential threat to HEIs’ charitable status.}

\section*{The governing body chair}

42. According to the Code, the chair is responsible for the leadership of the governing body and is ultimately responsible for its effectiveness. Universities Scotland’s written submission said there is an open process for the appointment of chairs, and the guaranteed involvement of student and staff governing body members.\textsuperscript{45}

43. As introduced, the Bill requires HEIs to appoint the chair of their governing body in accordance with a process to be set out in regulations made by the Scottish Ministers. Section 1 currently lists some of the steps that may be covered in the appointment process. We asked whether any steps would be left to HEIs to determine and the Scottish Government responded as follows—

\begin{quote}
Removal of a chair is not a matter that the Bill will provide for. This, along with most other terms and conditions of appointment, will remain an issue for HEIs, who shall continue to have the power to remove any member of the governing body and (according to the Code of Good HE Governance) must do so if the member materially breaches the conditions of his/her appointment.\textsuperscript{46}
\end{quote}

44. The Policy Memorandum stated that, due to the clear difference in stakeholder opinion, the Bill would not feature specific detailed provisions at introduction. Instead, detail was to be provided in regulations “following further discussion on co-design with key stakeholders”.\textsuperscript{47}

45. However, the Scottish Government is now considering making amendments to allow for provision on the face of the Bill “for a single model for the appointment of elected chairs”.\textsuperscript{48} This is, therefore, an issue where the current position is not entirely clear.

\section*{The rationale for change}

46. According to the Policy Memorandum, the policy aim of this section is “to establish a required minimum level of openness, transparency and consistency across all HEIs”.\textsuperscript{49} The Scottish Government considers this matter could not be left to the Code as “there is no explicit provision specifically stipulating the required
composition of the governing body in all HEIs”. The Policy Memorandum adds “it is too crucial to the achievement of good and consistent governance for the composition of governing body membership not to be addressed directly by legislation”\textsuperscript{50}.

**Stakeholder reaction**

47. Our call for written submissions generated a considerable amount of criticism about this proposal; the RSE’s submission summed up most of the main concerns—

"We re-emphasise the overriding need for the governing body to have full confidence in the impartiality and leadership abilities of its chair, and for the relationship between the chair and Principal to be mutually supportive but challenging. A process culminating in an election by any electorate broader than the governing body itself cannot guarantee either of these two crucial elements. It risks “politicising” the role and increasing the influence of people with either a very temporary stake in the university or others with clear vested interest. It may result in a chair beholden to a particular constituency rather than one able to pursue the best interests of the institution as a whole. In addition, turning the process into an election campaign will be likely to narrow, rather than widen, the pool of candidates, deterring people who are not comfortable with public campaigning and self-promotion but who may be well qualified for the role."\textsuperscript{51}

48. These types of arguments were challenged by NUS Scotland—

"… it has been argued that by electing chairs we may get to a situation whereby the chair doesn’t enjoy the ‘confidence’ of the governing body. However, while there is no evidence to suggest that would be the case, it also undermines the role of the chair and governing body. Governing bodies, as with all trustee boards … should act as critical friends to institutions, on behalf of their stakeholders – staff and students. We would seriously question any governing body, and the role they are carrying out, that did not put their trust in a chair who had trust put in them by staff and students."\textsuperscript{52}

49. It is relevant to note that the chair of the review of HE governance, Ferdinand von Prondzynski, has reiterated to us his support for “a more inclusive approach to appointing governing body chairs”. His justification was that this could “avoid the impression that governing bodies are not accountable to anyone other than themselves, which could be said to be the current position”. Professor von Prondzynski also agreed with the point that a governing body should have confidence in its chair, and called again for an open recruitment and selection process run by the governing body, which would include interviews and shortlisting."\textsuperscript{53}
The Cabinet Secretary's response

50. Many of the concerns expressed to us mirrored those provided to the Scottish Government’s earlier consultation on the draft bill, as noted in the Policy Memorandum. We therefore sought to understand why the Scottish Government now intends to provide detailed provisions on the face of the Bill, having ruled that out earlier due to the “clear difference in stakeholder opinion”; it appeared to us that the parties involved were no closer to a mutually acceptable solution.

51. Given the very strong concern expressed by HEIs, we also asked the Cabinet Secretary whether she considered there would be a problem if the chair were to be appointed or elected by a group other than the governing body. The Cabinet Secretary responded—

"No, I do not. When people are elected and appointed to positions, they have a responsibility that is based on the job that they are elected or appointed to do. As an MSP, I am elected by the good people of Almond Valley but, as a minister, I am subject to the ministerial code and have to respect the place and rights of Parliament."

52. The Cabinet Secretary said the Scottish Government remained open-minded on some issues, but was committed to the election of chairs, rather than their being appointed. The Scottish Government has previously said “the franchise for the electoral process would not expand beyond the community within each HEI”. Ms Constance also stressed the importance of an elected chair actually being able to take up the post, mentioning “some sort of fit-and-proper-person test” and noting that some elected rectors had not been able to chair the court (rectors are discussed in more detail below).

53. In response to our questioning, the Cabinet Secretary said the Scottish Government had not established how many new candidates for the post of chair were likely to come forward as a result of the Bill.

54. HEIs have already taken steps to open up the process of recruiting governing body chairs, including the involvement of students and staff. **We support measures that would potentially increase the pool of suitable candidates for the post of chair and agree that openness, transparency and consistency in the appointment process is desirable.**

55. At this point, the exact means by which the chair is to be appointed is not clear and our evidence-taking has indicated no consensus amongst stakeholders about a way forward. It therefore appears that the Scottish Government may have to adopt a model that will not attract unanimous support. **In order to inform the Stage 1 debate on this key part of the Bill, the Scottish Government should provide more detail on the process envisaged, such as whether there will be a pre-selection of candidates before an election; if**
so, who will be responsible for conducting that process; and who exactly will form the electorate for the election of chair.

56. Given the strong emphasis the sector has placed on maintaining an appropriate link between the chair and the rest of the board, it would be helpful if the Scottish Government could also provide examples of governing bodies in Scotland that do not directly appoint their own chairing member. Where such cases exist, have any evaluations been carried out to determine how this has affected the organisation’s performance? Is the quality of governance in such bodies markedly different?

The role of rectors

57. Another outstanding issue to be resolved before the Stage 1 debate is exactly how the provisions on an elected chair will take account of those universities that currently have an elected rector.\(^{54}\)

58. Our scrutiny of this issue was hampered by the fact the Bill, its accompanying documents and the analysis of the Scottish Government’s consultation on the draft bill made very few substantial references to the position of rector. The Bill only mentions ‘rectors’ twice, both times in terms of amendments to existing legislation; the Explanatory Notes to the Bill do not explain the reason for, or consequences of, these proposed changes.

59. Despite this lack of clarity, we have received some impassioned evidence about the threat posed by the Bill. For example, the written submission from the current rector of the University of St. Andrews, Catherine Stihler, stated—

> The unique Scottish tradition of the Scottish Ancient universities for students to select and elect their Rector to chair University Court, the ruling body of the university, is a special and precious tradition which the Higher Education Bill before you, will remove.\(^{56}\)

60. We received other similar submissions, while a number of former rectors of the University of Edinburgh highlighted to the media their concern about the role’s possible abolition.\(^{57}\)

61. The Cabinet Secretary has been clear that the Scottish Government does not desire such an outcome—

> ... we will seek to minimise, and consider removal, of any features of the model [for elected chair] selected that could impinge on the role of rector ... there is absolutely no intention to remove the role of rector from university life.\(^{58}\)

62. There was some confusing evidence provided to us about the precise nature of the roles currently undertaken by rector. In essence, however, it appears that
while some rectors have a statutory right to chair the university court (i.e. the
governing body), and some do so, the broader, substantive duties associated with
‘chairing’ an HEI are carried out separately by a senior governor.

63. In oral evidence, Ms Constance highlighted various difference between the role of
rector and senior governor, for example, that the senior governor has overall
responsibility for leadership and good governance of the court, while rectors do
not have a role in overseeing governance. The Cabinet Secretary said she had no
desire to change the statutory right of some rectors to chair court, but said this
needed to be considered alongside the role of elected chairs. While not
absolutely explicit, it appears the Bill will result in the universities in question
having both an elected chair and a rector.

64. It is regrettable that the position of rector has not been clarified by now
and that there was no substantive discussion of this issue in the Bill or its
accompanying documents. However, we welcome the Scottish
Government’s reassurance that the role of rector will not diminish. The
final model proposed by the Scottish Government must ensure there is no
ambiguity about the roles of elected chairs and elected rectors, and that
both figures are able to work together for the good of the institution.

Remuneration

65. The Bill’s provisions about the chairs of governing bodies also cover their possible
remuneration; section 2 states that Scottish Ministers may by regulations make
provision for remuneration and allowances to be payable by an HEI to the chair.

66. Universities Scotland has also criticised these provisions as being unnecessary—

…since institutions already have the power to remunerate Chairs and/or
independent members at their own initiative, and it is provided for in the HE
governance code. It is inappropriate in principle for Ministers rather than
governing bodies of autonomous institutions to decide on the reasonable
remuneration level.

67. The Cabinet Secretary explained that the rationale for this proposal flowed from
the von Prondzynski review, which had highlighted that remuneration may attract
a wider range of people and could also reflect the time commitment made by
chairs. The Cabinet Secretary confirmed the issue of remuneration was being
examined to see “whether it is actually required and whether it is expressed in the
best possible way.”

68. The von Prondzynski review recommended that the chair should receive “some
form of reasonable remuneration.” However, we remain unclear why the
Scottish Government requires a statutory power to make regulations about
remuneration when HEIs already have a power to remunerate chairs. We
therefore call on the Scottish Government to set out the intended benefits it expects to derive from assuming this power. We also invite the Scottish Government to address the following points, which were not explained in the Bill’s explanatory notes—

- how it would intend to use the power, for example, whether it would expect to set remuneration at a significantly different level than universities would;

- why it is seeking to delegate to “other persons” the power to determine remuneration and allowances in certain cases. Which persons does the Scottish Government have in mind and why?

Governing body composition

69. The Bill is concerned with both the chair of the governing body and its wider membership. Section 4 says the governing body is to be composed of various persons, for example: two elected staff members, two trade union nominees, two students’ association nominees; and two graduates’ association nominees. Membership of sub-committees of the governing body is not covered by the Bill.

70. The Policy Memorandum made the case for this approach with reference to both the von Prondzynski review and the Scottish Government’s consultation on the Bill. In essence, the Scottish Government considers that a fully representative membership “is key to the effectiveness of the governing body”. The Policy Memorandum goes on to say that consistency in approach will increase transparency and democracy, ensure more effective representation of internal stakeholders and help to create a more inclusive environment within the institution.63.

Reaction to the proposals

71. The Committee of Scottish Chairs told us “governing bodies are highly inclusive” and pointed out that all have staff and student governors, and a majority of independent members.64. This group also summed up one of the sector’s main concern about these provisions, namely the role envisaged for trade union nominees—

I do not think that any of us has an issue with trade union members being on the governing body. However, it is hugely important that they are clearly there in a representative capacity for the whole staff, not for a narrower interest, which could lead to the accusation—or concern—that there would be a conflict of interest.65

72. Trade unions have supported the Scottish Government’s position and have criticised the views expressed by some university representatives. For example, the UCU said in oral evidence—
Just because students, staff and trade unions have a stake in the organisation does not mean that they are not interested in the success of that organisation … . Trade unions are democratic organisations. Our members and representatives are elected to posts in institutions. To say that there is a democratic deficit does not sit well with us.66

73. In order to better understand stakeholders’ concerns we questioned the Scottish Government on the expected role of trade union members and what was meant by saying that they – and other members – had to act in the organisation’s “best interest”67. The Scottish Government responded as follows—

All members of the governing body should approach their work as being about the betterment of the HEI and everyone who works and studies there. While the Bill does not impose a duty in this respect nor contain a definition of ‘best interest’, we believe that the concept is well understood within the sector … . The Scottish Government is clear that, while the membership of the governing body … will ensure that an inclusive mix of interests are represented in HEI governance, all members must act in the best interest of the HEI as a whole. Furthermore, as charity trustees, governing body members are under a duty under section 66 of the Charities and Trustee Investment (Scotland) Act 2005 to act in the interests of the charity, i.e. the HEI, while engaged in the business of the governing body.68

74. OSCR’s written submission made some comments relevant to this discussion—

… it is not particularly unusual for charities to have charity trustees nominated by other bodies or groups … . Given the overall size and composition of the governing bodies provided for in the Bill, we do not see anything to prevent any conflicts of interest arising for charity trustees nominated under the provisions in the Bill being dealt with in a way that enables the trustees to meet their duties.69

Accommodating new members

75. Some HEIs have raised other, related concerns about this provision, for example, questioning why trade union members should be included on the governing body when levels of union representation at some institutions are very low. Universities Scotland has also criticised the Bill’s effect on the size and balance of existing governing bodies, concluding that at least twelve HEIs would have to remove at least one member of their governing body in order to maintain both a lay member majority and no more than 25 members—

The fact is that, for the majority of institutions, this cannot be done unless existing members are removed. The members who would typically have to be removed to maintain an independent majority and a membership no higher than 25 would be staff representatives elected from categories not
set out in the Bill (e.g. elected by the Senate or academic board), or members elected by all staff additional to two elected staff members prescribed in the Bill. 70

76. Universities Scotland has also repeatedly challenged the Scottish Government’s analysis of the Bill’s effect on the existing membership of governing bodies.

77. The reference to 25 members above stems from the Code, which requires a governing body to be no greater than this size and to have a clear majority of independent (lay) members. Further, the Scottish Funding Council (SFC) requires compliance with the Code as a condition of public funding.

78. The Scottish Government has acknowledged that complying with the Bill is “likely to create conflicts with HEIs’ existing governance instruments” but considers all relevant institutions will be able to accommodate the members required by the Bill. A letter from the Scottish Government referred to a period of transition in which HEIs will amend their governing instruments in line with the new statutory requirements 71.

The impact of new members

79. Perhaps the main consideration in this discussion should be the likely impact of the new governing body members on the quality of governance in HEIs. Trade unions and some student groups have both criticised aspects of existing HE governance. It was argued by some that requiring their inclusion on governing bodies may reduce the likelihood of poor governance decisions being made. However, as noted, all governing body members are required to act in the best interest of their institution, which suggests that members are not to use their position to campaign for a particular ‘cause’. We therefore asked the Cabinet Secretary exactly how opening up governing bodies to trade unions and more students would lead to better governance.

80. The Cabinet Secretary responded—

> I believe that members of staff, trade unionists and students are well capable of taking part and making a contribution to the big strategic decisions that a university governing body has to make… On the point about better governance, by definition and outcome, that broader and more inclusive approach that includes all the voices on the campus can be only a good thing in helping the sector to move forward. 72

81. The Cabinet Secretary said her understanding was that the size of the university court at 25 members was not fixed. She stressed that the provisions would be implemented over a period of four years, adding “We are not in the business of cack-handedly removing existing members.” 73

82. The Cabinet Secretary also said she recognised the varying levels of union membership across institutions but added, “We are talking about two places for
trade union members in a court of 25, representing both academic and non-academic staff.” She also noted the progress made by HEIs in changing the membership of their governing bodies, and highlighted that “the majority of institutions would already have four out of the eight places that the bill seeks to implement”.

83. By definition, the Bill’s proposals on governing bodies would make them more inclusive, although it cannot be guaranteed that governance and decision-making would improve as a consequence. Nonetheless, we agree with the principle that a diverse group of people, all of whom clearly have a shared interest in the institution’s continuing success and who bring a wide range of experience in skills and governance, should be included on the governing body.

84. We note that all members of a governing body are required to act in its best interest – a point acknowledged by trade unions – and therefore cannot agree that the appointment of trade union members would undermine this principle. HEIs have, however, asked legitimate questions about the Bill’s impact on existing governing body members. Although the Scottish Government does not envisage a problem with HEIs complying with this provision, it is the Scottish Funding Council that requires HEIs to follow the Code as a condition of grant of public funding. We therefore seek assurances from the SFC that no institution would be forced, by the Bill’s proposals, to remove existing members of governing bodies, several of whom are elected members of staff, and also that there would be no detrimental effect on university management if the governing body number exceeded 25.

Specific issues

85. There are some other, more specific issues around these provisions that we wish to highlight. Glasgow School of Art (GSA) and other HEIs pointed out that they do not have a graduates association, which they consider would be needed to comply with this section of the Bill. GSA described the creation of such an association as “an extremely costly and time consuming exercise”. The Royal Conservatoire of Scotland has raised concerns about its ability to comply with the requirement to appoint trade union members. We call on the Scottish Government to address these specific concerns. More generally, given the diversity of the sector, we would welcome confirmation from the Scottish Government that all HEIs will be able to comply with the requirements of section 4.

86. We have been informed that elected student representatives (the student president and vice-president) would not be eligible to serve on the university court because they are on sabbatical and, therefore, technically not students. It would be helpful if the Scottish Government could clarify this point.
87. We also note the Cabinet Secretary’s comments that one of the student representatives on the governing body would have to be the president of the students association and the other would have to be a woman. The Bill does not appear to contain such requirements and we therefore seek clarification from the Scottish Government on this point.

88. We have previously asked the Scottish Government whether, in theory, one person could fill the role of being both a graduate nominee and union nominee to the governing body. The Scottish Government confirmed this was not the policy intention. It added that “membership of each of the categories of governing body member is intended to be mutually exclusive” and said it would consider whether this needed to be made explicit. Given some of the concerns raised about trade union and graduate members of the governing body, we would welcome an update on the Scottish Government’s position in advance of Stage 2.

Academic boards

89. According to the von Prondzynski review, academic boards are responsible for academic governance and academic planning. Their key responsibilities are defined as being “the oversight of academic quality, the safeguarding of academic freedom and the necessary co-ordination with governing body to ensure that decision-making at all levels is properly informed”.

90. The Bill requires HEIs to ensure their academic boards comprise no more than 120 people and include, amongst others, elected academic staff and students. Staff and students together are to make up more than 50% of the membership of an academic board, with students alone comprising at least 10% of the membership. We understand that only three HEIs’ academic boards currently contain more than 120 members.

91. The Policy Memorandum says the provision will “…embed a level of consistency across all academic boards and will ensure they are both effective and representative in their decision making”. The Policy Memorandum does not, however, provide any indication of whether, or the extent to which, the Scottish Government considers these to be significant deficiencies in academic boards.

92. We asked the Scottish Government – both orally and in writing – to set out the benefits it expected to derive from requiring student membership on academic boards. In response, the Scottish Government said this representation would “help to advance equality on the academic board” and “could only enrich the academic conversation”. Officials added in oral evidence that they could not “catalogue tangible changes in the way in which an academic board would run”.

93. We wrote to the Scottish Government to ask why governing bodies, but not academic boards, were to include trade union and graduate nominees. The Scottish Government replied as follows—
Ultimately, governing bodies ... are the structures responsible for determining the overall strategic direction of HEIs. If a governing body’s composition is inclusive, fair and balanced, this will permeate throughout the institution. With the provisions on membership of the governing body designed to achieve this effect, there is no need to stipulate that there must be union or alumni representation on the academic board.  

If changing governing bodies is to have the effect set out above, we asked the Cabinet Secretary why student representation was required on the academic board. Ms Constance reiterated the points above and said the Scottish Government’s position was “still that the academic board is for academics and students”.

**Reaction to the proposals**

Universities have criticised this section of the Bill on the grounds that they consider academic board composition to be a matter for HEIs, rather than the Scottish Government, to determine and because it takes no account of the diverse nature of institutions. For example, some universities raised concerns to us about setting the ‘threshold’ for academic board membership at 120.

Similar concerns were also expressed in the prior Scottish Government consultation on the Bill and we were therefore surprised when the Scottish Government said it did not “anticipate any difficulty for HEIs” in meeting the threshold.

It would not have been arrived at willy-nilly; I imagine that it was subject to lots of cross-sectoral dialogue and that many opinions were taken.

The von Prondzynski review referred to evidence “which points towards dysfunctionality where the membership of the [academic] board is too large”, but did not provide any further detail. It recommended that academic boards “should not normally be larger than 120 members”. Neither the von Prondzynski review nor the Scottish Government’s subsequent consultation specifically mentioned the figure of 10% student representation, although the review did recommend that there should be “significant (rather than token) student representation”.

The Scottish Government took the principles on the academic board from the von Prondzynski review. However, we are concerned about the lack of evidence on this issue and consider that the Scottish Government should provide a more detailed explanation as to why it should legislate on this body. We also ask whether there could be flexibility around the 120 member threshold.

We understand the merit of having a student presence on academic boards and note that HEIs do not appear to have any significant concerns about this
proposal. With reference to paragraph 92, it would be helpful if the Scottish Government could identify whether any more tangible benefits are likely to arise from this provision.

100. We are still not clear why – taking into account the explanation provided in paragraphs 93 and 94 – there is to be statutory student representation on academic bodies, but not statutory trade union or graduate representation. **We therefore require further clarification on this point.**

### Academic freedom

101. The Bill seeks to alter the existing statutory definition of “academic freedom”, as set out in the Further and Higher Education (Scotland) Act 2005. Two main changes are proposed—

- The definition is now to include relevant persons’ freedom within the law to “develop and advance new ideas or innovative proposals”;

- Relevant bodies now “must aim to uphold the academic freedom of all relevant persons”. This replaces the current definition, according to which relevant bodies “must have regard to the desirability of ensuring” academic freedom.

102. According to the Policy Memorandum, the policy aim of this change is “to expand the current definition and to strengthen the protection of academic freedom … .This is to ensure that, going forward, the protection of academic freedom is more comprehensive and transparent.” Unlike the rest of the Bill, these provisions will apply to the Open University in Scotland, colleges and all Scottish HEIs.

### Background

103. The von Prondzynski review did not highlight any particular concerns or problems with the existing statutory definition of academic freedom. It did, however, compare this definition with the equivalent Irish legislation and concluded, in essence, that the Irish definition be adopted. The review did not give the impression that this would lead to a radical change, noting simply that the Irish definition “perhaps expresses slightly more comprehensively the full significance of academic freedom.”

104. Academic freedom is also covered in the Code; main principle one provides that governing bodies are to “ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments”. 
Stakeholder views

105. The written submissions we received on the Bill provided comparatively few comments on this provision, with a common view that it would have little material effect.

106. Unions, for example the UCU, were the most supportive of the proposal—

> We have a good definition of that [academic freedom] in Scotland from the Further and Higher Education (Scotland) Act 2005, but the bill will add to that by giving clarity to and strengthening the definition. The UCU has been asked on occasion to defend some of our members around questions of academic freedom. I think that the bill is a positive step forward.93

107. HEIs considered there was little justification for the proposed change. For example, the University of the West of Scotland said—

> There does not appear to be evidence that the current 2005 Act restricts or has left open to threat the freedom ‘to develop and advance new ideas and innovative proposals’ and we would ask for further clarification of the benefit of amending the legal definition.94

108. HEIs also highlighted what they considered to be a paradoxical position, whereby this provision would seek to strengthen academic freedom but within the wider context of a Bill that would diminish universities’ freedom.

The Scottish Government view

109. We raised with Scottish Government officials and the Cabinet Secretary some of the concerns expressed by HEIs and also sought to understand exactly how the Bill would strengthen the concept of academic freedom.

110. Both officials and the Cabinet Secretary repeatedly suggested that this section of the Bill was not designed to address a particular problem—

> The Government is not coming from the premise of deficiency. In looking at the recommendations of the von Prondzynski review, we saw an opportunity to make modest adjustments or improvements to the definition of academic freedom. I appreciate that, again, there is a range of views about the value of those modest changes.95

111. Scottish Government officials also referred to the provision as a “modest” change and said the consultation on the Bill “threw up support for the provision or neutral views on it . . . . The stakeholder evidence that we gathered generally supported a modest expansion of the existing statutory definition of academic freedom”.96 However, we note that the analysis of the Scottish Government’s consultation showed that 50 of 99 respondents disagreed with the view that the principle of “academic freedom” should explicitly refer to freedom to encourage new ideas97.
The other proposed change – about ‘aiming to uphold’ academic freedom – does not seem to have been specifically consulted on. We are therefore not sure which ‘stakeholder evidence’ was being referred to by officials.

112. In response to our questions, the Scottish Government confirmed it had no examples of academics who had previously been penalised for exercising their academic freedom in a manner that would now be permitted under the Bill.

113. We also asked why provision was required around the expression of ‘new ideas’. Scottish Government officials explained that “the specific academic freedom is about the freedom for academics to express their new ideas. This is a protection of their academic freedom. It is not so much about the universities’ reputation …”.

114. The Scottish Government has acknowledged that the proposed changes to the existing statutory definition of academic freedom are modest. We have provided further background on this provision, in order to inform the Stage 1 debate.

Specific issues

115. Various specific issues about academic freedom were raised in the written submissions. The most substantive issue was raised by the Scottish Council of Jewish Communities, which expressed concern about widening the statutory definition of academic freedom “while not also imposing equivalent statutory responsibilities to protect those who may suffer detriment from careless or malicious use of that freedom”. Its submission contained various examples of negative treatment experienced by Jewish students in Scottish HEIs. 98

116. The Cabinet Secretary did not believe the Bill’s provisions on academic freedom would undermine existing legislation that offers protection to students—

   It is clear that, whether the current definition or the modest proposed change to the definition applies, people are not excused from the requirement to operate within the law. There is a wide range of legislation on, for example, incitement and discrimination, and nothing in the current or proposed definitions excuses people from their obligations to comply with that legislation. 99

117. Scottish Government officials committed to investigating the wording of the existing legislation on academic freedom and to establishing “what consideration, if any, was given to the student side of the equation”. We have not heard anything further from the Scottish Government on this matter and expect to receive an update before the Stage 1 debate.
118. **We also look forward to receiving clarification on the following statement in the Bill’s Financial Memorandum:** “Alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs. However, no additional costs are expected to arise.”. We also invite the Scottish Government’s views on UCU Scotland’s suggestion that academic freedom should also apply to academic related and support staff.

Financial Memorandum

119. One of our roles at Stage 1 is to report on the Bill’s Financial Memorandum, taking into account the report from the Finance Committee. That committee raised a number of specific issues for us to discuss with the Cabinet Secretary and also made some general criticisms of the consultation undertaken on the potential costs arising from the Bill.  

120. We asked the Cabinet Secretary why the estimated costs to HEIs of amending their governing instruments had not been included in the Financial Memorandum. The Cabinet Secretary said this was because such work was “part of the core business of a university” and she did not anticipate significant new costs arising from the Bill.  

121. In response, we highlighted that universities would incur the costs of amending their governing instruments as a result of action taken by the Scottish Government. We also asked about the discrepancy in evidence provided by the Scottish Government and HEIs to the Finance Committee, concerning the costs and time involved for HEIs in recruiting a governing body chair.  

122. In response, the Cabinet Secretary said the Scottish Government would take the Finance Committee’s comments into account in considering whether to provide an updated Financial Memorandum at Stage 2. However, Ms Constance said she still believed there would not be substantial costs arising as a result of the Bill.  

123. **We acknowledge the concerns raised by the Finance Committee and stakeholders about the Financial Memorandum, and welcome the Cabinet Secretary’s commitment to examining these concerns.**  

124. **We also expect the Scottish Government to take the Finance Committee’s concerns about consultation into account, as appropriate, when preparing future Financial Memorandums.**

Policy Memorandum

125. As lead committee, we must also consider and report on the Bill’s Policy Memorandum. We have highlighted specific examples where the Policy Memorandum could have provided more detailed information. We have also
provided our views on the Bill’s main provisions, bearing in mind the Scottish Government’s aim of strengthening governance in the HE sector. However, we consider that the Policy Memorandum should also have been clearer about the Bill’s “principal objectives”, namely more “modern, inclusive and accountable” governance. For example, the Policy Memorandum could have provided more information on what is meant by ‘accountability’; to whom HEIs are accountable; and how the Bill would change levels of accountability. Given the nature of the concerns raised by the HE sector, it would have been very helpful had the Policy Memorandum provided definitions or more detailed discussion of fundamental concepts such as governance and autonomy.

Conclusions

126. The Higher Education Governance (Scotland) Bill contains relatively few provisions but has generated a considerable amount of comment and criticism. Some of the main concerns expressed were in relation to matters not explicitly mentioned in the Bill or its accompanying documents. Our Stage 1 consideration was made more difficult because various provisions were not fully defined by the time we concluded our evidence-taking. For example, the exact process by which a governing body chair is to be appointed; the remuneration that chairs may receive; the relationship between a rector and an elected chair; and the use of regulation-making powers are all areas where the Cabinet Secretary has indicated that the Scottish Government’s position is not fixed. We have asked the Scottish Government throughout this report for further detail on a number of such issues, which will help to ensure all members are fully informed in advance of the Stage 1 debate.

127. Evaluating the Bill’s success could be a difficult task as the Scottish Government has not described any deficiencies in existing governance, nor has it stated whether any of the specific problems identified by advocates of reform would be less likely to occur in future. Further, governance is also being revised separately through the Code.

128. In response to our questioning, the Cabinet Secretary confirmed she would want to monitor the impact of the Bill in conjunction with the sector as a whole. Ms Constance also referred to a university sector advisory board, and suggested this board could have “a renewed focus on governance, monitoring impact and measuring success and progress”. The Code is also due to be reviewed next year, while governing bodies are expected keep their effectiveness under annual review.

129. We welcome the Cabinet Secretary’s commitment to monitoring the Bill’s impact in conjunction with the sector as a whole, and her statement that the university sector advisory board could help to measure the Bill’s success. We look forward to receiving detailed information on how this
board would work in practice, including how it could be informed by any other reviews of HE governance.

130. The Scottish Government has explained its reasoning for each of the Bill’s provisions. However, we have highlighted in this report examples of further information we believe the Scottish Government should provide in order that members’ participation in the Stage 1 debate is as informed as possible. We have also highlighted the concerns about the issue of reclassification, and have suggested a possible solution that we consider the Scottish Government should be able to deliver. While recognising there is a difference of opinion, as set out at the beginning of this report, we agree it is appropriate to seek to improve governance, particularly to try to avoid future problems arising. Taking all these points into consideration, we support the strengthening of governance in higher education and thus the Bill’s general principles. The Stage 1 debate will be an opportunity for all members to question in more detail the precise means by which this will be delivered.¹⁰⁴

¹ http://www.scottish.parliament.uk/parliamentarybusiness/Bills/90125.aspx
² http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd-pm.pdf, paragraph 3.
³ http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90785.aspx
¹⁵ The Post-16 Education (Scotland) Bill contained provisions on higher education governance.
¹⁷ http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Higher%20Education%20Governace%20(Scotland)/Letter_from_the_Cabinet_Secretary_for_Education_and_Lifelong_Learning.pdf
¹⁸ If reclassification occurs it would mean Scottish HEIs being reclassified by the Office of National Statistics as falling within the ‘General Government category’ of the public sector for the purposes of the National Accounts, moving away from their current classification as ‘Non-Profit Institutions Serving Households within the private sector’. 
Current classification: Transactions not at economically significant prices.

Reason for assessment: policy - significant increases in tuition fee maxima

Impact on Fiscal Aggregates: not applicable

Impact on National Accounts: medium

Expected completion: Half 1 (January - June) 2016

From September 2012, the maximum tuition fees which could be charged by universities in England and Wales were increased from around £3,500 to £9,000. ONS will review the treatment of these fees in light of this change; in particular, whether tuition fees are now charged at 'economically significant prices'. This is relevant when assessing whether universities are 'market' or 'non-market' producers.
We have heard conflicting views on this matter, but it appears that the following institutions have the post of rector: the four ‘ancient’ universities, Dundee and the UHI. Methods of appointment and responsibilities vary.

The schedule to the Bill sets out two proposed amendments, to the Universities (Scotland) Act 1889 and the Universities (Scotland) Act 1966.

This was recommended by a majority, with one member of the review dissenting.

We have heard conflicting views on this matter, but it appears that the following institutions have the post of rector: the four ‘ancient’ universities, Dundee and the UHI. Methods of appointment and responsibilities vary.

The schedule to the Bill sets out two proposed amendments, to the Universities (Scotland) Act 1889 and the Universities (Scotland) Act 1966.
“The consequence of the Bill would require the Academic Council to be disbanded and replaced by a reformed Senate that would either have to be significantly larger in number or significantly less representative in its composition. We do not believe that this would be in the interests of good governance or effective administration.” (University of St Andrews). The University of Aberdeen’s Academic Board (senate) has 150 members. The University’s written submission says it is unclear how the Bill’s proposals would affect ex officio members but notes that “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”.

See column 62.


See column 62.

Liam McArthur and Mary Scanlon disagreed to this paragraph.
17th Meeting, 2015 (Session 4)

Tuesday 23 June 2015

Present:
George Adam
Chic Brodie
Gordon MacDonald
Liam McArthur
Mary Scanlon

Colin Beattie
Mark Griffin
Stewart Maxwell (Convener)
Siobhan McMahon (Deputy Convener)

1. **Decision on taking business in private:** The Committee agreed to take items 4, 5, 6, 7 and 8 in private.

6. **Higher Education Governance (Scotland) Bill (in private):** The Committee will consider its approach to the Bill at Stage 1. The Committee agreed:

   - a call for written submissions;
   - to delegate authority to the convener to arrange payment of any witness expenses;
   - to consider its Stage 1 report on the Bill in private at future meetings.

23rd Meeting, 2015 (Session 4)

Tuesday 6 October 2015

Present:
George Adam
Chic Brodie
Gordon MacDonald
Liam McArthur
Mary Scanlon

Colin Beattie
Mark Griffin (Deputy Convener)
Stewart Maxwell (Convener)
John Pentland

Also present: Liz Smith

**Higher Education Governance (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1, in a roundtable format, from—

Emily Beever, Women's Officer, National Union of Students Scotland;

Dame Jocelyn Bell Burnell, President, Royal Society of Edinburgh;

Jennifer Craw, Chair of the Board of Robert Gordon University, Committee of Scottish Chairs;
Ann Marie Dalton, Secretary, Heriot-Watt University;
Robin McAlpine, Director, Common Weal;
Professor Tim O'Shea, Principal, University of Edinburgh;
David Ross, Chair, Committee of Scottish Chairs;
Mary Senior, Scotland Official, University and College Union Scotland;
Professor Jeffrey Sharkey, Principal, Royal Conservatoire of Scotland;
Laura Duffy, Higher Education Governance and Funding Team Leader, Stephen White, Strategic Policy Lead (HE Funding, Governance and Student Support), and Ailsa Heine, Legal Directorate, Scottish Government.

26th Meeting, 2015 (Session 4)

Tuesday 10 November 2015

Present:
George Adam
Chic Brodie
Gordon MacDonald
John Pentland
Colin Beattie
Mark Griffin (Deputy Convener)
Stewart Maxwell (Convener)
Mary Scanlon

Also present: Liz Smith

Apologies were received from Liam McArthur

1. Decision on taking business in private: The Committee agreed to take item 5 in private.

2. Higher Education Governance (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—

   Angela Constance, Cabinet Secretary for Education and Lifelong Learning,
   Laura Duffy, Higher Education Governance and Funding Team Leader,
   Sharon Fairweather, Deputy Director, Finance Programme Management Division, Stephen White, Strategic Policy Lead (HE Funding, Governance and Student Support), and Ailsa Heine, Legal Directorate, Scottish Government.

5. Higher Education Governance (Scotland) Bill (in private): The Committee considered the evidence received.
31st Meeting, 2015 (Session 4)

Tuesday 8 December 2015

Present:
George Adam
Chic Brodie
Gordon MacDonald
Liam McArthur
Mary Scanlon

Colin Beattie
Mark Griffin (Deputy Convener)
Stewart Maxwell (Convener)
John Pentland

Higher Education Governance (Scotland) Bill (in private): The Committee considered a draft report. Various changes were agreed to, and the Committee agreed to consider a revised draft, in private, at its next meeting.

32nd Meeting, 2015 (Session 4)

Tuesday 15 December 2015

Present:
George Adam
Chic Brodie
Gordon MacDonald
Liam McArthur
Mary Scanlon

Colin Beattie
Mark Griffin (Deputy Convener)
Stewart Maxwell (Convener)
John Pentland

Higher Education Governance (Scotland) Bill (in private): The Committee considered a revised draft Stage 1 Report. Various changes were agreed to, and the report was agreed for publication.
Scottish Parliament
Education and Culture Committee
Tuesday 6 October 2015

[The Convener opened the meeting at 10:00]

Higher Education Governance (Scotland) Bill: Stage 1

The Convener (Stewart Maxwell): Good morning and welcome to the Education and Culture Committee’s 23rd meeting in 2015. I remind everybody present to ensure that all electronic devices are switched off at all times, because they can interfere with the sound system. I would not like to have to give you a row in the middle of the meeting, so it would be helpful if you switched off devices now.

I welcome Liz Smith MSP, who has joined us for the first agenda item today, which is a round-table discussion on the Higher Education Governance (Scotland) Bill. We have no apologies from members. Unfortunately, Liam McArthur has been delayed on his flight from Orkney, but I am sure that he will join us soon. We have had apologies from Professor Ferdinand von Prondzynski, who is unable to be with us.

I will start with a few words on the process. The Higher Education Governance (Scotland) Bill contains few provisions—it is a relatively thin bill—but it has certainly generated a lot of comment and interest in the sector. We have published almost 300 submissions on our website, and I thank everybody who contributed. For the avoidance of doubt, and because a lot of people wanted to come along today, I assure everybody that all evidence—written and oral—is treated in equal measure and in the same way.

The purpose of today’s meeting is to allow us to make progress on the main issues that arise from the bill, bearing it in mind that there have so far been conflicting views, a number of which have been expressed outwith the committee. I hope that everybody will get the chance to clearly express their views on the bill this morning and to propose any changes that they see fit to suggest.

Participants were all notified in advance of a number of broad topics that we want to discuss. We will manage the session so that we go through those three areas, but they do not cover all the things that members and contributors will want to discuss. I hope to encourage free-flowing discussion and I am happy to take comments from across the round table. I am also happy for contributors to question each other.

I am not sure whether both sides of the argument have been round the same table yet; this may be the first opportunity. If you want to discuss certain issues, by all means contribute. If you want to question someone else’s submission or evidence, please do that as well. I will try to allow that as much as possible.

I start with the first general topic that we sent you in advance. Will the specific measures that are set out in the bill rectify the perceived weaknesses in higher education governance that have been identified by some participants who are here today and in some of the written evidence that has been sent to the committee? All those with an interest in the sector consider that HE institutions’ governance arrangements should be fully effective. There is no argument about that, but there is some disagreement about how we move forward on the detail.

The submissions from a number of bodies, including HEIs, indicate that they are not clear on the problems that exist in HE governance that the bill seeks to address. However, others have clearly laid out that they believe that there are deficiencies in existing practice in a number of areas, such as transparency, democracy, and pay and diversity issues. There are a number of issues, on which I am sure that you have read the written evidence.

I ask those who perceive problems and difficulties to lay out why they think that that is the case, why they think that the bill should be taken forward, what they see as the merits—and perhaps some of the problems—of the bill and any changes that they would like to see in it.

I ask Mary Senior to start by outlining her views. I will then come to the National Union of Students, which is represented by Emily Beever, followed by the chairs and the universities, after which I will bring in members. I know that members are keen to ask questions, but I will bring in our guests first and let them lay out some of the groundwork for the discussion.

Mary Senior (University and College Union Scotland): Thank you for the opportunity to speak to the committee. For the University and College Union Scotland, the bill is about addressing a perceived disconnect between the staff and students and those at the top. It is about ensuring that decisions that universities make are scrutinised and that there is robust governance.

We are clear that universities are about education, learning, research, knowledge and knowledge exchange and that the people who are involved in those activities are staff and students. It is vital that they feel connected to the key
decisions and the strategy that the universities and higher education institutions are taking forward. That is why we support most of the recommendations in the bill.

We also supported the von Prondzynski report, which was the result of a thorough review of higher education governance in Scotland. The bill addresses a number of issues from that report, including the election of a chair of a governing body and ensuring that there is adequate staff, student and trade union representation on governing bodies. That will better enable staff and students to influence the decisions that come from the governing body and to have a say in how that moves forward.

**Emily Beever (National Union of Students Scotland):** I am delighted to be here to speak from the perspective of the NUS and to express our members' broad support for the bill. I will focus on the principles that we believe are behind the bill, and I hope that the conversation will move away from the hyperbole that has often been put out in the press in the past few weeks.

We would like to see more democracy, increased transparency and greater diversity on governing bodies, because we feel that those areas are lacking in governance. I echo what Mary Senior said; we believe that universities are academic communities and that the stakeholders in those communities are primarily staff and students. They should lead the discussions and decisions that take place in the institutions. That is why aspects of the bill such as elected chairs and other measures that we would like to be introduced—such as quotas for boards—are crucial to us. Our members support those proposals.

**The Convener:** Who from the university sector or the chairs would like to contribute?

**David Ross (Committee of Scottish Chairs):** I join my colleagues in thanking you for inviting us here. The Scottish chairs see this as a bill that is to some extent looking for issues that have been addressed. It is worth bearing it in mind that the code exercise of 2012 and 2013 to create the Scottish code of good higher education governance involved every university. It collected the views of students and staff and identified what they wanted good governance to look like. As a result, 94 per cent of universities already have two members of staff elected to their governing bodies, and 70 per cent already have two students on those bodies.

The danger is that the bill will set back the sector’s on-going process of ensuring good governance, because it does not build on the good governance that already exists and it introduces solutions that we think will damage aspects of good governance, such as accountability.

It might be entirely unintended, but the consequences of the bill will be bad for a sector that contributes £6 billion a year to the economy. In international league tables issued as recently as last week, five Scottish universities were in the top 200 and three were in the top 100 in the world. Good governance is required to achieve that level of success, so we believe that in saying that the bill carries dangers we are stating what is actually the case.

**Professor Jeffrey Sharkey (Royal Conservatoire of Scotland):** Thank you for letting me speak. I have really enjoyed coming to Scotland because of the huge support that the Government gives to higher education and culture, which is fairly unique in the world. The Royal Conservatoire of Scotland absolutely shares the intention of the bill and the goal that everyone is talking about—we want democratic governance and transparency.

The RCS is a small institution. Around the table we have one of the largest institutions, which has 50,000 students, and one of the smallest—the RCS—which has 1,000 students. The RCS has students on the governing board and I meet them regularly; they were involved in my appointment as principal. As an entire small institution, our submission has been that we feel that all concerns are listened to. We are a small enough institution that we can work within the code of good governance to suit the uniqueness of being small, whereas a law would require us to do some difficult manipulation to comply with it.

As a conservatoire, we are serving the democratic goals and intent very well, and we want to contribute to creativity and innovation as an arts leader.

**Professor Sir Timothy O'Shea (University of Edinburgh):** I thank the committee for inviting us. I am in a similar position to Professor Sharkey, in that I came back to Scotland because of the environment. I have experience of being in senior management in three major universities—the Open University, the University of London and the University of Edinburgh. The environment here has been positive and there has been a really good and productive partnership between the Scottish Government and the universities since devolution. One consequence of that is that I have served the German Government as part of its excellence initiative, which aims to give advice on how to improve its universities. I have also been deputy president of the French Government’s investissement dans l’avenir commission, which had a similar purpose.
The partnership between the Scottish Government and the universities has resulted in innovation and creativity. In my university, 47 new companies were created just last year. The partnership has also resulted in international links, which have cultural and economic benefits.

It is hard to perceive the governance problem here. We have a good code of governance, which we are refining. On my university’s governing body, I am in an environment with two students, five colleagues and three alumni. The anxiety in the university sector is that the bill could have serious unintended consequences. If the bill goes through in its current form, it will weaken not only the autonomy of Scottish universities but the perception of their autonomy.

As someone with a lot of international links, I find myself in the embarrassing position of getting letters from university presidents from other countries to commiserate with me. The discussion is not happening just in this room, and it is being observed around the world. The perception around the world is that the bill, if enacted, will reduce the autonomy of Scottish universities. In the University of Edinburgh’s case, it will weaken the accountability of our vice-convener.

We have a good dual model—we have a rector, who presides at the court and who is elected by all the staff and students, and we have a vice-convener, who is appointed to the court through an open and transparent process. That dual model works enormously well. We have a historic and large senate, which is more than 400 years old. It has 737 members, with substantial student and non-professorial membership. It is highly effective. It promotes serious debates, and initiatives that come from the students and non-professorial staff go through our senate and are adopted. If the bill goes through, Edinburgh will be asked to disenfranchise and remove the democratic rights of five sixths of those who are on our senate.

The current partnership is a success story. Scotland has proportionately more universities in the top 200 in the world than any other country has. The University of Edinburgh does better than any German university. When one looks at the unintended consequences—obviously, they are unintended—one sees that they will undoubtedly damage the autonomy that is vital to success. The Organisation for Economic Co-operation and Development documents that are cited in the committee’s briefing from the Scottish Parliament information centre are extremely clear on that point.

Robin McAlpine (Common Weal): The first thing that I want to say is that universities in Scotland are well managed. We should be clear that the issue is not about the quality of leadership or the staff. I have worked in the sector for 13 years, so I know that we are blessed with many good people.

The problem lies in the assumption that democratic debate in the system should take place only in a university’s governing body and that, once there is a governing body, that is the only place where the future of the institution can be discussed. That is not helpful. Universities are generational institutions—they are run not for 10-year periods but for 100-year periods. We do not really have a mechanism that allows most staff and students a way to discuss the purpose, future and strategy of the university.

Personally, I think that we should go further than is suggested and that we should have a fully democratically or stakeholder-elected court. Then the discussion would be undertaken by the whole university, as a community, all the time. However, the bill will give an immediate focus when, in the electoral cycle, people stand as candidates to be the governor or the chair of the court of a university. In that process, people will be able to hear those candidates’ views of the future. That will allow different views of the university’s future to be discussed in an open forum with staff and students.

10:15

We have excellent managers and leaders in our universities, but we have seen in recent years that, with governance models that select too many people who are too similar, good people make bad decisions. There is little evidence to suggest that less diverse governance is better governance, whereas an enormous amount of research from around the world on organisational development suggests that diversity in governance is not only normal nowadays but helpful and good. It is particularly important to ensure that staff, who understand bits of the university better than managers do, have an automatic and steady role in the governance of the university.

We have to be clear about the difference between autonomy for a university from Government and autonomy of a small management group from everybody else. I do not see any way in which having a democratically elected element of the governance of a university and allowing the staff and students to decide how that democratic outcome occurs affects a university’s autonomy. It might affect the autonomy of the senior management team, but it does not affect the university’s autonomy.

I do not understand what the unintended consequences are. We already have elected leaders of university courts, and that works well. That approach should be systemised across the
university sector to create a focus for debate about what universities are now and will be.

Ann Marie Dalton (Heriot-Watt University): Robin McAlpine made interesting points about the general direction of universities and perhaps the perceived lack of involvement. When we at Heriot-Watt University devised our most recent strategic plan, the process involved every student and all the staff of the university. Our student union was at the table on every occasion and there was a broad consultation on the values of the university and its vision and mission. The senate has a key role in hearing the voice of our academic colleagues on where they want to go in terms of excellence in learning, teaching and research.

Our university supports the code. We recently appointed a principal and a chair of court—both appointments were made after the code was published. Particularly with the appointment of the principal, we fully met the requirement of the code to consult and get the views of all members of staff and students of the university. We got excellent feedback from students and colleagues on the key issues for the university’s direction. Students were not shy about expressing a view on where the future leader of the university should take it and on the vision, mission and delivery of that.

Universities are much more inclusive than is perhaps perceived. The code helps us in that respect and it requires us to be much more inclusive. There is a fantastic spirit and embracing of the code across the universities. My fellow secretaries have been working hard to ensure that we do that. Universities have always had an inclusive and collegiate nature—that underpins their existence. That is a day-to-day approach in our university.

Dame Jocelyn Bell Burnell (Royal Society of Edinburgh): I want to make it absolutely clear that I am not a university representative. I have been president of the Royal Society of Edinburgh since 6 October last year, so this is my anniversary.

I have had a number of relevant roles, but I will start with what I have not done. I have worked for the Open University in Scotland, but I have not otherwise been an employee of a Scottish university. I regard the Open University as a national university with a Scottish arm.

I have, however, been involved with universities in England, Ireland and the USA. I have held governance roles in three of them and been a staff member in one, on what they call the council court. I have also held a senior management role on another council, and I have appointed three vice-chancellors, one of them in a Scottish university. I have a strong international reputation. I am frequently invited to lecture abroad, receive awards and things like that.

I want to start by addressing some unintended consequences, which to me are really scary. Starting at about the time of the independence referendum, but picking up momentum now with this bill, when I am abroad I have found people saying to me, “What is happening to the Scottish university? What is the Government there doing?”

The implication is that there is interference. There is also a not-quite-articulated implication that there is suppression of critical thought. That is not the word that you want to get abroad. It will be devastating for the Scottish National Party and for Scottish universities, but it is out there already and it is growing. So please, everybody, take care.

I also want to say a little about the Irish universities, because I believe that what has been proposed here is modelled on what happened in Ireland. The Scottish universities are fantastic. They lift Scotland in a way that is not seen in many countries. The Irish universities are a bit sad and muted. Trinity College Dublin has a fantastic history—full stop. The Irish universities are not lifting Ireland. I think that a lot of that is due to bad decisions that arose from curious governance arrangements. I would urge caution in that respect as well.

That is as much as I want to say at this point. There may be more when we come to the other questions.

Jennifer Craw (Robert Gordon University and Committee of Scottish Chairs): I am chair of Robert Gordon University in Aberdeen. I want to pick up on the issue of diversity. We share with other universities the view that a diverse governing body is effective and is something that we seek to achieve. Through the new code, we have made different commitments across the university—at RGU we have made a commitment to a 40 per cent gender balance on our governing board within the next two years.

That is challenging; we have an 18-member board of 12 independent members, four staff and two students. In our recent advertisement for new board members, we have taken steps to be very clear that we are seeking diversity. We have agreed to pay expenses to cover any costs or loss of earnings to ensure that we are more open to a wider range of governing board members.

With regard to our commitment to getting a diverse board and a diverse governing body, we share the view that a diverse body will support good governance in the future. That view is enshrined in the code and in the commitment that is shared across the university and higher education sector.

The Convener: Everyone has had a chance to speak at least once, apart from the committee members, so I will bring them in now.
the United Kingdom to have a lay majority when representatives. We became the last university in representatives and two elected employees on the governing body. In my own institution, there are six members of academic staff, three student representatives and two elected employee representatives. We became the last university in the United Kingdom to have a lay majority when the regulations were changed recently. There is a broad spread of representation across governing bodies, and it is up to them.

There is a very good argument for not having too many members of the governing body on the audit committee. I regard my university’s audit committee as the policeman. Its members are the people who look into what is happening and tell us about it. There is a balance to strike: remuneration committee members need to know enough about the university to understand how it works but, at the same time, they have to be sufficiently distanced from the university so that they are prepared to take a completely different view.

As for the investment committee, I do not know what it does. I chair the investment committee at my own institution, but the people who are on it are completely external to the university. They are professional fund managers, who provide expertise on investment matters. We report to the finance committee, which has staff and students on it.

It is very much a question for each individual university. The Scottish chairs take the view that the staff and students are and should be involved as fully as the governing body thinks is appropriate. That is what defines it.

On your second question, whether there should always be staff and students represented on committees as a matter of course, the answer has to be: what is the committee doing? We are looking for expertise. You will find that all the committees report to the governing body, on which there are staff and students.

On principals’ pay, the reality is that the Scottish Further and Higher Education Funding Council imposes on us—the members of the governing body; not the university—the obligation of sustainability. That is covered in paragraph 17 of the financial memorandum. That imposes on us personally.

We have to run the institutions in the best way that we think we can. That means that there are people who are paid at different rates, and there are people who some members of the public think are paid too much, but we must fulfil our obligation of securing sustainability. As Professor O’Shea and others have pointed out, the evidence is that we are doing that. It would be quite wrong to impose some standard multiplier, which would reduce the accountability of the governing body for securing the sustainability of the institution.

Ann Marie Dalton: I can comment on the actual operation of remuneration committees. The code has really helped us: it has given us much more guidance about how remuneration committees should operate. For example, it is required that the chair of court no longer chairs the remuneration committee, and we have implemented that.
requirement. It requires that we have a co-opted independent member who is not a member of court, who has the expertise in the area of reward, which David Ross referred to, and who can inform the decisions around the committee table.

The terms of reference of the remuneration committee are agreed annually by the court. There are of course data protection issues, which we must guard carefully. At least in my institution, the full court, including our staff and students, receives a report of the reward levels. Granted, that is in bands, but the court is fully informed of all the decisions of the committee.

In addition, pay in universities is really well publicised. A league table of vice-chancellors’ pay appears every year in Times Higher Education. It is used as sensible benchmarking data by the Universities and Colleges Employers Association, which the whole sector uses.

10:30

All the salaries are openly displayed in our published accounts for everyone to be aware of. The new guidance from the committee of Scottish chairs has also been warmly welcomed. The guidance is very new—it is only a couple of months old—but we are well on the way to adopting that as well.

Governance is an area that evolves over time in all organisations, not just universities, and we are moving forward, particularly in opening up transparency around sensitive areas such as pay.

Mary Senior: Gordon MacDonald raised three good questions and helped to illustrate the disconnect that staff and students feel from those leading universities.

No one is questioning that Scottish universities are good—they are good. What we are saying is that they could be so much better if staff, students and trade unions were fully involved in how they operate.

A number of people have commented on the governance code, which has been introduced over a number of years. I remind the committee that trade unions and students were not involved in the initial stages—certainly in the drafting of the code. It was only when we gave evidence at this committee with Lord Smith and pointed out that anomaly that we got to meet those who were drafting the code. Again, we felt that there was a real disconnect.

As regards the reputation of the sector in Scotland, my colleagues in England, Wales and Northern Ireland look at Scotland with envy in relation to the commitment to education, the interest in governance and the fact that we have a desire to do better. We see that as a very positive thing.

On principals’ pay, we still have concerns about transparency. When a principal in Scotland can get a 13 per cent pay rise while staff get a 2 per cent pay rise and we have no explanation as to why they are getting 13 per cent when the rest of the staff are getting 2 per cent, that is a difficulty. In previous years, there was a case of a principal who got a 24 per cent pay rise while staff got a 1 per cent pay rise, and again we did not get an explanation as to why that was happening.

UCU does a regular freedom of information request to universities asking for the minutes of remuneration committee meetings to get a sense of why principals are being awarded the pay rises that they are. Scotland tends to do better than the rest of the United Kingdom, but it is still not great. Two thirds of Scottish universities refused to provide full details of the committee that set their principals’ pay and four refused to send us the minutes. All we are asking for is an explanation of how decisions are made about the salaries of those at the top. It is important that that is looked at and scrutinised. That goes to the nub of why the bill is important.

David Ross: I have two points that I would like to correct. First, as the SPICe document on the matter reports, staff and students were represented on the working group on the code. I went to a meeting with the previous cabinet secretary, along with Alan Simpson, who sat on the von Prondzynski review panel, and Ewan Brown. The previous cabinet secretary suggested to us that we should have a rector or an ex-rector on the working group to represent staff or students. I understand that that is the basis on which SPICe made the correct comment that we had an ex-rector on the group—Simon Pepper, the former director of WWF Scotland, who had been a very successful rector at the University of St Andrews. We thought at that stage that we were proceeding as requested to ensure staff and student representation.

The other point that I would like to correct is that, when the code exercise was carried out and consultants went to every university, students and staff did not press to be on remuneration committees. In fact, a number of students said expressly that they did not want to be on remuneration committees.

Emily Beever: I am sorry, David, but that is just wrong, certainly from the examples that I have heard from members and from my own experience. We had been fighting for many years at Aberdeen for students and staff trade union members to be on remuneration committees. It was only in my last few days that I was granted observer status.
From being in that meeting—in that forum—I know that it is a very different atmosphere. As a participant, you have a very different ability to challenge and take part in the decision making than if you merely see a report that comes through the governing body. It is very difficult to challenge in those settings.

There are some great examples of best practice from colleagues here—Ann Marie Dalton and Jennifer Craw mentioned some—but it is worth noting that there are other examples of institutions that have just not implemented the self-regulatory measures in the code of good governance and, as a result, have failed to make the real, tangible changes that we wanted to see from the document. That is why we have reached the point of legislation.

**Robin McAlpine:** There have been improvements in the transparency of governance in recent years, and the ability to know why other people made a decision is useful, but that is only one of the three fundamental principles that are at the heart of the matter.

One of the other principles is diversity. From my recollection of 30 years in the university sector, I think that one of the problems is that people who are appointed to remuneration committees are almost always highly paid. We are talking about three people on £100,000-plus salaries being appointed to a committee to decide what another person’s £100,000-plus salary should be. That involves one kind of person making one kind of decision.

Diversity enables people to have a discussion with others that is not about comparing what they think is normal, but about comparing what the institution as a whole thinks is normal, including staff and students. Year after year, there is dismay about some decisions that are made, and it never changes.

The other element is democracy. Let us say that a decision is bad. In the university as a whole, who is able to stop it? Who is able to say, “We don’t think this is a good decision”? Is it only the university court—the governing body? It usually has a majority of lay members who are largely appointed, and if we profile them we will find that they are not low-paid people.

It is important to consider the range of principles that underpin good governance. Transparency is important, but so are diversity and some sense of something that is more than accountability—in such a large community, it is also about democracy and the ability to ask who, in the end, owns the university. Is it owned by its staff and its students, or is it owned by 20 people who are appointed to a committee without the wider university community having an automatic right to a say on who the people who make the decisions are?

I say again that this is not about ill will. We have seen from the banking sector and a whole load of other sectors that, if we put a lot of people who come from exactly the same background in a room and ask them to make a decision, we can guess what decision they will make. Good decision making comes when people have to debate with people who come from different directions, but I know that students have been actively excluded from some controversial decisions in universities, and that is not good.

Students might be younger and not as experienced, but they are a key part of the university community and their voice is not an add-on. Their expertise may not have come from 50 years in the financial services sector, but they have a whole other kind of expertise—the expertise of what it is like to be a student in the institution and what they think its priorities should be, and that should be valued, too.

Voluntary consultation is not good enough. As we know, people consult when they want to and in the ways that they want to. If we do not empower diverse voices to have a say in how universities are shaped, they will continue to be shaped by a small, self-selecting group, and that is not healthy governance.

**Professor O’Shea:** I want to straightforwardly contradict Robin McAlpine. Our court has five elected staff, two elected students and three elected alumni on it, and it is presided over by a rector who is elected by our staff and students. That provides a route for all sorts of debate. When our senate meets and discusses a large thematic topic, all members of the university community are invited, regardless of their status and whether they are academics or not. It is a very open system.

I will give you some examples. We had a student-led campaign for the university to divest from fossil fuels, and there were differing opinions on that from those on the investment committee, those who are engaged in petrochemical engineering, and the students.

There were a series of debates. The senior vice-principal chaired a group that included academics who did research on fossil fuels and students. As a consequence, the university court ended up with a divestment from fossil fuels. That process was student led and highly participative.

When the Scottish Government announced its business pledge, our university said straight away that we would adopt all elements of it, including the living wage. Again, that was a broad-based position within the university.
Led by academics in our sciences areas, we have been working very hard on gender equality. A few days ago we were delighted that the University of Edinburgh as a whole became one of seven universities in Britain to be given Athena SWAN—scientific women’s academic network—silver status. The moves on gender equality, which started in science and engineering, and the move to divest from fossil fuels inevitably did not come from certain parts of the university—they came from some other parts.

Within the university, we have a number of fora for discussions, such as our senate, which has debates that allow the whole university community in; the open discussions that I have with all staff and students; and our annual court meetings, which all staff and students can address. Last year there were a number of very clear examples of that, such as when the university took the lead in divesting from fossil fuels. Who led that movement within the university? It was the students. We took the lead in gender equality. Who led that? To start with, it was our academics in chemistry.

We have those mechanisms. This is not rhetoric; those are tangible examples, which involved serious debates. It was not a straightforward case of someone saying, “Let’s work on gender equality in science” and everyone said, “Yes, let’s do that”, nor was it the case that someone said, “Let’s divest from fossil fuels” and the whole of the investment committee said, “Sure—if that’s what the students want, we’ll do it.” There were long, careful, participative debates, after which the university community as a whole said, “Right—we have divested from fossil fuels” and “Right—we’re going for gender equality, particularly in science and medicine.”

Professor Sharkey: I agree that universities should be held to account. There are a variety of ways that that continues to be done. For instance, we are hosting the widening access commission. We are really looking forward to coming up with innovative ways to get more young people engaged in drama, music and dance. We want to influence the schools curriculum, because that influences the kind of student that we can take and educate.

We absolutely agree about diversity and transparency, but one-size-fits-all legislation could actually be hurtful for a small institution such as ours. I mentioned the art forms represented on our small board. We have to make sure that the board can help lead us through troubled waters for cultural institutions and education institutions. We need expertise from the acting profession, music, dance and production. Indeed, we have members who are part of the Musicians’ Union, Equity and the Broadcasting Entertainment Cinematograph and Theatre Union. That is as important as membership of some of the other unions that have been discussed here. We have good relationships with them, but if we had to create space for all of them on the board, we would not necessarily get some of the expertise that we need to function and flourish in the world. That is the bit that I am concerned about.

We need to be held to account. There are measures to do that, from our outcome agreements to the widening access commission, our coming to committees such as this one and the code of good governance, which has its review coming up. We would find challenging any legislation that tries to treat us all the same, given that the sector is so different.

The Convener: Are your concerns about the bill around the perceived lack of flexibility in the way that it would be implemented? In other words, you do not want something that is one size fits all, but if there was greater flexibility for institutions—

Professor Sharkey: That is among our concerns. To find a cultural leader, such as the leader of the Royal Scottish National Orchestra or the leader of the National Theatre of Scotland, we are identifying a small pool of people who have a sympathy to the culture and a way to lead it. Like the Glasgow School of Art, we are as much a cultural institution as an educational institution, so having an election would politicise, with a small p, the process. Would we get an actor, a musician or a dancer? It would take our eye off the ball in delivering on the creative and innovation agendas. It would be hard for us to be compliant with the law. It would make things more difficult.

The Convener: Therefore, what about having a fit-and-proper-person test, to use that loose description? In other words, what if there was a way of saying what kind of people we are looking for, and then people who fit the criteria could apply, as would happen with a job application?

Professor Sharkey: That might make it easier, but I would have to see the detail of what you are talking about.

The Convener: Sure. I just raised that as an issue.

10:45

Mary Scanlon (Highlands and Islands) (Con): I would like to raise three points that have already come up in discussion, not to go over what we have done, but to look forward.

Paragraph 13 of the policy memorandum states:“the SFC must, when making a payment to an HEI, require that HEI to comply with principles of good governance which appear to the SFC to constitute good practice ... The SFC’s Financial Memorandum ... sets out
the requirements with which HEIs must comply as a term and condition of grant.

Could all the issues that have been raised in the meeting not be part of the governance of the SFC in handing out the grants? Is there anything in the bill that cannot be included in the code of good governance? That is my first question.

Secondly, given that I have never been surrounded by so many learned people—I am not underestimating my MSP colleagues—I thought that I would take advantage of all the professorships around the room. Paragraph 63 of the policy memorandum states:

“The definition of academic freedom as expanded explicitly includes the freedom to develop and advance new ideas and innovative proposals.”

What is stopping you developing “new ideas and innovative proposals” at the moment? Will that be corrected by the bill?

I shall ask my final question while I have the floor.

The Convener: No. Can I bring—

Mary Scanlon: It is my final question; I need two seconds.

The Convener: I will bring you back in. Is your question very quick?

Mary Scanlon: Yes.

The Convener: Right. Okay.

Mary Scanlon: Can my learned friends explain section 20 of the bill? It states:

“The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.”

Can my learned friends tell me what that means? It seems to me that the Scottish ministers can just jolly well do what they like if the bill is passed.

I am finished. I will listen carefully to the answers.

The Convener: To be honest, I am surprised by your last question because, in my 13 years in the Parliament, ancillary regulations and provisions have been in every single bill that I have ever seen.

Mary Scanlon: Not those words.

The Convener: Yes, they have been.

Mary Scanlon: I do not think so.

The Convener: Who wants to answer Mary Scanlon’s questions? Does Mary Senior want to do so?

Mary Senior: Okay.

Many of the issues that we have raised are not in the code of good governance. It does not allow for elected chairs or trade union nominees on governing bodies, and it does not address strictly enough issues around remuneration committees. The bill takes a more holistic approach to really connect staff and students more effectively in respect of the governing body.

We are all saying that the sector is good, and I do not want to sit here and point out all the problems and difficulties that it has faced. I will give the committee just one example of how things could work in a positive way. The example is about the University of Aberdeen’s rector asserting her right to chair the court. The court faced a decision, because the senior management team wanted to make 150 compulsory redundancies. It wanted a very short window of a couple of weeks for a voluntary severance scheme and then wanted to move to compulsory redundancies. The rector enabled a full debate at the court, and the court said, “Hang on a minute—let’s pause and scrutinise these decisions.” The voluntary severance scheme was then extended and there was more consultation with the trade unions and students. We are now working that situation through rather than the court having made a drastic decision quickly without effective time to scrutinise.

That was because the rector, who does not always chair the court but asserted her right to do so on that occasion, took the chair, and staff and students who sat on the court were able to challenge a decision. The bill will allow more robust governance, scrutiny, transparency and accountability.

Your second question was on academic freedom. The bill will help to strengthen and give clarity to the definition of academic freedom. We have a good definition of that in Scotland from the Further and Higher Education (Scotland) Act 2005, but the bill will add to that by giving clarity to and strengthening the definition. The UCU has been asked on occasion to defend some of our members around questions of academic freedom. I think that the bill is a positive step forward.

Liz Smith (Mid Scotland and Fife) (Con): I will set out some issues that relate to the possible reclassification of the university structure. I was interested in what Dame Jocelyn Bell Burnell and Professor Sharkey said about the importance of the international dimension to our institutions, particularly those that might have great diversity.

Two weeks ago, Universities Scotland presented a case to the Finance Committee that there could be considerable detriment if universities were reclassified as public bodies. Its
works suggested that the cost could come to close on £1 billion, which is a significant sum. The Scottish Government responded last night, but not with any accuracy on its workings, because it has not yet produced them.

Are the witnesses finding a concern from international sources that the proposed reclassification could affect not only the way in which you work but the funding of our top-class institutions?

**Dame Jocelyn Bell Burnell:** I cannot comment specifically on the funding. I have a concern that universities should not be classified as public bodies. Sure, they get some public funding but it is far better for universities if they are more independent and are not classified as public bodies. I think that that is all that I need to say at this point.

**The Convener:** Okay.

**Robin McAlpine:** I just want to clarify the public bodies point. I was public affairs manager for Universities Scotland for 13 years and we took legal advice and were told that universities have always been public bodies. They are not public sector bodies but are defined as public bodies. As far as I can gather, the entire basis of the claim about the public bodies proposal relates to whether universities would lose charitable status. I have been out of the country a lot in the past few weeks and might have missed something, but as far as I am aware that issue has been put to bed by the Office of the Scottish Charity Regulator.

**The Convener:** To be honest, Robin, I do not think that that is correct.

**Robin McAlpine:** Is it not? Okay.

**Liz Smith:** There are two completely separate issues. On the charitable status issue, Mr McAlpine is correct that OSCR has made a ruling that the public bodies proposal would probably have no effect on universities’ charitable status. However, the proposed Office for National Statistics reclassification is a completely separate issue. There is great concern about what that reclassification would do, because it would make universities into public bodies of a different nature from what they are now. Universities Scotland presented to the Finance Committee a very articulate case and a detailed set of figures about the danger that that reclassification could do, and we heard from Professor Anton Muscatelli at the same committee what it could do to the University of Glasgow. I am sure that the university principals who are here today could say the same thing about their institutions.

If universities are concerned that their reclassification as public bodies would make them financially unable to do what they can currently do, is that not a major concern with regard to the bill?

**The Convener:** Do those who have raised the issue of the ONS take any comfort from what Scottish Government officials said on the record at the Finance Committee? They said:

> “we deem reclassification to be a low risk. However, if, as a result of a wider ONS review of universities, there were any risk of reclassification ... we would take what measures were required to ensure that universities were not reclassified ... there is absolutely no intention on the Government’s part that reclassification would be an outcome; it is something that we would seek actively to avoid.”—[Official Report, Finance Committee, 16 September 2015; c 16, 39.]

Do you take any comfort from those statements by Scottish Government officials?

**Mary Scanlon:** Excuse me, convener, but is that question for members?

**The Convener:** I am asking those from the sector what they think.

**David Ross:** You will be aware of the prospective project at the Western infirmary site in Glasgow, where we have 14 acres of contiguous ground and a £500 million investment programme. If we end up in limbo, which is what that suggestion would mean, that project will just stop dead. No one will deal with us, commercially or otherwise, if they do not know where we are. Therefore, I cannot take comfort from what Scottish Government officials have said.

**Gordon MacDonald:** I am just trying to understand the funding situation. The Scottish Parliament information centre’s briefing on the bill, at annex 2, gives the main sources of funding for all 18 institutions. According to SPICe, total income is £3.2 billion, of which £2 billion comes from public sector grants and fees, £747 million comes from the private sector, £144 million comes from charities and £317 million is “Other income”. In that range of funding streams, where is the danger that you perceive to the university sector, given that you get £2 billion in public sector grants and fees?

**David Ross:** May I follow up—

**The Convener:** I saw Professor O’Shea shaking his head earlier; do you want to come in?

**Professor O’Shea:** The danger at the moment is that, if the charitable status that we currently have, which allows us to deal with philanthropic support and to borrow, and which gives us a range of things—

**The Convener:** Sorry. Robin McAlpine made the point about the ONS and OSCR, and I think that Liz Smith quite rightly clarified that those are two separate issues and that OSCR has clarified the position. You have started to answer a
question about ONS reclassification with an answer about OSCR.

**Liz Smith:** May I just clarify something? This is on the record in the Finance Committee. In the Universities Scotland evidence to that committee, which I understand is now on the committee’s website, there is a clear breakdown of all possible impacts of ONS reclassification. Last night, the Scottish Government put out a letter from Angela Constance to the convener of the Finance Committee to try to clarify the situation, but the letter does not contain details that answer the university sector’s specific concerns about the sums, as set out in the letter from Universities Scotland. As I understand it, that is the issue that is causing anxiety in the sector, for exactly the reasons that David Ross set out and Anton Muscatelli set out in the Finance Committee, about certain projects in universities not being able to go ahead.

**The Convener:** Like you, I am trying to avoid mixing up OSCR and the charitable status stuff with ONS reclassification, because they are separate issues.

**Chic Brodie (South Scotland) (SNP):** I feel somewhat depressed that we are still in this situation of conflict. Change is a constant. I want to address a couple of issues. Yes, the universities need to be democratised. Having looked at levels of informed participation, I say to the unions and the students that democratisation is about harnessing the votes and input of all students and all members of staff. I say to the boards that we must consider who is appointed to boards. There must be a much more thorough appointments process and there must be a review of people who are appointed, so that it is not a case of Buggins’s turn or appointing friends.

I have run companies in Europe. What conversations have chairs, students or unions had with European universities about how they are governed? That is my first question. Secondly, how do you communicate to the wider community your outcome agreements and strategies for what you are trying to do? Last week, we talked to university representatives about their international involvement and asked whether they take an equity share in their products, thereby generating increased funding, as happens at Stanford University, in California.

The perception is of a total lack of communication between the court and the students and staff at the level that there should be. I am not saying that there is no communication, but the communications should be such that there is total engagement. Clearly, the court must select its leader but, in any company, the board must go to the shareholders and tell them what the hell is going on. I do not see that happening. The perception is of a bubble and that no one outside the bubble knows what is going on. If that is only a perception and an unfair reflection of the students, the unions and the board, then tell me that I am wrong. If I am not wrong, tell me what you are going to do to change the situation.

11:00

**Ann Marie Dalton:** First, I will address the Buggins’s turn remark. I think that that practice has been left in the past by universities—it certainly has at my university. I have been there for five years and, before that, I served as secretary for 10 years at another university, and the practice has long since passed.

We have defined roles for our governing body members. The court and beyond—student and staff members—were consulted on what the chair’s role should be. The entire community, including staff and students, were consulted on what the principal’s role should be. We have a clearly defined skills matrix, which we publish on our website, against which we recruit our governors. We recruit using an open advertisement process. A few years ago, our diversity was not what we wanted it to be. At that time, less than 20 per cent of our court was female. Today the figure is 54 per cent. We should not forget that there are more protected characteristics than merely gender, which tends to be the focus, and we are rapidly moving on to look at the rest of the protected characteristics.

We should not underestimate the value of the effectiveness reviews, which are contained in the published code. The code requires universities to conduct full five-yearly externally facilitated reviews on the effectiveness of our court and senate and all their committees. The results must be published on our website and made available to all our stakeholders. We cannot conduct the reviews ourselves; we must bring in someone else to do them.

The review of effectiveness goes further. We are required to carry out a mid-point review and an annual assessment of the effectiveness of each court. We must discuss both of those with our students and staff and publish them across the university.

We have moved on an awful lot on the transparency of our appointments and on looking at how effective we are. Because the code and its requirements are relatively new, many universities will not have gone through the full cycle yet. However, given time, the sector will certainly demonstrate its commitment to looking at and improving the effectiveness of its governance.

**The Convener:** Before I bring in Professor Sharkey, I ask that he picks up Mary Scanlon’s
question about the code of governance and its role.

Professor Sharkey: First, I will respond to Chic Brodie. We instituted an annual general meeting where any question can be asked. More to the point, we invite along external stakeholders—all the arts companies, for example—as well as our students and staff. The agenda is open. In my very first AGM, we started to talk about and lay the groundwork for a strategic planning process. We are a small institution so, over cups of tea and scones, we had groups of 20 talking about the institution’s values and where we wanted to take it. If you came to our institution and perhaps others such as the Glasgow School of Art and, as we heard, Heriot-Watt University, you would feel that there was a lot of inclusion when thinking about the strategic direction and the steps that need to be taken. Frankly, I am going to need every staff member and student to be working in the same direction to lift up the arts for this country.

The Convener: What about Mary Scanlon’s point about whether that can be dealt with through the code of governance?

Mary Scanlon: I asked about academic freedom and new ideas.

Professor Sharkey: That is related to what I have said. Measures are in place that can and do hold us to account. Our outcome agreement is debated and discussed at our academic board, which has a wide cross-section of staff and student representation. More could probably be done there, in constructive dialogue with higher education institutions.

The Convener: Before I bring in other members, I want us to move on slightly.

The cabinet secretary wrote to the committee recently to try to assure some of the concerns that have been raised about the bill, and to outline where the bill could be amended to deal with some of those concerns. I am sure that witnesses will have seen that letter. Does it assuage any concerns? Does it give comfort that the cabinet secretary is already thinking about amendments that would deal with issues that have been raised?

On the other side of the coin, does it worry you—I am looking at Mary Senior and Emily Beever—that there may be changes that would water down the impact that you would like the bill to have? I will leave that for people to discuss.

Liam McArthur has been waiting to come in.

Liam McArthur (Orkney Islands) (LD): Thank you very much, convener. I apologise for my late arrival, which was due to travel disruption.

The reassurances in the letter are well intentioned, but from reading the submissions it seems to me that the problem for those who have raised concerns is less the intent and more the scope of the bill’s provisions. I would like confirmation on that point, particularly in relation to the ONS, which will look at the scope rather than simply the stated intent when it makes a judgment.

My other point is in relation to the genesis of the bill. Obviously, quite a lot has been made of the amount of public funding that our universities receive. The amounts vary enormously—as you would expect in a varied sector—but are significant for all universities. There are funding levers to achieve the outcomes that ministers and the Parliament want.

There is a threat of reputational damage—Tim O’Shea gave the example of divestment from use of fossil fuels. However cathartic that process might have been, the threat of reputational damage was probably very much in the minds of those who are responsible for making the decisions.

The committee should reach for legislative levers only when there is a demonstrable need to do so.

I am interested in following up on Chic Brodie’s question about comparators—international, and not just from the UK—of governance, which could give us confidence that our world-class reputation can be safeguarded in this process.

I will also pick up on Mary Senior’s point. Clearly there has been a challenge relating to academic freedom, and comfort may be sought. It would be interesting to know how many successful cases in relation to academic freedom have been brought and, therefore, whether we require additional clarification or tightening of the 2005 act that we are being asked to sanction through the bill.

Jennifer Craw: I cannot answer the European question, but Tim O’Shea can.

From a governance perspective, we support the view that legislation should be used where it is most important. A good code of governance and good accountability through outcome agreements should be the appropriate route to ensure, across the whole sector, that good governance can be demonstrated and that it is transparent, open, progressive and fit for purpose for a modern and successful Scottish higher education environment.

From the perspective on the bill of a board or a chair, one of the key issues regarding the election of chairs is how to hold the governing body to account. We sign up to the outcome agreement and take that responsibility very seriously. I, as chair, am responsible to my governing body. As a result of the code we now have an independent governor who assesses my performance annually. That assessment is discussed without my
presence. If I am not doing my job, if I am not accountable to the body and if it is believed that there is an issue, I do not continue in my role. There are checks and balances in the governance code, and there are checks and balances in terms of broader diversity and broader actions in the community.

The point about how much communication we do is interesting. At RGU, a lot of the communication is cascaded down through the senior leadership team, and we have student partnership agreements, but as a board we are small in number and probably not very visible across the whole body. We definitely could look at the idea of having of an AGM.

On legislation versus governance, we should have legislation where it is required. However, we would definitely support management by good governance through good outcome agreements and the holding to account of the governing body, in terms of continuing success within the sector.

Professor O’Shea: The question that Chic Brodie and Liam McArthur have asked about the attitude in continental Europe is a very good one. The University of Edinburgh is the one Scottish member of the League of European Research Universities, which comprises the top 21 universities in Europe. We are also a member of the Coimbra Group, which essentially comprises the European ancients, and of the European University Association, which comprises all the European universities. Documentation from LERU and the EUA shows unambiguous admiration for the current situation in the United Kingdom—the success of UK universities in comparison with universities in other parts of Europe is put down to our autonomy and our ability to operate. In some of the German Länder, for example, a university may borrow only with all sorts of inhibitions. From the European point of view, therefore, the explanation for why the UK and Scotland do so well brings us straight back to autonomy.

I also counsel against bringing in legislation that is not necessary. Mary Scanlon asked three very good questions to which she knew the answers—

Mary Scanlon: I did not get any answers, though.

Professor O’Shea: I will give you some very brief answers, in that case. You are quite right that it is very easy for the Scottish funding council to control universities through outcome agreements and conditions of grant, and academic freedom would not be altered by what is in the bill. However, on the key point that you raised, which was about the provision for secondary legislation, the choice that is before the committee of whether to hand far-reaching powers to some future minister of whose persuasion we know nothing is what is causing the perception outwith Scotland that there is an attack on university autonomy.

I make a personal plea: given how well the partnership between the Scottish Government and the universities works, I ask the committee to pause on the bill. We have a very positive vector in the code of good governance, and we are very happy to come annually to the committee to report on further improvements. We acknowledge that we are not perfect, but we should look at the increase in student representation and open consultation. We would be very happy to document that for the committee annually, if you would just pause with this bill. It is unnecessary and too powerful: such legislation will be seen—correctly—as reducing the autonomy of Scottish universities.

George Adam (Paisley) (SNP): What I have been turning over in my head all this time is the fact that £1 billion of public money—or, at least, £1 billion from the SFC—is going into these organisations. We are therefore talking about the need for transparency and democracy and how we can move things forward in that respect. The universities might tell us, “There’s nothing to see here. Everything is wonderful—we don’t need to do anything else”, but someone from the outside looking in might, as Robin McAlpine has suggested, see what amounts almost to a network of people giving each other cricket-score salaries without any accountability for the public pound. What is wrong with universities actually representing the communities that they are in as well as the university community itself? What exactly is wrong with having such openness and transparency so that we can see what is going on? That would be a good way of collectively managing a university. Please correct me if I am totally wrong, but that looks like the way forward to me.

Ann Marie Dalton: The code is very helpful in this respect. I am sure that the chairs will not thank me for saying this, but the code makes it absolutely clear that the court and the chairs must take a lead role in engaging with all stakeholders in our local communities, with our students and with our staff. The code has given us that opportunity.

Coming back to the question that Tim O’Shea asked, do we need to legislate to take that further? No. Instead, we need time to demonstrate our full engagement with the range of stakeholders—with, of course, students and staff being right at the top of our list. You have heard about the inclusive nature of our governance; it is evolving, and I think that we can make evolve further.
11:15

**Dame Jocelyn Bell Burnell:** I suspect that I am the oldest person in the room and perhaps know some history. I may not look it; I am a lot older than I look. When granny was a young academic, vice-chancellors were paid typically 10 per cent more than the highest-paid professor. Then the Government said, “Your governing bodies are incestuous. Get some industrialists on board.” The universities got some industrialists in, and the industrialists said, “Hey, vice-chancellor—you’re running a £50 million business. In industry, if you ran a £50 million business your salary would be yea high,” so the vice-chancellors’ salaries went up. You cannot blame them for that, but it may have been an unintended consequence. That is the end of the history lesson.

The Royal Society of Edinburgh is particularly concerned about the enabling legislation, especially the items that are to be set out in regulations. As everybody round the table will know, that gives powers not only to SNP ministers, but to ministers of whatever colour of Government there may be in the future—Conservative, Labour, Liberal, Green, black, white or whatever—to do all sorts of things without parliamentary scrutiny. I think that that is a far bigger governance issue than anything to do with the universities in Scotland.

**The Convener:** For absolutely accuracy, I say that ministers cannot do that without coming to Parliament. Regulations would have to be brought to Parliament and agreed by Parliament, so ministers do not have absolute authority to change things willy-nilly, as they see fit. That is not how things operate. There would be parliamentary scrutiny of regulations and there would be a parliamentary vote on regulations. I just want to make that clear.

**Dame Jocelyn Bell Burnell:** Okay.

**Mary Senior:** There are some very good European examples, and I encourage the committee to bring Ferdinand von Prondzynski to a future meeting because he could speak about that in more detail. It is unfortunate that a family bereavement means that he cannot be here today.

On ONS reclassification of universities, no one wants that, so I encourage the committee to look at the trade union evidence from Unison, which addresses that point. There is a danger of sabre rattling on the issue, because although the sector receives a substantial amount of public money, it actually receives more money from other sources, which is one of the key issues related to ONS reclassification.

Part of the reason why it looks as though the bill will give significant powers to the Scottish ministers is that the cabinet secretary wanted the sector—principals, chairs, trade unions and students—to be able to come together to seek consensus on how we can move forward on elected chairs. I wonder whether that being in the legislation, rather than the bill giving powers to the Scottish ministers, would give comfort to the people who are concerned about that.

Liam McArthur asked about academic freedom; I am not sure that I can talk in detail about cases that we have taken, because they usually end in mutual compromise agreements. It is more important to understand what academic freedom means, what underpins it and how it should play out in the university sector in what is a challenging time. New legislation to prevent people from being drawn into terrorism is coming in, and one area on which UCU has agreed strongly with Universities Scotland is around the importance of academic freedom in dealing in the university sector with issues such as the “prevent” legislation.

Tim O’Shea made his plea to the committee. I make an equally strong plea that the committee enable the legislation to go forward, because it can make a big difference to how institutions operate. It is important that we shine a light on some of the poorer decisions that universities have made. Edinburgh university is a great university, but questions have been asked about the proliferation of zero-hours contracts there that we saw a few years ago. That needed to be addressed.

Why are there questions about the campus of a university in Scotland and its looking to open new campuses in London? We think that all such questions could be more effectively scrutinised by the governing body with the involvement of elected staff, student and trade union nominees on court.

The bill is flexible: it recognises the diversity of the sector. Another problem area that I want to highlight is the situation that Edinburgh College of Art faced a number of years ago. It was a small specialised institution that was let down by poor governance. Fortunately, the University of Edinburgh was able to come in and pick up the pieces. Whatever their size or nature, all institutions need to have a collegiate approach to governance, which I think the bill can provide.

**Robin McAlpine:** The European University Association does a ranking of universities’ autonomy, and universities in Scotland and Britain as a whole have the most autonomy of universities anywhere in Europe, by quite a stretch. A tiny tweak that moved the system a tiny bit would leave them still as the most autonomous universities in Europe. If we are talking about international experience, it is important to look at the ivy league in America. The American universities have much more collegiate...
governance systems, and I do not think that anyone would say that they are not successful.

There is a point that I really want to come back on. I cannot understand the ferocity with which some people oppose what is proposed. Tim O’Shea was right—the divestment campaign was a great example. That is a very good reason why we should ensure that it is a democratic right in every university for staff and students to be able to help the university. I think that that is a right; it is not something that should be given by a group of managers when they feel like it.

I stress the fact that there is a great deal of fascinating research being done around the world on what makes an effective modern organisation and what such an organisation’s governance looks like. The same point keeps emerging again and again. When an organisation brings in the expertise of its stakeholders as a matter of right rather than as a matter of grace and favour or patronage, it gets better governance. It also gets a more diverse debate. The zero-hours contract example is an excellent one. That is an issue on which trade unions, staff and students might take a different view from managers. You will not find in any sector many forward-looking institutions that are not looking at new governance models that enable and empower their internal stakeholders, so I do not understand the level of resistance to the modest change that is proposed.

David Ross: In response to the question that was asked a moment ago, I want to deal with two points that have been raised. The convener is entirely right about the operation of the regulations and the powers, but possibly because of my vulgar previous trade as a corporate lawyer, I know that power can be exercised in a number of different ways.

Section 8 of the bill would allow the Scottish ministers to decide that there was to be a new category of member of court—someone who would be appointed by the Scottish ministers. They could determine that there were to be 15 such members. Under our arrangement with the Scottish funding council, we cannot have a court of more than 25 members. Therefore, the Scottish ministers could make regulations that said that an institution had to have 15 members of court appointed by them, so it would have to get 15 people off its court, which would give the Scottish ministers control.

However, my vulgar past tells me that the Scottish ministers would not have to do that; all that they would have to do would be to get the principal of Edinburgh university in a room and say, “Under section 8, we have the power to do that.” You might tell me—I am happy to be guided by you—that that never happens in the world of politics, but my experience of life is that power can be handled in a number of different ways. The theoretical power to do that is in the bill and it will not have to be exercised to have the effect that section 8 is intended to have.

The Convener: Okay. I will not comment on that, but it is an interesting view.

Emily Beever: I want to come back to George Adam’s point about universities representing the communities that they are situated in. Tim O’Shea mentioned the five institutions in Scotland that are in the *Times Higher Education* top 200. It is worth noting that all five are the ancient universities, which use the elected chair model. That shows how that model can allow institutions to flourish.

It is worth noting that we are unconvinced about any pre-selection panels. We would push for open democracy for the chairs. We think that—short of what Professor Sharkey was saying—staff and students would choose someone who is capable, knowledgeable and interested in the institution, as they have done under the rectorial model for centuries. It is clear to us that, when the democratic system is in place, our institutions are better placed to make good decisions for the people’s best interests—that is, staff and students and not the bottom line. Our universities are not businesses.

Mark Griffin (Central Scotland) (Lab): I support the general principles of the bill, but ONS reclassification is quickly becoming the key issue. Given the fear on the part of panel members around the financial implications of ONS reclassification, are any of you comfortable about legislation coming in in a situation in which there is a disparity between Universities Scotland, which says that reclassification is an amber-to-red risk, and Scottish Government officials, who deem it a low risk? What work needs to be done by the Scottish Government to allay the fears in the sector around ONS reclassification, which, as I say, is fast becoming the key issue for the legislation?

Jennifer Craw: If the question is whether we believe that the reclassification is a real risk, my answer is yes.

The Convener: I think the question was what can be done to allay that fear.

Jennifer Craw: There could be a pause, to clarify what the ONS considers independent autonomy looks like and how we preserve the right of universities to raise funds, connect with business and accept philanthropic gifts, and not become public bodies but instead retain their current status. Until we have absolute clarity on those positions, we can address what we understand is needed to drive good governance—transparency, modernisation and openness—through the code, which is due to be reviewed in
the next year, under a three-year review process. We can examine what issues are still outstanding in relation to the code and current practice, present that openly and transparently and continue to work on driving good governance through the code.

ONS reclassification is a real risk to the sector when it comes to future investment and success. As governing bodies, we absolutely have to take financial accountability into account. Our principals are accounting officers in relation to the Scottish funding council, and as chairs and boards, we are accountable for the financial sustainability of the organisations as a whole. The ONS reclassification of colleges as public bodies has had a severe impact on the further education sector, and it is not a risk that we can afford to take with the HE sector. We are too successful, and we are too important to the Scottish economy, to put the sector at risk. If the issue is one of governance, transparency and modernisation, can we address it through the review of the code? I ask that we take the ONS issue very seriously in relation to the financial risk to the sector’s future success.

David Ross: I am not an economist but, as I understand it, the trouble is that the ONS will only decide when it has seen all the facts. That is why problems are arising in a number of cases. The ONS sits and waits until everything is clear, and then it says yes or no. There is no clearance procedure. You can talk to the Treasury—I do not know whether the Scottish Government has talked to the Treasury, but it has certainly not told us that it has done so—and you can get some informal guidance, but you will not get an answer. The ONS says, “We will look at it when it is settled.” Aside from the risks of reclassification itself, the bigger risk is that no one knows whether it will happen or not.

Professor Sharkey: I agree with my colleagues about the ONS—and they are more expert than I am. As Robin McAlpine mentioned, I recently came from an American university, Johns Hopkins University. I have to say that this is a much more enlightened country. No staff or students were formally part of the Hopkins board; in fact, the board was increasingly made up of hedge fund managers, who were helping the university to raise the $4 billion that it wanted for its campaign. I celebrate the greater transparency here, and I would encourage us to use the code and the mechanisms that are in place already.

Ann Marie Dalton: Mary Senior had a couple of concerns about staffing issues and ensuring that the staff voice is heard. All universities in the UK, and especially here in Scotland, have access to a very good mechanism, which is the joint negotiating committee. It covers management and involves the recognised trade unions in every university. We have an opportunity to bring greater transparency to the work of the joint negotiating committee and the issues that are emerging there. We have done some work around that, although at a higher level in the university. It is a fantastic mechanism.

Sure, there will be crises of governance from time to time because universities, like all organisations, are run by people and, therefore, there will always be conflict. When conflict arises, if we have appropriate structures in place, governance can be a mechanism through which issues are raised earlier and brought to the governing body’s attention if need be.

We can make further improvements, even outwith the code, that would enhance governance.

11:30

Mary Senior: This relates to a topic that we will discuss later, but I will raise the point now. I urge the committee to examine the Scottish Government’s working together review, which the Government set up in 2014 with the Scottish Trades Union Congress. The review had an independent chair—Jim Mather—and on it were three employers, three trade union nominees and an academic adviser. The review considered the relationship in the workplace between trade unions and employers—how they interact. In recommendation 24, the review made a really important recommendation that all public sector bodies should have a workplace trade union nominee on their board. As I see it, the provision in the bill on that represents the higher education sector coming into line with that important recommendation by the independent working together review.

I will also quickly answer Mark Griffin’s point about the ONS and how we can move the issue forward. We should iron out any drafting issues and then, as a sector, get round the table and work out the mechanism for electing chairs, so that the bill does not say, “Scottish ministers will do X, Y and Z,” but sets out a structure and framework for electing chairs to which the sector can agree.

The Convener: We will deal with trade union reps and elected chairs in a second. Liz Smith and Liam McArthur want to come in. Please be brief.

Liz Smith: Mr McAlpine, twice this morning you have said that bad decisions had been made. Will you give us examples of bad decisions that have in any way undermined the educational experience of our students, held back the institutions and, therefore, held back our international standing?
Robin McAlpine: I am very hesitant to focus here on individual decisions in individual institutions. Let me give you a category of decision that has been made a number of times: universities deciding that their fundamental purpose will rapidly and substantially change. I am trying not to name a university—

Liz Smith: I am just interested—

Robin McAlpine: —but what you—

Liz Smith: Excuse me one minute. The bill tries to address concerns about governance arrangements—that is its intention. If we are going to enact it, I am interested in finding out what evidence there is that the current system of governance has specific problems. You said twice that bad decisions had been made. I would like to know what those bad decisions were that in some way undermined the students’ educational experience, held back the institutions and held back our international reputation.

Robin McAlpine: A big and very radical decision about the future of the University of Strathclyde and the arts students at the university was made in an extremely short time. We will not know for a generation or two whether that was the right decision—universities are generational institutions. The decision was made too quickly and without discussion. I do not know whether it was the wrong decision. The difficulty is that universities’ reputations and positions do not change overnight. It can be many years later before we find that moving away from a broad-based model to a narrow-based model of subject provision in an individual institution harms that university.

There is no question but that there is a lack of trust among the public on leadership salaries, so it is a trust issue as well. Another key point is that a governance role is not just a watchdog role. That is where there has been a bit of a difficulty with accountability. Good governance drives good thinking. It is not just about preventing bad decisions but about creating what I might call a gene pool of people who can inject positive thinking into a university. It is not just a deficit model; good governance brings new ideas, perspectives and talent into an organisation. That is a key part of what we should consider.

Liz Smith: Has that been held back? If we look at the league tables, an ordinary member of the public would wonder what on earth we are doing because it looks as though Scottish universities are doing exceptionally well.

Robin McAlpine: An ordinary member of the public would wonder why having one democratically elected member of a university board is such a problem. You should be careful not to ignore the sense that universities are seen in society as organisations that are rather out of democratic control.

You have sitting here a group of managers who represent the leadership of the universities and who have staff and students who are saying, “We do not think that this is working for us”. That has got to be listened to.

Liz Smith: Would you agree—

The Convener: Liz, I am sorry but I asked you to be brief. Other members want to come in and there are still some subjects that we have to cover in the time available. I apologise, but I have to interrupt.

Does Liam McArthur have a brief question?

Liam McArthur: David Ross picked up the point. OSCR will helpfully give us guidance, but the ONS will not. That is the quandary that we are in on the ONS reclassification.

The Convener: Thanks for that brief comment.

I apologise for interrupting, but it is important that we tackle head on the issue of trade union representatives being on the boards. There is also, of course, the direct question of elected chairs, which we have skirted round. From what I have seen, that is one of the most difficult questions to get agreement on. I want to go round the table on that issue.

The committee has had evidence from the university sector, for example, which raised objections to the proposal on trade union representatives, saying that they would represent a sectoral interest, effectively.

The Scottish Government’s policy memorandum says:

“trade union representatives . . . would be required to act in the best interest of the HEI, as opposed to any individual constituency which nominated them”.

In other words, although they would come from that sector, they would have to operate in the best interests of the institution.

Can anybody explain to me what the problem is with trade union representatives or others being involved in the way that has been suggested in the bill?

David Ross: On our court, we have the immediate past president of the UCU, and his predecessor was a previous senior official of UCU.

From our perspective the issue is the idea that one size fits all. The staff representative is directly elected by all the staff and the union runs the election; anyone can stand and anyone can vote. To my mind, that is one of the unintended consequences of the bill. Our system takes away the issue of conflicts of interest, because the
constituency is the whole staff. That is a neat way of ensuring employee representation, as opposed to the nominated approach, which seems less democratic.

I am happy to say publicly that Dave Anderson is a very valued member of our court, as was his predecessor. I do not think that any of us has an issue with trade union members being on the governing body. However, it is hugely important that they are clearly there in a representative capacity for the whole staff, not for a narrower interest, which could lead to the accusation—or concern—that there would be a conflict of interest.

**Ann Marie Dalton:** In our institution, the proposal could disenfranchise a large proportion of the community. On our court, we have three staff members: two must be academic staff and one must be professional service staff.

We are a highly international university. The elections for those posts are open to all our colleagues across the world, including in our campuses in Dubai and Malaysia. Trade unions are not permitted in Dubai. Therefore, the current process of someone coming forward and being elected by the entire staff body means that they represent the views of all our staff across the world. That is a very important point: a large percentage of our staff would be disenfranchised if that—

**The Convener:** Mary Senior looks as if she wants to come in on that point.

**Mary Senior:** Ann Marie Dalton raises another important issue around governance, in that we have campuses in places where human rights barely exist and trade unions are not recognised. I do not think that that is a good reason not to have trade union nominees on elected bodies. It raises the issue of how we scrutinise decisions to open campuses in far-away places that have a very poor track record on human rights.

I also want to make a point about what David Ross said. The union does not run the election for the staff seat on the court at the University of Glasgow. The union puts forward nominations for that seat and, in the past couple of years, we have been successful in getting the trade union candidate elected, but that does not always happen. Initially—

**Jennifer Craw:** That is the point: this is a democratic choice. The staff have a democratic right to elect from their own body.

**Mary Senior:** The bill provides for staff nominees and trade union nominees. We are quite offended that Universities Scotland seems to be suggesting that trade unions and trade union representatives cannot adhere to Nolan principles. We can.

Just because students, staff and trade unions have a stake in the organisation does not mean that they are not interested in the success of that organisation. The working together review indicates that trade unions bring an authentic and genuine perspective from the coalface on what works and what does not. Their experience and expertise are invaluable. Trade unions are democratic organisations. Our members and representatives are elected to posts in institutions. To say that there is a democratic deficit does not sit well with us.

As the working together review recognises, trade unions get support for and training, advice and guidance on their duties on the boards of institutions or public bodies. The review report makes a progressive recommendation that is in stark contrast to the attack on trade unions that we are seeing from the Westminster Government in the Trade Union Bill. The recommendation is very important and I urge the committee to support it.

**The Convener:** As no one else wants to comment on trade union representatives, I will move on to my second question.

There is disagreement around the table and in the sector on elected chairs. The intention is clearly to have elected chairs, and a number of comments have been made in the press and in the evidence that we have received about that and, in particular, the possible effect on rectors. I want to hear your opinions about that part of the bill because it is important and many people have strong views about it. Who wants to kick off?

**Emily Beever:** Whether you call them rectors or elected chairs, the principle is the same, and we should have the position not just in our ancient institutions but across all institutions in Scotland. It is worth while and it reflects the principles that we seem to be agreed on, in that we want more democracy and we want our institutions and their governing bodies to reflect their communities and main stakeholders.

I am uncertain about where the hesitancy has come from. This great Scottish tradition has existed for centuries and it has functioned very well. I am sure that Tim O'Shea, whose institution has a rector, would agree with that. The rectors whom I have spoken to—Steve Morrison from Edinburgh, Maggie Chapman from Aberdeen and Catherine Stihler from St Andrews—all support the rolling out of the principle of rectors to all institutions, rather than rectors just being used by the ancients.

**David Ross:** Speaking first of all on behalf of the students of the University of Glasgow, who are not members of NUS, I know that they are deeply concerned about the continuing lack of clarity over what is intended for rectors. That is a legitimate
concern. They value greatly the fact that someone is elected to the governing body whose sole role is to represent students.

For the avoidance of doubt, it is important to make it clear that the way in which rectors operate—there are four varieties of rector in Scotland at only six universities—is not what the bill proposes. Each of the institutions has someone like me—if not better than me. I am the convener of the court of the University of Glasgow; Edinburgh has a vice-convener; and St Andrews and, I think, Aberdeen have a senior governor. They are like me, in that they are the principal’s line manager and are responsible for carrying out their own duties. That is what the bill wants to elect.

However, there is a serious risk that the proposal will weaken the governing body and strengthen management. With all due respect, in this city we have seen some fairly spectacular circumstances in which senior management in the financial services sector have not been subject to proper control. If I am elected by an outside body, I will have conflicting loyalties to the staff and the students. At the moment, I have a job to do. I am appointed by the court and if it does not like what I do, it can get rid of me. I am sure that you know Professor Muscatelli and that he is a polite man. When I go to talk to him, he listens to me because I speak for the court and because it wants me to speak for it. If that does not happen, the governing body will be weakened and management will be strengthened, and that is bad for governance.

11:45

Professor O’Shea: The Universities (Scotland) Act 1858 established what is more or less the common form of the University of Edinburgh senate as well as the post of rector. In the more than 150 years since, we have refined both models. Our senate is now more democratic and inclusive, and the bill would damage that. We also have a very particular and extremely successful dual model with a presiding rector, who is elected by all the staff and students and who performs a very key ombudsperson function and leadership function at the court’s big meetings, and a working vice-convener, who gives us the accountability that is absolutely necessary for an organisation with expenditure of more than £800 million a year.

You need democracy and accountability, and the current system is, as Emily Beever has kindly pointed out, very well regarded not only by the students and staff but by the different bodies that fund us. We therefore find it extremely unhelpful to have a bill that proposes a simplification that might damage the democratic aspect of how we lead our court, damage accountability or, indeed, damage both.

I plead with the committee to pause on the bill. We have good systems in Scotland, and they can be refined; indeed, they are being refined through the code of governance. Simple changes to 19 HEIs that are so diverse will inevitably result in damage, and the bill as introduced would damage the democratic nature of the University of Edinburgh senate and the combination of democracy and accountability that we have in our court.

Professor Sharkey: We believe that we have a highly functioning representative democracy. The students and staff who are elected by the staff and student bodies very clearly participate in any search for a new chair; indeed, they did so in the search for me. I had a really detailed grilling by the head of the student union, who had also arranged for me to meet the whole student body. However, there was no open election as part of that process, and the proposal for a very open election with an as-yet undefined electorate could keep us from getting some of the finest candidates that we are seeking. We want to beat the National Theatre of Scotland, the Royal Scottish National Orchestra and so on to get the kind of chair who can really advance the arts for Scotland, but our worry is that because the process might become too competitive, open and exposed, compared with the representative democracy that we have at the moment, such people might not apply for those posts.

Robin McAlpine: There is an important difference between democracy, where you have a right to decide, and consultation, where you have a right to voice an opinion. I know that it is unfair to pick up on points that people have made, but I do not think that you should see the interests of staff and the interests of students in terms of a conflict of interest in the running of a university; instead, those should be seen as being at its very heart.

A university is not a private institution that is completely removed from its community. It is a conceptual thing; in most organisations, you can identify an “owner”—and I put that in inverted commas—or a group the institution is run on behalf of. One difficulty is that, in the move from a more collegiate to a more executive-run model that has taken place over the past 30 or 40 years in many universities—though not all; there are variations—a division has emerged between those who represent the ownership of that university and its wider community and, in turn, that community’s ability to make decisions about and to shape the university.

I would go further—I would love to see us move towards having democratic universities that are communities that make collective decisions. I think that that will be the future for an awful lot of organisations in the public realm. We are in an era
in which people expect to be treated as members of a community who are capable of shaping it. As a first step, therefore, there needs to be an election. I really worry about the idea that a small group of people—and they alone—know better than everyone else and can decide who would be a good person to run a university; in fact, that is the kind of model that has caused problems in the financial services sector, and I think that it is dangerous here.

People could be put off, but there could well be many thousands of people out there who could do a phenomenally good and really inspirational job in an institution. They might not be selected by the sector’s committees, but because they have a vision or a real sense of what they want to do in an institution, they might come forward and inspire support from the staff and students, and they might get in. I suspect that, for every person who might be lost because they do not want to take part in a democratic election, there will be hundreds of others who would be able to do a wonderful job for institutions. However, they will never be considered for that role at the moment. That is one of the problems of mistaking stakeholder consultation for democracy: if you do not have any route in for people, you greatly close off your pool. That is one of the difficulties that we are facing.

Emily Beever: Robin McAlpine has already mentioned this, but I want to ask David Ross a direct question about his comment that if he had been elected by staff and students rather than the court, he would have had conflicting views. What exactly would those views be?

David Ross: First of all, I should paint the background by pointing out that my court has—I suspect—the widest representation of staff and students in Scotland.

The difficulty is that my responsibility as convener of the court is to the court, not to those who elected me. With all due respect, those of us in the ancient universities who regularly see— and hugely enjoy—rectorial elections understand the environment in which they take place. My point is that I have only one loyalty, which is to the people who appointed me to do what I am doing. They hold me to account, and they can get rid of me. If I were to be elected in some other way, there would be no such connection. The governing body would be weakened, because it would be divided. The chair would have responsibilities to a range of hugely important stakeholders, and the body itself would not have the chair that it wanted to appoint. Weakened governing bodies are legendary for their inability to produce good governance, and that is my concern.

Emily Beever: I am sure that, as a sector, we could come to some conclusion on a mechanism of accountability in that respect.

The Convener: I must apologise but, unfortunately, I am going to have to draw the discussion to a close. I know that we have a lot of stuff to discuss, but I have to consider the time and the fact that we have to take evidence from another panel. All I can say is that although we have already received a lot of written evidence, if you wish to add to the views that have been expressed, you can send your comments to the committee. I am sure that we will be delighted to receive them.

I thank everyone for giving up their time to come along. I briefly suspend the meeting.

11:52
Meeting suspended.

11:58
On resuming—

The Convener: We will now take evidence on the bill from Scottish Government officials. I welcome to the committee Laura Duffy, Stephen White and Ailsa Heine. We will go straight to questions.

George Adam: Good morning. My first question is about the governance and autonomy of the institutions. In the previous session there was much talk about how we should go forward. Does the Scottish Government feel that universities are sufficiently modern, inclusive and accountable?

Stephen White (Scottish Government): The Scottish Government is very appreciative of Scotland’s excellent universities. We are aware that governance has been improved by the code following the review of higher education governance in Scotland that was led by Professor von Prondzynski. However, it would be fair to say that the ministers feel that there is room for improvement in terms of greater inclusivity and transparency, so that every voice on campus can be heard equally.

George Adam: You say “every voice”. In general, though, no process is set out so that people can see how it would work. What are the current thoughts on governance?

Stephen White: Do you mean on elected chairs specifically?

George Adam: In general, yes. How would the constituency for that work out?

Stephen White: Do you mean the franchise of election for an elected chair?
George Adam: Yes.

Stephen White: Perhaps I can answer your question with a brief explanation of why section 1 reads as it does. When the consultation was launched in late 2014 or early 2015, the Government set out plans to have chairs elected, after a selection process to establish that the candidates could fulfil the requirements of the role. There was quite a lot of comment, and lots of people in the university sector opposed the proposal, as you heard from the previous panel.

Even the groups that were positive about the proposal did not agree on the format or the franchise. That is what led to section 1 being about a power for ministers, but as soon as that approach was proposed a dialogue about franchise started with all stakeholders. That dialogue is on-going, and I think that the cabinet secretary said in her letter to the committee that, on the basis of that dialogue, she is minded to consider a stage 2 amendment to provide for a single model.

I hope that that answers your question, because that is the situation at the moment, in practical terms.

George Adam: That is fine.

Liz Smith: I draw Stephen White’s attention to the discussions that took place at the meeting of the Finance Committee two weeks ago. What advice did you take about the possible reclassification of universities?

Stephen White: I was at the Finance Committee’s meeting, so I am happy to answer your questions—I might paraphrase answers that I gave to that committee, which are on the record. By “advice”, do you mean advice that is external to the Scottish Government?

Liz Smith: Yes.

Stephen White: The Scottish Government did not take advice from outwith the Government. There was a summation of advice from colleagues across different departments of Government. I think that that is what I said two weeks ago, although those were not my exact words.

Liz Smith: Why did you not take clear legal advice from outside the Scottish Government?

Stephen White: In considering the “European system of accounts: ESA 2010” guidance on the indicators of control, we thought that our internal analysis was sufficient. Specifically on how the ONS works—my finance colleague Kerry Twyman, who was at the Finance Committee meeting, is not here—I can say that the ONS is not the sort of organisation that one engages with to work through the detail. As I think that David Ross said, the ONS looks at things at the end of the process; getting it to look at early plans would not be a conventional way to engage with it.

I repeat what I said to the Finance Committee. The internal analysis concluded that the bill’s provisions complied with the indicators of control and that risk was not advanced by the bill.

Liz Smith: Given that the ONS will not rule until all the facts are on the table, how do you respond to the comments from Universities Scotland, which has taken and published legal advice that there is significant risk?

Stephen White: Universities Scotland has been kind enough to share the advice, which is quite new, and we will consider it. It is not for one person such as me to respect such an opinion, but consideration of such matters is part of the bill process. As Ms Constance said in her letter to the Finance Committee, which I understand has been shared with this committee, the Government takes a slightly different view on the quantum of risk and considers that the bill does not advance risk beyond what existed before. I think that the Finance Committee had a detailed discussion about that.

Liz Smith: Mr White, I hope that you understand that there are very serious concerns about the loss of money and the detriment to the sector that could be the impact of ONS reclassification. In her letter yesterday, Angela Constance did not address those concerns. Given the issue’s potential significance, is it not a bit odd that the Scottish Government has not gone into detail, taking outside advice, on exactly what numbers we might be talking about?

Stephen White: There is no suggestion that Universities Scotland’s comments will be taken lightly. They will be taken extremely seriously. We have a close relationship with Universities Scotland on a number of higher education policy areas, so that is a given.

As I said to Mr Baker in the Finance Committee, the Scottish Government has not analysed potential numbers because its assessment is that the numbers would be theoretical because the risk itself is not substantial. The idea that we would do a detailed analysis of numbers when we do not think that the risk is substantial—

Liz Smith: Sorry—how are you coming to the conclusion that the risk is probably not substantial?

Stephen White: The basis of that analysis was a consideration of all the indicators of control in the European system of accounts guidance that the ONS uses to make its determinations. It is not an empirical science; it is a risk analysis. It is not a binary thing with yes or no answers; it is our assessment of the risk.
Liz Smith: With £1 billion at stake? It is a very serious concern that there has not been the amount of discussion that would be expected about the possible effects of a bill such as this one, which has huge implications for the very successful education sector. It looks as though the Scottish Government has not done its homework very well.

Stephen White: It is for ministers to consider your comments.

Liam McArthur: Does the risk analysis that you have undertaken factor in ministerial intent, or does it look solely at the scope of the bill provisions? We have had reassurances from the cabinet secretary, as Liz Smith indicated, which suggests that there is recognition of a potential risk. However, whatever reassurances an individual minister gives, they are unrelated to the scope of the provisions in the bill that we are being asked to consider.

Stephen White: Again, on some of the material that the Finance Committee raised, we certainly have an open mind. Ministers are looking at all the evidence, written and oral, on how modification of certain of the regulation-making powers might address that risk. I think that I am right in saying that Professor Muscatelli indicated in his oral evidence to the Finance Committee that an examination of those sections to pare back—those are my words, not his—any feature that might suggest that there was a heightening of risk would be helpful.

Mark Griffin: In giving evidence to the Finance Committee, a Scottish Government official said about the ONS reclassification:

“we deem reclassification to be a low risk.”—[Official Report, Finance Committee, 16 September 2015; c 46.]

Universities Scotland said that reclassification was an “amber to red” risk. In your opinion, why is there that difference of opinion as to the level of risk?

Stephen White: It is an extremely serious issue, so it is certainly not about my opinion; it is about the opinion of the Government. The Government’s assessment was squarely focused on the indicators of control that are used by the ONS to make its determinations. I will not paraphrase all of what is a very detailed document, but it has a great emphasis on direct control of appointments—people on or people off. The bill is about processes—it is about the how, not the who. People are not placed on or taken off through the bill provisions. The bill is about consistent, transparent and inclusive processes.

Mark Griffin: The Government has come to the conclusion, after going through that process, that the risk of reclassification is low. Do you think that Universities Scotland went through a different process from that of the Government?

Stephen White: No, absolutely not. Universities Scotland has looked at all the same indicators of control. It might say that it has looked at them differently or more thoroughly—I do not know. However, it has looked at exactly the same material. I am not a risk manager, but risk is not an exact science. Some people will see a heightened risk where others looking at the same material will see a more modest risk. I do not want to put it in a nutshell for convenience, but Universities Scotland seems to have a different opinion and it is simply the opinion that it holds.

Mark Griffin: Has the cabinet secretary or have Government officials met Universities Scotland to discuss that difference of opinion and to find out what different emphasis Universities Scotland might be putting on different risks?

Stephen White: To answer your question honestly and directly, we have lots of meetings with Universities Scotland and we have talked about models of elected chair as part of the dialogue that I spoke about earlier; the ONS question has come up, but I do not think that there has been a meeting at which it has been the only agenda item. It is something that we talk about all the time. We exchange materials. Universities Scotland was kind enough to share with us very swiftly the legal advice that it had sourced. We appreciated sight of that.

Mark Griffin: But the issue of ONS reclassification has been discussed between the Government and Universities Scotland.

Stephen White: It has certainly been discussed between officials. I cannot remember whether the cabinet secretary has met Universities Scotland about it.

Chic Brodie: Good morning. I want to ask about the appointment of the chair of the governing body, which, of course, is a contentious issue. I ask the questions partly as devil’s advocate and partly as someone who has been a lay member of the court of the University of St Andrews and who has chaired several organisations. The Government has stated that it has

“no intention of politicising the office of elected chair or being involved in the appointment process. It is our intention that the franchise for the electoral process would not expand beyond the community within each HEI”.

That is nonsense, is it not? As you will have heard, each member’s appointment to a governing body is subject to a rigorous interview and adoption process involving staff and students. How is someone going to be elected as chair if their views run counter to those of the court?
Stephen White: I start by clarifying that the evidence base for that concept comes from the review of higher education governance in Scotland, which was chaired by Professor von Prondzynski. The review’s recommendation on elected chairs inspired how the Government’s consultation on that issue was framed. As I have said, I was not part of the von Prondzynski review, but I read the report in recent days to prepare for today. The idea was that a selection element was required in order that the person who took up the role could perform the duties—

Chic Brodie: Selection by whom?

Stephen White: By a representative cross-section of people in the university coming together to make that decision.

Chic Brodie: What cross-section of people?

Stephen White: Academic staff, lay members, students—

Chic Brodie: If that is the case, there should be no priority—either all or none should do it.

Stephen White: In practical terms, committees are often put together to source a chair. Therefore, the idea is just about making sure that that committee, which would be a smaller unit of the overall court, would be representative.

Chic Brodie: I am still unsure. In my experience, the chair of a private company, organisation or association has to carry, or at least ameliorate, the wider decisions of the body that they represent. It is a very difficult position. Selection by a cross-section of people would make the job more difficult in that the chair would be unable to carry the majority of the body with them. Although the Government says that it has “no intention of politicising the office”, that is exactly what happens with an election process, is it not?

Stephen White: I am not sure whether I have answered your question, because I am not sure that I understood the initial one correctly. Perhaps I could explain the process and you could home in on the bit that is most helpful.

In summary, the von Prondzynski review suggested that there be a selection and an election element. The franchise of the election element was writ quite broadly. There was even a suggestion that it might extend outwith the university community and include people in the local community or local authority representatives—I am not sure about that. The Government clarified in the consultation that the franchise—who would get to vote for the chair—would not be outwith the university community. In practice, one option might be the governing body itself. However, others might disagree and say that it should be all staff and students. Those are two examples of potential electorates who would vote after a selection period.

The selection period was felt to be important by a cross-sector panel. Without that, I suppose that the process would be opened up to the risk that candidates who may not be able to carry out the duties would find themselves in that role. I do not know whether that answers your question, but I am happy to expand on it if it does not.

Chic Brodie: I think that I understand. However, it does not answer—for those who have been there—the practicalities of how difficult such a role is.

On the selection element, where does the wider public interest and involvement lie?

Stephen White: This is virgin territory in the sense that the bill does not make any provision for that. However, universities have many ways to communicate with the public beyond that process. We are concerned that there is an element of reform in the internal governance. Universities provide annual reports, business plans and so on. The bill does not want to prescribe how universities communicate with the outside world or communicate their successes. It is about the internal organisation of the institution—

12:15

Chic Brodie: Forgive me, but are you telling me that the chair of the governing body of a major university with international experience will work only internally rather than represent the governing body and the university to the public?

Stephen White: No, of course not. I must be honest: I am not sure that I fully understood your initial question, although I am trying my best to answer it.

I would expect the chair of any university to be an ambassador and a great exponent of its values both internally and externally in order to help the university to thrive and succeed. I would hope that the candidates who come forward will accept the prudence of selection and would be delighted to be elected by whichever franchise the legislation provides for.

As I said, I must make a partial apology, as I did not understand the initial question.

Chic Brodie: I move to my last question. It has been suggested that an amendment to replace section 1 might be lodged at stage 2. What might be in that amendment?

Stephen White: As I said to another member, that is still under active discussion with all stakeholders: universities and other higher education institutions, unions and students. The
amendment would replace the regulation-making power and map out the structure of selection and election, and it would also comment on the franchise.

The current section 1 provides illustrative elements of what could appear in regulations, and some of those elements may not appear in the amendment. The amendment will mainly include the absolute staples such as how selection would work and what the franchise for the election would be. The aim is to provide for a model that is as consensual as possible. That is why the discussions are constant; they have been very active since June, and indeed before then, inspired by the consultation.

Chic Brodie: Is it not the case that consensus would best be arrived at by choosing the chairman or chairwoman from the body that they chair?

Stephen White: So you support a franchise of the governance body.

Chic Brodie: I am playing devil’s advocate—I want to hear your views.

Stephen White: The Government wants to facilitate as consensual a model as possible. It would rather have everyone agree on the model than simply stipulate one. Obviously the dialogue cannot go on for ever, and it is incumbent on partners to talk to Government and reach a consensus.

Liam McArthur: I am intrigued. There is an agreement that our universities are genuinely world class, as you accepted in response to George Adam’s initial question. I think that we would all accept, however, that that is not a reason to rest on the laurels. There may well be improvements that we should seek to make to governance, whether that is through legislation or by other means.

Can you point, in either Professor von Prondzynski’s report or work that the Scottish Government has done, to the international comparators on governance that have informed the decisions in drafting the bill? What is the nirvana that we are trying to reach in terms of good university governance that will safeguard and enhance the reputation and performance of our universities internationally?

Stephen White: That is a very good question. I cannot offer much on the international perspective. The von Prondzynski review was the inspiration for the consultation that led to the bill. The review took a great deal of evidence, and I seem to remember that there was an international element, although I do not remember how large that was. Perhaps colleagues will know.

Laura Duffy (Scottish Government): As I understand it, the von Prondzynski review took evidence from Scotland and across the UK and from Europe and America.

Stephen White: Liam McArthur used the word “nirvana”, but I do not think that the plan is to emulate any perfect model. The ambition is to move on with a modest set of proposals—others would disagree with that description—to improve the transparency, inclusivity and modernity of governance, rather than being inspired by a bar that has been spotted elsewhere.

Liam McArthur: Presumably, the sector would see its benchmarks as not necessarily being in the rest of Scotland or in the UK. The comparators are international. If we are drawing on the experience of other universities, one would hope that the experience on which we draw comes from universities that are performing better than universities in Scotland are at present. I would have thought that it would be easier to identify those international models than appears to have been the case.

There is nothing on that in the policy memorandum or in the materials with which we have been presented by the Scottish Parliament information centre. There is no indication of what exactly we are seeking to emulate.

Stephen White: In reading the von Prondzynski review last night I noticed that it said that it took a great deal of evidence on board when the review was conducted; it was published in 2012. What the review found was that quite a low level of research had been conducted on higher education governance issues. The way the report was written seemed to suggest that the review group was a bit surprised by that.

That is not a direct answer to the international question, but I do not think that there is a great deal of reflection in evidence or a huge evidence base, in relative terms, about higher education governance. There has not been a great deal of consideration of the international picture in assembling the bill—I could say that.

Mary Scanlon: I was interested to hear about the Government’s consensual model. I congratulate you on the consensus; I have never heard every single higher education institution in Scotland being as consensual as they are in their opposition to this bill. Why you are going on a collision course at this point in time I do not know.

On governance, what did OSCR say when you discussed your approach to the forthcoming regulations within the bill and further regulations? What was OSCR’s response when you discussed that with them?

Stephen White: I have not taken forward any discussions with OSCR—
Mary Scanlon: You have not discussed it with OSCR.

Stephen White: Could I finish answering the question?

You asked me specifically, if I understood the question, whether we had discussed with OSCR the use of regulation-making powers, rather than the bill in general. Is that correct?

Mary Scanlon: Have you discussed your proposed approach to regulations with OSCR?

Stephen White: Are you asking about in all sections or—

Mary Scanlon: In all sections, and the powers in the bill that will be forthcoming—future powers.

Stephen White: No, we have not discussed that with OSCR yet. We—

Mary Scanlon: You have not done that?

Stephen White: The bill is only at stage 1; it is in an early part of its consideration. To have a substantial discussion about how subsequent secondary legislative powers might be used with OSCR now—

Mary Scanlon: I think that I might be the only one sitting round the table who was actually on the committee in this Parliament that set up the Office of the Scottish Charity Regulator. I remember from 10 years ago—people from all parties will remember—that if there was anything anywhere near ministerial diktat or policy interference in an organisation, it could no longer be a charity; it would no longer have that status.

OSCR has been cautious in its approach and was able to talk to us, although unfortunately you were unable to talk to it. OSCR stated:

“Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions”—

plus ministers’ wide power to make further regulations—

“these amounted to ministerial control.”

There is huge uncertainty there. OSCR found time to give us advice and I am disappointed that you have not managed to find time to discuss the bill with OSCR.

Stephen White: I would like to be helpful, but to come back on that—

Mary Scanlon: I would like to be helpful, too.

Stephen White: Ultimately, I am not a minister. I can talk about the official engagement that we have had with OSCR, and we talked to OSCR after the bill was introduced and before evidence was submitted to the committee. I think that that was covered earlier. I note the passage that you read out. OSCR has reserved the right—entirely correctly, because it has only considered what is on the face of the bill—to revisit its position depending on how the secondary legislative powers are used.

It is certainly the case that the Scottish Government will have a dialogue with OSCR in using the secondary legislative powers. All that I am saying, in being honest, is that there has not been an early discussion yet but there certainly will be a discussion; there would not be any taking forward of secondary powers without consulting an important stakeholder such as OSCR.

Mary Scanlon: OSCR is a wee bit more than an important stakeholder, but I will leave that one there.

I want to look at the Scottish Government’s powers to make regulations in particular in sections 14 and 20 of the bill. Section 14 says that regulations “may make different provision for different purposes”, and section 20 says:

“The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient”

in the future.

The Scottish Government’s letter to the committee said:

“In general, the powers for Scottish Ministers ... are intended to future proof the content of the Bill”.

I think that the words “minor adjustment” were used. Could that not be done under the Scottish funding council code of governance, which is to be reviewed next year? It is barely over a year old, so why do we need legislation? Any further amendments or changes could be done next year in the code of governance. Why, in the consultations, were the provisions intended only as future proofing?

Stephen White: I will try to answer the various elements of that. The Government has noted the strong opinions of many colleagues in the sector about the secondary legislation powers and what, in their view, they mean for the advancement of Government control.

Mary Scanlon: It is everyone’s view.

Stephen White: The Government has no intention of having any direct control of or influence over the functioning of institutions. My legal colleagues could provide a view on this, but the various powers are quite standard to future proof legislation and, in fact, were all intended in that way.
However, specific views have been taken on different sections. It is fair to say that the cabinet secretary is open-minded about listening to all the oral and written evidence on how modification of those sections might be helpful.

I was in the public gallery earlier and I listened to the discussion. On the SFC question, I suppose that, theoretically, if the sector at large and the authors of the code were happy to have elected chairs, trade union representatives and staff and student representatives as staples of the code, there could perhaps be a profitable dialogue about changing the code. However, given people’s strong views against those Government plans being in the bill, I do not imagine that they would want them to be in the code.

I am trying to be helpful, so correct me if I am wrong but, on the consultation, I think that you are picking up the fact that certain colleagues, such as David Ross in the submission of the committee of Scottish chairs, have said that the powers were not consulted on in January or in late 2014. That was a policy consultation and the bill developed from it. The secondary legislative powers came out of that preparation. I go back to the first point that I made, which is that the powers were intended to future proof the bill. There is no ulterior motive behind them, but the strength of feeling and the comments are clear. As I said, the cabinet secretary is open-minded about considering those views and how they might influence the provisions.

Mary Scanlon: As we are running short of time, I will not take up more of it by referring to individual sections, but the bill constantly says that the Government “may by regulations” do this and that. I have circled the phrase five times, just on one page. The Government “may by regulations” do a huge number of things. Does the Government regret going a step too far and being on this collision course with our higher education institutions? Do I pick up from what you say that

Stephen White: I can certainly be confident that the Government is open-minded about making amendments, but the earlier part of your point is not for an official to answer.

Liz Smith: I seek clarification on a matter. Mr White, as I understand it, there is scope to change the constitutions of certain universities, which, by definition, involves Government control. Is that correct?

Stephen White: The OSCR submission went into that in some detail. I think that it proposes that there would be alteration to the ancient universities’ constitutions, but it then went a layer below that and said that the bill’s provisions do not jeopardise the charitable—

Liz Smith: My point of clarification is whether it is your understanding, as an official, that, by definition, changes would be made to the constitutions of certain universities and that therefore the Government could be seen to further its control. Is that correct?

Stephen White: I will ask Ailsa Heine to come in here, particularly on the first part of that question.

Ailsa Heine (Scottish Government): The bill sets out the minimum requirements for certain aspects of the bodies, which will form part of the constitution. The Government already has a role in approving changes to higher education institutions through the existing legislation, under the 1992 act or—

12:30
Liz Smith: Will the bill increase that role?

Ailsa Heine: It is not fair to say that it will increase it; it is just adding to it—

Liz Smith: If it is adding to it, it is increasing it.

The Convener: Can I clarify the point? The OSCR written submission says:

“In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4)(b) of the 2005 Act.”

Stephen White: That is the part that sprung to mind when I was asked the question.

Mary Scanlon: The point is that the ancient universities have different constitutions from the more modern universities. The part of OSCR’s written submission that the convener read out applies to the ancient universities, not the more modern ones.

Stephen White: OSCR did not comment on any constitutional alterations to the others.

Mary Scanlon: We are looking at all the universities.

Gordon MacDonald: I will ask the witnesses about the composition of governing bodies. The code of good governance specifies that lay members should make up a majority of the governing board and that governing bodies should not normally exceed 25 members.

The bill suggests that up to eight members should be co-opted or elected onto the board, coming from staff, students, trade unions and alumni. Is there anything in the bill that determines a minimum or maximum governing body size? I
Stephen White: I will give an interpretation. The 25 figure was adopted by the code’s authors, then subsequently adopted—I use the word “adopted” but it is not a legal term—by the Scottish funding council. It was part of the terms and conditions of grant that institutions—fundable bodies—were to abide by, in terms of the code. The 25 figure has that status.

I know that lots of your written evidence and some of your oral evidence has said that it would be difficult to accommodate the eight members that you referred to and keep the lay majority, but that was what the von Prondzynski review suggested. However, I should say that that was before the code, which was published the year after the von Prondzynski review, so that comment is probably not relevant.

The eight members could be accommodated. That is not my opinion; it is the summation of the Government opinion.

The 25 figure could be changed. I would not present a case for changing it, but it could be changed. The Scottish funding council would come to a decision about any change to the code; it would not just endorse the code once on the condition that it would never change. Indeed, I believe that there is going to be a review next year.

I would not have the audacity to start making personal suggestions about court sizes, but the figure is not immovable. Slight changes could be made to accommodate what the bill will provide for.

I apologise—my error. The code was published a year after the 2012 review, so the review would not have talked about the code.

Gordon MacDonald: Much of the bill is about diversity and changing the make-up of the governing bodies. On the existing code, NUS Scotland said in its evidence:

“On the issue of wider diversity only 40% of institutions had set targets for increasing the wider equality and diversity of their governing bodies, and only 30% were issuing regular reports on progress on equality and diversity targets with regards to governing body membership.”

We have the code of good governance, but it appears, from the NUS evidence, that many universities are failing to comply with it. Is there anything in the bill that will address diversity in governing bodies?

Stephen White: The intention of the governing body composition provisions is that a community will lead the institution and the inclusivity and representative nature of that will have a percussive effect on the way in which the whole institution runs. The bill does not make specific commentary on, for example, gender—I am not a lawyer, but I do not think that it can, because that is not within the competence of the Scottish Parliament—but the aim is to achieve a percussive effect with a representative, fair and inclusive profile leading the organisation whose conversations will lead to consideration of these areas as a mainstay of the business of the institution.

Mark Griffin: I have some questions that lead on from that about the composition of the academic board. The committee wrote to the Government, asking about the requirement to ensure that at least 10 per cent of the membership of academic boards is students, and we received a written answer. Over and above that, can you set out the tangible ways in which an increase in the number of students on academic boards will improve the work of the boards and academic quality throughout higher education institutions?

Stephen White: I hope not to give too simplistic an answer, but I think that the presence of students could only enrich the academic conversation. I cannot catalogue tangible changes in the way in which an academic board would run—I am not on one and never have been—but I refer again to the percussive effect of having a more representative conversation in such a forum.

Mark Griffin: Okay. Universities have expressed concerns about the size of the academic boards. Do you have any comments to make on the evidence that we have received from the University of St Andrews and the University of Aberdeen? The University of St Andrews talks about disbanding its academic council and replacing it with a reformed senate. The University of Aberdeen flags up how it fears the loss of crucial input from ex officio members. How can the Government address the sector’s concerns about the size of the academic boards?

Stephen White: Those comments have been noted and we are taking them into consideration at this stage in the bill’s progress. The figure of 120 comes from the review of higher education governance in Scotland. It would not have been arrived at willy-nilly; I imagine that it was subject to lots of cross-sectoral dialogue and that many opinions were taken. Many academic boards probably have fewer than 120 members. However, certain institutions face a particular situation and they have made their views clear. I think that the Government would be open-minded about considering that evidence carefully. The figure of 120 comes from the review, which is the substantive evidence base that largely inspired all the provisions in the bill.
Mark Griffin: Will you take those comments away and consider possible amendments at stage 2 that would make the bill more flexible in order to meet those institutions’ needs?

Stephen White: All that I can say today is that the comments will be respectfully considered along with the many other comments that have been collected in evidence. It will be for ministers to decide on any action.

Liam McArthur: My questions follow on from that and relate to the governing bodies and a number of other elements. At the round-table session that we had this morning, it was clear that the message from the sector is that a one-size-fits-all approach would be wholly inappropriate and would not reflect the diversity of the sector. The conundrum for us, in scrutinising the proposed legislation, is that legislation is not very good at making such distinctions and allowing for anything other than a one-size-fits-all approach. What assurance can you give the committee that, on this issue and on the other issues, the Scottish Government is alive to the real risks that are inherent in a one-size-fits-all approach for a sector that is as diverse as the Scottish HE sector?

Stephen White: It is a difficult question. If we think about why the bill is happening, the corollary is that there are risks in not making improvements because the governance arrangements are not ideal. Ailsa Heine might be able to address that question, because the bill provides the ability, through secondary legislation, to make different provision for different institutions.

Ailsa Heine: Yes, that would be possible, although not in relation to the composition of the governing body or the academic board, which has already been set out in the legislation. The powers to make regulation would mean that there is a possibility to make different provision for different purposes, which would apply in particular to section 1, on elected chairs, if that is to remain in the bill and be dealt with in regulation.

Stephen White: There is a point of debate and tension between those who say it is a one-size-fits-all approach and those who say that consistency, transparency and inclusivity are what is needed. The bill is not large, but several of its provisions are subject to quite a lot of discussion. The level of consistency relates to a limited number of matters. The matters that were not taken forward in the code, such as elected chairs and the composition of governing bodies as set out in the bill, link with what was in the original review report, to which the code also links. Therefore, there is not a great array of new standard features for the sector; rather, it is a focused series of measures in a focused bill.

Liam McArthur: To take an example from this morning, accountability, transparency and participation in the Royal Conservatoire of Scotland will look very different, one would imagine, than it would in institutions such as the University of Edinburgh or the University of Glasgow. For those of us scrutinising a bill that seeks to legislate for things that we all would hope would be a feature of our university governance, the real risk is the unintended consequences, if it works in 80 or 90 per cent of cases, but is wholly inappropriate for the rest. The real dilemma is how we come up with a piece of legislation that does not result in unintended consequences, or that results in fully anticipated consequences that are deemed to be a price worth paying for the effect that there will be on the majority.

We should legislate only when that is the only means to achieve the desired outcome, and we seek an assurance from the Scottish Government on that. Clearly that is just as much a matter for the cabinet secretary—if not more so—as it is for you as Government officials, but do you understand the position that we find ourselves in?

Stephen White: I take on board everything that you have said and I am sure that the cabinet secretary will also take that on board as the bill progresses.

Colin Beattie (Midlothian North and Musselburgh) (SNP): I would like to consider the roles of rectors. Various organisations have made submissions on the bill’s impact on rectors, but I am finding it difficult to get a sense of what a rector’s role is, because different bodies seem to have different job descriptions, for want of a better phrase. If the bill is passed, what exactly will be the role of a rector and of a chair? How will they complement each other?

Stephen White: That is a difficult question, because we are in the middle of what one might call a design discussion on how elected chairs will work, and the role of rectors is part of that. To answer that would mean jumping ahead and doing guesswork alone, as we are in an active discussion and I would not want to design something without taking everyone who we are talking to with us. However, I want to try to answer your question.

I cannot say today how it would work if there were to be two figures involved in the model. Rectors in different universities—we are talking about universities here, and not all higher education institutions are universities—have the legal right to preside in the university court. Ailsa Heine will correct me if I am wrong but, in general, in recent history, the chairing has been carried out by the vice-convener or senior governor and the presiding at court has gone alongside that. Certain
rectors may have had more of an active role and others a lesser role.

The cabinet secretary has been clear and has insisted that there is absolutely no intention to abolish the role of rector, which is a respected institution in Scottish and university life. However, we are still in dialogue on the exact interaction in future. In the cabinet secretary's letter to the committee, she outlined the aim of having clarity on that at stage 2. If I were to say something now, while there is still discussion going on with stakeholders, it would be based on my estimate.

12:45

Colin Beattie: The cabinet secretary acknowledged the concerns about the role of rector. She said:

"we will seek to minimise, and consider removal, of any features of the model selected that could impinge on the role of rector."

However, there is no single role of rector, because there are different models.

Stephen White: Sure. I do not want to second guess your question, but I think that I can answer it. The specific issue at the rub of this would be that of the legal right to preside and chair the court. That is the specific feature that the cabinet secretary was referring to. As far as I understand, the principal concern among rectors is about any alteration to that feature of the rector's role. The cabinet secretary is very alive to those views and would seek to address them.

That is actually in the bill. The bill had to accommodate that, depending on what the model would be. There is a consequential amendment in one of the schedules to say that, under a certain model, the role of rector would be modified. However, as you say, the cabinet secretary has made it clear that it is not at all the Government's intention to undermine the role of rectors or abolish that post.

Colin Beattie: Does that mean that the role of rectors will stay individual to the institutions that they are currently with? In other words, there will not be one single definition of what a rector does.

Stephen White: There will be rectors, in a statutory sense, only in the institutions that already have them. Elected chairs could use the term "rector", but there is no legislation for rectors in all HEIs. The roles will stay, subject to the dialogue on what the final elected chairs model is, but there is no Government intention to alter the role in each of the ancient universities and Dundee, where there are rectors.

Colin Beattie: So the differences will remain individual to the institutions in which there are rectors.

Stephen White: Yes. The governing instruments of the ancients and Dundee will not be altered, so there will be variety in what the rectors do. It is a complicated issue, but the way in which statutory elected chairs would operate is still the subject of dialogue. Until that concludes, we will not know exactly how the model will operate in practice. However, there is no intention and no likelihood that there will be any interference with the detailed description of rector in each ancient university.

Colin Beattie: So, on that basis, the rector could still, if it is permitted within the model in a particular university, opt to chair the governing body.

Stephen White: That is quite possible but, as I say, we are still in the middle of the dialogue to frame the model. Theoretically, the regulations could be used in future should the bill become an act, but that dialogue is very active at the moment with the aim to frame an amendment at stage 2 for the model.

Colin Beattie: I am obviously concerned about the potential for a conflict between the role of the chair and the role of the rector, in terms of the rector's right to chair the governing body.

Stephen White: Yes, and I think that they would need to be very clear on that. At the moment, the rectors have the right to preside at court, but they do not often substantively carry out the role of chair in all institutions.

Colin Beattie: But they could.

Stephen White: Statutorily, they have that right at the moment.

Colin Beattie: It looks like there is still quite a bit of work to be done there.

Stephen White: Yes—I would not underestimate the dialogue that still needs to be had.

Colin Beattie: Okay.

The Convener: Can I follow up on that, Mr White? I thought that I was following it until near the end there, when you kind of lost me. I am now confused. I know that we are still in discussion and I accept that the situation is not finalised. Excuse me if I have got this completely wrong but, if we have elected chairs, how can a rector retain the right to chair? How does that operate?

Stephen White: Without in any way wanting to appear to be evasive in answering the question, we are in dialogue and are looking at some of those design complexities. Rectors have been very clear and vocal about their concerns about any adjustment to their role as set out in statute. We are picking through these issues of great detail, and the issue that you raise is one of the
issues that we are looking at. We are talking to stakeholders and are confident that a solution can be found. We are not unaware of the challenge that you present, and we are working to address it.

**The Convener:** I am sure that you are. I included in my question the caveat that you are still working through the detail, but I will be fascinated to find out how you square that particular circle. I cannot see how a compromise can be reached between the right of a rector to chair and having an elected chair.

**Stephen White:** I take what you say and note it carefully. It would be fair to say that we will keep in close touch with the committee on the issue.

**The Convener:** We will be fascinated to find out what the compromise is.

**Stephen White:** Mention has been made of work that would ideally lead to a stage 2 amendment. Given the timescale for the bill, it would be important to have close dialogue with the committee in the lead-up to that.

**The Convener:** That would be welcome; thank you.

**Mary Scanlon:** Earlier, I asked a question about academic freedom. According to the policy memorandum, “The definition of academic freedom as expanded explicitly includes the freedom to develop and advance new ideas and innovative proposals.”

That is also mentioned in the explanatory notes. From the point of view of academic freedom and the freedom to express and bring forward new ideas, what will the bill do that is not happening already?

**Laura Duffy:** The bill seeks to clarify and strengthen the existing definition of academic freedom by being more explicit about what it includes.

**Mary Scanlon:** Could you be more explicit with me, then? There is no point in just telling me that the bill is more explicit. I would not have bothered asking the question if the bill had been explicit. Every higher education institution thinks that it is not explicit, and they are far smarter than I am. I am sorry, convener, but I find it quite insulting to be told that the bill is explicit. I am looking for an answer. What will happen as a result of the bill that does not happen now?

**The Convener:** Mary, you are quite right to challenge the response that was given, because—

**Mary Scanlon:** I would like an answer.

**The Convener:** Absolutely. I think that we should get an answer to the question about—

**Mary Scanlon:** I want to try and understand what the bill does.

**The Convener:** Yes, Mary—I am trying to be of assistance to you.

**Mary Scanlon:** Thank you.

**The Convener:** It is not a clear answer to say what has just been said but, at the same time, I would prefer it if you did not use some of the language that you have just used. I ask you to be a little bit cautious with your language. I would prefer it if you were not so challenging in some of your language to the witnesses.

**Mary Scanlon:** If I could just get an answer, that would be fine.

**The Convener:** That is what I am trying to get.

**Stephen White:** To go back to the question, I do not think that anyone would claim that the modest adjustment that is proposed is a huge advancement. I think that Mary Senior from the UCU said that it was a welcome enhancement.

There are two things that the bill does. Apart from the expansion of academic freedom to explore new ideas and to modernise things, there is a change—the comments on which we have read—whereby institutions must seek to aim to uphold academic freedom. I think that, previously, they had to aim to aspire to uphold it—that is paraphrasing. The bill provides for a strengthening of the duty on the institution to uphold academic freedom, and that has been welcomed by academics and others.

We are not talking about a quantum leap; it is a modest adjustment to the existing 2005 statutory definition. In addition, there is a slight strengthening of the expectation on the institution to uphold the academic freedom of its staff.

**Mary Scanlon:** Could you give me examples of higher education institutions in Scotland that have not been upholding academic freedom? I am struggling to understand why the modest enhancement is necessary. I know what your modest enhancement solution is, but I am not sure what the problem is.

**Stephen White:** I think that the committee’s letter to the cabinet secretary, which she answered, asked whether we had any cases and we said, “No, we can’t cite any individual specific cases.” However, the change to the law is not to address lots of unpleasant situations and strife in universities; it is just to make that modernised statement, influenced by the von Prondzynski review and what has been looked at in Ireland, which I think someone mentioned earlier. I would not claim that it is a quantum leap, but the important thing—and some of the institutions do not favour it at all—is to have the institution more
in the place of actively protecting and supporting academic freedom. Although it might not be important to some stakeholders, it seems to be quite important to quite a few.

Liz Smith: When international bodies and other institutions look at Scotland, they see our institutions as being at the absolute cutting edge of knowledge exchange, research and all kinds of developments in education; they see us as first class, which is reflected in the league tables. Why do we need legislation to allow universities to have new ideas?

Stephen White: The specific academic freedom is about the freedom for academics to express their new ideas. This is a protection of their academic freedom. It is not so much about the universities’ reputation; it is to protect the individual academic’s ability to expand—

Liz Smith: If it is not about academic reputation, what on earth is it about?

Stephen White: I think that it is about the protection of the individual academic. That part of the bill is not about advancing the corporate image of institutions; it is for a specific and different purpose. This is not answering the question that you have asked me, but I do not think that the provision will damage that image. It is a very modest advancement of the existing statutory description.

Liz Smith: Mrs Scanlon has just quoted to you the suggestion that there is something that needs to be done to enhance new ideas to do something a little bit differently. What is it that we need to do that we are not doing already?

Stephen White: That is a huge strategic question about the future direction of universities.

Liz Smith: It is at the heart of the bill, Mr White.

Stephen White: If I have picked up your question right, you are asking what are the new ideas that will further that success. That is a slightly different topic from what is in the bill. To be fair—and I am not trying to be evasive at all—you think that the bill jeopardises future success. You are asking me what are the new ideas about advancing the higher education sector in a global sense, which I think is a different subject.

Liz Smith: Let us turn it around a little bit in that case. What is it in the current system that in some way prevents universities from doing what they would like to do to be at the cutting edge? What is wrong with the way in which we govern our universities that prevents certain things from happening to allow us to flourish even more than we are doing now?

Stephen White: Is that just through the prism of the academic freedom provisions?

Liz Smith: Correct.

Stephen White: I do not think there is anything stopping universities; the provision is about protecting the academic freedom of the individual academic in their work. It is individual focused, rather than institution focused, except in the sense that the institution must uphold the academic freedom of all the relevant persons that the bill sets out. This does not need to be said, but the Government is very appreciative of Scotland’s excellent universities and often takes the opportunity to say it.

Liam McArthur: I am struggling to understand why we are being asked to put into legislation a protection of a freedom that does not appear to be under threat. As I said in relation to another bill that we are scrutinising at the moment, it just seems to be a solution searching for a problem.

Ailsa Heine: It is not a new provision in relation to academic freedom; it is amending a current provision in the Further and Higher Education (Scotland) Act 2005.

Liam McArthur: Okay. The 2005 act very properly sets out academic freedom and how it needs to be protected and safeguarded in our universities and colleges. I do not think that any of us has a problem with what is currently on the statute book. The issue is that we are being asked to put into further legislation a protection of a freedom when nobody can point to the immediate threat to that freedom.

Stephen White: What is in legislation is always a question for ministers, but the consultation threw up support for the provision or neutral views on it. That is set against some of the provisions that attracted support, very few neutral views or strong opposition. The stakeholder evidence that we gathered generally supported a modest expansion of the existing statutory definition of academic freedom. As I said in response to an earlier question, there is no quantum leap or radical reworking of the definition, and no one would claim that there is.

13:00

The Convener: The Scottish Council of Jewish Communities submitted evidence to us. You might be aware that incidents have been reported of mistreatment of Jewish students and academics. The council expressed concern about widening the statutory definition of academic freedom

“while not also imposing equivalent statutory responsibilities to protect those who may suffer detriment from careless or malicious use of that freedom.”

In other words, there is a duty of care to students in HEIs. What account has been taken of such incidents in your consideration of the changes that
you are proposing to the definition of academic freedom?

Stephen White: Are specific incidents indicated?

The Convener: Are you unaware of the incidents?

Stephen White: I am not aware of them in the context of a submission of evidence on the bill.

The Convener: It was the submission from the Scottish Council of Jewish Communities.

Stephen White: A very large number of submissions was received and we are still working our way through them. However, you have raised a serious issue, which will be taken seriously.

As I think the letter to the committee outlined, academic freedom does not give a person immunity from the criminal law. Institutions’ duty of care and law enforcement override academic freedom when it strays into criminal activity; there is no free pass to break the equality laws, obscenity laws or whatever. I am not a lawyer, so Ailsa Heine might expand on that.

Our team is working on the written submissions, and I must be honest and say that I have not yet got to the one that you quoted. It sounds like we should scrutinise it very carefully, as it raises an extremely serious issue.

The Convener: Does Ailsa Heine want to add anything?

Ailsa Heine: As Stephen White said, academic freedom is not a free pass to do anything that we want; it is subject to legal sanctions.

The Convener: I am sure that, when Mr White gets the chance to read the submission—

Stephen White: I can say sincerely that that is a priority. It is just that we have had rather a large volume of submissions to go through.

The Convener: As have we.

Thank you for coming along this morning.
Higher Education Governance (Scotland) Bill: Stage 1

10:04

The Convener: Agenda item 2 is our final evidence-taking session on the Higher Education Governance (Scotland) Bill. I welcome to the meeting Angela Constance, the Cabinet Secretary for Education and Lifelong Learning, and her accompanying officials. Good morning to you all.

I believe that the cabinet secretary wishes to make a few remarks.

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): Good morning, convener and colleagues. I am very happy to appear before the committee this morning to discuss the bill.

The Scottish Government values our higher education institutions, and because of our faith in them and what they deliver, we are as a Government again investing more than £1 billion in the sector this year. In a nutshell, the Scottish Government wants this bill to enable more modern, inclusive and transparent governance. Informed by the recommendations in the 2012 review of good higher education governance in Scotland, we are of the view that elected chairs, modernised governing bodies and academic boards and enhancement of the definition of “academic freedom” can help deliver that vision. I reassure members that I have listened and continue to listen to the views of the committee and, indeed, all stakeholders on the bill, and we are also scrutinising the substantial amount of evidence that has been presented to this committee and other committees that are considering the bill.

Before I talk about some of the bill’s provisions, I want to restate some points that I made in Parliament a few weeks ago. First, the Scottish Government does not seek to advance ministerial control of our institutions. Secondly, we are of the view that the bill does not add to any existing risk of reclassification by the Office for National Statistics of Scottish higher education institutions as public sector bodies, and I have written to the Finance Committee to that effect. Thirdly, further reclassification is an outcome that the Scottish Government would never want to realise. Finally, the Scottish Government has no intention of abolishing the post of rector.

Turning to some key provisions in the bill, I make it very clear that the Government supports the principle of elected chairs to higher education governing bodies. At this stage, though, I remain open-minded on how elected chairs will work in
practice and welcome any and all good ideas that will help us arrive at the best model for good modern governance. My overarching aim is to ensure that access to the position of elected chair is available to the widest possible pool of suitably qualified and skilled people. Over the summer, we started to talk to all stakeholders about a model for elected chairs; that active dialogue continues, and the Scottish Government is happy to keep the committee updated on those discussions. My aim is, where possible, to reach consensus through a continued dialogue with stakeholders, and I hope that, rather than simply lay down the Government’s position, we might be able to co-produce solutions to some of the issues that were highlighted in the earlier consultation and on which a range of views was set out.

Generally, as we begin to plan for stage 2 of the bill’s parliamentary consideration, we continue to examine all the constructive ideas and suggestions that the relevant committees of the Parliament and stakeholders have put to us. As I have already indicated to Parliament, I am open-minded about amendments and I am willing, for example, to examine sections 8 and 13 further.

I am delighted to take members’ questions.

The Convener: Thank you very much, cabinet secretary. We will go straight to questions, and I will begin with Chic Brodie.

Chic Brodie (South Scotland) (SNP): Good morning, cabinet secretary. I find it very encouraging that, after our earlier debate on the matter, you are trying to reach consensus with stakeholders. How many university principals—not necessarily leaders of trade unions—did you and your officials meet prior to this stage?

Angela Constance: Obviously, I have on-going engagement with the higher education sector—

Chic Brodie: But my question is specifically with regard to the bill.

Angela Constance: With regard to the bill, I have certainly been party to two round-table discussions. In between those discussions, I have met other individuals, including current and former rectors, and my officials have carried out a range of engagements with a variety of stakeholders, whether they be principals, trade union representatives or student organisations. The engagement that I and my officials are carrying out is on-going.

Chic Brodie: We have the policy memorandum and the other accompanying documents, but how will the bill improve governance? What deficiencies in the governance of the universities and higher education have there been in the past? Can you give us some examples?

Angela Constance: The premise that I am starting from is not the premise that there is a deficit. I am not for a minute saying that governance in our university sector is poor, but I believe that it can be better. As part of the von Prondzynski review in 2012, a range of evidence was gathered, some of which articulated the concerns of some stakeholders. I know that the committee has heard from the National Union of Students Scotland and the University and College Union Scotland. I think that the UCU put it quite well when it spoke about the lack of connectivity that can sometimes exist in any institution between staff, trade union members and management.

However, I repeat that, for me, the bill is about continuous improvement. I think that we are quite right to expect the highest standards of governance. Overall, our universities are excellent. In return for the £1 billion-worth of investment that this Government has continued to put in every year, it is right that we expect the highest standards of governance.

The bill makes proposals in discrete areas that I and the Government believe will lead to improvements. The bill is about how we can continue to evolve university governance so that it reaches the very highest standards to ensure that all voices in the university community are heard.

Chic Brodie: I understand that, but you have just made the point that our universities are excellent and of the highest standard. That is why I am struggling to understand what needs to be improved. I know that you have talked to the UCU, but how many of the principals have you talked to?

Angela Constance: I would have to go away and add that up. I have probably met most of the principals in Scotland, either in the specific context of the bill or as part of the Government’s broader engagement.

Chic Brodie: I asked what deficiencies there have been in an effort to understand why the Government is legislating. If we are to change the system, surely we need to know what needs to be improved. That is why I asked about deficiencies. Our universities are excellent—we know that many of them sit in the top 200 universities in the world. I understand the desire for more democratisation, which we support, but the bill includes some fundamental proposals that might be challenged.

I will play devil’s advocate. What will happen if there is no improvement or, worse still, there is a diminution of performance? How will we recover from that?

Angela Constance: In relation to the first part of your question, just because an institution is good, that does not mean that it cannot continue to evolve and improve its governance. Bearing in
mind that our universities are good and world leading, we are right to expect them to be exemplars when it comes to governance. A body of work, led by Professor von Prondzynski, was completed in 2012. The bill aims to reflect the evidence that was gathered in that review and to implement the review’s recommendations, particularly as some of them have not been followed through in the sector’s code of good governance.

I suppose that, ultimately, we are striving for greater participation in decision making from within the institution. I fail to see how that can be a negative and how it cannot take any institution or, indeed, the sector forward. We know that good governance, in essence, has to include a range of skills and a diversity of people and that, where an organisation or institution includes all the voices and interests in the area, that enriches transparency and accountability and, at a fundamental level, enriches the decision-making process.

10:15

Chic Brodie: I accept that participation in decision making and democratisation is fine but, at the end of the day, somebody has to make decisions. We will come to that later.

On the basis that we cannot define what deficiencies there have been, how do you propose to measure outcomes that will indicate that we are improving?

Angela Constance: Some stakeholders have defined what some of the deficiencies have been. Certainly, the von Prondzynski review gathered a range of evidence and views from different stakeholders regarding concerns.

With regard to how we monitor how the von Prondzynski review, as articulated in the bill, is implemented and the impact that it has, we would want to do that working hand in glove with all stakeholders and with the sector as a whole. There is a university sector advisory board, which is currently reviewing its function. That board could have a renewed focus on governance, monitoring impact and measuring success and progress.

Chic Brodie: What kind of measures would be used to determine improvements that have taken place in a university because of a change of governance?

Angela Constance: It is more of a qualitative process than a quantitative, binary process. Again, we would want to come to an agreement with the stakeholders about the best way to measure progress, as opposed to forming a view ourselves about how we measure progress. We would not want to do that in splendid isolation.

Chic Brodie: I understand that, but it would be unusual not to have some quantitative measures of outcome improvement.

Angela Constance: There could be an outcome improvement plan.

Mary Scanlon (Highlands and Islands) (Con): I was pleased to hear in the recent debate on the issue in the Parliament that, where there is scope to alleviate concerns, the Government will listen. My party would welcome that.

The bill might have been received with delight by Professor von Prondzynski, but no one else in the university sector seems to think that it will be hugely beneficial. The bill has been described as a solution looking for a problem. When Chic Brodie asked about what deficiencies there are in the sector, you talked about the lack of connectivity that can sometimes exist. That seems a bit nebulous. It is strange to bring forward a huge piece of legislation to deal with something that might sometimes exist.

Can you talk about the review of the code of higher education governance? It seems to me that progress is being made with that. It represents an excellent example of the Government working well with universities rather than being on a collision course with them. Further, my understanding is that a huge amount of progress has been made in the process of implementing that code. For example, in the past year, 42 per cent of those who have been appointed to the boards have been women. Why should we bring forward legislation when the code of higher education governance seems to be working more constructively than the legislation will?

Angela Constance: The first point is that there is a wider university community that is broader than principals and managers of the sector. My experience from engagement with a range of stakeholders, including principals and chairs of court, is that, although some people are opposed to the bill in its entirety, there are many shades of opinion out there. I repeat that, as a Government, we will work hard to build consensus whenever and wherever that is possible.

Mrs Scanlon is right that progress has been made with the code—I would never demur from that. Not all aspects of the von Prondzynski review are reflected in the code. That review looked at a range of evidence on issues in and around governance, from Scotland, the United Kingdom, Europe and beyond.

We have to ask ourselves how we ensure that progress is on-going and how it will be anchored for the future. Although the bill is discrete in its elements and the changes that it seeks to make, it is very much about ensuring that governance can evolve to the highest of standards to ensure that
the sector is operating to the highest standards that we would expect in 21st century Scotland.

Mary Scanlon: Many of our universities have been around for over 600 years and we are all justly proud that Scotland’s universities rank among the best in the world. You will have seen the evidence from people such as David Ross and Jocelyn Bell Burnell. As parliamentarians, we cannot ignore such academics, and they are concerned about the impact of the bill on governance and on the reputation of our universities here and abroad.

I cannot understand it when you talk about future proofing—I think that we are all still struggling with that. Chic Brodie asked whether the bill is going to be beneficial, what identified problems it will address and, if the bill is passed—as is likely given the Scottish National Party majority—what will be the measures of the future improvements and benefits. I am a member of the Public Audit Committee, which is looking at things such as remuneration committees, but the bill is silent on how the work on behalf of the governing body will be taken forward.

If no progress was being made at all and if the universities were not engaging with the Government, I would almost see a justification for the bill. However, tremendous progress has been made over the years and there is a good working relationship. That is actually being damaged by this punitive, unnecessary and counterproductive bill. We are all struggling to understand why heavy-handed legislation is necessary when good work is on-going across the sector, including an annual review of governance.

Angela Constance: I question an approach that says, “We are good, so leave us alone—there is no room for further improvement.” The whole essence of striving for the highest of standards and for excellence is the notion of continuous improvement. What I am saying on behalf of the Government is not that universities are starting from a poor base—far from it—but that there is room for improvement. Surely that is in keeping with the very highest of standards. We acknowledge the progress that has been made through the code, but the code was devised and pulled together by senior people in the sector and it did not, in its genesis, include students, staff or trade unionists. I suppose that I would question that aspect of the culture. Surely it should be the norm for all the stakeholders to work together in social partnerships.

The bill is a discrete bill with some discrete measures. It is certainly not looking at overhauling all aspects of university governance. Mrs Scanlon is right that, as parliamentarians, we should listen to all views, including the views of eminent academics such as those whom she mentioned, but we also have a responsibility to listen to other academics, and I certainly get correspondence from a range of academics. They may not be as high profile as Jocelyn Bell Burnell or Mr Ross, but there is a range of views out there in the academic community, and parliamentarians have a responsibility to listen to all stakeholders.

We should bear it in mind that the stage 1 report has not yet been produced and that I have already indicated to Mr Brodie that we can, in collaboration with all parts of the sector, consider what would be a meaningful way to measure progress. On the point about remuneration, the newly reformed or constituted university court will look at remuneration through that prism of more diverse voices around the table of the governing body, which will make decisions on remuneration.

Mary Scanlon: The committee was careful in inviting academics to a round-table session. We had a wide range of academics, from bodies such as the Royal Conservatoire of Scotland to the University of Edinburgh and from small and large universities, and not one of them was in favour of the bill.

Angela Constance: I am not disputing the process that the committee went through—

Mary Scanlon: I am looking for the evidence—

Angela Constance: Up in my office, I have hundreds and hundreds of postcards from members of the UCU calling on the Government to enact the bill. It is fair to acknowledge, as I do, that there is a range of views, including a range of views from within the academic community.

Gordon MacDonald (Edinburgh Pentlands) (SNP): I have a quick question on a specific point, on which I am looking for clarification. When I met representatives of one of the universities last week, they raised a question about elected student representatives. I was informed that, under the bill as it stands, elected student representatives—the student president and vice-president—are not eligible to serve on the university court because, technically, they are not students because they are on sabbatical. Is that understanding of the bill correct? If so, do you intend to address that and remove the anomaly?

Angela Constance: What you describe would most certainly not be our intention, given that the policy documents on student representation on the governing body state that one of the representatives has to be the president of the students association, and that one of the two student members is to be a woman. We will go back and examine that carefully, but it is not our intention to exclude those people from serving on a university court. If there is some unintended consequence of the drafting, we would be willing to rectify that.
Gordon MacDonald: Thank you.

The Convener: We move on to ONS reclassification, on which Gordon MacDonald also has questions.

Gordon MacDonald: I want to ask about the potential risks of ONS reclassification. In your opening remarks, cabinet secretary, you said that do not seek to advance ministerial control or bring reclassification into being. In your view, is there anything in the bill that requires autonomous institutions to ask the Government for permission to conduct their business?

10:30

Angela Constance: No, there is not.

Gordon MacDonald: How confident are you that the provisions in the bill comply with the current indicators of Government control that are set out in the ONS’s existing classification?

Angela Constance: Considerations regarding ONS reclassification have been absolutely central to the work that has gone on around the bill, and we considered ONS reclassification prior to the bill’s introduction. I was asked to provide a summary of our work on the matter to the Finance Committee, and the letter that I sent to that committee shows the consideration that the Government has given to each of the indicators of Government control. We have looked closely at the “European system of accounts: ESA 2010” guidance, which contains various indicators of Government control. We have looked through all those indicators and we are confident that the bill complies with them.

Gordon MacDonald: On the Scottish ministers’ powers to make regulations, can you say something about what future proofing means? Judging by past experience, how often are changes to the composition of governing bodies and academic boards likely to be required?

Angela Constance: On future proofing, the intention is that, where modest changes are required—perhaps at the request of the sector—we will have a mechanism for making them without requiring primary legislation. In the debate that took place in Parliament a few weeks ago, I indicated a willingness to look again at what is and is not required to achieve the bill’s purpose. The sections that we are discussing are routine. Most legislation contains some facility to amend the legislation in the future, and the provisions are not designed to allow radical changes to be made to the bill, once enacted. How often have ministers had to return to Parliament to make use of such provisions? It is not something that I have yet been required to do. Perhaps my officials can give an overview from their knowledge of when that has occurred in the past.

Ailsa Heine (Scottish Government): It is difficult to generalise, because it depends on the piece of legislation. In some legislation, the provisions might be used more, whereas in other legislation, they might almost never be used. Other pieces of legislation that apply to the further and higher education sector include the Further and Higher Education (Scotland) Act 2005 and the Further and Higher Education (Scotland) Act 1992. The 1992 act contained powers to change the composition of college boards. They were amended in 2013 but, prior to that, they had never been used to change the composition of the boards or the constitutions of colleges. It is difficult to give a general answer.

The other point that is worth making is that, generally, such powers would not be used to make radical changes that went against the grain of the original legislation because that would give rise to the question whether such changes would be within the scope of the powers. We would hesitate to use the powers in that way because it would be unlikely to be within their scope to do the opposite of what the existing legislation did.

Gordon MacDonald: In your opening remarks, cabinet secretary, you said that you never want to realise a situation in which ONS reclassification takes place. However, if the ONS itself identifies that reclassification is a real possibility, what steps can the Government take to ensure that that does not happen?

Angela Constance: I will ask officials to talk through that process from a more technical standpoint but, obviously, the premise of my argument as a minister is that there is nothing in the bill that increases the risk of ONS reclassification.

As I said, the Government would always seek to avoid ONS reclassification because, although it would not happen overnight, if it occurred—and I do not accept that it would occur as a result of the bill—implications would flow from that. We have a broader relationship and engagement with the ONS.

I ask Stephen White to say something on the more technical aspects.

Stephen White (Scottish Government): My legal colleague might have a perspective to give but, from a policy point of view, the cabinet secretary has covered the issue. There is no intention at all to have a reclassification event happen. If it did, we would immediately set in train the process of considering how to remove the legislation or not implement or commence the parts of it that had been cited.
Ailsa Heine might have a perspective on the technical or operational moves behind that.

**Ailsa Heine:** After the reclassification of colleges in England, the Government introduced legislation to reverse it. Time would be given to implement any reclassification decision, in which case legislation could be introduced in Scotland to ensure that the universities were not reclassified. That would involve dialogue with the ONS to work out where the issues were and what its concerns were in relation to the government controls that it saw as leading to reclassification. The whole suite of legislation applying to universities would then have to be considered—not just the bill but the existing legislation.

**Gordon MacDonald:** Thanks very much.

**Mark Griffin (Central Scotland) (Lab):** Cabinet secretary, you said that you do not think that the bill presents any risk of reclassification but officials have told us that they believe that there is a risk, albeit a low one. Has the Government done any work or taken any legal advice that has resulted in that change of rhetoric or stance from our being told that there was a low risk of reclassification to our being told that there was no risk?

**Angela Constance:** I think that I said that there is no increased or additional risk as a result of the bill. Officials can speak about the on-going issues around ONS reclassification, but I stress that there has been no change in rhetoric at all.

**Mark Griffin:** We heard from officials that there is a low risk of reclassification as a result of the bill, so there seems to be a change in rhetoric. It would be helpful if that could be clarified.

**Stephen White:** I think that that dialogue with me and other colleagues might have been at the Finance Committee—we will maybe go back and look at the *Official Report* of that meeting.

There exists a risk that could be assessed without the bill. Someone might mention the advice that Universities Scotland has had from Anderson Strathern, which maps out a lot of the current features of the system that could be part of a risk assessment. Therefore, at the moment, we cannot say that there is absolutely no risk of reclassification without the bill. The Government’s opinion is that the bill does not create additional risk. We will examine the *Official Reports* of this meeting and of the Finance Committee meeting and we will get back to the committee if there is any inconsistency between what I am saying now and what was said at the Finance Committee.

**Mark Griffin:** Thank you.

The review of the status of higher education institutions by the ONS covers English and Welsh institutions. Has the ONS been in touch to clarify whether that review will cover Scottish higher education institutions under the existing provisions?

**Angela Constance:** I am not aware that the ONS has been in touch with the Scottish Government about that. Sharon Fairweather might want to speak about our broader relationship with the ONS.

**Sharon Fairweather (Scottish Government):** It has certainly not been in touch with us about the classification work that it will do next year with regard to English and Welsh institutions.

**Mark Griffin:** Okay. Universities Scotland wrote to you on 29 October, cabinet secretary. Have you had time to respond to that letter?

**Angela Constance:** We are currently working through our response. I have seen the letter.

**Mark Griffin:** Okay. I think that it is fair to say that some of the comments in the letter criticise the Government’s approach. One of them is:

“The Scottish Government’s risk assessment in relation to ONS reclassification appears, from the content of the letter dated 5 October 2015 from the Cabinet Secretary to the Convener of the Finance Committee, to have completely overlooked the 5 specific indicators of control for non-profit institutions (such as HEIs) contained in paragraph 2.39 of ESA 2010”.

You said that you are working through your response to the letter, but can you comment on that particular criticism?

**Angela Constance:** In broad terms, officials have considered carefully and closely all the guidance that ONS and the Treasury produce on the matter. As I said, we are looking closely at the detail of Universities Scotland’s latest letter, and of course we will respond in detail to the specific points in it. That information will be shared with the committee.

**Mark Griffin:** Okay. Thank you.

**John Pentland (Motherwell and Wishaw) (Lab):** Stephen White said that there is no risk, or minimal risk, of reclassification, and in the letter to the Finance Committee, you summarise an analysis of that position. Is it possible for that analysis to be published and given to the committee, along with, perhaps, any legal advice that has been given?

**Angela Constance:** The Government always wants to be as helpful and forthcoming as possible. The Finance Committee initially asked for a summary of our work, and it has asked the Government for further information before the stage 1 vote. Given that we have received some detailed remarks from Universities Scotland and other stakeholders, we have an opportunity to cover in a future response to the Finance Committee some of the broader issues and some of the concerns that Universities Scotland has
raised. We will of course share that with this committee.

Liz Smith (Mid Scotland and Fife) (Con): Good morning, cabinet secretary.

Section 8 allows ministers to modify
“the categories of membership”
of governing bodies and
“the number of persons to be appointed”.
Can you confirm that?

Angela Constance: Yes.

Liz Smith: Thank you. Can you also confirm that the Government did not consult on that section?

Angela Constance: Yes. That is correct. The Government consulted on its proposals for legislation. The sections that relate to regulation and enabling powers were included in the bill as introduced and, obviously, part of this stage 1 process is to allow scrutiny of and feedback on those provisions. The Government consulted on policy as opposed to a draft bill.

Liz Smith: I will probe that point further. Can you explain the difference between your comments in the chamber on 28 October, which you repeated this morning, and the comments that officials made to the committee on 6 October? You said that you are “crystal clear” that

“the Scottish Government does not seek to advance ministerial control of our higher education institutions”.—[Official Report, 28 October 2015; c 39.]

I have the Official Report of our meeting of 6 October here, and officials confirmed to the committee that the bill adds a power for ministers. That is a contradiction.

10:45

Angela Constance: But the bill does not seek to give ministers any new powers over the appointment of chairs or of members of governing bodies or committees.

Liz Smith: It is not about the names of the people; it is about the power. On 6 October, your officials confirmed that the bill increases that power. That is where the concern comes in about the potential for ONS reclassification. As you know given your previous comments, there are certain criteria in relation to possible ONS reclassification. If section 8 increases ministerial power, the ONS will have to consider reclassifying universities as public bodies as a result. Do you accept that that is the reason for the concern and the reason for the letter that you received from Universities Scotland, which does not feel that the Government has taken evidence on the matter?

Angela Constance: I do not share the concerns that have been articulated by Universities Scotland and others. Nevertheless, the Government and I are willing to consider in detail concerns that are articulated by others and to attempt to address them. The bill seeks to provide a governance framework. It is worth bearing in mind that, for the ancient universities, membership of the court is set out in legislation that goes back to 1966. We are not seeking to do anything that is out of the ordinary or unusual.

Stephen White might want to add something from a policy perspective.

Stephen White: Some of my comments are in the Official Report of that meeting. The indicators of control and the guidance focus clearly on the appointment, removal and approval of individuals—I think that that point came up during that meeting. Whether there is a power is a slightly different point. Section 8 concerns a power—that is the word that is used in the bill. However, the issue is to do with whether that power advances control—it is about process: the why, not the who.

The idea that the provision contains a power and that it provides something new to Scottish ministers cannot be denied.

Liz Smith: That is my point, Mr White. The cabinet secretary has just confirmed that the Scottish Government did not consult on sections 8 and 13. You argue that you do not accept the concerns of Universities Scotland, but I am not sure how you can argue that if you do not have the evidence to rebut those concerns. Universities Scotland is extremely clear about the fact that it has gone to a great deal of trouble to ensure that it is well briefed on the matter, and I believe that it has consulted officials. Where is the evidence that leads you to say that you do not accept its concerns?

Stephen White: The evidence is contained in the letter that the cabinet secretary sent to the Finance Committee. She said earlier that we will consider the request from the Finance Committee for additional analysis before the stage 1 debate. That analysis was the evidence, and there will be more.

On sections 8 and 13, it has been said many times that they are future-proofing and housekeeping sections. That was very much the intention behind the sections. Of course I respect Universities Scotland’s view that the sections do substantially more than that. Further, the cabinet secretary has been clear that the Government is listening closely to all the evidence that is presented specifically on these matters.
Liz Smith: When there was a possibility that the ONS might reclassify the Aberdeen western peripheral route project, Mr Swinney took five different pieces of evidence into account. Why has the Scottish Government not done something similar in relation to this huge issue that concerns our universities, which, as has been said this morning, are a most successful part of our education system?

Angela Constance: This is a statistical classification issue as opposed to a legal issue. I hope that I have been clear with the committee that officials have examined carefully all the guidance that is available from the ONS and the Treasury on the area. In considering that, we have looked at all relevant areas of Government, not just education, and we have used the expertise of other parts of Government that have been exposed to such issues.

It is important to say that it would not be the norm to consult on routine housekeeping sections when we consult on the policy intent of our legislative proposals. The value of the stage 1 process in the Parliament is that people can scrutinise the absolute detail of the bill.

Sharon Fairweather wants to add to that.

Sharon Fairweather: The cabinet secretary is right. We have learned a lot about the subject as a result of the work that has been undertaken on the Aberdeen western peripheral route, and that learning has been applied to the bill.

Liz Smith: All stakeholders—students, staff, academics and business—are concerned about ministerial control and ONS reclassification, just as the Scottish Government claims it is. Would it not be sensible to remove sections 8 and 13 to take out any risk?

Angela Constance: We are actively considering whether to amend or remove those provisions. I was clear in Parliament that we were giving open-minded and careful consideration to those matters.

George Adam (Paisley) (SNP): Good morning, cabinet secretary. Correct me if I misquote you, but you said in your opening statement that you were open-minded about amendments and willing to look at sections 8 and 13. Is that to allay the fears of some of the sector?

Angela Constance: At risk of repeating myself—

George Adam: Sometimes it is good to say things more than once in the committee.

Angela Constance: I have already made it plain that we will consider amendment or removal.

Colin Beattie (Midlothian North and Musselburgh) (SNP): Cabinet secretary, I will ask about some comments that have been made about the appointment of the chair of the governing body. Several points have come out of the various discussions that we have had. One is that the universities are concerned that there should be a clear link between the governing body and the chair and that there would be real problems if the chair was appointed or elected by a group other than the governing body. Do you agree with that?

Angela Constance: No, I do not. When people are elected and appointed to positions, they have a responsibility that is based on the job that they are elected or appointed to do. As an MSP, I am elected by the good people of Almond Valley but, as a minister, I am subject to the ministerial code and have to respect the place and rights of Parliament.

I hope that I have not misunderstood your question, Mr Beattie. That is my instinctive response to it.

Colin Beattie: Who will the electorate for the chair be? The unions and some of the student groups argue for a wider electorate. How do you feel about that?

Angela Constance: The Scottish Government has a consistent position of being in favour the chairs of university courts being elected. The chair of the university court is the senior governor—they are sometimes called the vice-convener or convener—so we are clear that the position should be an elected one.

As I said in my opening remarks, we are still in close dialogue with stakeholders, individually and collectively, about the process of election. Mr Beattie is right to suggest that there is a range of views. On the one hand, some students and trade unions argue that the franchise should be every member of staff and every student, with no selection process about who is eligible to stand for election. On the other hand, other people within senior management in the sector argue that there needs to be a robust selection process and that the electorate should be the modernised university court.

As I said in my opening remarks, the Government remains open-minded. However, we are committed to the election of chairs, which would necessitate an election as opposed to an appointment. I am not closing down co-design with the sector, but bearing in mind that we are looking to elect the senior governor, it is important that that individual is able to take up the post. Sometimes, in rector elections, a student body might elect a rector who is not able to chair the court. It is the right of the student body to do so and I do not question that, but I am strongly of the
view that the senior governor needs to be able to take up their post as elected chair.

Colin Beattie: Another interesting point that was raised relates to the appointment process and the anticipation that it will be an open process, in which people will put their names forward before going through some sort of sifting or selection process. There was a feeling that that might dissuade some very competent candidates, particularly women, from standing.

Angela Constance: We have to be careful about lazy assumptions about women seeking promotion or standing for public office. The reasons why women do not necessarily put themselves forward are quite complex.

As it stands, the description in the bill is of regulations that will enable an open process that culminates in an election. As I said, I want to remove any ambiguity, work with the sector and co-design what should replace section 1 of the bill at stage 2. I am not pre-empting where we might get to in our discussions with the sector, but, for example, an open process could include an obligation to advertise the post in the press, some sort of criteria, as I suggested, about an individual being physically available to take up the post, and some sort of fit-and-proper-person test.

I want to ensure that we are able to consider a wide range of candidates and that we do not have an unduly narrow focus. There are various options in relation to advertising the position and encouraging a broader range of candidates to come forward.

Colin Beattie: Has the Scottish Government done any assessment of how many additional candidates might be expected to come forward, given that you have talked about hoping that a much wider range of candidates will present themselves?

Angela Constance: There are potential opportunities in relation to how any selection process might work and how positions are advertised or communicated to the wider world. However, it would be disingenuous to me to say that there is a piece of work that the Government can do to establish actuarially how many more candidates we will elicit by going through a particular process.

11:00

Colin Beattie: I would like you to comment on the remuneration of the board chair. There has been some criticism from Universities Scotland about the bill’s provision on remuneration, the detail of which is also left to regulation. How does the Scottish Government react to those criticisms?

Angela Constance: The intent of having a section in the bill on remuneration very much flowed from the von Prondzynski review. One of the review’s recommendations was that, if you seek to have a wider range of candidates, consideration has to be given to remuneration. In essence, the provision recognises that given the amount of time that an elected chair invests—chairs currently invest a substantial amount of time in the job that they do—remuneration is not unreasonable and, according to von Prondzynski, in many ways it is desirable if you are looking for a wide range of people.

As I have said with regard to other aspects of the bill in relation to regulation, we look very closely at what is in the bill, whether it is actually required and whether it is expressed in the best possible way.

Colin Beattie: I have one final, quick question. If the statute is to provide for remuneration of the chair, should that principle be extended to other members of the governing body or of relevant committees?

Angela Constance: I think that there is a distinction between the chair and other roles or people involved in the governing body or committees, given that it is a substantial role to chair a university court. It does not involve just chairing. People might chair a university court five or six times a year, but they will have many other duties as the senior governor with overall responsibility for good governance. For example, they are responsible for the performance appraisal of the principal.

The time that a chair has to invest is probably a day a week. I think that there is therefore a particular case to be made for the remuneration of the chair as opposed to other members of court or of committees. However, as I said earlier, Mr Beattie, we will look to see whether we have the detail right in the bill.

The Convener: The institutions already have the power to remunerate a chair if they so wish. Why did you feel it is necessary to put on the face of the bill, or even via regulations, that the Government will decide on the matter?

Angela Constance: The recommendation came from von Prondzynski in the context of considering what was good governance, but I am intimating to the committee that I remain open-minded about it. The principle that remuneration should be available is important. Whether it needs to be in legislation and whether it is articulated in the right way is another matter.

The Convener: Okay. We will have questions from Chic Brodie.
**Chic Brodie:** On the issue of electing a chair, it is already the situation that the rector is elected by the staff, students and wider electorate. On the basis of the conversations that you say that you have had with principals, would it not be sensible, rather than looking at the personalities in the election of a chair, to look at the whole operation of the university court and to consider the rector—this would have to apply to all universities—as the chair of the court for policy matters while a co-chair would be appointed by the governing body?

In my experience, external chairmen—or chairpersons—have great difficulties unless they can take the governing body with them on decisions. Would it be appropriate to change the bill so that the rector is the appointed chair of the court and there is a co-chair to deal with operational issues and oversee the role of the committees? Has that been, or will it be, considered? You have said that you are open to suggestions, cabinet secretary.

**Angela Constance:** I think that I understand what Mr Brodie is driving at, but we must be clear: the role of the senior governor is quite different in parts from the role of the senior governor/convener.

We are seeking to introduce elected chairs across all 18 institutions. The role exists just now where rectors are elected in the ancient universities, as those rectors have a right to chair court, whereas the rectors at the University of the Highlands and Islands and the University of Dundee do not have the same right.

As I have consistently indicated, the Government believes that there is value in having an elected chair in all institutions. I stress, however, that the role of rector is quite different from that of senior governor. A rector is ambassadorial and is of huge value in raising the sector’s profile. They can represent the views of staff and students—at the University of Edinburgh and other ancients, rectors are elected just by students, although they can be a point of contact for staff and students. A rector can be elected for broader symbolic political reasons or to act more as a working rector.

We should not forget that senior governor is a very powerful position. The senior governor has overall responsibility for leadership and good governance of the court, and for ensuring—as I intimated—that members work together. The senior governor is a critical friend of the principal and the senior team without getting involved in operational matters, and they ensure that the institution is well connected to other networks. They will often have an ex officio role on policy and resources committees and will make a significant contribution in areas such as remuneration. As I said earlier, senior governors are involved in performance appraisals for principals. Rectors do not have a role in overseeing governance.

**Chic Brodie:** I am not suggesting for one minute that they do—

**Angela Constance:** I know you are not, but—

**Chic Brodie:** The rectors should cover policy and chair the court on matters of policy, and there should be a co-chair who is not elected by the governing body.

Can you give me an example of where the chairman of a large association has been elected and that has been successful?

**Angela Constance:** I do not believe that universities should necessarily be compared with businesses. They—

**Chic Brodie:** I said “association”.

**Angela Constance:** Universities have many business-like considerations, but a university is an academic institution that is there for the good of its students. Universities are indeed a pillar of our economy and of wider society. Although there are some parallels with the world of business, I am not sure that a direct comparison is necessary.

**Chic Brodie:** I did not say that; I said “association”.

**Angela Constance:** It is important to recognise, in accordance with the von Prondzynski review, that the senior governor/convener and chair of court is a hugely powerful and influential position. The Government believes that it should be an elected position in order to reflect every voice on campus and the wider view of university life.

**The Convener:** Do you have a question on this issue, Mr Pentland?

**John Pentland:** Yes.

**The Convener:** Quickly, please.

**John Pentland:** Cabinet secretary, you will appreciate that the committee is trying to understand the role of the rector as opposed to that of the appointed chair. Scottish Government officials were previously unable to explain that point when the committee was trying to understand what the role should be. Perhaps the committee should ask the rectors along to talk about that at an evidence session.

**The Convener:** Sorry, John, but I have to interrupt you there. Excuse me, cabinet secretary. The committee discussed the matter and took a view on who it wanted to come along as witnesses. We decided that collectively.

**John Pentland:** Yes, but without going into detail, convener, I am of the opinion that we might...
have missed an opportunity to fully understand the view of the rectors.

Cabinet secretary, to go back to some of your answers to Chic Brodie, can you confirm that the relationship will come together and they will be able to deliver a service? Past rectors who have expressed concerns to the committee have said that they feel that their role might be diminished, and I have a concern—along with others, I am sure—that it will take quite a while for such a relationship to come together.

**Angela Constance:** I am on record in the press, in correspondence to the committee and in Parliament as saying that we have no intention of abolishing the role of rector and that I will seek to minimise or remove any impact on the traditional and valuable role of rector as it stands.

The first thing that we have to do, and we will have to do it in tandem, is the on-going work with all interested parties in the sector on the process of electing chairs. As part of that, we will consider the detail around rectors. There is, however, no desire to change the role of rector.

There are complexities to consider. Rectors in the ancients have a statutory right to chair court, and I have no desire to change that, but we need to look at how that function interacts with those of elected chairs across the sector. That is the sort of detail that we are in the midst of working out with all parties. As I have said, we are not abolishing rectors, and I wish to minimise or remove any unintended impact on their existing role.

**Liz Smith:** Cabinet secretary, you are on record as saying that you believe that diversity within the sector is one of the greatest assets of our universities. In relation to the point that we are just discussing and as a result of the bill, what might the governance model be in, for example, the Royal Conservatoire of Scotland, which is a small, highly specialist and very effective institution? At the committee’s round-table meeting, the conservatoire made the point that it fears that the size of the university court is 25 members, and that where it has representation currently, many of those eight roles are already filled, for example, two trade unionists, two members of staff, two students and two alumni. That is eight out of 25. The majority of institutions probably already have four of those eight roles—

**Liz Smith:** Yes, but my point is that the full impact of section 4 will be that existing members have to come off the governing councils. Are you comfortable with that?

**Angela Constance:** Yes, but we have said that the bill will be implemented over a period of four years. We are not in the business of cack-handedly removing existing members.

**Liz Smith:** I go back to the original issue, which is that the Government is insisting on having specific categories of people involved in the governance. It does not matter which side of the debate one is on, that is the aspect that is causing concern. There is a particular concern for institutions such as the Glasgow School of Art, Scotland’s Rural College and the Royal Conservatoire of Scotland, which are much smaller and require much more specialised input. The issue is whether one type of governance will meet the diversity of our institutions.

**Angela Constance:** Section 4 deals with eight members out of the 25 members in a university court, and the bill will be implemented over a period of time.

**George Adam:** On the back of those questions, I would like to ask about governing body representation. We have recently had a debate in the chamber on the issue and evidence has been given to the committee. One point that came through strongly from the NUS was that it feels that where it has representation currently, many of the decisions about remuneration and capital plans are made before its representatives get an opportunity to engage on those issues. How will opening up governance to more democratic representation and involving the NUS and trade
unions such as the UCU lead to better governance?

Angela Constance: I believe that members of staff, trade unionists and students are well capable of taking part and making a contribution to the big strategic decisions that a university governing body has to make. As with other parts of the bill, we are talking here about a wider range of voices in the decision making that takes place in institutions. On the point about better governance, by definition and outcome, that broader and more inclusive approach that includes all the voices on the campus can be only a good thing that is positive in helping the sector to move forward.

George Adam: To give what is purely my personal view, one positive that I see from the bill is that a diverse group who have the interests of the institution that they are part of at heart will be involved. Some institutions are almost saying that trade union groups might not have those interests at heart, but I do not believe that is the case. Personally, I believe that it is about collective responsibility and everybody working together to ensure that their institutions are the modern and inclusive institutions that we all want.

You said in your opening statement that you wanted a more modern and transparent form of governance. What is proposed might make the situation more difficult for universities to manage, but is not taking that next step a more modern way for us to work and to show that our universities can make the leap into the 21st century?

Angela Constance: I do not see diversity and the inclusion of representatives of staff, trade unions and students as being counterproductive to collective responsibility. The Government commissioned a body of work that I am familiar with from my previous portfolio involvement in the working together review, led by Jim Mather, the former Minister for Enterprise, Energy and Tourism, and Grahame Smith of the Scottish Trades Union Congress. It looked at the value of social partnership and of including voices in the context of the world of work, as we understand it.

Part of that body of evidence looked at examples such as NHS Lothian, whose board has a director of employee relations, who is the most senior person in the trade union in NHS Lothian. That person obviously has a role and a responsibility to represent the interests of the union’s members, but as director of employee relations he or she sits on the board of NHS Lothian and quite clearly has a responsibility for good governance and for the overall collegiality and collective responsibility of the board.

George Adam: Liz Smith mentioned the Royal Conservatoire of Scotland as an example of an institution that is small compared with the rest of the universities, as we all agree. The conservatoire does not have trade union representation on its board as such, so that is part of the difficulty for it if trade unions must be represented on boards. I do not know the inner workings of the Royal Conservatoire, but it seems to me that there might be a case for being more flexible about certain institutions that have a different make-up.

Angela Constance: That certainly sounds like an unusual situation, which we will examine closely. There are all sorts of differences and diversity from institution to institution; we do not demur from that fact, but we need to get the balance correct so that there is a level of consistency in some discrete areas of governance that we believe are fundamental, while recognising that the different institutions have different complexities in their make-up.

The Convener: I want to cover a couple of points. You said in response to George Adam’s first question that one of the reasons for the bill was to have a wider range of voices on the governing bodies of higher education institutions, but I am sure that you accept that all of the governing bodies currently have staff representatives on them and approximately 70 per cent of governing bodies currently have student representatives. I just wonder how you would define that wider range of voices, given that all the bodies have staff representatives and 70 per cent of them currently have student representatives.

Angela Constance: As I said in an earlier answer to either Mr Adam or Ms Smith, the majority of institutions would already have four out of the eight places that the bill seeks to implement, so we are not saying that institutions have not made progress or are not halfway there or, in some cases, almost there. However, it is important that the rights of staff, students and trade unions should be reflected in the bill and in the work that flowed from the von Prondzynski review.

The Convener: You have made clear your desire also to have union representatives on the governing bodies and, again following on from Mr Adam’s question, I want to ask about that. If a trade union or trade unions represent a relatively small number—less than half, perhaps, or a small minority—of staff, is it reasonable to have some other staff representative rather than somebody from a trade union?

Angela Constance: As it stands, the bill provides for both staff representation and trade union representation. We recognise that in different institutions a different proportion of the workforce will be unionised. We are talking about
two places for trade union members in a court of 25, representing both academic and non-academic staff.

Liz Smith: I have here a letter from a union representative at the Royal Conservatoire of Scotland, speaking on behalf of his members. He makes the point that one change that section 4 would make, by insisting on union representation on the board, is that other members of the board— who, I may say, are elected by staff—would no longer be on it. He points out that the expertise of those members is essential for the way in which the Royal Conservatoire operates. He is very clear that there is a very good relationship and that unions are very much involved in what goes on, and he makes the point that it would be preferable if there was not only one model of governance. The Royal Conservatoire’s model is working and unions are fully involved in the process; indeed, the principal made that comment when he came to the round table. As we come to the stage 1 debate, will you consider having different options and models of governance?

Angela Constance: There will be broader consideration of all the details as we move towards the stage 1 debate and stage 2 proceedings. Liz Smith makes the point that there are shades of opinion among all stakeholders. I can point to shades of opinion among senior managers and principals. Similarly, there are shades of opinion among trade union representatives and students. The Government is working hard to bring as much of that at times diverse range of opinions together, in an effort to co-design things and reach a position of consensus on a range of issues.

As I said, the bill will not be passed in Parliament one day and then be implemented the following day; there is a lengthy period of transition.

Mark Griffin: Why does the Government believe that the size of academic boards is a matter for Government intervention?

Angela Constance: It flows from the recommendation in the von Prondzynski review, which was that academic boards should be no larger than 120 people. The review recommended that students should make up a substantial proportion of academic boards, and we considered 10 per cent to be a substantial and reasonable proportion. Other people may have views on whether 10 per cent is exactly the right figure.

Mark Griffin: The committee asked the Government before why students were included specifically—you mentioned the 10 per cent figure—whereas staff and trade unions were not. The Government said that the effects of having an inclusive and fair governing body would permeate throughout the institution and that therefore “there is no need to stipulate that there must be union or alumni representation on the academic board”.

Why was 10 per cent student representation specified, given that statement and the fact that alumni and staff were not included?

Angela Constance: The quote that Mark Griffin read out would be our current position regarding academic boards on which, largely, academics are represented, but on which we have opted to include 10 per cent student representation in line with von Prondzynski. We did not feel that it was necessary to stipulate that trade unions or alumni should be represented on the academic boards, given that the university court is the main governing body where everybody is represented and that the range of voices that are included in the university court will flow through into other areas of university life, and we have not changed our position on that. Students, trade unions, alumni and staff are represented on the university court, but our position is still that the academic board is for academics and students.

11:30

Mark Griffin: We have heard concerns about the fact that the provisions relating to governing bodies cover a diverse range of institutions and about academic boards, in particular the 120-member threshold. How do you respond to concerns about the threshold, given the highly diverse nature of the sector? I am thinking in particular about the University of Edinburgh.

Angela Constance: Most institutions have an academic board of around 120. There are large institutions that have much larger academic boards. I think that the number on the University of Edinburgh’s board is bigger than the number of MPs in the House of Commons; it certainly has many more representatives than the Scottish Parliament.

The threshold flows from the von Prondzynski review, which received evidence on the size of academic boards and how, if a body was too large, it could lead to less-than-satisfactory arrangements. I cannot remember whether it was in the review’s report or in evidence that the committee received, but concerns were expressed about boards being dysfunctional due to their size.

Mark Griffin: How will the changes that the bill proposes ensure that academic boards perform effectively and are representative in their decision making? Where are the deficiencies that we seek to address?

Angela Constance: The implementation of all aspects of good governance will be for universities
in the sector to pursue. Overall, the bill aims to set a framework and to make some changes in discrete areas of university governance. As I said, we will undertake with all stakeholders in the sector detailed work on how that approach is implemented, monitored and evaluated and how we reflect on progress that is made post the bill.

**The Convener:** When officials came before the committee and talked about the size of academic boards, they said:

“The figure of 120 comes from the review”—that is the von Prondzynski review—"which is the substantive evidence base that largely inspired all the provisions in the bill.”

They also said:

“It would not have been arrived at willy-nilly; I imagine that it was subject to lots of cross-sectoral dialogue and that many opinions were taken.”—[Official Report, Education and Culture Committee, 6 October 2015; c 54.]

I cannot find the figure in the von Prondzynski report. It might be in an annex or some other evidence—let us call it unspecified evidence. Will you give us some detail on how we got from what the von Prondzynski report said—as I say, I do not know what the evidence is because I could not find it—to the provision in the bill that there should be a maximum of 120?

**Angela Constance:** My understanding of the von Prondzynski report is that the recommendation was that

“Overall, academic boards should not normally have more than 120 members.”

I can look to see whether that is in the body of the report, is in an annex or is, in fact, a recommendation, but perhaps Stephen White can cast some light on that just now.

**Stephen White:** I am certain that it is a recommendation. However, I do not think that the report contains a supporting rationale.

**The Convener:** That is what we are asking for.

**Stephen White:** The report, as published, does not feature all the workings for all the recommendations, but we can certainly take that up in detail and with the author.

**The Convener:** It is clear that the report did say that—I accept that—but I do not know why it said it. It is a statement without evidence. There may well be some evidence, but it would be helpful if we could find out what that is.

**Stephen White:** We can follow that up.

**The Convener:** Thank you.

**Liz Smith:** The von Prondzynski review also said that it heard unspecified evidence that

“points towards dysfunctionality where the membership of the board is too large.”

Where is the evidence for that dysfunctionality?

**Angela Constance:** We will pursue that as well, convener.

**The Convener:** I am grateful for that.

I turn your attention to a section of the bill that, because of other matters, has not received much attention yet, although it relates to the important issue of academic freedom. I asked questions on that in the recent debate in the Parliament and when officials came before the committee. I want to cover some general and specific points on the matter. A range of evidence was submitted to us about the redefinition of academic freedom. Will you talk us through why you thought that that was necessary?

**Angela Constance:** It is fair to say that the adjustments to the current definition of academic freedom are modest. It is only right and proper that we acknowledge that this is not a huge or radical change. The modest adjustments are that, instead of institutions being required to “have regard to” academic freedom, they will have to “aim to uphold” academic freedom and the definition will include the specific freedom to develop and advance new ideas, whereas currently that is only implied.

**The Convener:** Given that we have just been speaking about the fact that much of the bill comes from the von Prondzynski review, I say again that, as far as I can see, the review did not highlight any particular problems with the current definition of academic freedom, which is set out in the 2005 act. I accept that it comes from the von Prondzynski review, but where is the evidence of a problem with the current definition that requires the change that is laid out in the bill?

**Angela Constance:** The Government is not coming from the premise of deficiency. In looking at the recommendations of the von Prondzynski review, we saw an opportunity to make modest adjustments or improvements to the definition of academic freedom. I appreciate that, again, there is a range of views about the value of those modest changes.

**The Convener:** I am interested in your comments on how modest the changes are. Given that they are so modest, are they required?

I will move on to a more specific question that was submitted to us, which is that the alteration to the definition of academic freedom might change the nature of some internal disputes within higher education institutions. The specific question comes from the Scottish Council of Jewish Communities submission to the committee, which was very detailed on this area of the bill. Last
week, I met representatives of SCoJeC to discuss their concerns about what might be called the imbalance of freedoms.

They were keen to point out that the higher education code of governance talks specifically about academic freedom for staff and lecturers but balances that with the rights of students and other members of staff in institutions, whereas the proposal in the bill includes no balancing rights. What is your view on the evidence from SCoJeC? I am sure that you have had an opportunity to look at it. Why is there no balancing of rights in the bill, when that is the position in the code of governance?

Angela Constance: We will look in detail at SCoJeC’s concerns. Ministers have given you, convener, a commitment to meet to explain matters or to resolve concerns. I am alive to the issues that SCoJeC has raised. My official Stephen White has met SCoJeC, so it might help if he talked about the meeting.

Stephen White: I met Mr Ephraim Borowski and colleagues from SCoJeC, who talked me through their evidence, and I emailed the clerks about that. The main action point was on the question of balance that the convener has raised. I said that I would investigate the construction of the standing definition in the 2005 act and establish what consideration, if any, was given to the student side of the equation. We are going through that process. The code of governance has a broader role than one of setting the legal definition of academic freedom, but I want to establish why the 2005 act was drafted in the way that it was drafted and what the debate was at the time. I have undertaken to get back to colleagues in SCoJeC on that.

The Convener: That is welcome, but there will be a modest change to say that bodies “must ... uphold” academic freedom. Given that there have been a number of incidents around the country, which I will not describe in public session but which involved Jewish students in particular—I am sure that you are aware of those incidents, cabinet secretary—SCoJeC and others are concerned, and I share their concerns, that academic freedom must strengthen the hand of individuals who behave outwith the norms of what we expect from academic staff.

Angela Constance: I will give a careful response, given that we are in public session. It is clear that, whether the current definition or the modest proposed change to the definition applies, people are not excused from the requirement to operate within the law. There is a wide range of legislation on, for example, incitement and discrimination, and nothing in the current or proposed definitions excuses people from their obligations to comply with that legislation. I can ask Ailsa Heine to give you the legal perspective, if that would be helpful.

The Convener: That would be helpful. I completely accept what you said about the law, but there is an issue about strengthening the wording to include the word “uphold”, which has led to concern about the risks that I think that we both understand.

Angela Constance: It is those concerns that we seek to allay.

Ailsa Heine: First, the strengthened provision will say “must aim to uphold”, which is slightly weaker than “must uphold”—

The Convener: But it is a change from the current wording.

Ailsa Heine: I agree that it is a change but, as the cabinet secretary said, academic freedom is not unlimited and does not excuse people from their obligation to comply with other provisions of the law, whether that is the criminal law, defamation law, obscenity law or whatever. Academic freedom is not unlimited, and that will not change.

The Convener: I accept that. Thank you.

11:45

Mary Scanlon: As we all know, it is the small words here and there that make all the difference to the way in which legislation is understood and implemented. The Parliament has passed plenty of legislation that, when it was implemented, was certainly not what we understood it would be.

What new responsibilities would this “modest” change, as it is described, impose on governing bodies? I ask that because of the concern that Dame Jocelyn Bell Burnell raised that the bill could lead to a suppression of critical thought. Can you be precise about what responsibilities the bill will and will not impose on governing bodies?

Angela Constance: I do not think that anything in the bill, or anything in and around the modest adjustments to academic freedom in it, will suppress thought.

Regarding new responsibilities related to academic freedom, institutions already have to uphold existing responsibilities, so it would be disingenuous of me to suggest that I could produce a list of new responsibilities—or any onerous new responsibilities—that the legislation will place on institutions. It is part of their day-to-
day business to refine what they do in response to their understanding of academic freedom. I stress that the changes are modest and, I think, quite subtle.

Mary Scanlon: On another point, the University of St Andrews has asked how the wording “must aim to uphold” would accord with separate statutory duties that are placed on universities. For example, section 26(1) of the Counter-Terrorism and Security Act 2015 imposes a statutory duty on higher education bodies to

“have due regard to the need to prevent people from being drawn into terrorism.”

Have you looked at the proposed legislation in light of legislation that is already in place, and are they joined together?

Angela Constance: Yes, but I will ask Ailsa Heine to respond on specific points about counter-terrorism legislation and how that coexists with the definition of academic freedom. If there are outstanding issues on that detailed area, we will get back to the committee.

Ailsa Heine: I will attempt to answer the question. The section that is referred to in the 2015 act applies to specified bodies, and my understanding is that it does not specify any Scottish bodies at the moment. However, Scottish bodies can be added to the list, so it may apply in the future.

Specific provision is made for English universities in section 31 of that act, under which, in carrying out their duty to prevent people being drawn into terrorism, they must

“have ... regard to the importance of academic freedom”.

So there is specific provision already in that act that balances the two duties.

At the moment, my understanding is that the act does not apply to Scottish universities, as none of them is listed as a specified authority that is subject to the duty. If they were to be listed, some provision on academic freedom would probably have to be made that was similar to the one that applies to the English universities, because that act makes specific reference to the definition of academic freedom as it applies in England.

Mary Scanlon: Given that the University of St Andrews has raised the issue, I ask the bill team whether they might like to discuss it with St Andrews prior to the bill going forward.

Angela Constance: Of course.

Liz Smith: I have one question, cabinet secretary. The bill says that there will be

“freedom within the law to ... develop and advance new ideas or innovative proposals”. Is there something wrong in the present structure such that universities do not have new ideas and innovative proposals?

Angela Constance: No, but I refer to my earlier answer. They are modest changes, and people will be—

Liz Smith: Why do we need them?

Angela Constance: That will be a point that people are very free to debate.

Mark Griffin: I have a couple of questions on the financial memorandum, which have been raised by the Finance Committee. Standing orders require the Government to set out

“the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise”.

Why is there nothing in the financial memorandum about the estimated costs to higher education institutes of amending their governing instruments?

Angela Constance: That is because it is part of the core business of a university and its court to amend existing instruments and arrangements. The committee will be familiar with the process in and around the Privy Council whereby universities make their proposals through the Scottish universities committee. The views of the First Minister, the Lord Advocate and the Lord President are consulted before matters involving change to articles go to the Privy Council. I say that by way of demonstrating that universities do that sort of work all the time. I do not anticipate significant new costs related to what Mr Griffin referred to in the bill.

Mark Griffin: I realise that universities may do that on a regular basis, but that is on the basis of decisions that they take. Under the bill, they would incur those costs as a result of action taken by the Government. The Finance Committee’s report asked why the costs have not been included in the financial memorandum given that they would be incurred as a result of a Government decision.

Angela Constance: To add to what I have already said, in response to the issues that the Finance Committee raised, we have said that we will consider providing an updated financial memorandum at stage 2. We are of course looking at the detail of the Finance Committee’s constructive comments, but that does not change our current view that we do not see substantial costs arising as a result of the bill. We will look at the detail that the Finance Committee has submitted to the Government and, if we need to refine our thinking or the information in the financial memorandum, we certainly will.
Mark Griffin: I take on board your comments that you will look to refine the financial memorandum.

Another area of concern for the Finance Committee was the discrepancy in the evidence that it received from the Government and from higher education institutions and Universities Scotland concerning the financial costs of recruiting a chair of a governing body. The discrepancy related to the estimates of the time commitment that is required by university chairs and how that would impact on the costs. I would be grateful if the cabinet secretary would again commit to looking at the evidence and including that in any review of the financial memorandum.

Angela Constance: I have said that we will refine the financial memorandum at stage 2 if required.

Understandably, where there are differences of opinion with regard to the impact of the bill, that will lead to differences of opinion about the financial repercussions. In that spirit of openness and collegiality, we are looking at all the detail to ensure that our position reflects the reality on the ground.

The Convener: On behalf of the committee, I thank the cabinet secretary and her officials for coming along to give evidence on the bill. I say for everybody’s information that we intend to publish our stage 1 report on the bill towards the end of the year. I am sure that that will be an exciting discussion for us all.
Dear Angela,

The Committee recently considered its approach to scrutinising the Higher Education Governance (Scotland) Bill at Stage one. As part of its approach, the Committee agreed that I should ask the Scottish Government some factual questions on the Bill, in order to inform our forthcoming oral evidence sessions.

I would be grateful if you could reply to the questions below by no later than 18 September—

Section 1: appointing a chair

1. Paragraph 36 of the policy memorandum notes that implementation of the Code has, ‘to some extent’, increased transparency in appointing a chair. However, there is ‘no guarantee of consistency’ and, “in practice, HEIs have adopted different approaches”. Please explain whether and how the different approaches adopted have affected the quality of governance within the institutions in question.

2. Section 1(2) allows for regulations to be made in connection with appointing a chair. It highlights some matters (e.g. periods of appointment) but not others (e.g. removing a chair). Please set out all the steps involved in appointing a chair and confirm which of these are likely to be left to the HEIs to determine, rather than be specified in regulations.

Sections 4-8: governing bodies

3. The policy memorandum notes (paragraph 41) that these provisions will create “a more inclusive environment” and “embed a level of consistency
across the institutions”. What specific and measurable improvements are expected to arise as a result of the changes?

4. Paragraphs 46 – 47 of the policy memorandum explain, in response to concerns raised in consultation responses, that trade union nominees will be expected to act in the best interest of the HEI (as will, presumably, other members). Is there an agreed and established definition of “best interest”?

5. Please explain why student representatives are to be nominated for the governing body, but elected to the academic board.

6. Section 7 ensures that the validity of proceedings of the governing body of an HEI is not affected by any vacancy arising in membership or category of membership. This means that, in the event of an unexpected vacancy arising, the HEI can continue to function pending the appointment of a new member under section 4. Will this section be relevant in the event that a governing body is unable, from the outset, to secure a trade union, staff, student or trade union member?

7. Could one person fill the role of being both a graduate nominee and union nominee to the governing body?

Sections 9-13: academic boards

8. Why are students to comprise 10% of the membership of academic boards and what benefits are expected to derive from this? Is it likely that all HEIs will be able to meet this threshold?

9. Why are governing bodies, but not academic boards, to have trade union and graduate nominees?

Section 19: academic freedom

10. Does the Scottish Government have any case study examples of academics who have previously been penalised for exercising their academic freedom in a manner that would now be permitted under the Bill?

11. Academic freedom is to be exercised “within the law”. Please briefly summarise the key existing legislation that would place some constraints on academic freedom.

12. Academic freedom can be exercised by those who teach, make learning provision or undertake research. Will the provisions apply to a student at an HEI or college who is also undertaking some teaching or ‘learning provision’ (please also clarify what is meant by the latter term)?

13. The policy memorandum notes the definition of academic freedom in the Irish Universities Act 1997. This definition includes the phrase “in his or her teaching, research and any other activities in or outside the university”. Please confirm whether the Bill’s provisions will apply to a relevant person’s activities both within and outwith an HEI/college. What type of activity outside an HEI/college would and would not be covered by the new definition of academic freedom?

General

14. The policy memorandum discusses at various points the benefits of consistency in governance across HEIs. However, it also allows HEIs some
flexibility (for example, in relation to certain nomination and election processes). Where flexibility is to be allowed, is the Scottish Government content that there is a minimal risk of any significant inconsistencies arising? Does the Scottish Government intend to issue any non-statutory guidance to HEIs on such matters?

15. Does the Scottish Government anticipate that the Code will be rewritten to ensure it reflects the changes set out in the Bill? Between the provisions of the Code and the Bill, is the Scottish Government now content that all concerns about governance are being adequately addressed?

Yours sincerely,

STEWART MAXWELL MSP
CONVENER
Dear Convenor,

Thank you for your letter of 9 July on behalf of the Education and Culture Committee, asking questions about the Higher Education Governance (Scotland) Bill, introduced to Parliament on 16 June. Answers to each question are set out in the Annex to this letter. I look forward to engaging with the Committee on this Bill as it is considered by Parliament.

The 2012 Review of Higher Education Governance in Scotland, led by Professor Ferdinand von Prondzynski, made recommendations for reform. This work has informed the provisions in the Bill.

The Scottish Government believes that the principles underpinning the Bill are consistent with a modern Scotland. In last year’s Programme for Government, ‘participation’ was set out as one of three key priorities. This Bill aims to reflect that priority within the governance arrangements for our higher education institutions (HEIs). The Scottish Government wants to strengthen staff and student participation in decision-making at HEIs. This Bill is not about Ministers taking a direct role in the life of our autonomous institutions, but rather enabling every voice on campus to be heard.

We have shown our commitment to the higher education sector, again investing over a billion pounds through the Scottish Funding Council in 2015-16. As part of the return for Scotland’s people from this investment, we want to enable development of a more modern and accountable framework of governance for higher education institutions to work within.

I am aware that some stakeholders have questioned the intentions of the Scottish Government in including powers in the Bill to make secondary legislation. In general, the powers for Scottish Ministers to present secondary legislation to Parliament are intended to future proof the content of the Bill, allowing minor adjustment as required, rather than to enable any radical alteration to its provisions. This is explained further in the Delegated Powers Memorandum and the Scottish Government looks forward to discussing this issue as the Bill is examined by the Committee.
In particular, stakeholders have questioned Section 1 of the Bill relating to the appointment of chairing members of governing bodies. After introduction, dialogue commenced with key stakeholders aimed at agreeing a single model for the appointment of elected chairs. I would be happy to provide an update on progress made during these discussions at my appearance before Committee on 10 November.

Prior to and since introduction, I have listened to the views of those with an interest in the Bill. I will continue to do that as it progresses through the Scottish Parliament. I have received correspondence from, and held meetings with, a number of stakeholders, including rectors, on the subject of elected chairs in particular. Concerns have been raised about exactly how chairs would be elected, and what this would mean for existing rectors. Rectors play an important role in the ‘ancient’ institutions, raising the profile of the sector and representing students and, in some cases, staff. The role of Rector is part of the democratic tradition in our ancient universities that is also in keeping with the spirit of democratic renewal informing this Bill.

At the moment, we are talking to everyone with an interest in the Bill about how the appointment of elected chairs of court and other governing bodies might operate in practice. As part of that work, we will seek to minimise, and consider removal, of any features of the model selected that could impinge on the role of rector. I would like to reassure stakeholders and the Committee that I am giving very careful consideration to this matter and that there is absolutely no intention to remove the role of rector from university life.

In addition, the Scottish Government has no intention of politicising the office of elected chair or being involved in the appointment process. It is our intention that the franchise for the electoral process would not expand beyond the community within each HEI. The Bill provisions are aimed at opening up access to decision-making by the people within HEIs, and widening access to the role of chair to a broader group of people from a variety of backgrounds. Our approach is consistent with a fairer, more engaged Scotland.

I hope that the comments in this letter and the attached responses to the questions put by the Committee are helpful.

ANGELA CONSTANCE
Section 1: appointing a chair

1. Paragraph 36 of the policy memorandum notes that implementation of the Code has, ‘to some extent’, increased transparency in appointing a chair. However, there is ‘no guarantee of consistency’ and, “in practice, HEIs have adopted different approaches”. Please explain whether and how the different approaches adopted have affected the quality of governance within the institutions in question.

There is no straightforward methodology for quantifying the effect (on the achievement of good governance) of the approaches taken by each of Scotland’s HEIs. What the Bill seeks to do is guarantee a level of consistency and transparency in approach, and ensure that all HEIs are joined in a common purpose to achieve high standards of governance across the sector. This aim inspired the recommendations in the 2012 Review of Good Higher Education Governance, which in turn has inspired the provisions in the Bill. Governance in our universities is obviously not of a low standard. However, it can always be better, fairer, more transparent and more inclusive. With that in mind, we believe that chairs appointed through a consistent appointment process across all HEIs, and ultimately elected to their positions, will help to drive continuous improvement of governance in Scotland’s higher education sector.

2. “Section 1(2) allows for regulations to be made in connection with appointing a chair. It highlights some matters (e.g. periods of appointment) but not others (e.g. removing a chair). Please set out all the steps involved in appointing a chair and confirm which of these are likely to be left to the HEIs to determine, rather than be specified in regulations”.

Removal of a chair is not a matter that the Bill will provide for. This, along with most other terms and conditions of appointment, will remain an issue for HEIs, who shall continue to have the power to remove any member of the governing body and (according to the Code of Good HE Governance) must do so if the member materially breaches the conditions of his/ her appointment. The Bill simply aims to introduce a consistent process for the appointment of a chair. Influenced by dialogue with stakeholders, we plan to consider an amendment at Stage 2 that would replace Section 1 of the Bill with provision on the face of the Bill, rather than in regulations, for a single model for the appointment of elected chairs.

If such a Stage 2 amendment was not lodged, setting out the exact steps for appointment of a chair would be done following dialogue with stakeholders, in accordance with the requirements of Section 3.

However, if set out on the face of the Bill via Stage 2 amendments, the principal features of a process of appointment might involve open advertisement; fair and transparent consideration of all candidates based on ability to perform the role; assessment of all candidates demonstrating the skills and ability to carry out the role; and election by an inclusive, fair and balanced franchise from within the institution.
3. The policy memorandum notes (paragraph 41) that these provisions will create “a more inclusive environment” and “embed a level of consistency across the institutions”. What specific and measurable improvements are expected to arise as a result of the changes?

The specific improvements and benefits expected will flow from all parts of the HEI community having the ability to make their voices heard as part of the governance structures guiding an HEI. We envisage that the more inclusive approach proposed by the Bill will strengthen unity and the sharing of responsibility between different parts of the community within HEIs. With regard to measuring improvement, this is a matter that we would be keen to work with institutions on in the coming years, should the Bill be passed by the Scottish Parliament.

4. Paragraphs 46 – 47 of the policy memorandum explain, in response to concerns raised in consultation responses, that trade union nominees will be expected to act in the best interest of the HEI (as will, presumably, other members). Is there an agreed and established definition of “best interest”?

All members of the governing body should approach their work as being about the betterment of the HEI and everyone who works and studies there. While the Bill does not impose a duty in this respect nor contain a definition of ‘best interest’, we believe that the concept is well understood within the sector. For example, Main Principle 6 of the Code states that all members shall exercise their responsibilities in the interests of the HEI as a whole rather than as a representative of any constituency. The Scottish Government is clear that, while the membership of the governing body and academic board will ensure that an inclusive mix of interests are represented in HEI governance, all members must act in the best interest of the HEI as a whole.

Furthermore, as charity trustees, governing body members are under a duty under section 66 of the Charities and Trustee Investment (Scotland) Act 2005 to act in the interests of the charity, i.e. the HEI, while engaged in the business of the governing body.

5. Please explain why student representatives are to be nominated for the governing body, but elected to the academic board.

The Bill requires every HEI governing body to feature 2 student members nominated by the students’ association of the HEI (although it would be open to an HEI to have more than 2 student members on its governing body if it chose to do that). It is considered proportionate to require these 2 positions to be filled by nomination by the students’ association, rather than election because it is likely that, in the majority of HEIs, these positions will be filled by office bearers of each student’s association who will have already been elected to their respective positions in the students’ association.

With reference to academic boards, the relevant recommendation in the 2012 Review of Good Higher Education Governance was that, with the exception of those attending ex officio, all other members should be elected by the constituency they represent. In fulfilling the requirement under section 10, up
to 12 students might be elected to that body (as the Bill sets a maximum membership of 120 and requires that at least 10% of that membership must be students). It was felt that due to the larger volume of students involved, and the fact that it would be unlikely that as many as 12 students would have previously been elected to positions in a students’ association, these positions should be filled by election.

6. Section 7 ensures that the validity of proceedings of the governing body of an HEI is not affected by any vacancy arising in membership or category of membership. This means that, in the event of an unexpected vacancy arising, the HEI can continue to function pending the appointment of a new member under section 4. Will this section be relevant in the event that a governing body is unable, from the outset, to secure a trade union, staff, student or trade union member?

Yes, this section will apply in the situation described by the Committee. However, we think that it is unlikely that there will be circumstances in which an HEI will be unable to secure a trade union, staff or student member. The Bill requires that HEIs must adhere to the requirements of Section 4 from the outset. Section 7 merely provides for continuity of HEI governance functions where an unexpected vacancy arises. But it would also cover situations in which it takes longer to recruit a new governing body member, for example due to no-one standing for elections and a further election process having to be run.

7. Could one person fill the role of being both a graduate nominee and union nominee to the governing body?

It is not the policy intention that one individual could fulfil both roles. Indeed, membership of each of the categories of governing body member is intended to be mutually exclusive. It is possible that an academic or support staff union member, nominated by the union to be the member of the governing body, could also happen to be a graduate of the HEI. However, in order to be both a graduate member and a union member of the governing body they would need to be nominated by both the relevant union and the graduates’ association and accept both nominations. We consider it unlikely that this situation would arise or that this would be acceptable to either the graduates’ association or the union, but we will consider whether the implication that membership of each category is to be mutually exclusive needs to be made explicit.

Sections 9-13: academic boards

8. Why are students to comprise 10% of the membership of academic boards and what benefits are expected to derive from this? Is it likely that all HEIs will be able to meet this threshold?

Ensuring that at least 10% of the academic board is drawn from the student body will help to advance equality on the academic board. Students will be afforded a significant presence, enabling their unique perspective to be shared.

We do not anticipate any difficulty for HEIs in meeting this threshold. However, we will listen to the views of all stakeholders on this and the other provisions.
9. Why are governing bodies, but not academic boards, to have trade union and graduate nominees?

Ultimately, governing bodies (also known as ‘courts’) are the structures responsible for determining the overall strategic direction of HEIs. If a governing body’s composition is inclusive, fair and balanced, this will permeate throughout the institution. With the provisions on membership of the governing body designed to achieve this effect, there is no need to stipulate that there must be union or alumni representation on the academic board.

Section 19: academic freedom

10. Does the Scottish Government have any case study examples of academics who have previously been penalised for exercising their academic freedom in a manner that would now be permitted under the Bill?

No. The purpose of Section 19 of the Bill is to strengthen the existing definition of academic freedom, make it clear that HEIs must aim to uphold a person’s academic freedom and make explicit freedoms which were previously only implicit, rather than to fundamentally change the existing definition.

11. Academic freedom is to be exercised “within the law”. Please briefly summarise the key existing legislation that would place some constraints on academic freedom.

Rights to exercise academic freedom would be affected by many areas of the law e.g. relevant aspects of both criminal and civil law such as, incitement to racial hatred, defamation and breach of confidence to name a few. Exercising one’s academic freedom provides no immunity from the application of the wider civil and criminal law.

12. Academic freedom can be exercised by those who teach, make learning provision or undertake research. Will the provisions apply to a student at an HEI or college who is also undertaking some teaching or ‘learning provision’ (please also clarify what is meant by the latter term)?

It is certainly feasible that a student engaged in a teaching or research position at an HEI or college could be a “relevant person” for the purposes of Section 26 of the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”). The amendments proposed by the Bill will not change that, therefore, a post-16 education body must aim to uphold such a person’s academic freedom while the person is engaged in those activities. There is no definition of “learning provision” in the 2005 Act and the Bill does not insert one. However, we are conscious that the 2005 Act applies to higher and further education and defines “fundable further education” to mean “any programme of learning” which meets certain criteria, whereas “fundable higher education” is defined as “any course of education” which meets certain criteria. It is our understanding that “learning provision” is a catch-all term to ensure that the delivery of both courses of education at post-16 education bodies providing fundable higher education and programmes of learning at post-16 education bodies providing fundable further education, are covered. This term is also broad enough to capture all teaching outwith the formality of lectures and the most common forms of teaching delivery. An example of this might be practical seminars led by research students for undergraduates and the provision made for
dissertation students or those doing a research Masters/PhD where the tutor’s role is to provide support and guidance to assist the student with learning (rather than to teach the student as such).

13. The policy memorandum notes the definition of academic freedom in the Irish Universities Act 1997. This definition includes the phrase “in his or her teaching, research and any other activities in or outside the university”. Please confirm whether the Bill’s provisions will apply to a relevant person’s activities both within and outwith an HEI/college. What type of activity outside an HEI/college would and would not be covered by the new definition of academic freedom?

The Bill obliges the post-16 body to aim to uphold the academic freedom of relevant persons and to ensure that specific matters (appointments held or sought and entitlements or privileges enjoyed at the post-16 body i.e. within the institutional setting) are not adversely affected by a relevant person’s exercise of their academic freedom. Under the 2005 Act, a relevant person’s exercise of academic freedom might involve activity outwith work and this is unchanged by the amendments proposed by the Bill. However, there is clear implication that this activity must relate to the teaching, provision of learning, or research that the relevant person is engaged in at the post-16 education body. As such, the definition of academic freedom in the Bill (which is unchanged from the existing definition in this respect) clearly applies where a person publishes an article in an academic journal but would only apply when attending a demonstration or aligning with a particular political movement if it was clear that that act related to the teaching, learning provision or research they the person is engaged in.

General

14. The policy memorandum discusses at various points the benefits of consistency in governance across HEIs. However, it also allows HEIs some flexibility (for example, in relation to certain nomination and election processes). Where flexibility is to be allowed, is the Scottish Government content that there is a minimal risk of any significant inconsistencies arising? Does the Scottish Government intend to issue any non-statutory guidance to HEIs on such matters?

Consideration of non-statutory guidance is a matter that could be discussed with stakeholders in future. However, the Scottish Government has no plans to issue such guidance. With this Bill, the Scottish Government aims to introduce a set of focused and discrete provisions to improve governance. We have no intention of micromanaging autonomous institutions and that it why the Bill sets parameters but leaves it to HEIs to nominate and elect members to certain positions in accordance with rules to be made by the governing body of the HEI. The Scottish Government is content that, within the parameters set by the Bill, there is a minimal risk of any significant inconsistencies arising but that HEIs retain the freedom to devise certain election and nomination processes to suit individual HEIs.

15. Does the Scottish Government anticipate that the Code will be rewritten to ensure it reflects the changes set out in the Bill? Between the provisions of the Code and the Bill, is the Scottish Government now content that all concerns about governance are being adequately addressed?
Should the Bill be passed by the Scottish Parliament, the provisions will need to be considered by the Scottish Funding Council alongside the Code which sets out the principles of governance which appear to the Council to constitute good practice. This is a matter for the Scottish Funding Council.

The Scottish Government is content that between the Code and the Bill the core concerns raised by the 2012 Review of Higher Education Governance in Scotland are addressed. The Scottish Government has no plans for further primary legislation in this area in the near future. Indeed, the secondary legislation making powers in the Bill are limited to those areas where adjustment may be necessary in the light of practice and operation of the Bill provisions so that such adjustments can be made efficiently, rather than to enable Ministers to advance the Bill’s provisions in any significant respect. The intention is that all such powers will be exercised responsibly and in full consultation with stakeholders. Further, any regulations will be subject to Parliamentary scrutiny.
Written submissions to the Education and Culture Committee

Anonymous submission 1
Anonymous submission 2
Anonymous submission 3
Anonymous submission 4
Anonymous submission 5
Anonymous submission 6
Ansari, Prof Ali M
Abertay University
Aberdeen University Students' Association
Ali, Moi
Allan, Tim
Allen, David
Anderson, Eric
Auchincloss, Jeremy
Archer, Dr Edward G
Bailey, Lucy
Baldock, Susan
Bangham, Michael
Bartlett, Robert
Barnet, Duncan
Barker, Andrew
Bastow, Erica
Beamish, Gordon
Bell, Professor Stephen J.
Bell, Dr Karen
Bellhouse, Tony
Berry, William
Berry, Nick
Benchimol, Dr Alex
Bentley, Robert
Bentley, Sheila
Bignell, Adrian
Blackwood, Dr Robert
Bond, Chris
Booth, Richard
Boyle, Sarah Aine
Bovaird, Colin
Bradford, Hugh
Brockett, Lorna
Brown, Fiona
Brown, Philippa
Buchanan, David J
Burgess, Dr Frederick R.
Business Committee of the General Council of the University of Edinburgh
Business Committee of the General Council of the University of St Andrews
Butcher, Lynn R
Butler, Deirdre
Bickford, Susan
Cairncross, Frances
Cairns, Wilma
Campbell, Peter
Campbell, Dr A.C.
Carawan, Rosemary
Carlyle, R Morton
The Carnegie Trust
Chapman, Roy De C
Chesters, Pamela
Cochran, Kenneth W.M.
Condon, Dr Michael
Committee of Scottish Chairs
Committee of University Chairs
Common Weal
Council of Senate of the University of Glasgow
Countess of Carnarvon
Cook, Michael
Craig, Dr Andrew
Creamer, Lesley
Crockart, Eric
Crighton, Dr Gordon S
Cunningham, Dr Elizabeth H.
Dalgleish, Andrew
Daviron, Christian
Davis, Dr Graeme
Davies, Dr Ben
Davies, Dr Helen
Dawson, James Ronald
Devlin, Craig
Derrick, Dr Lewis
Dinkhauser, Gabriel
Duncan, Colin
Duncan, Kenneth
Duncan, Tom
Dunkinson, Sheila M
Drummond-Hay, Thomas
East Ayrshire Council
Eastman, David
Edinburgh University Students' Association
Educational Institute of Scotland
Edwards, Professor Anton
Edge, Rev Michael
Edge, Frances
Eltringham, Roger
Elliot, Christine
Farmer, Sir Tom - Chancellor of Queen Margaret University
Farquhar, Iain E
Ferry, John
Fenton, Dr Brian
Fett, Robert
Fife Council
Finegan, Salvatore
Forrest, Moyra
Ford, Caroline
Fraser, Simon
Fraser, Bridget
Fleming, David & Diane
Galloway, Alistair
General Council of the University of Edinburgh
Gibson, Margaret
Gill, Dr David
Glasgow Caledonian University
Glasgow Caledonian University UCU Branch
Glasgow School of Art
Glasgow, Cameron
Gordine, Samantha
Goddard, Stephen
Gray, EP
Gray, Prof Rob
Grazebrook, Vicky
Greaves, Roger
Grigor, Murray
Guthrie, Ronnie
Harrison, Oliver
Harris, David
Harvey, Stewart
Haseeb, Asif A.
Haynes, Nick
Heap, Dr Alison
Henderson, Andrew
Henderson, Professor Ian
Henderson, Richard S.
Henderson, James W
Heriot Watt University
Hersh, Marion
Hillman, Martin
Hoggard, Alexander
Holloway, Paul
Hossack, Duncan
Howe, Prof Jim
Huhn, Matthias
Hungerford, Andre J
Hunter, Elspeth A
Institute of Directors Scotland
Irwin, Anne
Isaacs, Nicholas
Johnston, Hamish
Johnson, Ian
Jones, Mervyn
Naismith, James
National Companies
National Union of Students
Nash, Shan
Neville, Lynn
Nolan, Professor Andrea
Niven, Andrew
Ogilvie, Adam
Ogletree, Andrew Wingham
Open University in Scotland
Office of the Scottish Charity Regulator
Osawa, Most Revd. Dr. Raffaele Arcangelo Yusuke
Pack, Brian
Pacult, Nicola
Pazdziora, John Patrick
Pay, Tony
Patrick, Gail
Paterson, Pamela
Paxman, Diana nee Ford
Pelargus, Tim
Peterkin, Victoria
Poulton, Robin Edward
Prondzynski, Professor Ferdinand von
Proctor, Louise
Price, Neil
Qassim, Samira
Queen Margaret University Court
Queen Margaret University Branch of University and College Union
Queen Margaret University Branch of University and College Union
Supplementary Submission
Quinault, Frank
Quick, Martyn
Ramsay, Gillian
Ray, Revd John
Reetz, Sebastian
Reid, Sir Bob
Raisinghani, Sanjay
Rickards, Elizabeth
Roach, Dr Andrew
Robert Gordon University
Robb, James
Robert Gordon University Students' Association
Robertson, Alastair W
Robinson, Heather
Royal Conservatoire of Scotland
Royal Conservatoire of Scotland - supplementary submission
Royal Conservatoire of Scotland Students Union
Roztomilý, Ondřej
Russell, Christine
Royal Society of Edinburgh
Russell, Wendy
Saunders, Gareth J.M
Scott, Professor Tom
Scott, Campbell
Scottish Association for Marine Science
Scottish Council for Development and Industry
Scottish Council of Jewish Communities
Scottish Rural College
Scottish Trades Union Congress
Sell, Catherine
Selby, Jane
Selwyn, Flora
Shaps, Ben
Simpson, Morag Macdonald
Simpson, Sandy
Sharples, Harold
Shaw, Prof Revd DWD
Spires Freeburn, Laura
Spratt, Dr Alasdair
Souter, Lorna
Stell, Helen
Stitt, Deborah
Stutchfield, David
Stollard, Dr Paul
Skelton, Steve
Sutherland, Dr Hamish
Taylor, Mike
The Rector of University of Edinburgh
The Rector of University of St Andrews
Thompson, David
Thomson, Anne
Todd, Malcolm and Mary
Torrance, Very Rev Prof Iain Torrance
Tucker, Janet S.
UCU Scotland
UNISON
Universities Scotland
University Court of University of Glasgow
University of Aberdeen
University of Aberdeen Development Trust
University of Dundee
University of Edinburgh
University of Glasgow General Council
University of Glasgow Students’ Representative Council
University of the Highlands and Islands
University and College Union Glasgow
University of St Andrews
University of St Andrews Student Association
University of Stirling
University of Stirling Students' Union
University of Strathclyde Glasgow
University of the West of Scotland
Vallance, Dr Elizabeth
Venning, Dan
Waiwood, Brenda A.
Waugh, Dominic
Wallace, David
Wallace, John
Wallace, Jim
Wallace, Joseph
Walker, David
Walker, Alison
Watt, David
Wass, Richard
Watson, Derrick
Watson, Ian
Warren, Dr Charles
Witham, Peter
Wilson, Jonathan
Wilson, Susan
Wright, Avril
Wright, Ian C
Wood, Prof Robert
Wojtas, Olga
VOICE
I am writing to you out of concern about the Higher Education Governance (Scotland) Bill.

It seems to me unclear what this bill is attempting to do. There does not seem to be an identified issue that the bill is addressing - governance and transparency at Scottish higher education institutions seems to be more than adequate. The laudatory (if unnecessary) goals of improving accountability and inclusivity seem to have been removed in favor of wording that encourages standardization ("embed[ding] a level of consistency across the institutions") which I find smacks worryingly of wanting to regulate institutions for the sake of regulation, rather than actually improving their state.

Surely Scotland’s government has better things to do with its time than increase the workload of already over-worked civil servants, whose competence at governing anything is usually suspect at the best of times? I also find the provisions to give ministers power to issue regulations governing how chairs are appointed to be designed to facilitate increased political control of Scottish institutions in the future without proper parliamentary control. Whilst admirably Orwellian in nature, it seems to me to constitute a threat to Scottish academic freedom, and above all it simply seems unnecessary.

I would therefore urge the parliament to withdraw the legislation immediately, so that Scottish universities can continue to thrive, be internationally competitive and continue the proud tradition of Scottish academic excellence.

Anonymous
August 2015
Higher education Bill:

I write to express my objection to the above

- the autonomy of the Universities will be greatly weakened and it will be vulnerable to direct political influence;
- Scottish academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for Scottish higher education, for the economy, for the country;
- It is unnecessary
I work at the University of Aberdeen where I also take an active role in the local branch of UCU.

I write in support of the majority of recommendations within the Bill, especially:

- Greater transparency and accountability over executive remuneration – at Aberdeen the deliberations of the Remuneration Committee and bonus paid to senior staff have (until very lately) not been subject to scrutiny – even by the University Court
- Elected chairs of Court – at Aberdeen we currently have a student-elected independent rector which has proved helpful in providing balance and critique
- Proposals on academic freedom – the increasing marketisation of education and focus on economic impact is threatening the traditional A-Z model of education and thus academic freedom
- Union representation on Court - union officials (like a student representatives) already have the mandate of a significant proportion of a constituency – unlike single lay members

Finally, as I was personally involved in the negotiation of a model statute for Scotland (ultimately only adopted by Aberdeen) I am aware of the tedious nature of dealing with the Privy Council and would welcome an improved model; however, I agree that the constitution and governance of whatever is to replace it would require great scrutiny. Although the Executive is explicit in stating that it does not see an increased role of government in the running of institutions it would be desirable to ensure that future administrations did not threaten the independence of institutions.
I am a graduate of the University of St Andrews. I am writing to express my concern about, and my opposition to, the current proposed legislation of the The Higher Education Governance (Scotland) Bill (“the Bill”). I understand that the Bill is due to pass through the Scottish Parliament shortly. I am concerned that the Bill will have a significant and detrimental impact on the University of St Andrews and other universities and higher education institutions in Scotland.

The University of St Andrews has a long, proud and distinguished history as Scotland’s first university, celebrating its 600th Anniversary between 2010 and 2013. While the University and those associated with it are justly proud of its history, the University is equally forwards looking. It has a strong presence and brand within the UK and globally, and it is able to offer much to the students and staff of today and tomorrow. It has its own very distinct identity as a leading Scottish university.

I understand that the new legislation under the Bill will enable the Scottish Government to exercise greater control over the composition and governance of all higher education institutions in Scotland, including the universities. I understand that the new legislation will also enforce greater consistency among institutions, and thereby reduce their ability to adopt individual strategies. It will burden universities and the public purse with extra regulation and bureaucracy that will stifle enterprise and jeopardise the positive contribution that universities, such as the University of St Andrews, make to the economy. I understand that in the opinion of many, the case has not been made, and that the legislation is not only harmful; it is superfluous.

My concern about, and opposition to, the Bill is therefore on the following grounds:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for the University of St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

I trust that consideration will be given to these concerns.

Anonymous
August 2015
Education and Culture Committee

Higher Education Governance (Scotland) Bill

Anonymous submission

Dear Sir or Madam

I am writing to express serious concerns with the Higher Education Governance Bill, which I believe are substantive enough to require significant redrafting or wholesale rejection of this bill. The bill does not allow universities to find local strengths or solutions, and instead forces them to adopt a homogenised system which will curb innovation and reduce Scotland's university system to an assembly-line for flat-packed thinking and degrees. It reduces the independence and autonomy of universities and makes them vulnerable to politics in a way they have never been before. It limits their ability to be locally responsive and independent.

As we have seen with the NHS, this over-politicisation of a sector turns independence into box-ticking and means that the people making governing decisions have no on-the-ground experience and often utterly fail to grasp the implications of their actions or inactions. Furthermore, when homogenising the running of academic institutions, history shows us that this very rarely results in an increase in standards; usually such measures result in a dumbing-down of all institutions concerned. Students considering Scotland for their university degrees will be faced with a one-size-fits-all approach, and may well be tempted to look to England and Wales to provide more bespoke and innovative educational opportunities. Academics likewise may be tempted south by the promise of more autonomy and less governmental meddling.

As well as the risks above, the case against this bill is more damning: it is regulation for regulation’s sake. It is confusing change with progress, and is pathognomonic of a government that values being seen to be doing something over one who wants to achieve real and meaningful change. There has been no successful case made demonstrating that this bill is necessary, and while any process of change is challenging, submitting to change that is imposed, that is not necessary and that is potentially dangerous is a disillusioning and disenfranchising process that will only serve to alienate staff and students who have already had to endure departmental and budget cuts while still trying to demonstrate Scotland’s ability to be a world-leader in university education and research.

Kind Regards,
I write a cautionary comment on the proposals for the above.

The Higher echelons of Education, in particular, flourish in a liberal ambiance, free from over regulation and bureaucracy, free from politics, race or creed.
This is where initiative and enterprise thrive, where success comes about through trial and error of its own making and with exciting results in all fields of learning, be it medicine, media, business, engineering, arts and humanities.
Such is the essence of education and from such is guaranteed the future success of our country.

Q. Does the Bill in question positively strengthen the present environment for study and structure in Higher Education?
Q. Is there further need for greater control from Government in this area?

Q. Is there justification for more administration of existing policies and practices? Bureaucracy always comes at a price.

Scotland's Universities have a world-wide reputation for attracting students to an open and dynamic sphere of further education.
It begs the question that these institutions determine best practice and line of direction on the global stage.

Of historical interest -------when the first of our Universities was established it was the forward looking and determined sense of independence that Pope Benedict X111 applauded as he signed the final Papal Bull over 600 years ago-------

The spirit of the age is also caught in the 14th century “The Bruce”, line 225, where the poet John Barbour writes on Freedom:
“Ah! Freedom is a noble thing!
Freedom makes man to have liking;
Freedom all solace gives;
He lives at ease that freely lives!”
Submission from Professor Ali M Ansari

Dear Sir/Madam

I am writing to express concern over the HEG (Scotland) Bill as currently drafted. My reservations lie in the following areas:

1. It is not clear to me why this Bill is being introduced and what problem it intends to solve. It is unclear to me why we need a new definition of ‘academic freedom’ and it troubles me that in the absence of a clear reason why this should be necessary, this will simply enable further discussions, revisions and refinements of what is at best a highly contested issue.

2. The pursuit of standardisation, while conducive to efficiencies, seems in this context to be more conducive to central government control. The Scottish Government is currently among the most centralised in Europe, and this aspect, along with Ministerial prerogatives over governance, would simply appear to reinforce an unfortunate trend (cf Police Scotland) towards greater centralisation and political control. Universities thrive on distinctiveness and individuality. Standardisation conflicts with this, and while this approach might take us towards a more French centralised system of HE, I would humbly submit that the British model - at least in the European context - has been far more successful and productive in terms of knowledge production than our continental rivals.

3. Ministerial prerogatives on governance - with or without Parliamentary scrutiny (bearing in mind that there is no revising chamber in the Scottish system) is deeply troubling. It facilitates political interference (which no doubt will be used for political and electoral advantage) and must be avoided at all costs if the Scottish HE sector is to retain its excellent status.

With kind regards

Professor Ali M Ansari
Submission to the Scottish Parliament’s Education and Culture Committee on the Higher Education Governance (Scotland) Bill

Introduction

Abertay University welcomes the opportunity to submit views to the Committee on the Higher Education Governance (Scotland) Bill.

According to the Policy Memorandum, the principal objective of the Bill “is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose”.

Abertay University considers that the proposals in the Bill will neither strengthen the governance of the University, nor improve accountability. As has been acknowledged by the Scottish Government, higher education institutions (HEIs) are autonomous bodies. That has been the key to their success, but has not prevented their working hard over the years to ensure that they are at the forefront of good governance practice as this has developed within the public and private sectors. Compliance with the Scottish Code of Good HE Governance (‘the Code’), published in 2013, is regarded by the Scottish Funding Council as indicative of good governance and has been accepted as a condition of grant. The Code is reflective of current best practice as contained in relevant publications covering both the private and public sectors in Scotland and more widely in the UK, and when it was adopted by all Scottish HEIs, those institutions committed to regular review. The first such review is planned for 2016.

A report in 2014 (‘Scottish Code of Good HE Governance One year into implementation’) showed that most institutions were by then compliant - or were moving towards full compliance - with the requirements of the Code and with its Guiding Principles. Abertay University is therefore surprised that the Scottish Government is proposing at this early stage, before the Code has properly been given a chance to bed down, and in advance of the 2016 planned review, to introduce legislation and associated regulations - the need for which has not been justified by any evidence of failure of governance or performance by Scotland’s HEIs.

Abertay’s position is that the proposals in the Bill are not evidence-based, are unnecessary, and represent an unprecedented political entry into the internal affairs of Scotland’s HEIs. This not only cuts across the long-cherished principle of university autonomy, but is also the thin end of a wedge which is capable of exploitation for partisan political purposes in the future, and which, if so exploited, risks irreparable damage to a jewel in Scotland’s crown, the stewardship of which has served our nation well over many years.

That said, and recognising that having come this far the Scottish Government will be unwilling to change course, we urge the Committee to consider very carefully those aspects of the proposals which are of greatest concern to Scotland’s HEIs. We therefore note here that Abertay University agrees with the concerns raised by the Committee of Scottish Chairs, Universities Scotland, and others. We note in particular the potential unintended consequences and future risks with regard to ONS classification, charity law and costs, which have been raised.
1. **What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?**

Since the introduction of the Code in 2013, we consider that the perceived problems for the Higher Education sector as a whole have been addressed, or are being addressed. Abertay University believes strongly that governing bodies should comprise members with a diverse set of personal characteristics - to reflect so far as possible the community from which the University draws its staff and students, and to provide a variety of voices. The University notes that attracting candidates for governing bodies which fully reflect the diversity of Scottish life is challenging, as it is for non-departmental public bodies (NDPBs), including Health Boards, and all areas of public service. Abertay University is not deterred by the challenge and will continue to work hard to ensure that its governing body is as representative of the community it serves as it can be. The proposed legislation will do nothing to make meeting this challenge easier.

The report ‘Scottish Code of Good HE Governance: One year into implementation’ (2014) showed that HEIs in Scotland were modernising their governance arrangements to enhance diversity, transparency and inclusion and had been doing so for some time. It is important to note that good governance in HEIs did not suddenly begin either with the Report of the Review of Higher Education Governance in Scotland in 2012 or the adoption of the Code in 2013. For example, when Abertay University appointed its current Principal in 2011/2012 (before the publication of the Code), our staff and student governors were full members of the selection and appointment panel and, more broadly, staff members - including union officers - had the opportunity to be involved in the specification of the role. Many were able to meet, through focus groups, all the shortlisted candidates - providing formal feedback to the selection panel. Abertay University also conducted a full external effectiveness review in 2011/12 and already plans to do so again in 2016/17.

2. **The extent to which the Bill; (a) will improve higher education governance, particularly in the areas above (b) may alter the higher education sector’s current level of autonomy ; (c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector**

The Bill will not improve higher education governance, and will do nothing to improve the learning of Scottish students, or the generation of research and innovation for the benefit of business, and of Scottish society more generally. Indeed, we note that no mention is made of prospects for improved governance – that is to say governance that helps the HEIs to do a better job – in the Bill itself, or in the consultation document that preceded it, or in the report by Professor von Prondzynski, on which the consultation was based – a surprising and disappointing omission.

The Code, together with existing legislation, including the Further and Higher Education (Scotland) Act, plus the Financial Memorandum and Outcome Agreement between Abertay University and the Scottish Further & Higher Education Funding Council, provide an appropriate framework for meeting the expectations of staff, students and external partners. This framework is sufficient incentive to governors to behave in an accountable manner, if any such incentive is required.
The governing body of Abertay University is acutely aware of, and committed to, its accountability to its students and their families for the quality of education and care they receive, to its employees for their working environment, fairness of treatment and opportunities for development, to the taxpayer for value for money, and to the community at large for the economic, social and cultural benefits that a successful university provides. We do not doubt that this is true of the sector as a whole. Individual governors and chairs are also acutely conscious of the personal reputational damage they risk if taken to task by the media - a very real “accountability” in itself. If justification for political involvement in the affairs of HEIs embodied in the Bill is to improve “accountability” we consider that it reflects on the part of the Bill’s proponents a disappointing lack of regard, if not respect, for the ‘voluntary service’ ethos among governors, a surprising lack of awareness of the impact of Scotland’s media on individuals unused to the rough and tumble of political life, and a strangely narrow view of how accountability should work in modern Scotland.

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

No, that balance is already there. Abertay University considers that the current balance - between existing legislation, financial and outcome agreements with their conditions of grant, plus the Scottish Code - is appropriate. As noted in the introduction we would be very concerned if the legislation and associated regulations led to unintended consequences or future risks relating to ONS classification or charitable status.

4. 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

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

Appointment of Chair: – The Scottish Code already covers most of this so we consider that legislation and regulations are not required. The current principles and practices set by the Code include public advertisement and the inclusion of staff and student members of the governing body in the selection, nomination and appointment process. Given that compliance with the Scottish Code is a condition of grant, and given that it reflects best practice, Abertay University considers that it is already applying the process envisaged by the Bill.

More fundamentally, it is not appropriate that the method of appointing the chair of an autonomous charity should be determined by regulations made by Government.

The election of chair by a “wider constituency” – so far undefined - is inappropriate on grounds of both principle and practicality. The chair has to have the confidence of, and be
accountable to, his or her fellow governors. This is absolutely fundamental to good governance, as otherwise the governing body is unlikely to be able to function in a coherent way, providing challenge and, as appropriate, support to the Principal and other members of the senior team. It is this combination of effective challenge and contingent support that allows Scotland’s HEIs to deliver to their students and to Scottish society more generally.

Accountability to an external constituency, whatever that may be, cuts across this and undermines the effectiveness of the governing body. A chair cannot serve two masters or fulfil the role he or she must give to the governing body if he or she owes the appointment to external interests. Abertay University has no difficulty with the concept of an elected chair provided that it is the governing body members, comprising its students, staff, officers and a majority of independent members (whose appointment or election has itself been made involving staff and students) which determines the election. That is the only basis on which governors can have confidence in the chair, and vice versa.

At a practical level, the requirement for election by the “wider constituency” will deter good candidates from coming forward. Not everyone is comfortable with “campaigning” or with exposing themselves to rejection, and the risk is that those putting themselves forward will be drawn largely from the ranks of political activism.

Membership of governing body: Abertay’s governing body already includes two members elected by, and from among, all academic staff and all support staff. If we were required to add two members nominated by academic and other unions, we would be concerned regarding the ability of such members to work only in the interests of the University (points made by Universities Scotland and others); and we would either have to remove positions currently held by independent members or other categories of member such as those nominated by Senate as we cannot increase the overall size of the current governing body, which is already a maximum of 25, in accordance with the Code. If existing staff members are to be replaced by union nominees it is hard to see how this increases accountability and inclusiveness when fewer than half of Abertay University’s staff members are members of recognised trade unions.

This also prompts the question as to what other categories of interest group might then seek to be included in future changes to the regulations – for example, each subject discipline might seek to ensure that it could nominate a member. One could of course resist such pressure for a change in regulation (though it might be hard to articulate a principled reason to do so). But a more likely, and more immediate, reaction would be for governors coming from a different background (the professions, business, local government, and so on) to tend to act as representatives of those constituencies. In that way, governing bodies might become a forum in which special interests compete – at least to an extent – rather than purely focussing on supporting the university in its mission. This would be the antithesis of good governance. Overall, Abertay University considers that the current approach of having two membership positions that are open to all staff provides the most democratic structure.

With regard to the proposal to have two members nominated by “the graduate’s association”, we ask the Committee to note that Abertay University does not have such a formal entity and that there would be costs associated with establishing one, creating office bearers, and putting in a supporting infrastructure. This additional imposition of costs comes at a time when the Scottish Government will no doubt be asking the Scottish Funding Council as part of the 2016-17 Spending Review to consider options for reducing HE funding.
Abertay University’s current and preferred approach is to ensure that advertisements for vacancies on Court (our governing body) are circulated to our alumni. This approach is successful as demonstrated by the fact that four of our existing independent members are, in fact, Abertay alumni.

Membership of academic boards: The proposed cap on members of the academic board is not directly relevant to Abertay since we have fewer than 40 members. However, we consider it to be the right of each and every university to agree amongst its own community how many members its academic board might have, and what the balance of membership should be. Abertay University’s Senate (academic board) is currently undertaking a self-evaluation and is debating the type and number of members as part of determining as a community what role Senate should have and how we can ensure that we are being inclusive.

The composition and focus of a university’s academic board (or Senate) is at the very heart of what makes a university a university — quality of provision, academic standards, and the pursuit of knowledge and excellence. The integrity of the academic board sits alongside academic freedom as fundamental to the essence of what a university is. That the composition of such boards should be subject to political determination is a proposal that strikes at the core of HEIs’ autonomy, and sits uncomfortably alongside the Bill’s stated wish to safeguard academic freedom.

**Academic freedom**

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.**

There is no evidence that teaching, learning or research at Abertay University will be enhanced by these proposals. On the contrary, were the legislation to result in a change to the ONS classification or loss of charitable status immense damage would be done.

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

Ability to comply with existing legislation in a variety of areas, including diversity would require to be reviewed. The impact on academic freedom would be zero as respect for such freedom is a *sine qua non* of acceptance as a governor of Abertay University. The legislation in this regard appears to be pointless.

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?**

Views based on academic research and discipline and held and expressed in that context are, in the opinion of Abertay University, entitled to be expressed in contributions to conferences, seminars, the media, and in a range of circumstances. Abertay University would expect that such freedom would be respected by the Scottish Parliament and by Government even if such views, if based on academic study and evidence, were not shared by the administration of the day and would not expose the institution concerned to any financial or other sanction.
Conclusion

Scotland’s HEIs are a success story. They meet the skills requirements of Scottish businesses and of the public sector, including the NHS, and they contribute to Scotland’s international reputation for innovation and learning. They punch above their weight in research, commercialisation and knowledge transfer and have been a crucial asset in our successful efforts over many years to win mobile inward investment. That they are autonomous institutions, free from political direction, is key to that success.

Scotland’s HEIs are not complacent. Where improvements to governance are required these will be made and the Code which came into force in 2013 is a sound basis on which to build.

The case for legislation of the kind proposed has not been made. It will do nothing to enhance the performance of Abertay University and has the potential to do much damage. We urge the Committee to consider very carefully how the Bill might be amended to reduce the risk that it poses.

Abertay University
September 2015
Submission from Aberdeen University Students’ Association

Aberdeen University Students’ Association represents our 14,500 students. The ways in which our University is governed has a

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

The Von Prondzynski review (2012) clearly stated in its opening paragraphs that despite the complex legal framework on the status of HEIs in Scotland, our HEIs are independent public bodies, and therefore are not accountable to private shareholders, but, to students, staff and wider society. Our universities are, rightly, in receipt of well over a billion pounds of public funding each year, however, we believe they could and should do much more to evidence their public good in return for this funding.

Aberdeen University Students’ Association agrees with NUS Scotland that the best way to ensure this accountability is to open HEI governance to democratic participation. On every level of HEI governance students and trade union representatives should be involved. All decisions made should be done so transparently and open to public scrutiny.

Our concern is that there is a lack of a genuine democratic culture in governing bodies as well as a lack of transparency and accountability over how decisions are made and the people who make them, plus a lack of fair representation and diversity on governing bodies.

Lack of democratic culture on governing bodies

On many occasions it can feel like student representatives are purely there as token members of committees, with major decisions being made without sufficient opportunities for student to input. This is reinforced by the appointment process for chairs and lay members of court. While we are luck in Aberdeen that our Rector now chairs the University Court, this was only introduced this year.

Lack of transparency over decisions

In addition to a lack of participation and democratic culture on governing bodies, there is a distinct lack of transparency over governance decisions. It can feel like there is a back-door culture on our governing
body. Decisions are often effectively taken at private meetings between individual court members, rather than through open debate at court meetings. This leaves little opportunity for genuine democratic decision-making where a multitude of views are taken into account.

The impact of this type of decision-making is exemplified by the ever-increasing principals’ pay packages in Scottish HEIs. Decisions on senior management pay are usually taken in remuneration committees, which more often than not comprise solely of members appointed by the Principal. This means there is little oversight, few opportunities for scrutiny by the wider community and often non-existent involvement of staff and students. Because there is no legislative requirement to allow student and staff participation on all committees, student officers have to often spend a considerable amount of time arguing for their right to participate in these committees. Here at Aberdeen University Students’ Association, we only secured an observer place on the university’s remuneration committee after a number of years’ of asking to be included.

Lack of fair representation and diversity on governing bodies

We believe that all governing board would benefit from a balanced membership that reflects the composition of the group of people the body takes decision on behalf of. Despite recommendations made through the HE Code of Good Governance, university courts are still dominated by men. In Aberdeen there are 9 women on a court with 28 members, making the percentage of women 32. This is nowhere near representative of the student population (55% female). While there has been a move in the sector to increase representation of women on governing bodies, it can often feel like this is to increase awards such as Athena SWAN. We do not feel the current approach on self-regulation is sufficient to ensure fair representation on boards, and call on the Scottish Government to legislate on 50% women representation on all boards of public institutions.

We also feel it is important to encourage boards to look beyond gender and consider the diversity of their boards in terms of ethnic background and age of members. This is crucial as older members may be out of touch with what students actually need.

2. The extent to which the Bill

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

We believe the proposed bill will address the above concerns in two key ways.
Elected chairs

AUSA recognise that the Chair of the governing body holds an important role in the governance of our HE institutions. We believe that as leaders of our institutions, chairs should come from diverse backgrounds, have the confidence of the institution’s most important stakeholders (staff and students), and be elected in a democratic manner.

In order to ensure that the Chair is chosen in a democratic and transparent way, and that they will represent the interests of all key stakeholder of an HE institution, students and trade union representatives must lead every stage of the selection process. Crucially, we believe that the candidates standing for Chair should be nominated by students and staff without a selection panel to pre-vet candidates.

The draft Bill includes a proposal to legislate on process to elect Chairs from among candidates in section 1(v). We fully support increased transparency and democracy of governing bodies, and welcome the proposals to move to electing chairs or HE institutions. We believe that this process should be transparent and democratic, and led by our students and staff every step of the way.

We have some concerns over how the introduction of elected chairs would impact the role of the rector in our university. We believe that our rector role is similar to that of an elected chair – ensuring the chair of the governing body exercises their role with a sensitivity to the views of the key stakeholder of the institution (students and staff), and that they are accountable to those stakeholders. Therefore, rather than threatening the role of the rector, rolling out elected chairs throughout Scottish HEIs would extend and strengthen the proud democratic history of Scottish universities’ rectorship. It is worth noting that the proposal for elected chairs in the Von Prondzynski review were also based on extending the benefits of the rector model beyond ancient intuitions such as ours.

Student and trade union representation on governing bodies

AUSA believes it is crucial the governing body of our institution is representative of its stakeholders. Students and staff are a vital part of our institution, and must be a part of the decision-making process of the University of Aberdeen. This view is also set out in the Scottish Code of Good HE Governance, which described one of the main purposes of HE Governance to be “promoting an appropriate participation of its key constituents, including students and staff”.

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Section 4 of the draft Bill includes provisions for a minimum of two elected staff representatives, one trade union representative from academic staff, one trade union representative from support staff and two representatives appointed by the students’ association, as well as two representatives appointed by the graduates’ association. While our institution already include student and staff representatives in our governing body as recommended in the Code of Good HE Governance, these provisions in the Bill would secure staff and student representation through law. We are strongly supportive of this proposal, and fully endorse its inclusion in the final Bill.

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

While we fully recognise the need of any further regulation to fully respect the autonomy of Scotland’s HEIs, we do not believe the proposals set forward in the current bill alter that autonomy in a notable way. The proposed changes would not require institutions to implement any substantive policy changes; rather, they address the processes through which decisions on substantive issues are taken. We fully endorse the notion of ‘responsible autonomy’ for our institution. Where we have concerns is around the weight lent to both aspects of that, and are of the view that there has not been enough responsibility in return for the significant sums of public funding our institutions rightly receive.

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

With the development of the Scottish Code of Good Governance, undertaken by the Chairs of Scottish Courts, an attempt was made to make the majority of governance reform non-legislative; however, we believe that this simply did not go far enough, or result in a tangible and meaningful code or outcome and, as such, it is now necessary to seek reform through legislation. While our institution has voluntarily taken on board some of the measures proposed in the Scottish Code of Good HE Governance, others fall short of delivering on democratic, inclusive and transparent governance. It is crucial that we deliver the same high standards across the board in our HEIs.

When it was announced that the Committee of Scottish Chairs would be undertaking the development of the proposed code, NUS Scotland raised serious concerns, which we agree with. Chief among these was the concern at the system of self-regulation being adopted, and the potential for a weakened code as a result, which would now seem to have been a very real one. As we have stated in evidence before, we are wholly supportive of university governance being underpinned by ‘responsible autonomy’. However, we have often felt that this balance was tipped firmly to the side of autonomy, with little responsibility.
Getting a much more transparent and democratic form of governance was vital to ensuring that institutions were demonstrating genuine public benefit for the public funding they receive. But the code did not do that. From the start of this process we were of the opinion that it was not the chairs’ job to rewrite the original VonProndzynski report, but rather to find a way to take his recommendations and apply them across the sector through a code. Instead, it selectively picked those it wanted, ignored the ones it didn’t, and watered down those it took on.

The 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

AUSA believe electing chairs of governing bodies would be very beneficial for strengthening the democratic culture in university governing bodies. At its core, elected chairs provide a defined link between staff and students – who we would argue are the two single most important stakeholders an institution has – and the governing body. Two of the main arguments against elected chairs are based on fallacies.

Firstly, it has been argued that by electing chairs we may get to a situation whereby the chair doesn’t enjoy the ‘confidence’ of the governing body. However, while there is no evidence to suggest that would be the case, it also undermines the role of the chair and governing body. Governing bodies, as with all trustee boards (as the governing body essentially is, given the charitable status of our HEIs) should act as critical friends to institutions, on behalf of their stakeholders – staff and students. We would seriously question any governing body, and the role they are carrying out, that did not put their trust in a chair that had trust put in them by staff and students.

Secondly, it is often argued that there is no need for chairs elected by staff and students because staff and students already have representatives on the governing. Again, this entirely fallacious. As HEIs are very quick to point out – and a point entirely accepted, understood and respected by student representatives – when, in particular, controversial decisions come before a governing body, staff and student members do not have a representative role on governing bodies. We are there as full members, and bringing a representative role, as opposed to an independent one, into our membership of a governing body would go against the spirit, if not the actual letter, of trustee law. Elected chairs would
not undermine this legal role as a trustee, but would ensure that staff and students are able to directly have a say in the person chairing the governing body, and an advocate the act on their behalf, instilled with their confidence and trust, in addition to the student representatives they send to a governing body.

In terms of processes for election, we would maintain our support for the original von Prondzynski review, with a constituency of all staff and students of the institution. We already have the systems in place for elections. We do not believe there should be any bar or limit place on candidates for election (as the von Prondzynski review also stated must be the case). This should not be done to try and identify preferred candidates (again, as recommended by the von Prondzynski review), but simply to ensure all candidates would be able to undertake the role if elected. In order to ensure a degree of ‘independence’ from the institution, as a governing body should, this selection panel should not consist of institutional members. Instead, it should be made up of the three governing body constituencies – staff, students, and lay members. The process should be open and transparent; if ever a candidate is refused permission to run in the election it should be clear why.

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

As mentioned above, we have concerns over student and staff members’ ability to genuinely take part in the decision-making at our institution under current governance regulation. We believe securing places for student, staff and trade union representatives would be very beneficial to increasing transparency and democracy in HEIs, and would enable key stakeholders to better contribute to debate over key-decisions at their institution. We believe that having representatives of these stakeholders on our governing bodies will go a long way to ensuring that our institution is run to the benefit of our students, staff and the wider community.

However, we believe that student, staff and trade union representatives should also have representation on key committees of the institution. Currently, the university court often act merely as a “rubber-stamp exercise”, where decisions have effectively been made at committee level or behind the scenes. In Aberdeen we have representation on most committees but we are aware that other HEIs do not have the same level of access to decision making committees. Student and trade union representation on committees would further foster a culture of democracy and transparency in HEIs.
Submission from Moi Ali

Since 2010 I have been a Governor of Edinburgh Napier University, although this response is being sent in a personal capacity.

I have particular concerns around the possibility that in future, chairs of university governing bodies may be elected rather than appointed. My concerns are based on personal experience, having been a non-executive director (NXD) on a range of public bodies for more than 15 years (including, currently, the Scottish Police Authority and the Scottish Ambulance Service). I served for seven years on the Nursing and Midwifery Council (NMC), the world’s largest healthcare regulator, where latterly I held the position of Vice President. When I was an NXD at the NMC, lay members were appointed to the Council but registrant (nurse) members were elected. This created serious governance difficulties for the organisation. Nurse members were elected by nurses, and in order to maintain popularity to ensure re-election, good governance was potentially compromised. This situation created pressure on elected members to put the short-term vested interests of voters first, rather than the longer term interest of the organisation. Additionally, it was found that elected members were selected on the basis of popularity, rather than a skill-set that included experience of being a governor. After a number of well-publicised governance failures, the UK government changed the legislation to ensure an all-appointed NMC Council. It therefore seems to me to be a retrograde step to introduce elections. In part, the rationale for this Bill is consistency, but no other publicly-funded body, to my knowledge, elects its Chair. Currently a rigorous appointments process is underway to appoint a Chair for the Scottish Police Authority, as it is recognised that this principal leadership role must be occupied by an individual with the skills and ability to undertake it effectively. Our universities also deserve to have appointed chairs, with the ability, experience and, crucially, independence, to undertake this important role.

Moi Ali
Submission from Tim Allan

Dear Sir/ Madam

I am writing to express my objection to the Higher Education Governance Bill currently due for consideration in the Autumn. As a member of the General Council of the University of St Andrews, I fundamentally disagree with government interference in the autonomy of the University which will be greatly weakened by this most mendacious bill. Further, the academic reputation of this great and historic university will suffer and it will be seen as a lesser centre of free thought than it had hitherto been. It risks losing its reputation, in a global market, and its ability to attract the best students, the best academic staff and UK and Global funding.

This unnecessary and superfluous legislation is badly thought out, badly executed and smacks of overt political meddling. It is broadly seen as such and thus will be bad for St Andrews, for Scottish higher education, for the economy, for the country;

Please register my objection and opposition to the Bill.
Submission from Mr David Allen

Higher Education Governance (Scotland) Bill

Dear Sir/madam,

I am writing to you to voice my concerns at the Bill introduced on July 16th. My business is organising and conducting tours for school groups, and groups of HE advisers in international schools, around UK and European universities. Scotland has long been a favourite of my clients, indeed I have a tour right now in November of four Scottish universities that is already full and operating a waitlist. I had the first person sign up for this tour in April – 7 months ahead of the tour. Scotland is that popular!

The Bill, in my opinion, represents an attack on the autonomy of HEIs in Scotland. In yet another attempt to centralise, this government is meddling in things it should not. Scottish universities have long been admired for their contributions and it is as a result of their autonomy that this has been the case. I can only see negatives from this unnecessary Bill. I wonder why it has been introduced in the first place, is something inherently wrong with the current system? Have not Scottish universities been competitive in the global HE market? Do they not have envious reputations for academic excellence? My question is – how have they managed to build such a strong reputation, or deliver such amazing breakthroughs if their current governance structure is flawed?

I urge you to reconsider the Bill in its entirety.

Sincerely,

David
My qualifications for writing is that as a Scot and a St Andrews graduate, and later head of three academic schools and of an Oxford College, I have some experience of Higher Education in Scotland, England and world-wide and some understanding of the relative success and reputation of universities in different countries. I am alarmed at the prospect of this Bill which, I believe, will adversely affect the excellence and excellent reputation of Scotland’s universities.

My belief is

- that the league tables which show the best Scottish universities high in the world rankings are correct;
- that our universities enhance the reputation of Scotland abroad;
- that they bring to Scotland talented students from the rest of the world and talented teachers and researchers;
- that membership of what you might call the commonwealth of learning is of inestimable value to Scottish students and academics as well as contributing to the country’s international reputation;
- that our excellence depends on the independence of these institutions and their ability to operate without fear, favour, prejudice or political pressure;
- that the provisions of the Bill imperil that independence;
- that over quite a short time the international pool from which Scotland draws many of the best academics and students in the world would shrink in size;
- that the overall result would be to impoverish the Scottish Universities intellectually and in terms of global reputation.

The universities of Scotland are not broken and do not need to be fixed urgently. Higher Education as a whole is not perfect, however. Is there not a strong case for pausing rather than rushing into legislation? A commission of enquiry, or something of the sort, on which those who work in Higher Education should be largely represented, ought to produce proposals more useful than those in this Bill. Please consider this.

Eric Anderson
(Sir Eric Anderson, K.T., F.R.S.E.)
September 2015
Submission from Jeremy Auchincloss

Sir,

As a graduate of the University of St Andrews and one who knows how much he owes to his University education, I am appalled to see that the Higher Education Governance (Scotland) Bill has progressed to the stage where it will be submitted to the Scottish Parliament.

Has common sense become so uncommon, is higher education so rare among Scotland's parliamentarians, that this interference - for such it undoubtedly is - has yet to be challenged?

Democracy - not the original Athenian model, but that espoused by the 'western' world and expounded so succinctly by Abraham Lincoln himself - implies 'government of the people, by the people and for the people' (and not government of the people by the government for the government). Such Stalinist control will adversely affect the quality of education in all Scotland's Universities including those with impeccable international standing as St Andrews.

Should this bill pass through Parliament, it's adverse effects on the Universities themselves will be reflected in a failure to attract the best students and teachers, and a diminishing of Scotland's higher education (once the envy of the world) which will effect the country's economy and status.

I urge parliament to think again and to terminate this Bill before its birth.

Yours

Jeremy Auchincloss
Submission from Dr Edward G. Archer

Dear Committee Clerk:

As someone who has had a life-long involvement in Scottish education, I write to say that I am deeply concerned by the provisions of the Higher Education Governance (Scotland) Bill.

The Bill seems to me to be misguided in a number of respects. First and foremost, by seeking to limit the powers of individual institutions, and by transferring these to central political control, it strikes at the heart of Scotland’s universities. Academic freedom has been the hallmark of the universities over centuries. Through this freedom they have achieved great renown, in the interests of Scotland, of the United Kingdom and, essentially, in the wider world. This Bill seems to me be unnecessary and it would greatly undermine the international prestige and success Scottish universities have rightly enjoyed, in both their outstanding teaching and in their many and varied research programmes.

I hope the Bill will not proceed.

Yours sincerely,

Edward G. Archer
I wish to object to the Higher Education Governance Bill. I am a graduate of 2 Scottish universities both with world class reputations. I believe the reputations of these universities will be damaged by the bill as it will lead to direct government intervention in universities.

It seems extraordinary to me that the Scottish Government wants to pass legislation on universities that are clearly outstanding leaders in their fields. When I studied my MBA I learned that top down change never works, something that has been shown with the disastrous formation of Police Scotland. Changes in universities should always be lead by the universities themselves and not through Government.

I am fully aware of a number of students from elsewhere in the UK that have decided not to apply to Scottish universities due to the uncertainty that has been created by the Scottish Government. A number of the top universities could get into serious financial trouble if the rest of the UK decided not to go to Scottish universities leading to a large reduction in fee income.

The Scottish Government has not made any attempt to explain why these changes are needed. I suspect this is because they are not needed, they are just political.

Lucy Bailey BSc, MBA
September 2015
Submission from Susan Baldock

I wish to register my opposition to the proposal for the Scottish Government to exercise greater control over the composition and governance of all higher education institutions in Scotland. My concern centres around the inescapable consequence if this legislation is passed: the stifling of free enterprise; over regulation smothers the development and the exploration of ideas and strategies that are essential to growth - of any kind.

Please acknowledge this protest.

Yours sincerely
SUBMISSION FROM MICHAEL BANGHAM

I have seen some information about legislation under consideration by the Scottish Parliament concerning the Governance of the Scottish Universities.

Although I do not live in Scotland, I am a graduate of St Andrews University, and this proposed legislation raises some concerns with me.

There is a good general principle that can be applied: "If it ain't broke, don't fix it". Put more formally, if there is a problem or difficulty, identify the problem and take steps to remedy it; if improvements can be made to an organisation, make clear what improvements are intended and how the proposed action will implement them.

The proposals in the "Higher Education Governance Bill" seems to fail both these tests.

Scottish education has an extremely creditable history. It would be a great pity if its future were to be compromised, which many of us think will be the case if this legislation goes through in its present form. I hope the Scottish Parliament will reconsider this measure.

Michael Bangham
Submission from Robert Bartlett

I write to register my opposition to the Higher Education Governance (Scotland) Bill. Its effect will be to increase government control of universities. We have see the results of this in other countries and other periods of history. It erodes freedom of thought and expression. The British universities are prized institutions with centuries of responsible self-government behind them. Nothing should be done to prejudice their uniquely valuable standing.

Robert Bartlett,
Dear Sir or Madam

I am writing to express my concerns in relation to The Higher Education Governance (Scotland) Bill due to be considered by the Scottish Parliament in the autumn.

Scottish higher education institutions are in the process of implementing the Governance Code and Supporting Guidelines for Members of the Governing Bodies of Higher Education Institutions in Scotland. This process is due to be reviewed in 2016 so it seems precipitate to be proceeding with legislation in this area until that review has been carried out.

Neither the Bill nor the Explanatory Notes explain why this legislation is necessary and what issues are to be addressed.

Yours faithfully

Duncan Barnet – Graduate of the University of St Andrews
Submission from Mr Andrew Barker
Higher Education Governance (Scotland) Bill

Dear Sirs,

I am writing to express my opposition to the proposals to remove the ability of Scottish universities to govern themselves which is, it seems to me, the none too subtle purpose of the legislation being laid before the Parliament in the near future.

I was educated in maintained schools in Renfrewshire and Lanarkshire before taking my degree at the University of St Andrews, and it is the potential to destroy the superb academic reputation of St Andrews which motivates me to write now.

As I understand it, there are several issues which threaten all Scotland's universities if this legislation is enacted: the most basic of these is the loss of the current autonomy under which the universities, especially but not exclusively, St Andrews, thrive. The purpose of enabling legislation is to pave the way for future government action: one logical result of the current proposal would be to eliminate the distinctive character of our universities and make them all the same, governed by the pen of a minister or bureaucrat in Holyrood rather than by those who have the interests of the individual university at heart. St Andrews has a worldwide reputation in the Liberal Arts, Science and Divinity - this would be endangered by making it a carbon copy of whatever whim is dominant in the Parliament at a given moment. Our ancient and our modern universities have built up their reputations over time, centuries in the case of St Andrews, Edinburgh, Aberdeen and Glasgow: this proposal would put them back to square 1. To quote an opponent of FDR's plan to pack the Supreme Court in order to get his own way, 'This is more power than a good man should want or a bad man should have.'

Another aspect of the proposal which alarms me is the threat to the position of Rector: What is wrong with having the students choose the person who chairs the Governing body? Our ancient universities have had many distinguished men and women from all walks of life as Rector, whose skill and wisdom have benefitted the universities in countless ways for the duration of their term: is it seriously considered that some faceless CEO would raise the profile, challenge complacency and uplift spirits while having their strings pulled by Edinburgh? I think not.

In order to preserve and enhance the unique features of Scotland's universities, this narrow minded set of ideas needs to be rethought and greater trust placed in the best people to run these priceless assets for the benefit of Scotland and the wider world.

Andrew Barker
Submission from Erica Bastow

Dear Sir/Madam,

I write to object to the passing of this Bill due to pass through the Scottish Parliament in the autumn. As a (very proud) graduate of St. Andrews it is a matter of great concern to me that if this Bill were to succeed there would be many unwelcome side effects, most prominently perhaps is the direct political influence which would be wielded with the autonomy of the University being greatly weakened. There is no doubt that St. Andrews’ reputation as an outstanding world university would suffer. It is vital to attract the very best students in this increasingly global market and for this we need the best academic staff and, equally important, the best possible funding. This is unlikely in the event of this unnecessary Bill being passed.

I urge you therefore to reconsider the passing of this Bill and by writing state my objection to it going forward. This great university remains at the forefront of academic institutions over more than six centuries and should remain there; no unnecessary political Bill should hinder its path onwards and upwards.

Yours truly

Erica Bastow
As a graduate of St. Andrews University (1994), I wish to make it clear that I am totally opposed to this Bill. Any measure which threatens to compromise the independence and autonomy of universities in making policies is a step towards subordinating them to a dominant sectional interest.

As a child of the twentieth century I do not need reminding of the results of the subjection of the universities to the ambitions of the dictators in mainland Europe, I therefore urge that this Bill be decisively rejected.

Sincerely yours,

Gordon BEAMISH
Dear Sir/Madam,

HIGHER EDUCATION GOVERNANCE BILL

I write in response to the consultation regarding the above. Let me say from the outset that I view these proposals with considerable disquiet, and wish to express my concerns in the strongest terms. While the Royal Society of Edinburgh has already responded in detail, and I endorse wholeheartedly the content of its formal Advice paper, I would wish to add my individual voice here to the points the Society has made.

Firstly, and fundamentally, it seems extraordinary that detailed proposals are being made at the same time as the Scottish Government is seeking views as to the nature (and indeed the very existence) of deficiencies in the governance of the sector. Since no serious deficiencies have yet been identified, the Bill is arguably unnecessary, and certainly untimely. No proper explanation is offered of the problems the Bill seeks to solve, or of how the six major proposals would improve existing governance. No evidence is offered that the proposals would enhance transparency and accountability.

The Bill is arguably self-contradictory, in that while denying a wish to exercise increased Ministerial control, and stating its intention to respect the diversity and autonomy of individual HE institutions, and academic freedom, it seeks to impose blanket, standardised changes which threaten precisely those principles and qualities which have made the sector so successful, to the detriment of good governance.

Political control without proper parliamentary scrutiny would be facilitated by enabling future direct regulation of the composition of Courts and Senates, circumscribing institutional independence.

The role of Rector would be undermined.

The relationship between chairs and governing bodies would potentially be compromised by the proposal for the chair to be chosen by an electorate wider than the governing body, and the role of chair politicised.

Practical implementation of the proposals would be counterproductive, costly, duplicative and bureaucratic, threaten universities’ charitable status, jeopardise competitiveness, risk compromising current high academic standing, and limit innovation and diversity. The proposals are ill-timed, unnecessary, self-contradictory and threaten the necessary autonomy of universities. Consequently, they should be withdrawn.

Yours faithfully,

Professor J Stephen Bell.
To The Committee Clerk

I am contacting you to express my opposition to the proposals in The Higher Education Governance (Scotland) Bill. I am unclear what governance problem(s) this Bill is intended to address. Scotland has a long and unique history of academic excellence. These proposals threaten the future reputation of Scottish research and the institutions that produce it. Our HEIs strength is rooted in academic freedom and innovation and these proposals if implemented will be detrimental to the international standing of higher education in Scotland and consequently on our economy. The autonomy of the HEIS will be greatly weakened and will be vulnerable to direct political influence which is unacceptable. It is for these reasons that I felt compelled to lodge my opposition to the Bill.

Yours sincerely

Dr Karen L. Bell
Scotland has a long and proud history of achievement in Higher Education and, in particular, the excellence of its universities. The global standing of our universities is widely recognised and is of immense benefit to the country. This position has taken many years – indeed centuries - to develop, based on a great deal of informed judgement and sound decision making. This evolutionary process has a well established and very firm base and there is no reason to believe that the structures and processes that have created this highly desirable situation are about to fail us.

No organisational or institutional management process is incapable of improvement. However, as I myself know from my personal experience in hi-tech industries, the most effective way to manage effective change is to give the people in charge of the organisation free rein to seek sources of improvement on a continuous basis. Imposition of rules and regulations have their place but not in situations where the requirement is for continuous improvement in a system that is fundamentally working and is not materially failing to achieve an excellent result.

Therefore, along with many others, I am surprised and disappointed that the above bill is being presented to the Scottish Parliament. The Scottish universities do not need this. Perhaps some other parts of higher education would welcome the implementation of parts of this bill but I am absolutely certain that the universities will suffer as a result. They will lose valuable autonomy, have crucial academic freedoms curtailed and will become less attractive and, therefore, less competitive on the world stage.

The Scottish government is running a serious risk of being the agent of future failure. If there was any evidence that Scottish Government intervention in other areas (in particular secondary schools) had produced a substantial improvement in the standards of education across Scotland, there might be a case for looking for ways to extend this success to other sectors such as Further Education Colleges. But there is no evidence of such success. So, why is the Scottish Government so intent on fixing minor problems in “other people’s houses” when they have material and very serious problems in their own. (The universities would benefit enormously from substantially improved levels of literacy and numeracy in Scottish schools but this is not happening on the scale required.)

There is nothing in this bill that will improve the overall quality of our universities. All the universities and even the Royal Society are telling the government to abandon this bill and to look for other ways to achieve objectives that all players can agree with. This intervention is a “step too far” and will do nothing to enhance the reputation of (and support for) the Scottish Parliament.
Please, abandon this bill.

Tony Bellhouse B.Sc (Hons), DMS, C.Eng.
September 2015
Submission from William Berry

The Higher Education Governance (Scotland) Bill

1. I am writing to object strongly to the principle of this Bill, which will strike at the autonomy of Scottish Higher Education Institutions.
2. I believe that the current and continuing success of the leading Scottish Universities is of the greatest value, nationally and internationally, to Scotland and her people.
In addressing any perceived needs of the less successful institutions, the autonomy and success of the best universities must not be prejudiced by a “one size fits all” approach.
3. The two Universities of which I am a graduate, St Andrews and Edinburgh, each rank impressively in UK and World higher education comparisons. There is no evidence whatever to suggest that their respective governance arrangements are deficient in any way. Quite the reverse.
It would be folly to put the success of these and other institutions at risk.
4. Detailed objections to the proposals have been made widely in the Press and elsewhere, including the General Councils of my two universities and also notably the Royal Society of Edinburgh. I associate myself with the Royal Society’s view that the proposals are “inappropriate, unnecessary, and potentially counter to good governance”.
5. I have particular experience as regards the University of St Andrews. I was elected to the University Court by the General Council (in a contested election) in 2000. As a member of Court, I was elected Senior Governor (again in a contested election) in 2002 and served in that capacity until 2007. During that period Governance arrangements were kept under continuous review, including a rigorous review by a specially constituted Governance Review Group under the chairmanship of the Chairman of the Audit Committee and with a senior external member, as a result of which certain improved arrangements were initiated.
6. In view of the 600 year history of St Andrews and its current admirably high standing, it seems to me arrogance – and possibly worse – to think that a small group of people comprising the ministers of the Scottish Government for the time being, should be in a better position to organise the Governance of the University than the dedicated people with the special knowledge and interests of the University at heart.
7. I urge the Scottish Government to reconsider before going further with these shameful and potentially disastrous proposals.

William Berry
Submission from Mr Nick Berry

To Whom It May Concern,

Higher Education Governance (Scotland) Bill

I am writing to express my concerns with many of the proposals set out in the Higher Education Governance (Scotland) Bill that is due to pass through the Scottish Parliament this coming autumn.

My primary concern is that, as a piece of proposed law, the Bill is simply unnecessary; it neither addresses an issue nor rectifies an injustice. Instead, it appears to propose establishing a mechanism by which government can exert political influence over academia through its function as an enabling act.

Secondly, whilst the Bill’s original aims were to promote greater accountability and transparency (ideals that are difficult to argue against) the Bill in its current form seems to be advocating the exact opposite through its ‘one size fits all’ approach of enforcing greater consistency among institutions; furthermore, the simple act of enforcing consistency flies in the face of the long established and time-proven principle of academic independence. Surely, the universities of Scotland (such as my own alma mater, St Andrews) have the world-wide reputation that they have precisely because they were not shackled to a centrally imposed ‘ideal’.

This leads me to my final concern: the potential impact on universities of implementing the changes this legislation would require. For example, my own university estimates that, were the Bill to become law, it would require significant revision of at least four of its currently established ordinances in order to comply with the legislation. This process would take approximately two years, involve extensive consultation and needs Privy Council approval for each revision; an enormous administrative and financial burden for no apparent improvement or benefit, save ‘consistency’ where none is necessary.

In summary, the legislation as proposed is simply not needed; and, if introduced into law would adversely curtail the very foundations of Scotland’s universities, universities that have a richly deserved and hard-earned reputation for academic freedom and world-class teaching, research and learning.

Throughout my examination of the arguments both for and against the Bill’s proposals, it has been difficult to ignore the old maxim – ‘if it ain’t broke, don’t fix it’ and with this in mind, I urge the Scottish Parliament to reconsider the need for this Bill.

Yours Sincerely

N J Berry
Submission from Dr Alex Benchimol

Dear Committee,

I write as an academic at an ancient Scottish University whose research has been directly related to highlighting the intellectual excellence and democratic traditions of Scottish higher education. I am very proud of these traditions. Indeed, it was one of the things that first attracted me to Scotland as a postgraduate student in 1994, and I have since settled here, become a Scottish citizen (UK national) and am raising a family here.

I am very concerned that the provisions of the Charities and Trustee Investment (Scotland) Act 2005 have been invoked against the crucial oversight capacity of the academic senate as final arbiter on all academic matters. My strong belief--bolstered by my own research on the cultural history of Scottish civil society, including its universities--is that the Senate is the primary democratic body of the university, acting as our parliament, and should have final say on all academic matters, including research and teaching, which make up the core business of the university.

Universities are not ordinary private institutions and their charitable status should not conceal the fact that they are publicly funded, and part of the public sector. But much more than this our universities are key Scottish civic institutions that have shaped the modern history of Scotland and provided key institutional support for Scotland's civil society and public sphere and, of course, played a noted role in the major constitutional reforms which led to the founding of the Scottish Parliament.

From the outset of this consultation process it has been clear from statements by Professor von Prondzynski and former Education Secretary Mike Russell that Scotland's universities cannot behave like private companies; that they are also guardians of the precious legacy of Scotland's 'democratic intellect'. I hope that this latest loophole can be closed and that we can have the accountability, clarity and transparency in university governance that the von Prondzynski review promised.

All best,

Dr Alex Benchimol
Submission from Robert Bentley

I am writing to express my concern over the Higher Education Governance (Scotland) Bill currently under consideration by the Education and Culture Committee of the Scottish Parliament.

The proposed legislation would undermine the autonomy of Scottish Universities by giving future Governments significant influence and control without the safeguard of parliamentary scrutiny. This poses a danger to the ability of Universities to ensure academic freedom and act as sources of independent thinking, offering analysis and comment without fear or favour.

I also have serious concerns about the financial implications of the Bill, which include:

- concern that the Government has significantly underestimated the costs of compliance – in particular in relation to proposals for remuneration of chairs and the amount of work to implement the legislative change through reviewing, consulting, amending and implementing University ordinances
- concern that reductions in institutional autonomy will harm the global competitiveness of Scottish Universities and their relationships with business and charitable/philanthropic funders
- concern about the risk that the increased Ministerial control will jeopardise Universities’ charitable status

Given that there has been no compelling explanation of the problem that the legislation is trying to solve, I urge that the proposed legislation be tabled *sine die*.

Robert Bentley
Submission from Ms Sheila Bentley

I am contacting you as a member of the General Council of St Andrews University to express my concern at the proposed Higher Education Governance (Scotland) Bill.

I am concerned that the changes proposed are unnecessary - the need for change has not been made clear.

The changes will weaken the autonomy of the University, making it vulnerable to direct political influence. This is serious for an institution that has established a worldwide reputation over 600 years. Such loss of autonomy and possibly academic reputation could have a negative impact on attracting the best students, academic staff and funding.

It is not clear whether the costs necessitated by the changes have been fully appreciated.

The Scottish Universities have a world class reputation and deserve to be left to run their affairs in their own best interests.

Yours sincerely,

Sheila Bentley
Just want to register my opposition to the Higher Education Governance Bill. The bill will harm the higher education system and it’s reputation internationally by introducing superfluous and useless red tape.

In the short term, we won’t see the effect but over 3-10 years it will greatly impair university reputations and demand for places + quality of applicants.

The knock on effect is less highly qualified people coming to Scotland and therefore fewer high quality research jobs / companies being created.

Is this what we want?!

Yours sincerely,

Adrian
Submission from Robert Blackwood

Dear Sir/Madam,

As a double graduate of the University of St Andrews, a member of the University’s General Council, and an academic based in UK HEI, I write to express concerns about the Higher Education Governance (Scotland) Bill. I am startled by the proposals contained in the Bill introduced by the Scottish Government in June which, despite the (legally meaningless) Ministerial foreword to the contrary – in the consultation documents from November 2014 – will very much increase governmental control over Scotland’s universities.

To my mind, the implicit removal of the Rector’s role to preside over Court meetings is both unnecessary and threatens autonomy of the universities. There is no evidence of bad governance in Scottish universities, and this legislation is therefore excessive, not least in the interference of the membership of university Courts. The introduction of required members, each representing special interests, will undermine the freedom of conscience of individual representatives.

From my own perspective as an academic researcher, and a member of the UCU trades union, I am alarmed by the unexplained change to the obligation on universities in terms of academic freedom. Without clarification, this seems wrong-headed and again unnecessary.

As an employee of a UK HEI whose work involves significant international travel, I am well aware of the global reputation of Scotland’s universities, and I would call upon the Education and Culture Committee at the Scottish Parliament to reconsider this legislation, given its explicit and damaging undermining of Universities’ autonomy, the potential threats to academic freedom, and the wholly unnecessary interference in university governance which has not been demonstrated to be failing in its current form.

Yours faithfully,
Submission from Chris Bond

Dear Sirs,

I am aware that the Higher Education Governance Bill is due to pass through the Scottish Parliament this autumn. This would be a grave mistake. The move would greatly harm Universities, including St Andrews which I attended and which is a top UK institution and of international standing. I would be a bizarre move to take successful and dynamic success and hamstring it through counterproductive measures. In brief, superfluous bureaucratic interference will stifle the ability of the Scottish Universities to use autonomy to compete as effective individual and independent organisations. Academic standards will suffer, as will student recruitment, with the loss of academic independence, integrity and reputation. Economically, thriving areas will lose out as the Universities suffer - thus local economies will miss out on the positive multiplier effect that places like St Andrews enjoy courtesy of a fantastic University. The legislation seems at best pointless, and at worst destructive of a centuries old Scottish success story.

I urge the dropping of these misguided plans.

Yours faithfully,

Chris Bond
Submission from Richard Booth

Dear Sir,

I am writing to express my opposition to the The Higher Education Governance (Scotland) Bill. I am uncomfortable with the consequences it will have on Scottish higher education and, particularly, on my alma mater, St Andrews.

I fear that the autonomy of the University will be greatly weakened and that it will be vulnerable to direct political influence, which is totally unbecoming for a higher-education institution in 21st century Britain. As a consequence, I feel that the academic reputation of St Andrews will suffer, particularly in the global market where it fights to attract the best students, the best academic staff, and the best funding, on behalf of Scotland.

This wholly unnecessary Bill will be bad for St Andrews, for Scottish higher education, and consequently for the Scottish economy and Britain as a whole.

I strongly urge you to withdraw it from consideration.

Best wishes,
Submission from Ms Sarah Aine Boyle

To whom it may concern,

Having read through the Higher Education Governance Bill it appears that the Scottish Government wishes to control everything about each of Scottish Universities. This is something that I am NOT supporting for the following reasons:

As an alum of the University of St Andrews I was able to experience a unique University career. This is something that I greatly cherished. I have many friends and now colleagues who attended other Scottish Universities and speak of their unique experiences. This bill would not enable Scottish Universities to have their own unique identity. This bill if passed would hinder all Scottish Universities.

Furthermore, speaking in the name of St Andrews, I am concerned with this bill because of the following:

- the autonomy of the University of St Andrews will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;

I am the North American Alumni and Development Officer for the University of St Andrews. As a staff member, I have been able to see the individual strategy St Andrews has adopted based on its unique culture as a Scottish University. My position is not a position that exists at all Universities. This position exists because of St Andrews large North American alumni and parent community. This community supports St Andrews as a volunteer base and also with charitable financial gifts. I speak with donors on a daily basis and many have expressed to me that St Andrews is the only charity they support in the UK. If this bill were to pass, it cannot be guaranteed that their financial support would continue.

Lastly, this bill is completely unnecessary. There is absolutely no need for one more layer of bureaucracy.

I ask that you withdraw the bill immediately.

With kind regards,

Sarah Aine Boyle
Graduate of the University of St Andrews (2013) MA (Hons Geography and International Relations
North American Alumni and Development Officer, University of St Andrews
Dear Sir/Madam,

I wish to express my opposition to the proposed Higher Education Governance Bill.

As a graduate of the University of St Andrews, I was concerned to learn that the Bill would allow the Scottish Government to exercise greater control over the composition and governance of Higher Education institutions in Scotland, and that it would enforce greater consistency among institutions, and thereby reduce their ability to adopt individual strategies.

In an increasingly competitive marketplace, I am concerned that the impact of this will negatively affect student recruitment and will therefore be detrimental to the HE sector and to the Scottish economy.

Yours sincerely,

Colin Bovaird
My name is Hugh Bradford and I am a graduate of two Scottish Universities - St Andrews (BSc, 1977) and Strathclyde (PhD, 1992).

I am also a graduate of Manchester University (MBA, 1985), and have worked as an administrator at two colleges in the United States (Colgate University, and Mount Holyoke College).

I am a permanent resident of the United States and I would not normally feel that it would be appropriate for me to weigh in on proposed Scottish legislation. I do however have a vested interest in the performance of the institutions from which I have graduated. Furthermore one of the great strengths of Scotland's universities is that they operate simultaneously and effectively in Scottish, UK, and global contexts. From both the alumni and international perspectives, I am writing to express serious concern about The Higher Education Governance (Scotland) Bill.

It is totally appropriate for the Scottish Government to hold universities accountable for the funding that the Scottish Government provides. The Scottish Code of Good HE Governance is a well written, sensible, document that allows the Scottish Funding Council to do exactly that, while giving institutions some flexibility in how they achieve good governance.

In stark contrast, The Higher Education Governance (Scotland) Bill seeks to provide Scottish Ministers with powers to intervene in university governance at a very detailed level, which will undermine the autonomy of every institution. It is immaterial whether or not those powers are exercised, their mere existence will serve to stifle independent thought and action by university governing entities and their senior leadership; and promote self-censorship and other undesirable traits.

Although much attention is focused on the allegedly high salaries paid to University Principals, they are low by international standards, and it is already difficult to recruit talented leaders for these positions. The increased government/political influence outlined in the Bill will make it harder yet to recruit such leaders.

With regard to the very detailed proposals on the composition of governing bodies, the Bill is once again concerning. In particular, the stipulation that two places are reserved for trade union nominees seems to run directly counter to established principles of good governance, in that it would create an immediate conflict of interest.
Lastly, it is very hard to understand why details of the composition of an institution's academic board need to be the subject of government legislation.

Scotland's universities have a global reputation and influence that is disproportionate to the country's size. The Higher Education Governance (Scotland) Bill, as proposed, has the potential to adversely affect both. I would strongly urge that the Bill be withdrawn.

Hugh Bradford
September 2015
Dear Sir/Madam,

As a St Andrews graduate, and member of the St Andrews University General council, I urge you to reconsider this bill. It is hard to see a justification for it.

The bill would weaken the autonomy of the university. St Andrews has a very high ranking in the UK and beyond, and this proposed legislation would damage its reputation and its ability to attract the best students globally.

It is important to respect the autonomy and diversity of higher education institutions.

Yours sincerely

Lorna Brockett
Submission from Fiona Brown

As members of the General Council of the University of St. Andrews, we would like you to consider our view of this proposed legislation.

There are many valid arguments against the suggested changes, but in brief we completely fail to understand the need for alterations to a settled and obviously successful existing system. Such alterations could well harm the independence of the university and would in our view do little except add expense and yet more bureaucracy, the curse of our particular era.

Nigel & Fiona Brown
Submission from Philippa Brown

Dear Committee Clerk, I am a past student and MA of St Andrews and am horrified by the proposed Higher Education Governance Bill. I believe universities should always be free of political influence and bastions of free thinking. The university’s academic reputation will suffer if it is influenced by governments. It will no longer be able to attract the best students and staff. Funding will suffer.

It is an unnecessary Bill in that if something works as well as the University of St Andrews, which is famous as far afield as the USA etc. why change it? It is a totally unnecessary Bill and I do hope it will be withdrawn in the interests of freedom of thought and speech and action.

Yours sincerely, Philippa Brown
Submission David J Buchanan

Dear Sir

The Higher Education Governance (Scotland) Bill

I understand that the this draft Bill will shortly be discussed by the Scottish Parliament and that comments on the Bill have been invited. I am writing to you to express my concerns about the Bill and to urge its abandonment even at this late stage.

I was born and brought up in Scotland. I have three degrees from the University of St Andrews - BSc, PhD, DSc - and I am a Fellow of the Royal Academy. I have spent my career in England working in senior capacities for industry and Government. I will always be grateful that my excellent Scottish education has allowed me to follow a very successful career.

In my view this Bill place Scotland's Higher Education system in serious jeopardy. Parliamentary Bills ought to address and rectify problems, but in this case I see no problem that requires rectification. The Scottish education system is spoken about in glowing terms, and the Universities perform very well in comparison tables. Indeed, St Andrews is third in the UK league table. This proposed legislation can only damage this enviable position.

Universities must be autonomous and free from political interference at the whim of whichever party forms the government. Universities benefit greatly from public money and I accept that there needs to be accountability, but this Bill is a clear threat to the existing autonomy.

St Andrews performs well in the international market with many of its students coming from overseas. They come because of the University's reputation and the quality of its teaching and research. The Bill puts this at risk unnecessarily.

There is more than a hint of social engineering in these proposals with the aim of unjustifiable standardisation. Inevitably overall standards will be reduced, particularly for those institutions which perform best.

The Bill will damage St Andrews, the Scottish Higher education system and ultimately Scotland itself. It should be abandoned forthwith.

I am copying this letter to the General Council Business Committee of St Andrews, and to Professor Dame Ann Dowling, DBE FEng FRS, President of the Royal Academy of Engineering.

Yours sincerely
Submission from Fredrick Burgess

Dear Committee Clerk,

I am writing to express my concern at the Higher Education Governance (Scotland) Bill.

The independence of universities is of paramount importance and I feel that this Bill is unnecessarily endangering this freedom.

I cannot see there is a case for reforming the governance of universities in the first place - frankly I am surprised so much time and public money has been spent on this process.

As an alumnus of the University of St Andrews I am very happy with the way the university goes about its business, especially so the contribution it makes to the wider economy.

I do hope you will reconsider introducing this unjustified, unnecessary, potentially damaging bill.

Yours,
Submission from the Business Committee of the General Council of the University of Edinburgh

Higher Education Governance (Scotland) Bill - Call for Evidence

Introduction

The General Council of the University of Edinburgh consists of graduates, academic staff and members of the supreme governing body of the University, the University Court. It is responsible for electing the Chancellor of the University, three Assessors to the University Court and its own Business Committee. By the Universities (Scotland) Act of 1858 it has the statutory right to take into consideration all matters which affect the well-being and prosperity of the University and to make recommendations as appropriate. This submission is made under these terms of reference by the Convener of the Business Committee (BC).

The BC shares the Scottish Government’s view that higher education governance should be modern, inclusive and accountable. It believes also that, in the words of the 2012 Review of Higher Education Governance in Scotland, ‘for universities to be successful, and in order to avoid undue influence from outside, they need to be autonomous institutions’. It notes further that in November 2014 the Scottish Government explicitly endorsed this statement in the Ministerial Foreword to its Consultation Paper on a possible Bill.\(^1\)

The BC expresses its concern therefore, that many of the provisions in the Higher Education Governance (Scotland) Bill (hereafter, the Bill) appear inconsistent with the overarching principle of institutional autonomy. In addition, some provisions do not sit easily with the legal responsibilities of governing body members as charity trustees; nor in some cases with good practice in governance. We note also that the provision for subsequent legislation to take the form of Ministerial regulations, bypassing the full parliamentary process, renders the nature of future developments somewhat uncertain.

Our detailed response to the Education and Culture Committee’s questions, set out below, is therefore founded on the belief that the provisions of the Bill appear to challenge:

- the principle and practice of institutional autonomy;
- the importance of universities’ charitable status;
- the development of good practice in governance; and
- the need for both the Bill and subsequent secondary legislation to be subject to the scrutiny of the full parliamentary process.

Questions 1, 2 and 3: general observations

The BC acknowledges that the governance arrangements of higher education institutions must be reviewed from time to time to ensure that they are up-to-date and fit for purpose. The guiding principles of such a review must, we strongly believe, be those of autonomy and accountability, for on these

\(^1\) http://www.gov.scot/Resource/0046/00462633.pdf
foundations rest the success of Scottish higher education, its ability to contribute to economy and society and its global reputation.

Significant revision and reform, consistent with these principles, has recently been achieved through the sector’s commitment to the Scottish Code of Good Higher Education Governance (hereafter, the Code) which was introduced in August 2013. The provisions set out in this Code address all the key areas with which Part 1 of the Bill is concerned, most notably the membership and chairing of the governing body. The Code recognises that ‘governance is a rapidly developing field’ and so provides for a periodic review of governance arrangements. In November 2014 a first report on the implementation of the Code showed a high level of compliance with its provisions, with considerable progress having been made in respect of equality and diversity on governing bodies. A more extensive review of the Code itself will follow in early 2016 and will include a range of stakeholder perspectives.

Although the Code lays down a comprehensive set of eighteen Main Principles with supporting guidelines, it respects the degree of autonomy which the higher education sector currently enjoys, and its provisions are compatible with each institution’s ability to decide certain matters at institutional level. While it expects consistency of principle in each institution’s arrangements, it does not rigidly stipulate uniformity of practice. We regret that the provisions of the Bill do not appear to maintain a similar balance in respect of principle and practice, and we suggest that they appear to conflict with the Scottish Government’s clear statement in 2014 that it ‘does not want to increase Ministerial control over universities’.

It is important to note that under the Scottish Funding Council’s conditions of grant, universities are required to state each year that they comply with the Main Principles of the Code and follow closely its supporting guidelines. Through this mechanism the Scottish Government exercises its power to require universities to comply with certain governance standards as a condition of grant and so ensures accountability for public monies received. In light of all these factors, we see no further need for legislative provision at this time. If the Scottish Government wishes to see more rapid progress in ensuring good governance in compliance with the Code, it already has a mechanism to achieve that which strikes an appropriate balance between institutional autonomy and accountability. Proceeding through legislation on the lines proposed would upset that balance.

Question 4: specific proposals

Appointment of chair of the governing body: the BC believes that the provisions set out in the Code for appointing a chair are sufficient and fit for purpose.

With regard to the provisions in the Bill, the BC is strongly opposed to any requirement that across the sector the appointment of the chair should include an election from among candidates. Responses from many stakeholders to the Consultation on a future Bill highlighted a number of problems which might result from such a provision. Crucially, as the submission from Universities Scotland convincingly argued, it would risk disempowering the chair of the

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governing body and could reduce, rather than strengthen, accountability by severing the link between chair and governing body. We firmly believe that chairs have to be accountable to the body which they chair and we are disappointed that the cogent views expressed on this point in the Consultation have not found favour.

In the specific case of the University of Edinburgh, moreover, we would point out that the provisions of the Bill are not compatible with the current division of roles and responsibilities between the Rector and the vice convener of Court. These have been agreed and are set out in a formal and publicly available document.\(^4\) The primary role of the Rector is to preside at meetings of the University’s governing body; the Vice-Convener’s role is similar to that of Chair of the institution and is responsible for the overall leadership of Court and for its effectiveness. There is an important balance in the methods of selection of each of these officeholders: the Rector is elected by all staff and students, whereas the Vice Convener is appointed by the University through an open recruitment and interview process. Overall, therefore, the need for accountability is appropriately met.

On the matter of the appointment of the chair of the governing body, we do not think that further legislation is required. Were the Scottish Parliament to decide otherwise, however, we question the proposal to use Ministerial regulations, rather than the Bill itself, to bring about change. We do not regard this procedure as providing an adequate level of scrutiny, even although we note that the Bill provides for further consultation with stakeholders before any such regulations would be brought forward.

Membership of governing bodies: the BC agrees that a range of internal and external stakeholders should sit on the governing body, and that these stakeholders should include students and staff of the institution. But we believe that to specify numbers in each category is overly prescriptive and does not reflect the diversity of the sector.

There are serious difficulties with the notion of ‘representation’ being applied to members of the governing body. In accordance with the ‘Nolan’ principles of public life, charities law and indeed the Code, governors do not ‘represent’, and cannot be mandated by, any constituency or interest group. They must act solely in the interests of the institution and exercise collective responsibility to that end. It is thus difficult to see how and why trade union members should be identified as a distinct category of member, in addition to governors drawn from the generality of staff. Aside from the issue of principle, we also observe that unionised staff constitute less than 30% of all staff, and that other arrangements exist within virtually all institutions for more focused engagement between employers and trade unions.

The provision in the Bill that governing bodies should include persons appointed by being nominated by ‘a graduates association’ of the institution raises important issues of interpretation in the case of the University of Edinburgh. The General Council of the University of Edinburgh, as noted in the Introduction, is more than a ‘graduates association’; the title of ‘Graduates Association’ belongs to a quite different organisation in the University. The General Council, moreover, elects three assessors to the University Court, in contrast to the two specified in the Bill for nominees from ‘a graduates’

\(^4\) http://www.docs.sasg.ed.ac.uk/GaSP/Governance/RoleofRector.pdf
association’. The BC feels strongly that these arrangements should be maintained without alteration. We draw attention to the fact that the General Council Assessors, and indeed the Chancellor’s Assessor, provide an important channel of information and communication with the Court, by virtue of their attendance at BC meetings. This is an important element in governance which links the General Council with the governing body. More generally, it secures the inclusion in the Court of a larger number of people who are independent in their thinking than would be secured by the Bill and affords the university access to a wider range of skills of value to the institution’s governance.

Further, we note with some concern that the Bill gives Ministers the power subsequently to modify by regulations the categories of membership and number of members; and that it does not set a requirement to consult stakeholders before so doing. Such regulations, moreover, would not be subject to the detailed scrutiny of the full parliamentary process.

Academic boards: the BC agrees that a range of internal stakeholders should serve on academic boards, but the provisions of the Bill on this matter are overly prescriptive. We question whether legislative provision is in principle appropriate. The BC believes that the size and composition of academic boards should be decided by institutions and that, given the diversity of the sector in terms of internal structures and subject areas, a single model should not be applied to all. We note that in some universities the current proposals might in practice reduce the involvement of a significant number of academic staff. We accept, however, that matters relating to academic boards should be periodically reviewed. In this regard we consider that the provisions in the Code are adequate: institutions are expected to review the effectiveness of their senate/academic board and its committees in parallel with a review of their governance arrangements. The Code lays down that the governing body shall, where necessary, revise its structure or processes, and shall require the senate/academic board of its Institution to revise its structure and processes, accordingly.

Questions 5, 6 and 7: academic freedom
The BC welcomes the Scottish Government’s strong commitment to upholding academic freedom. We believe this aim is best served by preserving institutional autonomy and by retaining unaltered the definition of academic freedom in the Further and Higher Education (Scotland) Act 2005. The freedom to ‘develop and advance new ideas or innovative proposals’ is, we suggest, an unnecessary addition, since it is already implicitly covered by the existing definition. To include an additional element runs the risk of removing meaning from the existing provision, thus creating uncertainty over its interpretation and weakening, rather than strengthening, its force. Moreover, we find no evidence that the existing definition is inadequate and therefore do not understand the statement in the accompanying Financial Memorandum to the Bill that ‘alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs’.
We note further that institutions are already held to account for the protection of academic freedom. The Code states as a Main Principle that every higher education institution must ‘…ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments’. The Scottish Funding Council places as a condition of grant compliance with this, as with other, aspects of the Code.

**Conclusion**

For all the reasons given, we are deeply concerned by the Scottish Government’s intention to proceed with the Bill as proposed. We believe that the existing approach embodied in the Code provides clarity about principles whilst preserving flexibility and a proper degree of institutional autonomy. We submit that the case for introducing arrangements which would afford Ministers the opportunity to impose a one-size-fits-all governance model on Scotland’s varied range of HEIs is not made out.
Dear Sir or Madam

Higher Education Governance (Scotland) Bill

I write on behalf of the Business Committee of the General Council of the University of St Andrews.

The founding mission of the General Council is to consider any matter affecting the well-being of the University and make representations on it. The General Council is independent of the executive arm of the University. It presently has over 40,000 members, some 98 per cent of them graduates of the University, who automatically became members on graduation. The Business Committee, which is largely elected by General Council, organises General Council’s business.

Following the last General Council meeting in June, over 200 members have recently written to the Education and Culture Committee, communicating their opposition to the above Bill. This response is an unprecedented expression of the views of General Council members and demonstrates the strength of their feeling on this matter.

Now, we, as the Business Committee, present our own comments on the Bill.

Preface

Although the Bill covers all Higher Education Institutions (HEIs) and not just universities, the comments we make in this letter are mostly to do with universities – universities in general and our University of St Andrews in particular. Much of the terminology we use is therefore of our university, rather than the more generic language of the HEIs, as contained in the Bill.

1. There is no need for this Bill
As the Royal Society of Edinburgh cogently reported in the consultation that preceded the Bill, no compelling case has been made for new legislation. Universities are already signed up to the Scottish Code of Higher Education Governance, which came into being in 2013 and which is due to be reviewed in 2016. Universities’ funding from the Scottish Funding Council depends on adherence to the Code, which means that universities are well motivated to comply with it. An interim review in 2014 found that good progress was being made in achieving compliance.

It seems somewhat perverse to replace the Code, which is being followed voluntarily, by an Act, which will be imposed on unwilling universities. The stated aims of the Code (transparency, accountability and diversity) are virtually identical to those of the Bill.

2. The Bill will reduce Universities’ autonomy and individuality

- Provisions to prescribe the composition of university courts and academic senates and the method of appointing chairs of courts will unnecessarily fetter freedom of action and will prevent universities from pursuing their individual goals. The Bill explicitly states that one of its aims is to ‘embed a level of consistency across the institutions’”. The success of Scottish universities, not least St Andrews, in punching well above their weight in a global marketplace is due to their ability to run their own affairs and an agility in developing their own unique character and strategies. Expecting all universities (let alone all higher education institutes) to conform to the same model will homogenise (and therefore reduce) their market appeal and stifle enterprise.

3. The quality of governance will suffer

- The Bill is an enabling bill, allowing future changes to universities’ governance to be made by Government regulation, rather than subjecting them to the scrutiny and safeguards involved in an Act of Parliament. This Bill, which is going through a parliamentary process, is, in our view, significantly flawed. Regulations, which will not undergo the same level of open scrutiny, may therefore be expected to contain even more deficiencies.

4. Academic freedom is at risk from Government involvement

- The Bill’s new definition of academic freedom is not fully explained. In the change from “must have regard to the desirability of ensuring academic freedom of relevant persons” to “must aim to uphold the academic freedom of all relevant persons”, the reason for the apparent increased obligation on a university is far from clear.
- Academic freedom is a cardinal principle of all universities. Without it, the selection on merit of staff and students and the quality of teaching, research and degrees are all suspect. Through its reduction of university autonomy and an increase in government control, this Bill is bound to have some effect in restricting academic freedom. If a future government were to be tempted to introduce further regulations (which this Bill makes possible), for whatever purpose, academic freedom could be at even greater risk.

5. University courts will operate less, not more, effectively
- The proposed competitive election of chairs of court is likely to lead to divisions among court members and a diminution in respect for the chair. This could be made worse if the chair is imposed on the court by the vote of a constituency that is wholly or partly outwith the membership of the court.

- A university is a registered charity and court members are trustees. By law, trustees of a charity must act in the best interests of the charity. The Bill calls for two court members to be nominated from academic and support staff members by trades unions representing those staff. Since the accepted function of trades unions is to act for their members, their representatives on court may find themselves with a conflict of interests.

- In some universities, eg St Andrews, only a minority of staff belong to unions. To reserve two staff positions on Court for trades unions would therefore show bias towards trades unions, and would be unrepresentative of the will of the staff.

6. The future roles of Chancellor’s Assessor and Rector are uncertain

- The Chancellor’s Assessor enables the Chancellor to be kept well informed of the University’s affairs, thus enabling the Chancellor to carry out his or her duties (which include presiding over General Council meetings). The Assessor is appointed by the Chancellor and sits on Court. The Bill makes no mention of the role of Chancellor’s Assessor and this omission leaves the future of the role open to speculation.

- The role of Rector in its current form has existed in the four ancient universities for over 150 years and in Dundee for nearly 50 years. In St Andrews, the Rector presides over Court, but devolves the management of Court business to the Senior Governor. The Senior Governor also chairs Court when the Rector is not present. The Senior Governor, who is appointed by Court members, also fulfils the other duties expected of the chair of a modern institution. In its provisions concerning the role of chair of the governing body, the Bill makes no specific mention of the Rector or Senior Governor. It is unclear whether the Bill adequately recognises their distinctive roles.

- The Rector, who is elected by the student body, also plays an important part as an advocate of student interests. In St Andrews, over recent years, Rectors have brought fresh insights to Court and most have accomplished valuable initiatives. It is feared that, by removing the Rector’s right to preside over Court, an unwelcome consequence of the Bill would be to reduce the Rector’s role to a purely ceremonial one.

7. The consequential costs of the Bill have been substantially underestimated

- The Financial Memorandum suggests that any additional costs consequent on the Bill are those borne by HEIs in appointing and remunerating chairs of their governing bodies. These are relatively trivial: £8,000 per appointment and £3,000 per annum in remuneration (for 6 days' work).

- The chair of any reputable institution is involved in far more than simply attending the meetings of the governing body. Best governance practice recommends that the roles of chair and chief executive should not be held by the same person. In St Andrews, the Senior Governor presides over meetings of Court in the Rector’s absence and, just as importantly, undertakes all the other responsibilities expected of a chair. This involves, for example,
ensuring that Court fulfils its objectives in a proper and effective manner, reviewing the performance of the Principal and convening various committees. The time requirement is far greater than 6 days a year.

- The Financial Memorandum ignores the heavy costs associated with changing ordinances through the Privy Council to accommodate the Bill’s provisions. In St Andrews, this is expected to take about two years and involve significant internal and external resources.

- There are grave concerns about the adverse impact that this Bill and, in particular, subsequent additional regulations could make on a university’s ability to raise funds. The increased Ministerial control may result in the Office of National Statistics (ONS) re-classifying universities as central government bodies and rendering them ineligible for some research grants and some funding for entrepreneurial activities. If charitable status were also to be lost, further damage would be done to the value of grants and donations. The Bill contains no safeguards against future regulations causing such changes in ONS classification.

- Increased government intervention and reduced university autonomy is likely to harm global competitiveness and relationships with funders. This is especially important in St Andrews, where the majority of funding comes from non-Government sources.

- There is a further risk that, if a university’s freedom is impaired, its academic reputation will suffer and its ability to return economic value will be reduced. St Andrews delivers £12 in benefit for every £1 it receives in government funding.

**Conclusion**

The Government has stated that the aim of the Bill is to promote transparency, accountability and inclusivity. We subscribe to these same aims, but this Bill will do little to advance them. Indeed, overall, we believe it will do harm to Scotland’s universities.

- **Their autonomy will be weakened, they will lose their diversity and they may become vulnerable to political influence.**
- **Their academic reputation will suffer and, with it, their ability in a global market to attract the best students and staff and necessary funding.**
- **This will damage university finances and their contribution to local and national economies.**

Furthermore, with the Scottish Code of Higher Education Governance proving successful, the Bill is unnecessary. **It should be withdrawn.**

Yours faithfully

D Graham Wynd
Convener
Submission from Lynn R Butcher

Dear Sirs:

I am writing to you as both a parent of St Andrews University graduates and also in my capacity as President of the University of St Andrews American Foundation.

We who love and support, emotionally and financially, this superb 600 year old institution urge you to reject the Higher Education Bill.

This bill will seriously impact the autonomy of the University and with that its ability to attract the very best students, the finest academics, and much needed key funding from around the world.

St Andrews is a treasure and point of pride for Scotland and indeed for the world. Please, through misguided good intentions or lack of understanding of the impact of your actions, do not jeopardize that. Reject the bill.

Thank you,

Lynn R Butcher
Submission from Ms Deirdre Butler

I am in agreement with the views of St Andrew's University opposing the proposed legislation of The Higher Education Governance Bill in that:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Deirdre Butler

MA (Hons) St Andrews
Submission from Ms Susan Bickford  
Higher Education Governance (Scotland) Bill

Dear Committee Clerk,

I write to express my extreme concerns about the above Bill. My unhappiness is with the intent of the Bill. I leave it to those more capable than I to comment on it point by point.

I do not believe it is in Scotland's interests that its Higher Education Institutions should have their governance dictated to them any further than is already the case. I don't consider it to be the business of the Scottish Parliament to legislate on how these institutions run themselves. I see no benefit to the country, but do see much pointless, wasted, time, effort, money.

Scotland has several universities with worldwide reputations for excellence, for innovation, for scholarship. They work. They benefit the national economy. They raise Scotland's standing in the world. An important part of their strength is their individuality. Enforcing a level of consistency across the governance, indeed of almost any aspect, of separate institutions causes a considerable amount of entirely unproductive upheaval to them all, and invariably particularly penalizes the outstanding.

I repeat: These institutions work. With respect: Leave Them Alone.

Yours faithfully,
Susan Bickford
To Members of the Education & Culture Committee
Response to the Call for Evidence on the Higher Education (Scotland) Bill

I write in a personal capacity, since Heriot-Watt University is separately submitting a longer and more detailed set of evidence. I write as someone who chose enthusiastically to work (in a voluntary and unpaid capacity) for a Scottish university out of love for the country and admiration for the long and distinguished history of academic freedom that Scottish universities have enjoyed. I would have thought more cautiously about my choice had the provisions of the Bill been in force, for the following reasons:

1. Several provisions of the current Bill differ considerably from the propositions in the earlier consultation draft. I note that the bulk of responses to the previous draft were negative. I have read nothing to explain what flaws in current arrangements the Bill hopes to address.
2. I am particularly dismayed by the provisions in the Bill which will allow the Government to curb the independence of universities by taking powers to issue regulations rather than through measures that would allow Parliamentary scrutiny. No argument is offered for depriving Parliament of a proper opportunity to scrutinise this sensitive process.
3. The proposal for a far-reaching extension of Government power over Scottish universities is, I am reliably informed, already having a discouraging impact on recruitment of academics. Scottish universities will have to compete for expertise and ability with universities south of the boarder and in the United States, Canada and Australia, where government regulation is less intrusive than that which the Bill allows.
4. One of the strengths of Scottish universities has been the Code of Good Higher Educational Governance, which has introduced substantial changes in areas such as gender balance and the appointment of chairs of Court. I have seen no persuasive argument by the Government for legislating in areas where the Code sets out standards.
5. The Court on which I serve is already impressively diverse in terms of gender (although not, as yet, in terms of ethnicity). The measures proposed for the selection of Court members and chairs are likely to reduce that diversity. There is a substantial body of academic work that suggests that women are more averse to seeking a position through election than men are.¹

Two important points are not covered in the Committee’s request for evidence, but are of particular importance.

First, the market for academic talent and especially top administrative skills in the world of universities is now international. The best academics and principals are wooed in a global market. If Scotland is to retain its edge as a country with an unusually impressive group of universities for its size, it must avoid any policies which will make it hard to recruit such people.

Second, the most striking deficiency in Scottish higher education is the relatively low proportion of young people from poor families who go to university, especially when compared with other parts of the UK. The Bill does nothing to address this issue, and instead will waste scarce legislative time on making changes for which no case is made.

Yours sincerely,

Frances Cairncross
Submission from Wilma Cairns

Dear Sir/Madam,

As a member of the General Council of the University of St. Andrews, I am writing to express my concern regarding The Higher Education Governance (Scotland) Bill which is due to pass through the Scottish Parliament in the autumn of 2015. I understand the deadline for responses is Friday 4th September, 2015.

I appreciate that if these policies are passed it will allow more transparency, accountability and inclusivity, but there is a danger that the Bill will mean Universities losing autonomy and diversity.

The University of St. Andrews has a world-wide reputation of providing first-class education based on its ability to choose and deliver innovative enterprise. I am concerned that if this Bill is passed it will have a detrimental effect in the University being able to attract the best students and staff, and funding.

This may well deter the many philanthropic donors of which the University is renowned as well as affecting the contribution the University makes to the national economy. I believe St. Andrews delivers £12 benefit for every £1 received in government funding.

If this Bill is passed these new regulations will quite likely mean that Universities will lose their autonomy and in its place there will be direct political influence at the cost of academic freedom. This is unnecessary bureaucracy not only for St. Andrews but all Scottish Higher Education, for the economy and the country.

Yours faithfully

Wilma Cairns (Rev.)
Submission from Peter Campbell

Response to Questions relating to Higher Education Governance Bill

Q1 – The introduction of the 2013 Code on governance has addressed issues in this area and should be allowed time to be bedded and its success assessed across all institutions before any new legislation is brought forward.

Q2a – The proposal to appoint chairs of university courts through a selection process has the potential for conflict between chair of court and court members whose support the chair may not have. It is essential that the chair has the confidence and support of the court members for the court to work effectively and in harmony.

Q2b – With the proposals to enable changes to be made by regulation rather than full after scrutiny by parliamentary debate, the autonomy of universities could be undermined and the scrutiny of parliamentary process by-passed. The potential for re-classification of universities as public bodies by the Office of National Statistics exists which would be detrimental. The Office of National Statistics has already reclassified incorporated colleges of further education which has resulted in the creation of difficulties for the colleges. The charitable status of universities could be challenged by HMRC if the proposed levels of control which a government minister could exercise through regulation are approved. Universities receive a significant amount of funds from the donations of philanthropic bodies and individuals and this could be reduced if the universities’ charitable status was lost.

Q2c – The Financial Memorandum for Higher Education(2014) and the Code of Good Governance (2013) set out the accountabilities of a university court and its principal in relation to public funding. Transparency already exists. The proposals will only complicate the existing position with no gains for the HE sector with no increase in accountability or transparency.

Q3 – A process of discussion between ministers and university representatives to resolve any issues which arise is preferable to a situation where ministers have the power to introduce regulations without discussion between the universities and the minister taking place.

Q4 – The appointment of a chair of a university court should be the concern of the court acting within the existing governance process of the university.

Rather than seek nominees from a set number of trade unions to be staff representatives on court, a more open process would be to have open elections for a specific number of teacher and non-teaching staff representatives so that individuals who are members of smaller unions or who are not members of any union have access to the process.

The membership size of an academic board should be determined by the individual institution and not by legislation or regulation.
Q5 – Academic freedom has long been supported by universities. When resources are restricted, time and money could be spent on litigation should a staff member of an institution decide to challenge their own university, where they believe that research they propose but which has been turned down for support by the university, as it does not fit with the university’s strategic planning, is a breach of academic freedom.

Q6 – With restricted funds available to a university, the institution’s strategic plan with determine the areas of research which will be supported. Matters relating to academic freedom should be the concern of an institution’s academic board with responsibility for strategy and funding decisions residing with the university court.

Q7 – Activities of staff should be within the law and not bring their institution into disrepute.

Peter Campbell
Dear Sir,

The Higher Education Governance (Scotland) Bill

I am writing to indicate my strong objection to this proposed legislation which I believe will have a very deleterious effect on the Scottish Universities as a whole and upon the Ancient Universities in particular. The system of governance as applied through the existing constitution of the University Courts has served the universities well and assisted them in becoming highly respected institutions, both nationally and internationally. At the centre of this is their autonomy which protects them from interference, particularly from politicians with agendas. History has shown how one very distinguished university institution, Trinity College Dublin, suffered a decline in reputation following political interference post 1921. It has took TCD 50 years or so to recover from the effects of this. There is no doubt that the legislation now being considered will reduce the reputation of the Scottish Universities and student applications will suffer. A decline will be bad for Higher Education, for the economy which benefits from it and for the future generations of students. In a sentence this will do no good. It is unnecessary: *If it ain't broke don't fix it!*

Yours faithfully

Dr A.C.Campbell
Dear Madam or Sir,

As a graduate of the University of St. Andrews and a member of the University’s General Council, I write to register my serious concerns about the proposed Higher Education Governance Bill due to be considered by the Scottish Parliament this autumn. Given the global standing and success of St. Andrews, and indeed the strong position of other Scottish universities, it is unclear to me what problem this legislation is supposed to address, and why it is necessary. Furthermore, compliance with this legislation will require complex changes to the University’s constitution and impose an additional bureaucratic burden that will inevitably cost money and divert resources away from the University’s primary role in higher education - how can this be justified?

It seems to me that this legislation is designed to increase the ability of government to intervene in the governance of universities, and I object to that as a matter of principle. St. Andrews and the other Scottish universities are autonomous, independent institutions, which must be allowed to determine their own particular character and take the long view. The idea that each university should operate in a way consistent with all the others, or in accordance with the political flavour of the month, is completely unacceptable. I have seen no evidence that something is wrong with university governance in Scotland, and the only interpretation I can place on this legislation is that it is an example of government seeking to justify its own existence by making change for its own sake, even where there is no problem to fix, and to extend its influence over a successful sector that punches well above its weight in the world.

I am convinced that there will be no positive effect of this legislation for St. Andrews, and that there will be a number of negative effects: on its autonomy, on its distinctive character, on its global reputation and on its financial position.

I trust that this ill-conceived legislation will be withdrawn.

Yours sincerely,
Submission from R. Morton Carlyle

Dear sirs,

I am writing to express my grave concern about the above bill. I fully support the reasoned concerns expressed by The Royal Society of Edinburgh and urge you to take full account of their arguments.

I am particularly concerned that the universities will lose their autonomy and will suffer damage to their reputation both at home and overseas. I urge you to reconsider this largely unnecessary legislation.

Yours sincerely, R. Morton Carlyle
Higher Education Governance (Scotland) Bill

The Education and Culture Committee – Call for Evidence

Submission from the Carnegie Trust for the Universities of Scotland, August 2015

Summary

The Carnegie Trust for the Universities of Scotland wishes to express a number of concerns about the Higher Education Governance (Scotland) Bill currently going before Parliament. In particular, the Trust notes that the new Bill, if enacted, risks undermining the autonomy of the Scottish Universities and imposing regulations that could be significantly detrimental to their current operation and future prospects for maintaining their existing high international standards.

Our Trust, founded in 1901, was a major funder of the Scottish universities during the early part of the 20th Century – a time in which government grants to the universities were relatively modest. Since that time, although the balance has shifted, we continue to play a significant role supporting students and staff in the Scottish universities and funding a variety of research programmes.

Having contributed to our universities becoming leading players within the world academy, we are keen to ensure that this major Scottish asset be maintained into the future. The proposed legislation could significantly threaten this position.

Preliminary comments

Our Trustees comprise principals of the Scottish universities and a similar number of nominated Trustees. Whilst the university principals are extremely familiar with the arguments surrounding this Bill, our other Trustees – from a variety of backgrounds – have been less closely involved with these issues. Nonetheless, this submission has been prompted by specific concerns raised amongst our nominated Trustees.

As the Trustees have not met together since the Bill was published, there has been no opportunity for the Board, as such, to debate its content. The Trust is consequently making this submission with the caveat that a small number of Trustees prefer to reserve judgement until they have had an opportunity to discuss the areas of concern in further detail.
We comment on four aspects of the Bill:

1. The status of Scottish universities

The Bill, as drafted, would appear to give Scottish Ministers unlimited powers to determine: the compositions of the governing and academic bodies (e.g. Court and Senate); the manner in which Chairs are selected and appointed; and remuneration arrangements for Chairs.

We are concerned that, in addition to disrupting unnecessarily the existing, highly effective, systems of governance, this degree of externally imposed oversight may jeopardise institutions’ status as charities. That would have profound financial implications.

We are equally concerned that increased ministerial control of this type, building on other requirements brought into effect over recent years (e.g. adherence to ministerial guidance, outcome agreements, etc), increases the risk of reclassification of our universities by the Office for National Statistics as public sector bodies. This would have a particularly dramatic effect on institutions’ financial capabilities, including their ability to plan ahead and borrow for crucial investments.

2. Weakening of governance

Existing arrangements already allow and support university staff to put themselves forward for governing body membership, through open elections and/or via the academic board. These procedures ensure broad representation of different categories of staff. The idea that a sub-group of staff – the 27% that are members of Trades Unions – should form a further constituency would seem both unnecessary and undemocratic. Furthermore, this would introduce members to the governing body with a mandate from a particular interest group – contrary to regulations covering charity trustees and widely accepted principles of good governance.

Most higher education institutions recognise trade unions for national collective pay bargaining and have separate, well established, liaison arrangements for regular consultation and discussion with unions on a wide range of issues. At the same time their members are already eligible to be elected to governing bodies through existing channels, as often happens in practice.

We are keen to see that our universities continue to attract a diverse range of talented individuals onto their governing boards, with the most appropriate expertise and experience. Previous examples in which candidates for such bodies were required to stand for public election (e.g. Chairs of Health Boards) have demonstrated that, under such circumstances many talented candidates are discouraged from putting themselves forward.

Current procedures, recognised in the earlier consultation on the Bill, by which individuals with appropriate skills and experience are attracted through advertisement and then interviewed by a panel including staff and students, already ensure an open and transparent process.

We are particularly concerned with the possibility of the election of Chairs by constituencies other than the governing body itself. This would erode crucial lines of accountability and potentially create unresolvable conflicts for the Chair, i.e. being simultaneously responsible to the governing body and to the mandate of an external electorate. Significant instability could ensue; with a governing body potentially finding itself at odds with its Chair.
3. Diversity

The Bill also seeks to impose uniformity on the operation and make-up of governing bodies and academic boards across the sector.

Scotland’s higher education institutions vary greatly in size – from hundreds to thousands of staff, and less than a thousand to tens of thousands of students. And, constitutionally, they range from specialist institutions, incorporated as companies limited by guarantee, to universities operating under royal charters.

These structures have evolved over the years, often for very good reasons.

We see the widely differing size and nature of our universities, their autonomy and variety of governance structures, as strengths of the Scottish sector, which we ask be taken into account in progressing this Bill.

4. Academic Freedom

The Bill also seeks to address the issue of academic freedom. This is clearly an extremely important issue. However, Trustees have asked what evidence exists for a current lack of academic freedom or, as matters stand, a future threat to such freedom?

Request

Under the Trust Deed, written by Andrew Carnegie in 1901 and under which we operate, we are charged with contributing to the welfare of the universities in Scotland and their students. It is in this context that we request that the following factors be taken into account during the passage of the Bill:

i. The evidence that exists internationally for a strong correlation between institutional autonomy, including freedom from political interference, and academic excellence.

ii. The disadvantage of a “one size fits all” approach to the governance of institutions of widely differing size and nature and the need to respect diversity and heterogeneity.

iii. The major financial risk to our universities were there to be, as a result of the Bill and other government actions, a consequent loss of charitable status or Office of National Statistics reclassification as public bodies.

We conclude by noting that this latter issue is of paramount concern to the universities’ philanthropic supporters, such as our Trust, and any change of status could significantly restrict our ability to continue grant giving to the Scottish universities.

Professor Dame Anne Glover CBE FRSE FASM
Chair of the Carnegie Trust for the Universities of Scotland
Submission from Roy de C Chapman

Dear Sirs,

I am writing to lodge a strong objection to the content of the Higher Education Bill on the following grounds:

1. The Scottish universities all have their individual character, strengths and weaknesses. By imposing the sort of regulation entailed in the Bill, there is a very great risk of producing homogenised, grey universities which are indistinguishable from each other.

2. It cannot be good for education when everything is reduced to uniformity. Diversity brings with it interesting differences which enable prospective students to choose a course which is most suited to them.

3. It is extremely difficult to see why it is even necessary to make the proposed changes. Heaven forbid that our universities should be subjected to political interference.

I speak as a St Andrews graduate with children and grandchildren who have been to various universities, on both sides of the Border. Each one has been able to choose a course with its own individuality and has greatly enjoyed the experience. All the universities have been “away from home”, one of the great experiences of a university education. With the uniformity implicit in the Bill, there would be little incentive to go away from home and, as a result, widen one’s experience. The insularity which could result would not be in Scotland’s interests.

Roy de C Chapman,
Submission from Pamela J Chesters

Dear Sirs

While I agree that a periodic review of the governance of any organisation or sector is desirable, I write to express my strong reservations about many of the proposed changes.

My concerns relate both to the lack of clarity about the perceived problems which the Bill is seeking to address and to the proposed "solutions". Good governance is essential if Scotland's higher education institutions are to play the optimal role they are capable of, not just in terms of education and research but also in the wider economic benefit they bring to the country as a whole.

This has the potential to be severely compromised if the arrangements for appointing the Chair, when published, are such that an appointment could be made which does not carry the unequivocal support of the clear majority of the voting members. Where this has occurred in other sectors, organisations almost invariably degenerate into introspection and internal, energy sapping debate. It is not clear how this logjam could then be resolved and such a situation might encourage some to assert that further intervention by the Scottish Government was appropriate notwithstanding statements already made by this Government confirming institutional autonomy. It is also not clear how universities can be assured that the changes ultimately put in place will be such that the very best candidates will be encouraged to put themselves forward (or indeed that this is the criteria against which the proposals will be judged).

As a very experienced public sector chair, I would also have concerns about prescribing the the membership as proposed. Organisations need to be able to have a degree of flex to deal with circumstances as they may arise. While it is important that the voice of key stakeholders is present and has the opportunity to influence debate prior to decisions being made, it is the Court members acting collectively that take the organisation forward. Systems that require very large membership and/or encourage members to think they are simply there to represent the best interests of their particular constituency do not generally get the best outcome for the organisation as a whole.

Given the pressures on the public sector, the role of lay members in ensuring that the Court rises above the inevitable short term pressures and acts to secure and enhance the long term viability of the organisation, has never been more important.

The proposed changes produce a very unwieldy group if lay members are to be in the majority.

Again it would be helpful to understand what exactly the deficiencies of the current system are perceived to be, and thus how these proposed changes rectify them.

The issue of academic freedom is one which is paramount if the institution is to fulfil its potential and indeed the Government itself suggests that it it is seeking to enhance this which is to be welcomed.

However in the absence of a much clearer rationale behind the proposed changes in definition and wording, it is hard to be confident that the stated intention of the
current administration will be so interpreted by others relying on this legislation in the
generations to come. Consequently I would oppose this unless a much clearer proposition is brought
forward.

I accept the role of Rector is in one sense unusual - but would highlight it is a role
that works and the selection and support of "their Rector" has encouraged students
over the generations to engage, and feel engaged, in the University's governance. (I
write here as a former Rector's Assessor.) At a time when we are encouraging
young people to participate in the democratic process it seems bizarre to be
considering the removal of an institution which contributes to this broad engagement.

Finally on a technical point, if the Bill is to give increased powers to Ministers to
address issues of governance through Regulation, then I think this would further
diminish confidence that these important matters, which could have major impact on
the long term success of the institutions, and consequently the country as a whole,
will be subject to full Parliamentary scrutiny. The level of interest shown in this whole
debate surely underscores the importance of operating through legislation and not
regulation so that all voices can be heard in Parliament and proper scrutiny can take
place.

I hope these comments assist in the consideration of these issues and would repeat
in conclusion, far greater clarity on the problems the proposed legislation is trying to
fix and how the proposed solutions can be shown to be the best options to address
them is necessary if the legislation is to carry public confidence.

Yours faithfully

Pamela J Chesters CBE
Submission from Kenneth W.M. Cochran

I am writing in response to the call for evidence on the proposed Higher Education Governance (Scotland) Bill

My comments are in italics.

You have asked for responses to the following ...

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

Higher education governance in Scotland is healthy, mature, and developing in measured progression. The recent Scottish Code of Good Higher Education Governance (‘the Code’) has gone a long way to promote ‘modernity, inclusion and accountability’. The Code has barely been given time to effect its changes when legislation is proposed to trump it. The bill is un-necessary as its aims could be more easily achieved through further incremental developments to the Code. The Code already has a ‘comply or explain’ ethos with distinct implications for funding if it is not observed. It should be given longer to prove its worth. I am not aware of any evidence of problems in HE Governance which cannot be addressed by the Code and which require intrusive legislation.

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

The Bill will be a retrograde step, enforcing a one-size fits all structure on Scottish Higher Education. For instance, legislating that trade unions get to nominate two-members to a university court 4(1)(c&d) in addition to two selected by other staff in 4(1)(b) will be disproportionate in institutions where few members of staff belong to a trade union. This should at least be adjusted in proportion to trades union representation in a higher education establishment. Of course Section 8 gives ministers carte blanche to alter all of Section 4 at their sole discretion; thus Section 4 is essentially worthless and leaves governing bodies open to politically motivated (re)construction – a further threat to the stability, reputation and autonomy of higher education establishments.

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

The Bill can only decrease the sector’s autonomy and international reputation. By giving ministers broad powers to interfere, it opens up the sector to the political manipulation of whichever party is in power at a given time in Holyrood. This will be detrimental to private/corporate sourced research investment, Scottish Higher Education’s international reputation, and will reduce the credibility of the independence from political manipulation of university research findings. Our chief rival institutions in the United States have complete autonomy in their governance (within US business and employment law)

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

By placing universities effectively under control of government ministers, the accountability of their courts as charity trustees to act solely in the interests of the charity will be compromised.

3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?
**NO!** non-legislative measures, such as the Code, should be given more time to evolve. My earlier comments that legislation is not needed at all, still stand. It is mildly encouraging to note that the bill has been softened since the initial proposals for consultation. What is proposed seems to have greater flexibility as enabling legislation—however being more flexible has the drawback of being prone to political ministerial manipulation by the party in power at a given time.

**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. This too is open to political manipulation. The greatest drawback is that the chair appointed may not have the confidence of the court. Currently courts appoint their senior governor. This ensures that the chair has the respect and confidence of court. It would be an intolerable position for a chair to be appointed who was fundamentally at odds with the views of a majority of court. **By opening the possibility that a chair, appointed from outwith the governing body would also be paid, opens the possibility that he/she may be considered financially indebted to an electorate rather than to the other trustees of the charity. This is an incredible conflict of interest.**

- To require HEIs to include various persons within the membership of their governing bodies. The requirement to have **two trade union members would be disproportionate in an institution where trade unions do not represent a significant number of staff.** Trades union members should stand for election in the same categories as for non-trade union represented staff. As universities have a major impact on their local communities, there should be stakeholder representation from the local community. **In the event of insufficient candidates for a post coming forward to force an election,** (Sections 5(4) and 11(4)), an election should still be held with an option to ‘re-open nominations’. **This will prevent ‘elected unopposed’ members with no mandate taking office AND give a candidate who is elected unopposed confidence that he/she has the support of their electorate.**

- To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons in their academic boards / senates. The size of an academic board should be left to the institution. Where an academic board is large, it is common practice to delegate some areas of responsibility to smaller sub-committees.

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

**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”.

*Academic freedom does not need redefinition. The proposed bill attempts this but does not specify any resulting implications for good HE governance.*

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.

Yes – opinions will always vary on controversial topics. The important thing is to ensure that people are not discriminated against because of their beliefs, so long as these are expressed within the law. However this does not require a redefinition of academic freedom. *Academic freedom is significantly compromised when politicians are able to pressure university staff to comment in favour of their political views* as happened last year when the then First Minister applied pressure to the Principal of the University of St Andrews to ‘clarify’ comments on Independence. This would be even worse if ministers had controlling regulatory power over universities.

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 proposed tinkering with the definition of academic freedom does little to bring clarity, especially in the light of the greater threats of political interference.

*Finally may I add my whole hearted support to the Royal Society of Edinburgh’s advice paper (15-01 of February 2015) which so clearly articulates the problems with the proposed legislation. I hope these comments are helpful to you.*

*Sincerely,*

Kenneth W.M. Cochran  B.Sc. 1979
Submission from Dr Michael Condon

To The Committee Clerk.

Dear Sir / Madam,

As an alumnus of the University of St Andrews I am extraordinarily concerned by the provisions of the proposed Higher Education Governance Bill. I was an undergraduate of St Andrews between the years 1956 and 1962. I vividly remember the travails of the university of the late 1960s and 1970s during which time the very existence of the university was threatened. By the skill and very hard work of a succession of gifted Principals the university pulled itself up by the bootstraps and is now the foremost university in Scotland and frequently in third to fifth place in the UK rankings. It also has high rankings in the international universities' arena. These opportunities for display of extraordinary initiative and progress will be severely if not totally curtailed by the provisions of the proposed bill.

The new legislation will also enforce greater consistency among institutions, and thereby reduce their ability to adopt individual strategies. It will burden universities and the public purse with extra regulation and bureaucracy that will stifle enterprise and jeopardise the positive contribution that universities, such as St Andrews, make to the economy. In my view the bill is simply unnecessary.

In summary the deleterious effects on the University of St Andrews can be stated as:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

I trust my views and the views of other alumni and concerned persons will be taken into account when the bill is presented for discussion.

Yours faithfully,

Dr Michael Condon, OBE.
Higher Education Governance (Scotland) Bill

Submission to the Scottish Parliament’s Education & Culture Committee
by the Committee of Scottish Chairs

Introductory Comments

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

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

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

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

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

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

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

3. **Inadequate consultation**

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

It is regarded as being well established that:

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

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

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

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

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

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

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

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

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

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

2 The extent to which the Bill

a will improve higher education, particularly in the areas above

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

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

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

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

- deciding on the process for appointing Chairs of university governing bodies (Section 1 (1)), on remuneration to be paid to Chairs (Section 2 (1)) and on their terms of office (Section 1 (2));
- deciding on the composition of universities' governing bodies (Section 8); and
- deciding on the composition of the internal academic boards that have responsibilities relating to universities' curriculum and academic standards (Section 13).

This proposed increase in Ministerial powers:

- will reduce the independence of the universities and the diversity which is one of the sector's strengths;
- runs the risk that a future administration would take far-reaching decisions on university governance without adequate parliamentary scrutiny;
- directly contradicts the Cabinet Secretary's commitment - in the Governance consultation document - that 'for universities to be successful ... they need to be autonomous institutions' and that 'The Scottish Government does not want to increase Ministerial control over universities'.

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

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

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

- prevent universities from rolling forward income essential to fund investment in the renewal and improvement of their estates;
- place a severe restriction on the universities' ability to borrow funds, bringing them within the constraints of public sector borrowing, and thus reducing investment in new and improved infrastructure;
- inhibit universities' ability to enter into productive partnerships with commercial bodies because of the issues associated with state aid; and
- have a severe impact on philanthropic income, which currently stands at over £50M per annum. Philanthropic giving supports a range of infrastructure initiatives, and also scholarship opportunities, including for students from disadvantaged backgrounds. Philanthropic income could be further reduced if the provisions of Bill as enacted and the Regulations made thereunder resulted in the loss of charitable status.

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

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

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

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

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

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

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

- To require higher education institutions to appoint a chair of their governing body in accordance with a process set out in regulations made by the Scottish Ministers
- To require HEIs to include various persons within the membership of their governing bodies

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

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

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

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

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

.2 Membership of governing bodies

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

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

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

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

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

.3 Membership of academic boards

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

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

.4 Role of the Rector

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

Academic Freedom

Please provide your views on the following:
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.

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

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

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

The new Bill:

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

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

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

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

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

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

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

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

CSC, 3.9.15

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

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

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

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

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

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

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

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

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

   No   √

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

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

Yes   √

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

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

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

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

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

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

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

   No    √

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

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

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

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

10. Do you agree that a provision to describe the head of the university as the ‘chief executive officer’ should be introduced in legislation?
   
   No   √

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

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

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

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

D. CHAIRING OF GOVERNING BODIES

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

   Yes   √

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

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

Yes √

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

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

See comments after Q 19.

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

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

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

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

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

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

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

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

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

E. MEMBERSHIP OF GOVERNING BODIES

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

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

No √

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

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

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

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

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

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

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

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

F. COMPOSITION OF ACADEMIC BOARDS AND APPOINTMENT OF MEMBERS

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

   No ✓

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

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

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

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

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

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

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

Submission to the Scottish Parliament's Education and Culture Committee
by the Committee of University Chairs (CUC)

We are writing as the representative body of Chairs of Universities in the UK. We think it important that the Education and Culture Committee is made aware of significant concerns we have regarding aspects of the Higher Education Governance Bill.

The Bill proposes that government ministers take new powers on themselves covering fundamental aspects of university governance. These could have a serious detrimental impact on University finances. They did not form part of the consultation; indeed the proposals are in direct contradiction to statements made in the Ministerial Foreword to the consultation paper.

The areas in which increased Ministerial powers are proposed are:
- deciding on the process for appointing Chairs of University governing bodies, on the remuneration to be paid to Chairs and on their terms of office;
- deciding on the composition of universities' governing bodies; and
- deciding on the composition of the internal academic boards that have responsibilities relating to universities' curriculum and academic standards.

The Bill raises fundamental issues about autonomy and institutions’ role as a force in public life independent of government. Our concerns arise from the fundamental change in institutions’ constitutional position which would result from Ministers taking powers, exercisable through secondary legislation, to decide what categories of person should be on governing bodies, how they should be appointed, and their conditions of service – and then be able to change all that at Ministers’ own initiative without limit on the category of person they may decide should be on governing bodies. These are not matters which the Scottish Government consulted about. Ministers are taking similar powers in relation to academic boards and senates, which are part of universities’ autonomous self-regulation as an academic community, and which will result in disenfranchisement of a significant number of academic staff. These major new powers for Ministers fundamentally change institutions’ constitutional status. They are contrary to previous assurances from this Scottish Government that they respect ‘responsible autonomy’. They could also give rise to significant political influence over universities which would be highly undesirable.

Financial sustainability, operational autonomy, appropriate governing structures and strong management and leadership capacities are key elements in order for universities to fulfil their multiple missions and respond to the current challenges in an increasingly complex and global environment. Diversification of missions and activities, financial strains caused by rising costs, new stakeholder demands, global competition and the global economic downturn all contribute to the increasing complexity of steering and managing universities. The
research evidence\textsuperscript{1} is clear that there is a direct correlation between the degree of autonomy a university has and its effectiveness and productivity. This is because autonomy and good governance encourages strategic visioning, innovation and flexibility, and enables decision-making and resource management free of bureaucracy and political control.

The Governance Bill proposes an increase in the level of control Scottish Ministers will exercise over Scotland's universities. As a general approach, we think this is unwise, and is not in the Scottish (or UK's) national interest since it will constrain the dynamism and ambition that have made Scotland's universities one of the nation's great successes.

Given the success of Scottish Universities, we do not see the benefit but do see substantial risks in proceeding in this way. We believe that if there are any significant issues that need to be tackled in Scottish university governance, they would best be tackled by publishing Codes of Governance and sharing best practices that supports universities in their efforts to improve governance and management structures.

We also understand that there is a risk that the current proposals could lead to universities being reclassified by the Office of National Statistics (ONS) as 'Central Government'. Should this happen, it would have dramatic adverse consequences. It would:

- put at risk their status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support and call into question Scottish Universities ability to participate in various UK collaborative ventures;
- place a severe restriction on their ability to borrow funds;
- reduce their ability to enter into commercial partnerships.

CUC took part in the consultation exercise, responding to the issues the Government raised through its consultation paper. However, we have had no opportunity to date to comment on important matters that were not included in the consultation but which now form part of the Bill.

These proposals were not included in the Consultation on this Bill which the CUC participated in. Had they been included the CUC would have argued strongly against them.

We have also had the opportunity to see the detailed submissions being made by Universities Scotland and the Committee of Scottish Chairs and we endorse those.

CUC 20\textsuperscript{th} August 2015

\textsuperscript{1} The Governance And Performance Of Research Universities: Evidence From Europe And The U.S. Philippe Aghion Mathias Dewatripont Caroline M. Hoxby Andreu Mas-Colell André Sapir Working Paper 14851 CSC, 17.8.15
The problem – who 'owns' a university

Governance arrangements are generally designed to ensure that the 'owner' of a company, organisation or institution have their interests protected in the management and administration of that company, organisation or institution. Thus shareholders have a right to oversee the work of management teams in companies, trustees are appointed by people who set up charities to ensure the charities goals are met and Parliaments are subject to election by citizens who have the right to change the 'management' of their elected institutions.

Universities are generally understood to be 'public' institutions. This does not mean they are 'public sector' (owned or directly managed by government) but that they fulfil a wholly essential public service on behalf of all of the public. They are also public in the sense that universities are essentially communities of students and academics.

No-one is calling for universities to be 'owned' by government (although this is a perfectly possible arrangement). However, absolutely no-one would argue that universities are or should be 'owned' by individual principals, senior management teams or small groups of self-selecting private individuals. And yet this is effectively the governance model which is used in the Scottish university sector.

How does university governance really work?

Governance arrangements vary from university to university. However, there are important consistencies. All governing bodies have a built-in majority of members who are appointed by that same governing body (the 'lay members'). Vacancies on the governing bodies will therefore almost always be filled on the basis of candidates selected by senior management teams. Previous nominations put forward by the senior management teams (the existing lay members of governing bodies) will then select from among the new set of nominations. The chances of a university's governing body ever failing to have a permanent majority made up of people nominated by senior management teams is negligible. In addition, other members of governing bodies increasingly rely on senior management teams for their appointments. Where senate used to be elected by academics (senate is responsible for all academic decisions), it is now often made up automatically of heads of department who themselves have been directly appointed by senior management teams. There are very few routes onto a governing body other than by the 'grace and favour' of senior management teams, almost no chance of ever having a majority on those bodies not selected by senior managers and potentially in some universities no chance whatsoever of a non-management-approved individual getting onto governing bodies (other than a student representative).

It is inherently risky to have the governing body (which is supposed to hold senior managers to account) to be effectively appointed by senior managers. A simple example of how this model fails the wider university community is the extent to which the almost
universal dismay at the constant inflation-busting salary increases of senior management staff cannot express itself as any form of governance-driven restraint on pay settlements. The more substantial risk is that there is a real reason to worry that a determined senior management team can force through extremely radical and irreversible changes to a university and there is little or nothing that staff, students or other stakeholders can do to moderate those decisions.

This model is recent and a result of two decades of increasing centralisation and control within the Scottish university sector. In the recent past governing bodies were more independent and able to hold managers to account. Few believe this to be the case now. It is simply bad practice to allow administrators this degree of control over those who should be holding them to account.

Some basic principles

Common Weal believes that the days of governance by self-selecting elites without any democratic element and with little or no attempt to reflect diversity should be coming to an end. If you look at the profile of those who populate governing bodies you will find little reflection of diversity. It is extremely unlikely that any will be from low-pay sectors of the economy. The vast majority will be made up of very senior figures from the professions. They will often know each other and be in social circles together. There will be little or no transparency in their recruitment and no opportunity for groups other than senior management teams to nominate or recommend people who should be appointed. Voices representing students or staff are likely to be in very small minorities and in some cases are required to leave during certain decisions. 'Controversial' decision (such as the appointment of a new principal or the setting of principals' salaries) will be handled in a small subcommittee, narrowing further the diversity of people making the decision and reducing substantially the already low level of transparency. All of this is defended in precisely the same way that other elite social groups defend their positions – that this is all necessary to ensure that the 'right' people are appointed. The definition of 'right' is not up for discussion.

That a big and essential public institution in 21st century Scotland should be run almost entirely divorced from principles of stakeholder representation, democratic accountability, reflection of social diversity and expectation of transparency is clearly anomalous. Common Weal believes that these principles ought to underpin the governance of all public institutions – and certainly public institutions of the size and importance of universities.

Solution

Common Weal would favour wholly-elected governing bodies of universities (a model used in other successful university sectors). Democratic elections to court would provide a forum for wide and participatory debate and discussion about the purpose, future and strategy of a university. It would inject fresh and diverse thinking into institutions which have been governed by small elites – who in 2015 really believes that only people on very high salaries have something to bring to the administration of the public realm? Debate and discussion is healthy and should be supported. People elected to govern institutions can be expected to carry out that duty with every bit as much commitment, skill and dedication as those appointed by senior managers. Requiring universities to at least have
an election and debate in selecting the chairs of governing bodies is an important start (though it is a very modest proposal). Universities have complained that this is some kind of interference with their ‘autonomy’. However, billions of pounds of public money are given to universities and it is entirely reasonable that the public should wish to be assured that the governance arrangements in an institution are sufficient to safeguard the use of that money. An alternative means of doing this would be to apply conditions to the grant given to universities – if they wish to receive public money then they would be required to have at least a democratic element to their governance. Universities would then be free to exert their autonomy and choose not to accept grants of public money.

Some arguments

The following arguments against reform have been put forward but do not appear to stack up:

- **This breaches academic freedom.** Academics freedom is the protection of academics from politicians – and senior managers. This is generally viewed as an era which has seen greatly increased management interference in the work of academics. There is a good case for an inquiry to see if there really is a threat to academic freedom from management practice. Institutional autonomy (the right for universities to act free from external influence) has nothing to do with academic freedom and the deliberate conflation of these completely different concepts should be challenged.

- **You can't let trade unions onto governing bodies.** This claim is remarkable. Across most of Europe, having employee representatives on governing bodies is standard in the private sector never mind the public realm (it is legally mandatory in many). Good managers recognise that having staff involvement in governance is essential to effective management of an institution (this has been shown many times in research). It is difficult to comprehend why the universities oppose this.

- **This will prevent universities taking radical decisions quickly.** Good governance will support good ideas and implement them quickly. But it will give proper time and consideration to risky decisions. Universities appear to be arguing either that their existing governance simply rubber-stamps their decisions or that democratic governance is inherently bad. Either of these claims should be examined very carefully.

- **It will put 'good people' off.** Almost every element of this statement gives great reason for concern. The assumption that only management teams are capable of identifying 'good people', that only wealthy professionals can be considered 'good people', that democratic elections cannot select 'good people', that self-selecting elites are the only true 'meritocracy' – it is rare to hear these kind of 19th century attitudes in the modern world.

- **It will mean the end of rectors.** It is difficult to see why electing a chair of court would prevent the existing limited cases where staff and students can elect a chair of court. There is a good case for creating the role of 'rector' in every university and to make this the title of the chair of court.

- **This is anti-democratic.** Perhaps the most remarkable claim of all – it is simply impossible to engage with the argument that some democracy is less democratic than no democracy.

Conclusion
Universities and university principals have a freedom to act independently and autonomously which is probably unmatched in any institution or organisation that receives anything like the level of public funding they receive. The unbalanced nature of the aggressive lobbying campaign that the universities have run against this very modest proposal (effectively using public money to run that campaign) shows how little restraint can be placed on them. We do not believe this position reflects the majority of views in the university sector – yet neither managements nor governing bodies have any requirement to do so much as have even a cursory consultation with the wider university community. If the principles which underpin university governance do not include democracy, diversity, representativeness and transparency, then what principles drive the oversight of universities?

The democratic university – run by and for its staff, learners and other stakeholders – should be the ultimate aim. This Bill is a first step in that direction and really must be supported.

Robin McAlpine
Director, Common Weal
HE Governance (Scotland) Bill Consultation:
Response on behalf of the Council of Senate of the University of Glasgow
September 2015

Questions raised by the Education and Culture Committee:

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

2. The extent to which the Bill
   (a) will improve higher education governance, particularly in the areas above
   (b) may alter the higher education sector’s current level of autonomy
   (c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

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? Are any further measures needed?

Response:

A key challenge for the University of Glasgow Senate derives directly from the 1858 Universities (Scotland) Act, notably the membership of Senate of all professors of the University ex officio. The subsequent growth of the University, and corresponding increase in the number of elected members, means that Senate now has a membership of c. 600. One feature of our constitution, therefore, is that only a minority of members is elected but, additionally, there are practical consequences for the agility of the senior academic body of the University, and also our ability to convene a quorate meeting. The quorum is also established in primary legislation and is one-third of the total membership. We welcome those aspects of the Bill that address these difficulties, while noting that the University has already taken steps to do so itself, through the establishment of a Council of Senate, the composition and remit of which corresponds very closely with those proposed for academic boards in the Bill. (The Council’s composition also includes 12 [=10%] student members, whereas our Senate has no student members.)

The power of ministers to set and vary regulations concerning constitutional features – the procedure for the appointment of the Chair of the governing body and the composition of the governing body and academic board – albeit subject to consultation with the universities, constitutes an incursion into institutional autonomy. In our response to the consultation on the draft Bill in January 2015, we argued that, beyond broad principles, matters of detail should be determined by institutions internally, where the expertise and competencies lie.

Related to the last point is the fact that the University of Glasgow established its Council of Senate – and was able to do so in order to modernise its academic governance despite the constraints of current legislation - but wished to retain the full, much larger Senate. As we noted in our January 2015 response, in establishing the Council of Senate, the University has taken significant steps in
finding means of meeting the expectations of contemporary good governance, while simultaneously maintaining traditions that are key parts of our identity and distinctiveness as a research-led global university. There are many variations in the configurations of the senior academic bodies at UK universities and a number have senates larger than Glasgow’s. These include LSE and UCL, as well as the University of Edinburgh. Such constitutional features of leading centres of academic excellence reflect the richness and diversity of institutional cultures and are reflective of their distinctive missions. Senate provides the University of Glasgow with a single body composed of the entire community of senior scholars and we would wish to retain that historic and, importantly, collegial, feature of our institutional identity. The breadth of Senate membership helps ensure that the academic voice is heard and that fully informed decisions are taken. An additional feature particular to Glasgow is the position of the Clerk of Senate, which has been maintained for almost three hundred years. This elected, senior role plays a key leadership part in the oversight of academic policy and practice across the University, and thus remains critical to the integrity of our academic governance. Again, provided broad principles are expressed in legislation, we argue that there is no need for the level of uniformity that would be brought about by the Bill.

We very much regret that the proposal to establish the academic board as the final arbiter on academic matters has not been pursued in the Bill. We note in this regard that current legislation establishes that the decisions of academic boards are already subject to review by the governing bodies of the ancient universities, and also the account given in the policy memorandum of the decision not to pursue this matter in the Bill in light of the responsibilities of charities’ trustees. In our submission to the earlier consultation, we argued that academic boards should be the final arbiter on academic matters: it is with the academic board that the expertise and competencies lie for taking major academic decisions on which academic standards rest. Universities are large and complex organisations that should be managed on the basis of transparency and accountability and through a balanced system of governance. A system of checks and balances and separation of powers is common in comparable contexts and confirmation of the principle that the academic board/senate must remain the final arbiter in academic matters would help ensure good governance in the HE sector. Removal of this provision exposes academic freedom to risk and potentially reduces the scope for HEIs to balance academic against other interests in accordance with their role as bodies serving the public interest.

With respect to the balance between legislative and non-legislative measures, we also argue below for the Act to include provision for representation of the academic board on the governing body.

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.
In our response to the earlier consultation, we expressed our support for the appointment of the Chair of the governing body as the culmination of a transparent process involving selection criteria and interviewing.

We note the proposed composition of governing bodies includes two members elected by staff, one member of academic staff appointed by a trade union recognised in relation to academic staff and that the institution may make its own prescriptions for the appointment of other governing body members. Under the terms of an Ordinance of the University of Glasgow there is provision for six members of our Senate to be members of our Court (governing body). However, this provision would be subject to variation, whether by ministerial regulation or a revision of the Ordinance. Given that the core and defining activities of HEIs are academic, we believe that there should be provision in the Act for representation by the academic board/senate as a matter of principle to ensure that academic interests are fully represented. If detail is prescribed in the Act, we argue that a 25-member governing body should include six members of the academic board.

As noted above, the University of Glasgow has established a Council of Senate (formally, a committee of Senate) which conforms closely to the proposals concerning the size and composition of academic boards. We would argue that it is important that the composition of academic boards includes - and we have provision for this on our Senate and Council of Senate - vice-principals/equivalents so that they are accountable to the academic board, subject to the provision as expressed in the draft Act for a clear elected majority on the board.

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 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.

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?”
Response:

The 2012 review of HE Governance chaired by Professor von Prondzynski recommended as a model for legislation concerning academic freedom Section 14 of the Irish Universities Act 1997:

*A member of the academic staff ... shall have the freedom, within the law, in his or her teaching, research and any other activities in or outside the university, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions, and shall not be disadvantaged, or subject to less favourable treatment by the university, for the exercise of that freedom.*

If the definition of academic freedom needs to be elaborated in law, we would argue that the Irish Act captures the issues well.

There are likely to be restraints other than legal constraints on academic freedom; transparent institutional governance demonstrates that freedom is preserved. The testing as well as proposing of ideas is the core business of the academy; provided employment and career are not prejudiced, facing a degree of institutional scepticism may be inevitable. Academic freedom must apply to views expressed outwith the institution as well as within, provided that the view or action is not itself illegal.
Submission from the Countess of Carnarvon

Dear Sirs,

I write as an Alumna of St Andrews University in relation to the proposed Higher Education Bill.

The bill as it currently stands seems a missed opportunity to promote diversity and excellence in the colleges and universities seeking to continue to succeed in higher education within Scotland.

It does not recognize the strength of different opportunities. A “one approach fits all” Bill rarely recognizes individual talent and could suppress and stifle the chance of Scottish universities being recognized as some of the best in the world.

Ideas and practical skills can surely be best encouraged and learnt through allowing independence (underpinned by good governance) but nor dictated nor stifled by layers of legislation.

As an alumna of St Andrews I had tremendous respect for the innovation of the current Principal. Her appointment could not have been more transparent and her successor will be chosen with same care and diligence. The effect of the current proposals may militate against such a world-class candidate coming forward to be considered. After all Louise Robertson’s work, that would be disappointing. Furthermore, like others, I am helping to raise funds to support the university in terms of infrastructure and support of future students. If universities are no longer independent then I suspect it will be less easy, or not possible, to put the case forward to a global audience. Education in most world-class universities is associated with independence from political prescription.

Scotland has often punched above its weight in terms of innovative, well-educated people who travel, create and retain strong links to Scotland. They are not afraid to try or to express their views.

Please consider that for tomorrow’s students an alternative aim might to be to include at least one Scottish university as one of the best 10 or 20 in the world.

Yours faithfully,

The Countess of Carnarvon
Submission from Mr Michael Cook

Dear Sir/Madam

Higher Education Governance (Scotland) Bill

Please accept this letter as my response to the Scottish Government’s Higher Education Governance (Scotland) Bill introduced in the Scottish Parliament on 16 June 2015. The proposals are inappropriate, misguided and risk injury to the autonomy which makes our universities so esteemed, and routine entrants in QS and other world top university lists.

I graduated from the University of St Andrews in 1989 with a First Class MA Honours Degree in Scottish History, winning the Samuel Rutherford Prize for Distinguished work in Scottish History. My time at St Andrews and the learning experience I was privileged to enjoy there was a defining episode of my life.

According to the Policy Memorandum, the principal objective of the Bill “is to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose”.

The proposals serve no obvious purpose in delivering the avowed purpose of Ministers, and no evidence is adduced to support them. On the contrary, they simply represent interference in the discretion of universities to determine details of good governance, which are inappropriate subject matters for Ministerial authorship.

The HE Code of Governance already requires the Chair to be appointed through a transparent process, following open advertisement; with limits set on the period of appointment. So too, Chairs of Court must be able to demonstrate the full confidence of the Court. That can only be secured if the individual concerned is selected by the full Court. Appointing the Chair through an election between competing candidates, or by a wider electorate than the Court itself, would undermine the relationship between the Chair and Court and, with it, good governance.

The Bill intimates that Governing Bodies should include eight elected or nominated representatives. Taking one element of this only, the proposed requirement that union representatives are included on the governing body would appear to create direct conflict between the basis of those individuals' selection and their paramount responsibility as charity trustees to act in the best interests of the institution as a whole. Furthermore, the effect of the legislation would appear to be to make the role of Rector within Court redundant, relegating him or her to a ceremonial or titular head of the university.

Above all issues, however, there are two which overwhelm other concerns, the more so because their purpose is opaque and difficult to reconcile with Ministers’ endorsement of the Von Prondzynski report, specifically, that universities “need to be autonomous institutions” if they are to be successful. The two issues are:-
1. the general power afforded to Ministers to issue regulations governing how Chairs will be appointed; and

2. the creation of a new definition of academic freedom.

**General regulatory power**
The grant of a general power to Ministers to make future changes to the composition of University Courts and Senates through regulations is wholly misguided. Such a power would risk introducing a new degree of Ministerial control, undermining the autonomy of Universities. It is impossible to square grant of such a power, with the stated aim of the proposals ‘not to increase ministerial control over institutions.’ No rationale is given for it, still less for unarticulated changes to be unilaterally determined by Ministers. Periods of appointment, selection criteria, payment etc are all matters which should remain within the discretion of universities, which have the knowledge, insight and experience to make appropriate judgements.

**Academic Freedom**
The protection of academic freedom is already a statutory obligation. The proposal to replace the current definition of academic freedom with a definition that includes provision to encourage exploration of new ideas is unnecessary. While the change may be well-intentioned, it is simply misguided of Ministers to seek to characterise the content of academic freedom. As Orwell put it, ‘if thought corrupts language, language can also corrupt thought’. The need to express what academic freedom is is redolent of a controlling intent, not an image one imagines the Scottish Government desires.

Currently, institutions “must have regard to the desirability of ensuring academic freedom of relevant persons”. It is proposed to alter this to “must aim to uphold the academic freedom of all relevant persons”. Again, no rationale is offered for what is a substantial increase in the existing general obligation.

**Conclusion**
The present battery of proposals has the appearance of a remedy seeking an ailment. It is difficult, if not impossible, to reconcile the Scottish Government’s apparent wish to enhance academic freedom with increased Ministerial control over how universities function. In prescribing rules, which infringe university autonomy, the Scottish Government risks undermining the freedom of universities to establish their own template of excellence. Scottish universities are among the best in the world, providing top class teaching and research, which delivers significant benefit to the national economy, including its output of domestic students, and its attraction of overseas students and investment. It is inconceivable that Scottish Government would wish to act to the detriment of such a model. The present proposals do so and should be withdrawn.

Yours faithfully
Michael Cook
Submission from Dr Andrew Craig

Dear Sir

Comments on the Higher Education Governance (Scotland) Bill

I am writing to express my opposition to the intent and the content of the Higher Education Governance (Scotland) Bill and to record my hope that it will be withdrawn.

Through years of consultancy practice, I am experienced in advising on governance in the public, private and third-sectors. Having reviewed the draft legislation and explanatory information, I am not persuaded that the Bill is needed in order to improve governance in Scotland’s higher education institutions. If it is implemented it is likely to be unwieldly and costly in practice for little benefit. More importantly, it is likely to have perverse impacts on the distinct profiles of Scotland’s HE institutions, particularly the internationally attractive ancient foundations. Enforced governance uniformity would place some of the country’s most valuable international educational assets at risk of continuing to attract high levels of inward research investment and internationally diverse students and staff. To take just one example, St Andrews University calculates that it delivers £12 benefit to the economy for every £1 received in government funding.

It is a misunderstanding of good governance to assume that it always implies consistency and identical processes as the Bill intends. Consistency for the sake of mere bureaucratic neatness is not a virtue. One size does not fit all where governance is concerned. On the contrary, with institutions having widely varying historical patterns of evolution and unique characteristics, what is needed is flexibility around common principles of governance linking all Scotland’s HE institutions. These principles can then be expressed and complied with in individual ways.

The Scottish HE sector is fortunate in already having this set of common principles in the Scottish Code of Higher Education Governance (2013). The most recent review demonstrated good progress in implementation and the next review in 2016 will no doubt show even more progress. As compliance is a condition of funding from the Scottish Funding Council, there is a clear link in place already between good governance and resourcing which is open to scrutiny. This is the framework that is needed to achieve good governance objectives rather than the proposed legislation. The Code has all the scope that is needed for being developed further while retaining the unique characteristics and diversity of the individual HEIs.

Having been an undergraduate at St Andrews University and a PhD research student at Edinburgh University, I know at first hand the tremendous benefit that direct election of the Rector as chair of the University Court (governing body) can have. In recent years the individuals who have been elected to those offices have been very able in attracting both participation from within the institutions and public interest and support from the Scottish and wider world public. This is a significant asset that must not be tossed aside. It would be a pointless loss if the institution of
elected Rectors at the ancient universities were lost in seeking an homogenised election process for chairs of HEI governing bodies. In addition, proceeding as the Bill proposes in adding trade union representatives to the governing body also risks compromising the legal role of all governing body members as charity trustees. Another perverse consequence.

I am aware of the negative response to the Bill from the Royal Society of Edinburgh. Having reviewed the RSE’s advice paper on the Bill, I agree with the detail of their criticisms and their conclusion that the Bill is unnecessary. Legislation of this sort needs to address a clearly defined problem. This Bill fails to identify the problem to which it purports to be the remedy. There is no evidence that such a problem even exists. The Bill does not make out a case to answer in terms of governance deficiencies in the Scottish HE sector.

In light of the above, I strongly urge the Scottish Government to reconsider and to withdraw this Bill. I have no objections to this response being published.

Yours faithfully

Dr Andrew Craig
Submission from Lesley Creamer

Dear sir

As an alumnus of St Andrews University I feel I must write to you to voice my horrified opposition to the measures the Scottish government is proposing to introduce. I feel all that will be achieved is the stifling of not only my alma mater but of all such institutions in Scotland. I can see no reason for this bill and feel it smacks very much of a government determined to have complete control over every aspect of our everyday lives.

Yours faithfully
The Clerk to the Education and Culture Committee  
The Scottish Parliament

**Views on the Higher Education Governance (Scotland) Bill**

The University of Aberdeen is presently one of the leading universities in the world. I am concerned that this Bill envisages radical changes that could harm this ancient and complex educational community. I propose a way forward. My examples are drawn from Aberdeen, of which I am a graduate.

Aberdeen is one of four Scottish universities in the top 200 of the THE World University Rankings. All of those universities have a governance structure that was set up by The Universities (Scotland) Act of 1858, as amended by subsequent legislation. You simply can't be in the top 200 universities in the world without an existing system of good governance. The governance system of Scotland's four world class universities should be a source of pride for our nation. I would commend this system to your attention and study.

Under the 1858 and subsequent Acts, some of the best minds in Scotland were given the room to fine-tune and develop governance arrangements to suit the particular needs and challenges facing their individual institutions. The result in Aberdeen is a governance system developed by generations of highly intelligent people, all with a direct stake in the continued well-being of their university. There is much to learn from it on how to balance the many different interests involved in successfully running a complex HE institution.

Aberdeen's present system of governance has shown itself to be flexible at addressing issues of modernity, inclusion and accountability.

The Bill's proposal for elected Chairs is retrograde for institutions like Aberdeen. It is woolly on the process of election, the constituency that would vote for the candidates, and how suitable candidates would be identified and chosen. It does not address the very real possibility of a legal challenge if a willing candidate was deemed unsuitable.

The present system avoids these problems. Aberdeen has long had an elected Chair in the person of its Rector. The arrival every three years of a new Rector, democratically elected by the student body alone, is a timely reminder for all about whose best interests are at the heart of what the whole institution does.

The role of Rector with the right to chair Court has for many years been under intermittent attack. But government has repeatedly, and so far wisely, resisted calls from non-student interest groups to curb the powers of the Rector. There is an excellent, detailed and still very relevant summary of the issues involved in the Guide to the Scottish University Rector, produced in 2004 for members of HE Governing Bodies in the UK. I would commend it to the committee's attention before any decision is taken on the future of this peculiarly Scottish role. It can be accessed on the Aberdeen University website at [https://www.abdn.ac.uk/documents/scottish-university-rector.pdf](https://www.abdn.ac.uk/documents/scottish-university-rector.pdf)

For the reasons outlined in the Guide just mentioned, there is a good argument for having a capable, experienced and committed person as Rector, to champion the student cause. But actually there is nothing to stop matriculated undergraduate or post-graduate students at Aberdeen electing a student as Rector, as well as having a student as Rector's assessor, both with the right to sit on Court.
Aberdeen's Court membership already includes 2 Student Association representatives. So if nothing else changes under the present system of governance, there is provision for up to 4 students with the right to sit on Aberdeen's Court. Yet this Bill envisages only 2 students on Court, and that the students also lose their long-standing right to have their Rector in the chair. So the Bill as proposed could actually lessen the involvement of Aberdeen students or their representatives with the governing body. Might I suggest that in order to accommodate institutions like Aberdeen, where provisions for students in this respect already exceed those proposed in the Bill, that numbers are expressed as a minimum i.e. “a minimum of 2 members nominated by the Students' Association”.

I have a similar suggestion to make regarding the 2 members the Bill proposes be nominated to the governing body by the graduates' association. At Aberdeen this is the General Council, the vast majority of whose members are the institution's graduates, who automatically become life members of the General Council upon graduating. There are presently 4 assessors elected to Court by Aberdeen's General Council. If the Bill's proposals were to be interpreted narrowly then only 2 assessors would be left. But 4 is what works for Aberdeen. So my proposal would be for “a minimum of 2 members nominated by the graduates' association”. This would then still allow Aberdeen to retain 4 General Council assessors on Court.

I am unclear on where the Bill would leave the status of the General Council. At present, under the Universities (Scotland) Act 1966, the General Council must hold statutory meetings twice a year. It has the right to review and comment to the University Court on all questions affecting the well-being and prosperity of the University. The General Council also elects a Business Committee of 21 members who provide a means of managing that ongoing dialogue with the Court and the university administration. What is to happen to all this in future, if the Bill becomes law in its present form? Will the Scottish Government, or Ministers, seek to direct how the General Council is organised and goes about its business?

Your Committee wishes to know whether this Bill will improve higher education governance. At Aberdeen, we have already had experience of changes brought about by trying to comply with the strictures of the recent Code of Good HE Governance. Court members, the university management team, and members of the Business Committee of the General Council have already spent large amounts of time dealing with issues raised by the Code. The results, which include some of the senior management team no longer having the right to sit on the governing body, seem to have pleased no one. This has not notably enhanced governance at Aberdeen. So my prognosis for the Bill, as it might affect Aberdeen, is pessimistic.

There are real issues that face Aberdeen, like bettering the student experience, improving the quality of research, and striving to get further up the world university rankings. Government should of course have a regular dialogue with Aberdeen and other HE institutions about how to continue evolving good governance. But seeking to give Ministers regulatory powers to micro-manage complex educational institutions full of independent-minded thinkers is not the way forward. I believe this will just cause strife and resentment, end up pleasing no one (including politicians), and risk eroding Aberdeen's place in the hugely competitive world of international universities. If it must be done at all, let Parliament decide, not Ministers.

Eric Crockart, M.A. (Hons)
I write to question the necessity of this Bill.

It is hard to see what the Bill will achieve other than politicise and weaken the autonomy of the Universities. It will also damage the high global reputation built by Scottish Universities over many a year. I speak, from direct knowledge of this global reputation, having spent considerable time working overseas. Scottish education is at the top of the global reputation league alongside its whisky and golf. It is this reputation that enables Scottish Universities to attract the best students, the best academic staff and research. Damaged reputations are hard to recover and can only result in adverse economic consequences for Scottish Universities and for Scotland.

On the 1st August 2013 the Scottish Code of Good Higher Education Governance was introduced. The Scottish Funding Council expects Universities to follow this Code. The Code’s independent Steering Committee has recommended that the Code be reviewed in 2016. It is difficult, therefore, to understand why there is such a rush to push through this controversial Bill.

Lord Thompson’s preface to the Scottish Good Governance Code is well worth a read. In it he states that his independent Steering Committee recognises “that the continued success of Scotland’s Universities rests on their autonomy, exercised within a robust system of governance”

Good governance is not a discovery of the late 1990’s. The culture and practice of good governance has developed over the ages. In education it is a heritage left to us by previous leaders of our Universities, and continued by the current ones. The principal of good governance has been, and always will be the key to the strength and independence of Universities. Scottish Universities have in place regulations and processes which are recognised as complying with global standards. Efforts by the government to introduce laws which amongst other things attempts to ‘standardise’ the practice of good governance can only create doubts on the integrity of the Universities and their staff on what they have been successfully doing for ages. “A production line one size fits all” policy is unsuited to Universities where original research is being pursued.

Listen to the people who successfully run our Universities. Let them continue to do so, by doing what they want.

The proposed Bill is unnecessary.

Dr Gordon S Crighton HonDSc BSc CEng FREng FICE
Do Not pass The Higher Education Governance (Scotland) Bill into law. Do Not interfere with our ancient and revered Universities. Do Not strip our Universities of their politically independent autonomy. Do Not deny us our seats of interdisciplinary learning. Do Not exchange the guardians of our Literacy for proponents of mere Party Political Indoctrination. Do Not pass this nefarious Bill.

Elizabeth Cunningham
August 2015
Submission from Andrew Dalgleish

Having read some of the background to this bill, and the details of what it might do, I am very concerned about the damage that could be done to some Scottish institutions - such as the university I attended, St Andrews.

St Andrews already has an excellent position in the academic world - a world-leading reputation in some areas - with a constitution and operational practices that serve the students, the university, and Scotland to a very high level. It has evolved over centuries, and the radical changes proposed via this legislation are not needed. If the university is damaged then Scotland is damaged, and if the university is damaged there will be less world-class research and less benefit to Scotland. A strong university needs strong, independent leadership. A strong university generates financial gains for the whole country, and reputational benefits worldwide.

While there are differences between how some Scottish educational institutions are run when compared to each other, these are not things to abolish or change for just for the sake of it. Sometimes these differences are what make the system stronger and better. Political parties are not the same as each other - why should universities be?

Change for the sake of change is no good for anyone. If the universities cannot see a benefit in the proposed changes, there appears to be no logic to the changes, and there is no obvious benefit resulting from the changes, then why make the changes.

Yours sincerely
Andrew Dalgleish
Submission from Christian Daviron

Dear members of the Committee:

I am writing to you to express my profound concern at the proposed Higher Education Governance (Scotland) Bill.

I am a graduate of St Andrews and also have an MBA from Columbia University in New York. I have served as a trustee of the American Foundation of the University of St Andrews. I have a great affection for Scotland and own a flat in St Andrews where I spend several months a year though I am still a resident of the United States. My great great grandfather was Principal of St Andrews from 1859 to 1868. My daughter, an American, is a 2005 graduate of St Andrews. Several young American friends have attended or are attending the University of Glasgow, the University of Aberdeen, the University of Edinburgh and, of course, St Andrews. I take great interest, therefore, in Scottish universities in general.

I am particularly concerned that the proposed legislation reduces academic freedom and independent thinking. While the current parliament may have every intention of keeping the universities free of interference, a future parliament might be more interfering. You will all know how much faculty and students want and need academic freedom. Many of the world’s most important discoveries and advances came about from free thinkers who thought outside the box and were often unpopular for it. Most of us tend to gravitate to the familiar, the comprehensible. Where would we be if Darwin had not been allowed to find backers and publish? Many of the most innovative biotechnology advances at this time are coming from Leuwen University in Belgium because of its connections with Paul Janssen and his researchers, students and followers: small countries can have a global impact.

While I do not doubt that the proposed legislation is done with good intention, in the United States we say, “If it ain’t broke, don’t fix it.” At this time Scottish universities are attracting some of the best global academic talent, both outstanding faculty members and the most promising students. If there is political interference in governance and academic freedom, I can assure you that that talent pool will dry up very quickly. Many of the American students who come here were aiming at Harvard and Princeton and Stanford and, if unsuccessful there, preferred to come to Scotland instead of going to Georgetown or UPenn. But if academic standards slip, and international recognition fades, they will quickly turn away because the value of their Scottish degree will be debased.

At St Andrews we are particularly worried because we have to find a successor to a remarkable Vice Chancellor, Louise Richardson, who came to us with the highest academic and administrative credentials from Harvard. If there is political involvement in the University, and infringement of academic freedom, we will not see her like again. Top academics will not want to be considered for the post, and the Principal who starts in January 2016 will be the start of a sad downward path for the University. I have degrees from two countries and work in the international investment industry, and I have seen how quickly strategic missteps can ruin a company, an industry, and an academic institution.

In answer to your specific questions, there are no areas of teaching, learning and research that will be enhanced except, perhaps, the special interests of the government of the time.

There will be significant constraints on university funding. Much funding at present comes from research funds, they have many universities from which to choose, and they will avoid
Scotland if there is political involvement in the universities. Additionally, many of them are based in England, and very few in Scotland. One third of St Andrews’ undergraduate body is international, bringing different perspectives and international fees to the University. The proportion, and the earnings, would gradually drop.

The ethos of the universities will not change immediately. Rather, over time the institutions will become more parochial and less interested in or of interest to other countries. Top Scottish faculty and students will increasingly go to other countries so that Scotland is left with the dregs.

The proposed changes to the governance are all for the worse. You will know that appointees with special interests (representatives of students, or faculty, or unions, for example) will want to represent their constituency first, and take the university forward as a lesser consideration. That would have given power to librarians to resist the advent of computers and on line texts. Universities will inevitably tend towards mediocrity if they are run by unwieldy collections of special interests. Yet that would be the effect of your proposed legislation.

Please, for the sake of your country – the country of Adam Smith, James Watt, and Alexander Graham Bell – do not commit your universities to slow decline. Kill this bill.

Sincerely,

*Christian Daviron*
Dear Committee Clerk  [The Higher Education Governance (Scotland) Bill]

I'm writing to express concern at the proposed The Higher Education Governance (Scotland) Bill. I'm a St Andrews graduate (twice, MA and PhD) now a Professorial Research Fellow at the University of Buckingham, a University founded by Royal Charter and with a particular emphasis on academic freedom. I know that the autonomy available to the University of Buckingham has enabled it to excel in many areas and has allowed it to think outside the box. I know the ability of this University to do things differently has provided a challenge to other universities throughout the UK, and that responding to that challenge has enriched all.

Against this background I'm concerned that the weakening of autonomy to St Andrews through this proposal will cause academic quality at St Andrews to be compromised, and academic reputation to be belittled in international forums. Any university anywhere operating with the reduced autonomy proposed by this measure would by definition be a second-rate institution. I would be very sad indeed to see this fate inflicted on my St Andrews.

Dr Graeme Davis
Submission from Dr Ben Davies

Dear Clerk to the Education and Culture Committee,

I am emailing you - as an alumnum of the University of St Andrews - concerning The Higher Education Governance (Scotland) Bill, about which I have serious reservations.

In brief:

* the bill will weaken the autonomy of Scotland's universities, and they will be vulnerable to direct political influence;

* the academic reputation of Scotland's universities - amongst the best in the world - will suffer;

* Scotland's universities will lose their edge, in a global market, to attract the best students, the best academic staff and funding;

* this will be detrimental to Scottish higher education, the economy, and the country.

This bill - and its deleterious effects - is completely unnecessary. For the good of HE in Scotland and Scotland itself, I urge you to drop this bill, or at the very least work with Scotland's universities to change it greatly.

Yours sincerely,

Ben Davies

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Dr Ben Davies
SUBMISSION FROM DR HELEN DAVIES

I am writing to express my concern about the proposed legislation regarding the Scottish universities. I was extremely lucky to have benefitted from a superb education at St Andrews as part of my medical degree. We were taught to the highest standards, as students we were well looked after, with excellent pastoral care. Part of the joy of the Scottish system is that the universities are free to vary the education; as part of my first year I studied Mediaeval History, not an opportunity I would have had in an English university.

I can remember the excitement of the election for Rector, as students we really valued this opportunity to choose who would represent us. There were students active in representing our views, and I never felt that we were anything less than valued and respected by the university staff. I cannot think we would have felt the Rector was really our choice if they were chosen via an interview process.

I believe any overly bureaucratic control of the universities will stifle development and restrict their ability to respond to changing circumstances both in this country and the world beyond. Students, above all, do not want to choose between identical institutions, they want a variety of courses, and indeed size and type of university so that they can choose one that matches their needs most closely. Please do not risk losing these gems of Scottish education by over-regulation and unnecessary micromanagement of their work.

Dr Helen Davies
BSc (Medical Science) St Andrews 1990, MBChB
Submission from James Ronald Dawson

Higher Education Governance (Scotland) Bill

Dear Sir or Madam

As a graduate of the illustrious University of St Andrews I am writing to express my concern about the upcoming Higher Education Governance (Scotland) Bill.

As the oldest university in Scotland, St Andrews has always been a special place with the highest academic standards, which are consistently confirmed by various (also international) league tables. It has always been able to attract the best academic staff and students (including many overseas students, especially from the US, who have the potential to influence their countries favourably towards Scotland) and though its autonomy and excellent reputation it has been able to attract significant external funding.

I feel that the Higher Education Governance (Scotland) Bill will endanger the future of higher education in Scotland, and consequently the future of Scotland, itself. With its more than 600 years of history, the University of St Andrews demonstrates the significant value placed on higher education in Scotland over the centuries, which has led to the country being considered a beacon of learning. Increased regulation has rarely been a positive development and in this case it will lead to additional costs to the universities and to the taxpayer. A lack of autonomy in the governance of the universities and an increased political influence on places of learning can only lead to uniformity and a lowering of standards. The academic reputations of the universities will suffer and the quality of staff and students will decline. The numbers of overseas students (who are so enriching at the academic and personal level) are likely to drop.

What I find particularly baffling, is that the system has worked perfectly well so far and I fail to see why such short-sighted legislation should seem to be necessary. I respectfully request that the the Higher Education Governance (Scotland) Bill be rejected as detrimental to the future of Scotland.

Although I currently do not live in Scotland, I have the good of this beloved country and its reputation (including that of its higher education) at heart, and I sincerely hope that my nieces, who are growing up in Edinburgh, will have access to the same excellent university education that I enjoyed.

Yours faithfully

James Ronald Dawson
Submission from Craig Devlin

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

Response;

I currently see no issues around governance within HEI’s, my own experience is that the existing mechanisms, e.g. 2013 Code of Good HE Governance etc., provides a suitable framework for a modern and diverse structure to be in place, indeed this is reflected within UWS today.

I cannot see how introducing legislation will materially benefit HEI’s in this area, rather it could potentially distract them from the core objectives in making HEI institutions & their students a success.

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

Response;

Potentially remuneration of the Chair could work positively for HEI’s, I believe should this go ahead there should be a upper limit, set as to reward but finely balanced against those driven purely for the financial gain.

In all other aspects, I believe that this legislation would not impact significantly on effectiveness, diversity, accountability, or economically, therefore it would appear to be reworking, serving no real purpose.

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

Response;

I cannot see how legislation can even positively impact autonomy, for me this is a contradiction in terms. When I look at HEI’s across Scotland each and every institution is making their own way, creating their own brand, serving their own students, and doing it in their own way. Long may this continue, long may these institutions be empowered, without the need of a bill, to have the creativity, and drive to go forward without political interference.

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

Response;

I believe and have witnessed strong accountability within HEI with respect to the Scottish Government etc. Implementing ‘stronger’ lines between an autonomous HEI and the acting Government would create potential conflicts of interest, dividing boards, and diluting the core fundamentals of why boards exist, for the benefit of the institution, to drive it forward correctly.

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

Response;

I believe that the current 2013 Code of Good HE Governance is currently sufficient for the time being, there is the need to measure effectiveness, and identify gaps, that indeed some of the Bill may correct, however I truly believe that currently there is no driving factor for this Bill to be introduced.

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

Response;

This directly conflicts with the desired autonomy, additionally the boards of which the chair would lead would potentially be disrupted as this could be seen as an outside appointment with political signatures.

- To require HEIs to include various persons within the membership of their governing bodies
Response;
This exists via the Good Governance code, and a simple check across the country would advise on its adoption without the need for this Bill.

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

Response;
This directly conflicts with the desired autonomy, there is little need, nor evidence I’d suggest to why a board could not exceed 120 members should it wish, and still be effective.

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.

Response;
This is already a statutory requirement of HEI's, thus there is no need and stating this need simply leads to confusion.

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”.

Response;
I can only see duplication and contradiction within this Bill. No significant benefit will be introduced, only delays and cost.

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.

Response;
The one size fits all will reduce the creative freedom of HEI's and also the commercial freedom. This restriction would limit the diversification of incomes, leading HEI’s more reliant of SFC 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 out with the institution?

Response;
As exists within private sector, without legislation, it is easily achievable to differentiate between views of the institution and views of the individual. Simple guidelines would clarify this position.
Submission from Dr Lewis N. Derrick

Higher Education Governance (Scotland) Bill

Dear Sirs

With respect to The Higher Education (Scotland) Bill:

1. This proposed legislation gives every appearance of a solution in need of a problem. There is no adequate evidence available to suggest that the higher education system in Scotland is in any way ‘broken’ or in need of substantial alteration or ‘repair’. The major Scottish higher education institutions, such as St Andrews, have a high reputation worldwide. This unnecessary interference risks both that reputation and the financial benefits that it reaps for the nation as a whole.

2. Standardisation of higher education is in no way desirable in a sector where freedom of choice, thought and process are essential ingredients in both teaching and research. External control of academic freedom will result in loss of autonomy, expertise and eventually reputation and resource.

3. Political influence, which by its very nature changes in an unpredictable way on a regular basis, is likely to lead to institutional instability and lack of forward planning in the long term. One only has to examine the constant party political tinkering within the English educational and health systems to observe the demoralising effects of that inconstant meddling on those working in the institutions concerned. Politicians are neither qualified nor suited to the job of running institutions of which they may not even have first-hand experience, for them to attempt to do so in such an unjustified way looks like nothing so much as Holyrood power grabbing for the sake of it.

This proposed legislation is bad from the outset, it is unjustified and it smacks of ‘Big Brother’. Drop it now!

Yours faithfully
Dear Sir/Madam,

I am a German teacher who graduated from St. Andrews University in 1985 (BSc Hon. Biology). The General Council Business Committee of St. Andrews University informed me about the Scottish Higher Education Governance Bill. In the following I would like to give my views on that subject.

Working in the German education system has taught me how important it is for educational institutions such as schools and universities to remain as independent from political influence as possible. A federal government (in my case it is the government of Baden-Württemberg) makes decisions that suit the federal state and the political parties in power best.

But these decisions are not always what an individual institution needs. Since in Baden-Württemberg, for example, teachers can only be employed directly by the federal government, which in turn wants to employ those, who have graduated from a federal university, my school in Schwetzingen does not always get the teachers it needs to cover all the subjects. In a slow bureaucratic process, my school informs the government of a shortage of, e.g. teachers of Mathematics. It may take time well into the school year, before the government (in our system the institutional body is called Regierungspräsidium) has found a teacher available during that year and who is willing to move to our town. Because of this problem our system changes now to give individual schools the opportunity to look for teachers themselves.

A second problem is the influence of political parties on the system. Depending on which party is in power, educational institutions have to adapt to different political lines. In my federal state this proved particularly difficult after the elections of 2011, when political power turned from the conservatives to a red-green coalition.

Because of such problems I am of the opinion that the Higher Education Governance Bill is not a very good idea.

Thank you for the opportunity to express my views!

Yours sincerely,

Gabriele Dinkhauser
1. Thank you for the opportunity to offer evidence to the above Bill. I write as a taxpayer and as someone who retains a keen and active involvement in Higher Education in Scotland.

2. It is not clear why there is an apparent need to create legislation to tackle perceived deficiencies in current governance arrangements; a view which has gained editorial support and coverage in the national Press in recent weeks. There is no obvious public concern over current arrangements within universities, and any attempt through legislation to manage and standardise governance in our Scottish universities is misguided and unnecessary. Diversity within our universities has been a strong driver of their success worldwide; in some cases for centuries. The proposed legislation appears to want to curb this, through standardisation, and to reclassify Scottish universities as part of central government, without an appreciation of the probable consequences.

3. As to the role of the Rector in our Ancient Universities under the proposed legislation: there is a total lack of clarity. The Rector has enjoyed the right over centuries to chair Court meetings. The present Rector of Aberdeen University fulfills that right – at the direct request of the student body – enabling students to have a strong and influential voice on the governing body. Current proposals would diminish the voice of students, as there is no clarity re any future Rectorial role.

4. The proposal in the Bill to increase Ministerial control will alter the relationship between the State and universities, to the detriment of both. It would lead to reduced autonomy by universities, which would compromise their charitable status and lead to reduced funding from donors, much of which is currently used to fund world class research. Additionally, it would reduce university borrowing and stop them from reinvesting surpluses. The result would be to reduce university levels of activity and investment, with significant implications for their ability to deliver on Scottish Government priorities, such as skills provision, innovation, and social mobility.

5. The proposal to have the Chair of the Court elected externally could potentially lead to chaos, depending on the outcome of the election. The choice of Chair is fundamental to the effectiveness of any organisation, and the choice of chair should rest with that body. The proposal, too, to remunerate university Chairs is neither desired nor sensible. It is completely wrong to spend public money unnecessarily.

6. I write in an individual capacity, but also as a graduate of Aberdeen University, current member of its Court, former Chair of its Business Committee and General Council. My knowledge of Governance is based on the above, plus my current membership of the Accounts Commission for Scotland and a national Health Board, my former non-executive role on a territorial Health Board, and thirty years as a senior manager of Marks & Spencer. Governance has therefore played a large role in both my current and past work, and I remain convinced that the proposed Bill is unnecessary, centralist, and not fit for purpose. The Bill seeks to address a problem that is imagined, rather than real, and would cause financial and reputational damage to Scotland’s university sector.

I ask the Committee to note my comments, and to reject the Bill. I provide answers overleaf to the specific questions posed.
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?

I do not consider that there are any serious problems with higher education governance in Scotland. Universities have to comply with the Scottish Code HE Governance as a condition of funding. As an experienced governor of Court at Aberdeen University I have first hand knowledge of the skills that exist – and are actively used – to ensure that senior management are held to account whenever necessary. Lay members with business skills, as well as academic staff, plus members with special audit and governance skills provide an effective blend of experience.

2. The extent to which the Bill
(a) will improve higher education governance
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

The proposals provide Ministerial control over the internal governance of charitable organisations, eroding the principle of institutional autonomy. The Bill would fundamentally change the relationship between State and institution, and diminish the role of universities in a democratic society.

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

No. The Scottish Code of Good HE Governance already covers this. The Bill is unnecessarily prescriptive and centralist, reducing the scope for universities to introduce necessary future changes to governance.

Specific proposals

The Bill proposes a number of specific changes to higher education governance:
- To require HE 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 that 120 people, and include various persons

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

Chair: this is a key role in any organization. The governing body should appoint the individual responsible for its leadership. Where a university has a Rector, that person can choose whether to exercise that right to chair meetings, or request the senior Governor to do so. I am deeply concerned that this proposal is in the Bill, despite 78% opposition in the consultation, and without specifying the detail to enable proper scrutiny at Stage 1 of the Bill.

Composition: It is undemocratic for Ministers to prescribe the composition of the board of what is an autonomous charity. No case has been made for the proposal that Ministers should
determine the number of Alumni on the governing body. The proposal to include union representation fails to mention how non-union members should be represented. It is likely that union members would represent their membership, rather than acting as individuals whose overall concern is for the good of the institution. I am deeply concerned that this proposal is in the Bill, despite 67% opposition in the consultation.

Academic Boards: As with the composition of governing bodies, it is important that each academic community is able to determine the size and composition of its academic board, that reflects their respective academic structures and character. I am unaware of any evidence that suggests that 120 persons is an optimal number.

**Academic freedom**

Please provide your view 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 likely to be any significant constraints – other than legal constraints – on academic freedom?

7 Are the situations in which relevant persons can exercise their academic freedom clear?

Academic freedom (within the law) is a fundamental value of universities, and has been the subject of discussion at our Business Committee in recent months. The discussion, which included union representatives who sit on the committee as individuals, raised no concerns with the current situation. I believe therefore that the current statutory protections are adequate.

I believe that the provisions of the Bill represent a clear threat to academic freedom, by seeking to replace university autonomy with Ministerial control.

I ask the Committee to take note of my evidence on the Bill. There are more urgent and serious issues in Scottish education for Parliament to address than the imposition of Governance legislation. This piece of proposed legislation will do more harm than good, and should therefore be withdrawn.

Colin Duncan
Submission from Mr Kenneth A. Duncan

The Clerk of the Education and Culture Committee The Scottish Parliament
Edinburgh

Dear Sir,

I am writing to express my concern that the proposed Higher Education Governance Bill is unnecessary and worse will have an adverse impact on higher education in Scotland. I myself have benefited from a Scottish university education and, therefore, know at first hand its unsurpassed quality and global reputation.

In the consultation document and its Ministerial forward, the aim was set out as 'not to increase ministerial control' but to support our institutions to develop their own governance systems to enable them to reach their full potential'(para 2 of the Consultation). I find it difficult to accept that the imposition of a 'one-size fits all' approach does enable each university to full realize its own potential. Rather, it appears to be a recipe for stifling initiative through over regulation.

And so I would hope that in this matter the Scottish Parliament will be guided by the views of the Royal Society of Edinburgh which has characterized the proposals contained in this bill as 'inappropriate, unnecessary and potentially counter to good governance'. Quite frankly, if it isn't broken, don't fix it.

Yours faithfully,

Kenneth A. Duncan
Submission from Tom Duncan

Dear Sir,

I am alarmed to have read that there is a proposal to reduce the amount of autonomy Scottish Universities can wield in the shape of the Higher Education Governance (Scotland) Bill.

As a graduate of the University of St. Andrews and member of its General Council I would like to register my own concerns about the Bill.

It is likely to result in the diminution of the university (and other Scottish universities as well, of course) on the world stage, by reducing its ability to attract the best – both students and staff – in introducing a restriction on the autonomy of the university. It is likely to open it to political influence where the university has thrived under its own independence. That independence supplies a stream of innovation that contributes directly to the Scottish economy; as a weaker institution that stream of innovation is put at risk.

Yours faithfully

Tom Duncan
Submission from Sheila M Dunkinson

Dear Friends

I am writing to oppose the HEG Bill, particularly as it pertains to St Andrew's University. I write as an English woman who is grateful for the unique and life-changing experience I had during the years I was educated at a Scottish University.

Why should we listen to an English woman meddling in Scottish affairs, you might say? I applied to St Andrews as my first and only choice because, having done the round of English universities, I was put off by their similarity and the extent to which they were hog-tied by the interference from party politicians. Don't make the same mistake!

Education is too important to be left to the politicians - particularly as they change their minds as frequently as the weather, and use education as a dart board for scoring points.

Please, leave Higher Education - especially the quality of Tertiary Education available at your superb Scottish Universities - alone. Those who are running these institutions know far better than you do, how they will thrive and prosper and deliver the best results not just for Scottish students, but for all of us who come from all over the world to benefit from a unique, personalised and first class education.

Yours truly,

Sheila M Dunkinson,
Submission from Thomas Drummond-Hay

Dear Sirs and Madams,

I am writing to you in opposition of the proposed HEG Bill. I oppose the bill as an alumni of the University of St. Andrews and as a part time resident of Fife, for the following reasons:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Please reconsider the proposed bill.

 Regards,
 Thomas Drummond-Hay
Education and Culture Committee - Higher Education Governance (Scotland) Bill - call for views

Response from East Ayrshire Council

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?

While progress has been made in making Higher Education institutions more inclusive to young people from poorer backgrounds, any move towards making them more accountable, more inclusive and more ‘modern’ should be welcomed. For some of our older universities where tradition and ceremony may be an embedded part of their ethos, this very “history” can look “alien” to many young people growing up in 21st century Scotland and this perception, in turn, may mean that they don’t see themselves as being in the particular ‘client group’ destined to attend there.

2. The extent to which the Bill

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

The proposed membership structure should lead to more representative governing bodies and particularly the inclusion of graduates of the HEI will more clearly connect the bodies to the world of work. Also welcome is the commitment to a 10% minimum student representation on academic boards that will give opportunities for students to play a meaningful part in the planning process of the institution they attend.

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

A more representative governance structure may help to ensure that HEIs connect more effectively with their own staff and student population but also with the world outside of the academic institution.

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

The requirement for HEIs to appoint the chair of their governing body in accordance with an agreed process for selection which could include holding an election for shortlisted candidates would clearly demonstrate that the process is both transparent and democratic.

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? Are any further measures needed?

On reflection, the correct balance looks like having been struck.

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

   As above.

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

   As above.

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

   Given the variations in size of the HEIs this seems a logical size for membership and the proposal to have a guaranteed minimum 10% student representation is broadly welcomed.

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.

   With the continual advancement of technology and its application in business, industry and media, all post-16 education bodies need to innovate and experiment to ensure their teaching and student learning is keeping pace. This is particularly applicable to STEM subjects but the same dynamic is apparent across all curricular areas.

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.

   With competing priorities it may be the case that pressure on funding could restrain the development of innovative proposals particularly if their intended outcomes are not clearly delineated.

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?”

   In some contexts (e.g. media interviews), academics may be asked for their views on a particular subject. It would be helpful if there were a clear (if not necessarily formalised) code of conduct in place in such circumstances.
Dear Members of the Parliament,

As a graduate of the University of St Andrews (M.Litt., 1995), I am gravely concerned about the details of the HEG Bill, because it replicates many of the errors that have weakened university education in my own institutional context in the United States. Here legislators have sought more and more control, and in order to get it they have created more and more layers of useless administration. Now we face a situation in which the proliferation of redundant administrators has put a stranglehold on university budgets. Many universities, including my own, are now struggling or simply unable to hire faculty at a living wage, because they must fund useless and pointless government oversight. Now people are put aside so that pseudo-administrators can generate mountains of reports that seem to justify their existence but actually go nowhere and do no good to the universities.

It is therefore of great concern to me that the Scottish Parliament is considering the creation of its own version of this same problem. Faculty do not interfere with your work as legislators, and you should respect them by not interfering with their work. Universities know how to run universities better than politicians do! This has been the case since the founding of the University of St Andrews in 1413, and it is still true today. I beseech you not to ignore the wisdom of a 600-year history in order to follow the latest fads in higher education.

During my time in Scotland, I had great admiration for the spirit of independence and creativity of the Scottish people. It certainly informed the values of my own country in a positive way, so please don't chip away at that independence and creativity with this legislation.

Regards,

David L. Eastman
Edinburgh University Students’ Association’s (EUSA) submission

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

Many current higher education governance structures are outdated, lack transparency and are unrepresentative of the university community. Higher education institutions are publicly funded and exist to serve the interests of their students, staff and society, yet even most students know very little about their university’s governance. Governance structures and decision making processes need to be clearer and student and staff representation must be stronger. Whilst some students’ associations enjoy good representation on governing bodies this is not the case at all institutions. The Bill is an opportunity to improve higher education governance, to provide consistency across the sector and to make institutions more transparent, representative and democratic.

2. The extent to which the Bill
   (a) will improve higher education governance, particularly in the areas above
   (b) may alter the higher education sector’s current level of autonomy
   (c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

We believe that the provisions in the Bill relating to elected chairs and membership of governing bodies will help to improve representation and accountability in higher education governance. Whilst The Scottish Code of Good Governance has begun to have a positive impact on institutions, legislation will ensure that there is consistency across the sector and that all institutions have governance structures that are transparent, representative and democratic. However, we believe that the Bill could go further, particularly in relation to the regulation of senior management pay.

The Bill provides an opportunity to ensure that principals’ pay is set more transparently. There should be measures to ensure that any pay increases received by Principals are fairly proportioned to other members of staff, and that principals and senior managers should be placed on the same pay scale as other members of staff. We also believe that there should be guaranteed student, staff and trade union representation on remuneration committees to ensure that senior staff pay is set by elected representatives of the university community.

We are concerned about the potential for adverse secondary legislation in section 8 of the Bill, namely the Scottish Ministers’ ‘power to modify’ the ‘categories of membership’ of the governing body. We concede that some fears around the potential for secondary legislation are overblown; however we are worried by the possibility of future Ministers negatively
modifying aspects of this legislation we fully support, namely student, staff and trade union representation.

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

Many institutions are making good progress in improving the way that they are governed following the introduction of The Scottish Code of Good Higher Education Governance. However, the Code is not mandatory. The Bill provides a welcome opportunity to enshrine into legislation aspects of the Code, such as appropriate representation on university courts.

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

EUSA supports free elections of chairs, open to all staff and students, of university governing bodies, specifically the university court. The University of Edinburgh is one of five institutions that already have an elected chair of its highest governing body, through the role of Rector. The existing processes used by institutions for electing the role of Rector are a good example of how all chairs of governing bodies could be elected. As well as chairing Court this is an important role in representing students and staff to the University. New legislation should take into account the existing role of Rector within these universities and ensure that this role is not undermined.

The chairs of university governing bodies should be openly elected by students and staff and this process should not involve a selection process or panel prior to election. An internal shortlisting process could contradict the election of chair and rule out potential candidates preferred by staff and students. Chairs should come from a diverse range of backgrounds. If only one candidate is shortlisted then staff and students are simply ratifying that candidate rather than having a true democratic say. We believe that this is not the most transparent or democratic way to appoint chairs, and therefore, contradicts the purpose of the Bill. However, if a shortlisting and interviewing process is implemented then it is crucial that students and staff are involved in this and that the selection panel is gender balanced.

- 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

EUSA strongly supports the proposals which relate to the membership and composition of governing bodies and academic boards. These should help to provide consistency across the sector. We particularly welcome the proposal to require governing bodies to reserve two places for student representatives nominated by students’ associations and for academic boards to include student representation. It is crucial that bodies making decisions on behalf
of members of the institution are made up of representatives from that membership. We also support the provision for two elected staff representatives on governing boards. Students and staff are a vital part of our HE institutions and must be a part of the decision-making process.

In addition to having representation on university governing bodies we believe that students and staff should be represented on other university decision-making bodies and all committees that work to the governing board. This would increase transparency and democracy. We particularly believe that students and staff should have reserved seats on remuneration committees.

It is crucial that students who sit on governing bodies receive thorough training to enable them to participate and contribute confidently and meaningfully. EUSA’s student officers are well trained and involved in the University’s governing structures, but it is important that similar standards are in place across all institutions.

Furthermore, we believe that the membership of governing bodies should be representative of our diverse society. The Review of Higher Education Governance in Scotland recommended that each governing body should be required to ensure that at least 40% of its membership is female, as well as reflective of the diversity of society more widely. The Code of Good Governance makes recommendations relating to this but has not resolved the issue of women’s underrepresentation in higher education governance. We believe that the Scottish Government should demand the power to legislate on gender quotas for public bodies. Legislation should require 50% women representation on all boards of public institutions. Work should also be done to ensure better representation of other underrepresented groups such as those from Black and Minority Ethnic backgrounds. Furthermore, we believe that institutions should be encouraged to collect equal opportunities information from members and make publicly available the demographic makeup of their governing bodies.

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 welcome the proposals and think it is key that academics retain protection to express their views, regardless of how controversial, both within and outside of the institution.

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The EIS is the world’s oldest educational trade union, with approaching 55,000 members in Scotland and is the largest teachers and lecturers union in Scotland. The EIS has members in both the Higher Education Sector and the Further Education Sector organised in two self-governing associations; EIS-ULA and EIS-FELA respectively. The EIS-ULA has its own Annual Conference and Executive to determine and implement HE policies on behalf of its HE members and for determining the EIS’ HE policy. The EIS is the sole union recognised for collective bargaining on behalf of lecturers at five HEIs and shares recognition at a number of other HEIs. The EIS is also one of the five trade unions that make up the Staff Side of the New JNCHES body which negotiates pay and pay related matters for the UK’s HE Sector.

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

   a. Accountability

HEIs are usually described as autonomous bodies\(^1\) and are therefore accountable unto themselves.

In recent times the Scottish HE sector has used the term *responsible autonomy*\(^2\) when describing its autonomy, the term *responsible* may be considered as an acknowledgement of accountability arising from HEIs receiving public money and that HEIs have a responsibility for the promotion of the common good. On careful reading however the Universities Scotland paper on responsible autonomy\(^3\) is clear that responsible autonomy does not actually involve having any extra responsibilities or duties\(^3\), in other words responsible autonomy should be considered as full autonomy.

The EIS supports the view that HEIs should be autonomous bodies, and that they should be self-governing setting their own missions and strategies. The EIS believes that HEIs should be institutions of learning and knowledge, built on an education ethos with academic affairs being the responsibility of Academic Boards\(^4\) supported by collegiate management structures and an effective governing body. This view is not realisable due to the excessive power of university managements and a necessary step to achieving this vision is the reform of university governing bodies as set out in the HE Governance Bill.

The failure of effective governance oversight at the former Edinburgh College of Art led to it being taken over by the University of Edinburgh. There was a governance-senior manager issue at Abertay University a few years ago. The Scottish FE sector had a similar governance structure to the HE sector until the Post-16 Education Act (2013). A significant number of issues and governance/management failures arose in the college sector from that autonomous model of college governance, such as Adam Smith College, Stow College, James Watt College, Edinburgh College etc. The HE governance structure used in colleges until Post-16 Education Act also led to large salaries and large severance payments that were authorised by

\(^1\) [http://www.gov.scot/Topics/Education/UniversitiesColleges/16640](http://www.gov.scot/Topics/Education/UniversitiesColleges/16640)

\(^2\) [http://www.sfc.ac.uk/web/FILES/UniversitySectorAdvisoryForum/Agenda_item_6_-_responsibility_autonomy_paper.pdf](http://www.sfc.ac.uk/web/FILES/UniversitySectorAdvisoryForum/Agenda_item_6_-_responsibility_autonomy_paper.pdf) [Link no longer operates]

\(^3\) Ibid (final paragraph)

\(^4\) i.e. Senates or equivalent bodies
remuneration committees of college governing bodies. It is worth noting that the current model of university governance also authorises large salaries and severances for some.

The HE sector as a whole was unwilling to meet Government aspirations on ‘Widening Access’ willingly and it required statutory widening access agreements\(^5\) to facilitate this.

The principle of any Institution that receives public money needs to account for the use for that money, is neither new nor progressive. Furthermore, the accountability for a specific sum of money should not be conflated with accountability for the HEI as a whole, which is solely in the hands of the HEI’s governing body.

2. The extent to which the Bill

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

The EIS believes that many of the failures of university and college\(^6\) governance in recent times was due to the marginalisation of staff and students on Governing Bodies. This marginalisation led to staff and students being less able to scrutinise plans put forward by senior management at governing body meetings, which was also compounded by an increase in the number of senior managers attending court in an ex officio capacity.

The Bill sets out compositional changes to HEI governing bodies that should lead to more effective scrutiny, as the compositional balance of governing bodies will alter slightly to include a more informed membership in terms of their day-to-day knowledge of the HEI and its workings. Furthermore, the change in composition should add members that may not be aligned to the senior management team of the HEI. This should prevent ‘groupthink’ and encourage a more robust debate.

The Bill would give Ministers the authority to issue regulations for the appointment of chairs of HEI governing bodies - which will lead to elected chairs. The EIS welcomes this authority. The EIS is keen that elected chairs actually carry out the role of chair – which is not the case of several rectors. The EIS is against simply having elected figureheads as the EIS is keen to ensure that elected chairs actually chair the governing bodies and their meetings. There is some concern that whilst all rectors may have the legal right to chair meeting, the actual chairing is often carried out by another person of the governing body.

One of the reasons where there is insufficient oversight of senior management teams is the perception that the people who are appointed as chairs or that actually chair governing body meetings are closely aligned with senior management teams. The Bill will establish the principle of elected chairs and set out Ministers’ role in this. It is important to note that whilst several universities have elected rectors, very few rectors chair governing body meetings. The establishment of elected chairs will therefore be new and different to existing practice. The principle of elections for rectors at the older HEIs does not seem to have undermined HE governance. The EIS is not against referring to an elected chair as a ‘rector’.

The additional student and staff representatives (the latter from recognised trade unions) to the governing body is welcomed by the EIS. Universities are made up of students and staff and therefore raising their representation at governing bodies is a common sense proposal. These representatives should bring additional experiences from a ‘bottom up’ view which together with their deep knowledge of the Institution as a whole should bring improved scrutiny of decisions.

\(^5\) Post 16 Education Act (2013)  
\(^6\) Ibid
These improvements to governance that are set out in the Bill should improve the scrutiny capability of governing bodies and may restore a fairer balance in power between governing bodies and senior management teams. Universities Scotland has reinforced this view by their campaigning on this issue.

The aspiration to achieve a greater separation between the academic affairs of the HEI and the management of the HEIs by improving changes to academic boards is welcome.

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

The effect of the Bill is to replace parts of existing legislation and thus get consistency across the sector on appointing chairs of governing bodies. There is legislation in place now regarding how rectors should be elected in the ancient universities and that they have the legal right to chair meetings, although the EIS understands that this is rarely exercised. The Bill does not meaningfully reduce autonomy for ancient universities in the view of the EIS and will simply bring the rest of the sector into alignment with the ancient universities.

Any theoretical loss of autonomy that arises from the Bill is offset by the potential for greater scrutiny, which leads to HEIs exercising their autonomy more effectively.

The Bill would lead to HEIs remaining as autonomous bodies that are only accountable to themselves. Universities Scotland has claimed that the Bill could lead to the reclassification of HEIs as public bodies leading to the potential loss of charitable status and fewer philanthropic bequests. The EIS does not believe that the Bill brings increased control to the government that would lead to reclassification. Colleges were reclassified by the ONS in 2010 from the private sector to the public sector due to Ministerial control over college borrowing. This reclassification has not lead to colleges losing their charitable status. The EIS believes that Universities Scotland’s claims are simply supporting the personal interests of principals, some of whom may not welcome the additional scrutiny brought about by the Bill.

The changes proposed for academic boards makes them less susceptible to management pressures driven by internal and external factors. The EIS believes that these changes will make the HEIs more autonomous in terms of their academic affairs.

The Bill does not add extra accountability for the HE sector to the Government, nor does it change the nature of that accountability. Any potential reduction in autonomy caused by the Bill does not undermine the fundamental nature of HEIs as autonomous bodies, but the Bill should enable greater scrutiny. Greater scrutiny is in the interests of governing body itself and should improve governance.

It should also be noted that Outcome Agreements and Widening Access Agreements for the Post-16 Education Act (2013) were also introduced by the Government that in the view of the EIS will influence HEI research, learning, strategic targets and priorities to a greater extent than the HE Governance Bill.

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

The main line of accountability between the Scottish Parliament and HEIs runs via the Scottish Funding Council and then Ministers and seems predominantly to do with the public money spent on the HE sector. The Scottish Parliament spends over £1Bn per annum on learning and research, with additional monies on student fees, research grants, student grants/loans, capital etc.

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With the possible exception of one or two Scottish HEIs, all HEIs are dependent on Scottish Parliament funding for survival in their current form. The Scottish Parliament is dependent on the HE sector to deliver degrees and post-graduate qualifications to students in Scotland. The HE sector is also perceived as one of Scotland’s international successes and the Government has been keen to associate itself with that success and to enable further success. The relationship between the Scottish Government and HE sector is thus complex and mutually beneficial.

The Management and Governance parts of the HE sector have generally reacted negatively to the provisions outlined in the Bill. The EIS believes that there are two main reasons for this; firstly the Bill acknowledges that in practice HEI autonomy is in the gift of the Scottish Government and secondly the Bill makes changes to the established way of doing things which has generally favoured senior university managers and allowed chairs (or at least those that chair governing body meetings) to be generally selected from within.

The Bill may have generated tensions between parts of the HE sector and the Government but it does not change the nature of the lines of accountability the HE sector has to Government Ministers, or the degree of accountability.

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

It is too early to speculate as to whether the right balance has been achieved between legislative and non-legislative measures. Non-legislative measures, such as the Code, have had some positive impact but it has been very limited and controlled by the HE sector’s management and governance elites – not participatory and not transparent.

**Academic Freedom**

The EIS welcomes the statutory duty for HEIs to maintain academic freedom and for it to be extended to colleges in the FE sector.

The EIS does believe that the Bill strengthens the academic freedom of staff within fundable bodies. The 2005 Further & Higher Education Act stated that “A fundable body must have regard to the desirability of - ensuring the academic freedom of relevant persons...”, whilst the Bill states that “A post-16 education body must aim to— uphold the academic freedom of all relevant persons...”

There is likely to be limited practical effect of these enhanced provisions although some lecturers and researchers may be reassured by their adoption. It will allow teachers to continue to explore a range of ideas with students and for research to continue into areas into which some people object.

The Bill’s caveat that academic freedom is to be exercised “within the law” reflects the content of the 2005 Act, albeit the “within the law” was in parenthesis. To some extent this caveat is inevitable, since fundable bodies cannot be exempt to the laws of the land. There is a danger that some academic freedom may be limited or frustrated by those claiming that the ideas being explored are outwith the law – e.g. incite racial hatred or that HEI support for academics working within some contentious areas of work may be limited by a fear that such a claim may be made.

There are likely to be many significant constraints on academic freedom arising from other pressures, such as avoiding negative publicity e.g. academics exploring the causes of current behaviours in conflict zones may be misrepresented as being apologists for ideas most people find unpalatable. The duty to promote
equality in the workplace should not come into conflict with any exploration of ideas that cover different races.

**Academic Freedom and Views Expressed Outwith the Institution**

The EIS believes that the freedom to expression is a fundamental human right and that all staff should have the right to lawfully express their personal views outwith their work without fear of detriment or discrimination at work.

The EIS does not believe that academic freedom is the vehicle for ensuring that staff have the freedom to express their views outwith the tertiary institution, since this right should be wider than academic staff. The EIS recognises that there will be occasions when the distinction between work and private capacity may be difficult to judge for some academics that also campaign in their fields. However, the EIS is clear that all people have the right to express their views within the bounds of the law without fear of discrimination.

**Summary**

The EIS supports the Bill as a progressive piece of legislation that will deliver welcome improvements in the way that Scotland’s higher education institutions are governed. The Bill will improve the composition of governing bodies by having additional staff (via the trade unions) and student representatives and by ensuring the election of all chairs of governing bodies. These elections will be more open and transparent than existing practices and will help to ensure that all HEIs operate to similar standards. The EIS also welcomes the Bill’s provisions on academic boards, supports the principle that academic affairs should primarily be the responsibility of these boards, and agrees that they should be made up of mainly elected staff and students. The EIS does not believe that the Bill reduces university autonomy or that it will lead to the reclassification of HEIs as public bodies. The EIS supports the Bill’s provisions on academic boards and the principle that academic affairs should be primarily the responsibility of such boards and that they should be made up of mainly elected staff and students. The EIS also supports the changes to academic freedom which it sees as a minor improvement.
Submission from Professor Anton Edwards

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

I am aware of no problems that need legislative solution. There is an existing Code of Practice for Higher Education that is being explored and implemented. This is sensible – the role of government is to set standards, leave it to the universities to achieve those standards, and monitor progress.

I see no need to rush into some sort of ill-defined legislative helter-skelter (as in the proposed legislation) so as to try to accelerate the changes encouraged by the Code of Practice.

2. The extent to which the Bill

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

It will worsen governance.

It will encourage ministers to interfere in the affairs of the universities via regulations that are not subject to parliamentary scrutiny. Universities are not civil service departments and should not be regarded as mere tools of ministerial policy.

A small Court with an appointed chair and 8 nominated representatives is absurd. A university is not a widget factory to be run by a works committee.

The proposals to include 2 staff association representatives will mean members of courts will have divided loyalties – to their association and to their university court. Add to these, 2 staff, 2 students, 2 graduates nominated by other alumni and we have 8 people whose loyalties are split.

Furthermore, these people are chosen from a small electing or nominating body; members of the public who want to be stakeholders with concern for their university, their region and for education generally are substantially disenfranchised by these proposals. This disenfranchisement will not be politically popular.

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

As far as I can see the bill is likely to reduce autonomy, diversity and adaptability of the higher education system in Scotland. Funding pressures and the adoption of common standards and quality systems already inevitably exert strong (and in some case welcome) homogenising influence and it is most unwise to add to this with centralising legislation such as this proposal. This may be a tragedy of bland uniformity in the making.

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

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? Are any further measures needed?

No further measures are needed; neither are the proposed measures needed. They trespass on what the universities are already doing in respect of representation, position of women, and how to govern a body whose main function is to train, to teach and to pursue research.

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

A Court with an appointed chair and 8 nominated representatives is absurd. A university is not a widget factory to be run by a works committee. The proposals to include 2 staff association representatives will mean members of Courts will have divided loyalties – to their association and to their university court. Add to this two staff, 2 students, 2 graduates nominated by other alumni we have 8 people whose loyalties are split. Furthermore, these people are chosen from a small electing or nominating body; members of the public who are concerned for their university, their region and for education generally are substantially disenfranchised by these proposals.

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

The figure of 120 seems plucked from the air and has no justified operational or administrative significance whatsoever in the proposals. It should be for universities to constitute their academic council as they wish in relation to their own missions, structure and aspirations.

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 practical effect of any constraining legislation will never be to encourage freedom. It will restrict, distort and confuse the pursuit of knowledge and the proper training of youth.

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.

Of course there will be other constraints such as funding. That is why it seems folly to add to the list of constraints by legislating.

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?

- See more at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90819.aspx#How to submit your views
Submission from Reverend Michael Edge

Scotland has long been looked up to for the high standard of education it has provided, especially in its universities, and my wife and I, our two daughters and son-in-law have benefitted immensely by being alumni of five of them. The proposed Higher Education Bill seems determined to remove that pre-eminence apparently for no other reason than a wish to have an overbearing control over them as would be expected in a totalitarian state.

A universal governance document has never been suitable or workable for diverse institutions. It stultifies their individuality and reduces them to the lowest common denominator. In Scotland, universities such as St. Andrews and Strathclyde are very different and each is excellent in different ways. Why, then, should the Scottish Parliament wish to make them the same? The assertion that “our aim is not to increase Ministerial control over institutions, but to support our institutions to develop their own governance systems to enable them to continue to reach their full potential” is hypercritical nonsense in the context of the whole bill.

All the right words have been used such as transparency, accountability and inclusivity, but the Bill effectively makes the Scottish Parliament and its agents the managers of the universities especially in the appointment of Professors, the membership of the University Court and the composition of academic boards and will seriously diminish the ability of each university to pursue its own excellencies and long established concerns. Heriot Watt, for example, was in the vanguard of establishing a Chair of Actuarial Science, Strathclyde has an excellent Business School, Aberdeen has excelled in Forestry. There will be little, if any, support for such individual and important pursuits.

The attack on the role of Rector and that of the University Court seems to be a gratuitous act of destruction. The office of Rector is of long standing and works well and is enormously valued by students. The Chancellor’s Assessor’s role in chairing the University Court is an important link between Chancellor, staff, members of the Court and students. To remove the ancient title of Principal of the University and replace it with the weasel words “Chief Executive” is an unnecessary nonsense. So, why remove them? One is to tempted to say that it stems from spiteful interference.

The University of St. Andrews of which I am a graduate delivers excellent value for money, 12:1, and many other institutions to be affected by the Bill will have a similar record. Those who do not should be tackled individually. There is no reason to attack them all with the same fly swat.

As it stands, the legislation is clumsy and probably unworkable. If it is passed, the high reputation of Scotland’s universities will have been dealt a mortal blow, self-inflicted by the legislative body which claims to stand for all that is good in Scotland.

Shame on the Scottish Government if this Bill is passed, and it will be a shame which can never be redeemed or reversed. Do not make this Bill law as it stands. It will be a matter of everlasting regret.

Michael MacLeod Edge
Submission from Mrs Frances Edge
Higher Education Governance (Scotland) Bill

The General Council of the University of St Andrews, of which I am a member, has brought to my attention the proposed legislation on HE governance. I write to protest against the proposal and will set out my reasons.

1. There is no need for further legislation. In 2013, the Committee of Scottish Chairs launched a review of Higher Education Governance, with a commitment to review in 2016. An interim review in 2014 showed that Higher Education Institutions were making good progress in implementing the code. Why then, is the Scottish government, wading in with another review - totally unnecessary from the point of view of timing and inappropriate in any case, as I will demonstrate.

2. The foreword to the Scottish Government consultation document claimed not to want to increase ministerial control, but the areas of change listed clearly showed a level of government intervention which is inappropriate for autonomous institutions. In the consultation document, there was a pledge to respect the autonomy and diversity of each institution. Now in the Bill introduced on 17th June, this pledge has been dropped - so much for the Scottish government's reassurance that it does not seek to control! Instead, the sinister phrase has been substituted: ‘embedding a level of consistency across the institutions’; this is redolent of both Communist and Fascist governments. Such legislation would reduce the ability of institutions to adopt individual strategies. It should be obvious, even to bureaucrats drafting this proposed legislation, that each institution is different: in age, targeted students and specialisms. To take necessarily over-simplified examples: the University of Edinburgh has a worldwide reputation in Medicine; the Heriot Watt in Brewing, St Andrews in Marine Biology, Aberdeen in Forestry, Napier in Hospitality, and so on. Some are ancient universities, others very young, others specialist colleges, quite different in nature from universities. They all, of course, play to their very varied strengths: I know that St Andrews attracts very necessary funding from international sources as well as high fees from foreign students. These will dry up if the University is stultified by the proposed legislation, as the international reputation of this renowned and ancient University will disappear and the Scottish economy will suffer. How can the very different requirements of all the Scottish Higher Education institutions be fully met if they are homogenised? The short answer is: they won't be. They will be dumbed down for ease of control and ease of administration at the tap of a few keys, which I suspect are the main reasons behind the proposed legislation. What a travesty of the proud heritage of Scottish education, which should be supported and furthered in its excellence, not betrayed.
3. Further evidence of meddling to impose control are found in the proposals over the appointment of Chairs, the membership of academic bodies and the composition of academic boards. They also, I believe, reveal a hamfisted attempt to impose what the Scottish Government obviously sees as 'democratic process', although such a process already exists and has been approved by the Committee of Scottish Chairs. In the appointment of Chairs, for example, the idea of an election by a wider body than exists at present is crass, and candidates for Chairs already respond to open advertisements and have to be selected by the full court. What is wrong with that in terms of transparency and democracy?

Why should the government effectively get rid of the ancient post of Rector, democratically elected by the student body, and which has for centuries brought what is considered the modern buzzword 'diversity' to the life of the University? It obviously does not fit into their vision of a homogenised higher education system, but how impertinent to try to sweep away this ancient institution!

The Scottish Government's proposals for reform of the University Court would contravene the numbers in the university ordinance; four ordinances qold require changing, taking eight years. And all for what? Eight representatives representing specific interest groups, when, as members of a charitable trust, which is what the Court is, they are, quite rightly, required to act in the interests of the University as a whole. To take one example of almost certain conflict of interest: the insistence on trade union representatives; it is naïve and heavy-handed on the Scottish Government's part to suppose that the inclusion of this and other interest groups ensures democracy; the Court already consists of a majority of lay members.

The Bill also proposes an increase of members of academic boards, the majority being elected. It is well known that the larger the body, the less efficient the decision making. At present, the Senate, of about 230 members, sensibly devolves its functions to the Academic Council of about 40 people. The decisions made require specialist knowledge and informed comment. The unwieldy and largely elected body proposed would not have the expertise to handle the matters under discussion. Democracy can be a very blunt-edged tool, and only the politically naïve believe otherwise. After all, government ministers are not elected, but chosen to fulfil a particular function for which they are deemed suited.

4. Perhaps the most worrying aspect of this proposed meddling is that any future amendments to legislation would be made without parliamentary scrutiny, despite the assurance in the consultancy document, which, like that of preserving autonomy and diversity, has been stealthily dropped. The 'certain level of consistency' would keep increasing. The conclusion is obvious: Higher Education Institutions are all just businesses, and can therefore be 'managed' just like B&Q or Asda.

Universities exist to promote independent learning and research, and should each be distinctive enough to attract funding and the best minds. They are already hemmed in by financial restrictions and other legislation, and, if left to themselves, both academics and administrators will continue to be adept at managing their budgets to best effect. The University of St Andrews, Scotland's oldest university,
deserves better than the Scottish Government's attempts to dumb it down in order to control it, disguised in weasel words and meaningless pledges. As a Scot living in England, I am ashamed of this proposed legislation. Trust, sadly, is an ugly word for those in power, but that is what is needed, together with an appreciation of the diverse nature of the Scottish Higher Education Institutions; surely the Scottish Government is not against diversity! The Committee of Scottish Chairs has proved itself perfectly adequate to keep a watching brief on Scottish Higher Education institutions, so leave my University alone, so that those who understand the issues and contribute to its international renown can continue their expert work unhindered by unnecessary and treacherous legislation.

(Mrs) Frances Edge
Submission from Roger Eltringham

Dear Sir,
As a member of the General Council of the University of St Andrews I am writing to express my complete opposition to the Higher Education Governance Bill. St Andrews University is widely recognised as one of the finest universities in the world and brings great credit to Scotland. We are perfectly satisfied with the way it is currently governed, we see no reason for the changes proposed and do not believe the primary objective is to improve the high standard of the University. The Scottish Parliament will have enough problems dealing with all the changes it hopes to make on institutions genuinely needing reform. It does not have either the time or the money to interfere with institutions which are working superbly and are highly respected throughout the world. I trust you will listen to those who have the interest of this fine institution at heart and abandon this plan.

Yours sincerely,
Submission from Christine Elliot

Dear Sir or Madam,

Higher Education Governance Bill

I oppose the principle behind the Bill in that I do not consider it necessary or desirable for the Government to alter the governance structure to allow more direct Governmental control. I agree with the Royal Society of Edinburgh when it says that “Autonomy and independence from political influence or control are fundamental principles...” In my view, academic independence is vital for a vibrant, successful and diverse higher education sector. Laying down mandatory arrangements for governance are inimical to this.

In particular, I object to the proposed requirement whereby the chair of a Higher Institute of Education (HIE) is chosen from an electorate wider then its governing body: this may lead to an outcome where there is a fracture between the chair and that body. Further, I see no good reason to impose mandatory Trade Union representatives on the governing body. There should, properly, be staff members on that body so as to play a part in a properly-balanced decision-making body, but that is a very different thing from people mandated to act and vote in a particular way.

Yours faithfully,

Christine Elliot
SUBMISSION FROM SIR TOM FARMER CVO CBE KCSC DL, CHANCELLOR OF QUEEN MARGARET UNIVERSITY

I am responding to the call for evidence from Scottish Parliament’s Education and Culture Committee on the Higher Education Governance (Scotland) Bill currently before the Scottish Parliament in my capacity as Chancellor of Queen Margaret University (QMU). I have held that honoured position for 8 years, during which time I have been struck by the diversity, entrepreneurialism, and quality of the Scottish HE sector. I fear that those very qualities have the potential to be undermined by this unnecessary piece of legislation.

I share and fully endorse the concerns about the Bill as they have been set out in the submissions from Queen Margaret University to the Education and Culture Committee and to the Finance Committee of the Scottish Parliament.

I do not intend to repeat each of those concerns in this submission but to highlight two aspects in particular:

• the manner in which the Bill seeks to interfere with the internal organisation of autonomous charitable institutions,

• the potential impact of the extension of Ministerial power on the charitable status and classification of Universities.

On the first of these concerns, the Bill seeks to mandate, or provide Ministers with significant power to determine, the internal organisation of autonomous higher education institutions. This relates to matters of no less concern than the composition of the governing body, the manner of appointment of members and the appointment of the Chair and related conditions of service.

At first sight the intent behind the Bill to establish a framework of higher education governance that is more modern, inclusive and accountable, is admirable. The difficulty is that, to date, no attempt has been made to set out where the deficit or deficiency lies currently in terms of accountability and transparency of HE governance arrangements. Scottish Universities are, without exception, fully compliant with the requirements of the Scottish Code of Good Higher Education Governance which has been designed to promote and ensure such accountability and transparency.
With respect to creating greater uniformity in governance arrangements, it is for institutions themselves to determine what open and accountable arrangements are best suited to their specific needs. A uniform approach, mandated by statute, has the potential to undermine effective governance by restricting institutions’ flexibility to respond to changing needs.

On the matter of governing body membership, a central principle of good governance is that members act in the interests of the corporate body and are selected on the basis that they are accountable for the good governance of the institution, rather than for representing the interests of specific groups. The need to act in the overall interests of the Universities is also a requirement of charity law. The proposals set out in the Bill, with the emphasis of ‘representative’ constituencies would appear to undermine this central principle.

Specifically, the Bill sets out a number of requirements, including staff trade union representatives and alumni representatives. A number of these requirements are already accommodated within my own University’s current Order of Council, including 2 persons elected by staff and 2 persons appointed by nomination of the Students’ Union. The concern is that the addition of specific categories of governing body membership, prescribed in legislation, would result in my University being required to change its governing instrument in order to be compliant. This would likely result in the University’s governing body membership having to be increased beyond the maximum of 25 members prescribed by the Scottish Code of Good Higher Education Governance, or, alternatively, in other classes of staff membership being reviewed. The latter would likely have the effect of disenfranchising significant numbers of staff who currently elect not to be represented by a trade union.

This represents a risk to the effective governance of Scottish Universities and a departure from accepted best practice in terms of the size and composition of governing bodies, with no clear need established for these proposals during the consultation for the Bill.

The extension of Ministerial powers implied by the draft Bill has the potential to constrain the entrepreneurialism of Universities by depriving them of their Charitable status, and, potentially, by promoting their reclassification by the Office of National Statistics (ONS) as ‘central government’.
The particular circumstances under which the above could arise has been set out clearly in the Universities Scotland submission to the Finance Committee of the Scottish Parliament, and separately by Queen Margaret University in its submission.

I am fearful that any such development would be highly detrimental to the financial health and to the entrepreneurial capacity of Scottish Universities, depriving them of their ability to retain annual operating surpluses, restricting their ability to borrow funds, and putting at risk their charitable status and accompanying tax status.

I would resist strongly any legislation that has the potential to put Scotland's universities at a competitive disadvantage when compared with those in the Rest of the UK.

Overall, the proposals set out in the Bill have the potential to create significant risks to effective governance within Scottish universities, and to their financial health and entrepreneurial capacity. I am not persuaded that the case has been made in terms of any value that would be added to current HE governance arrangements.

Sir Tom Farmer CVO CBE KCSG DL, Chancellor of Queen Margaret University

Thursday 3rd September, 2015.
I wish to register my opposition to proposals in the Higher Education Governance (Scotland) Bill. What evidence is there that the current method of governance is unsatisfactory? The Scottish universities are perhaps the most successful sector of the entire educational system and breaching their autonomy by imposing restrictions on both the membership of Courts and the appointment of Chairs seems both harmful and unnecessary. The government would do better to concentrate on improving basic literacy and numeracy in the population at large.

Ian E Farquhar
Submission from John Ferry

Dear Committee

I wish to register my concerns in relation to the Higher Education Governance Bill. I am a graduate of St Andrews University and can testify to the life-changing benefits that the education provided by our universities offer. I want future generations to also have the opportunity to acquire a first-class education, but I fear this is now at risk. I have a number of concerns regarding the HEG Bill. These are as follows:

- While some of the aims of the bill appear laudable it is not clear that legislation to enforce a Scottish Government view of optimal governance is required. A more reasonable approach would be the publication of recommendations for governance, which institutions in respect of their freedom from government are free to adopt as they. and not the Scottish Government, see fit.

- The wording of the current bill appears to leave scope for ministers to influence the drawing up of shortlists for the selection of university chairs. This would obviously be completely unacceptable and would be a direct impingement of academic freedom. It may be that the government does not envisage such direct influence by government on the selection of potential university chairs, but the scope for subjective interpretation of the bill, such that it could be used as a platform for ministers to effectively control who becomes chair, is there, and this is a concern.

- In general there is considerable scope within this bill for politically-driven interference or influence in our universities. This is not progressive in a liberal democracy.

- The one-size-fits-all approach to governance that this bill would implement fails to take account of the diversity of our HE institutions.

- Current established governance norms do not appear to be having any negative impact on Scotland/the sector/the people of Scotland. This legislation therefore appears to be aiming to fix a problem that does not exist.

- The bill gives ministers power to regulate for future changes in governance at Scottish universities without requiring parliamentary approval. This is a direct threat to the autonomy of our universities and clearly allows for ministerial control. This is unacceptable.

Yours Faithfully

John Ferry
Submission from Dr Brian Fenton

Response to The Higher Education Governance (Scotland) Bill (The Bill).

I have been an academic researcher and teacher for almost 40 years. I have worked in Scottish Universities, Institutes and a College. I am a member of the alumnus of two Scottish Universities. I have been and am an active member of academic Trade Unions (AUT (now UCU) and Prospect).

The role of Unions from a lay reps perspective

Many unions are now non-affiliated and will contain members belonging to all political parties. In each Institution, local reps are embedded in the work place as employees and are subject to the terms and conditions of their employers. They are members of staff elected every year to represent their members where they are organised to operate in an open and transparent way. It is their primary objective to ensure that their employers are successful, as this is the best way of making sure their member’s jobs are protected. However, it is also important that their reps can scrutinise an organisation’s major plans because this provides a test of their effectiveness by an independent group that also fully understands the nature of the business. TU reps in the workplace are also uniquely placed because they can call upon an independent full-time support network that can highlight potential legal or financial issues, which can save the organisation future financial losses or legal challenges. This relationship can work, but it is strongly influenced by the personal politics of individual senior managers. Their inclusion on boards provides a potentially important auditing point which would be best implemented by statute because it has become common for managers to completely bypass negotiations (proof can be provided). TU reps will be committed to processes of social justice including fair and transparent pay and equal opportunity, in line with the progressive views of the Scottish Government.

Trade Union Representation on Boards and other bodies

Trade Union reps will often be more knowledgeable of the business than external members of governing boards and entirely motivated to protect their organisations from mismanagement. Nonetheless, over the years there has been a decline in the use of effective consultation with TU. The inclusion of TU reps on the Boards would bring more transparency, but it does not appear to be applied to all bodies (e.g. Section 10 of the Bill). It is important that a level playing field is established between organisations undertaking research and teaching. As another example there is no provision in the Bill to make all Institutions and their Boards subject to Freedom of Information. At the moment Scottish Research Institutes receiving £millions of tax payer’s money operate a self-regulated process independent of oversight by the Information Commissioner.

Democratically elected Chairs and equal representation

The Chairman of a Board has an important role. However, this should not result in an autocracy where principles of democracy are ignored. The Chair should be supported through a voting process as outlined in Section 6 and 11 of the Bill.

Academic Freedom (Part 2, Section 19 and 26)
Academics should be able to express their views without interference from senior managers or Board members. However, it is equally important that academics have the freedom to report academic fraud by peers directly to the journals where the attempted fraud is taking place. This should be protected by whistleblowing provision. Evidence can be provided where intimidation and bullying have been used by administrators to prevent such disclosure.

I can also present evidence showing that members of some of the Scottish Institutes are being restricted in their academic freedom through gagging contracts. These now attempt to use redundancy payments as Deeds of Covenants to enforce their clauses. This seeks to maintain control over the work of academics after they have left, deliberately inhibiting their employment prospects (proof can be provided). This practice is against the principles of academic endeavour and the basic right not to be prevented from earning a living by your previous employer. The Education Committee should look into this practice and either justify it, or stop it, and for those who have been subject to gagging contracts by Scottish Institutions have their restrictions removed.

The evidence can be found freely on the internet in the templates for Settlement Agreements as part of the BBSRC staff code. These form the Terms and Conditions of staff in many Scottish Institutes because they have evolved over decades to be fine-tuned to fit employment in academic research. These T and C are theoretically negotiated centrally with TU reps at BBSRC HQ in Swindon. The Agreement pre May 2015 (#1) was based on a situation when an employee had been a potential problem (e.g. dismissed) and it offered the chance for both parties to save an employment tribunal. It provided for severance payment of up to six month’s pay, which would be fully taxable as it was not a contractual redundancy payment subject to a 30k tax free arrangement. However, a different agreement was used by a Scottish Institute during a mass redundancy situation (dating from October, 2014). The dates of the two documents verify that the one used in the Institute was before it had been agreed centrally and it contained many restrictive clauses. Evidence can be provided that Trade Unions were not consulted over these changes. It was used in a mass redundancy situation and sought to use contractual redundancy payments to create a post-employment controlling relationship, including severely restricting their academic freedom after employment. This agreement was designed by a Governing Board to fit with corporate and not academic values. In May 2015, the BBSRC settlement agreement changed (#2) to incorporate the restrictive covenants and it now also attempted to use contractual redundancy compensation to restrict the freedom of academics to talk about the work they carried out in an Institute (#2 section 10.2). The section suggests that the copyright belongs to the Institute, however this is wrong because the copyright of academic work is assigned to the journal. This is an example where HR managers have interfered in a process they do not understand, but seek to control. The use of redundancy compensation to enforce gagging contracts undermines the tax free nature of these payments. However, there is ambiguity in how the financial sections are laid out, implying that compensation has to be repaid in addition to severance payment. By comparing the versions it appears to be designed to be misleading through the use of headings. The contracts make no allowance for the legal requirement of state minimum compensation as they demand all money is repaid and their terms go beyond even the official secrets act (25 tears). The employer also seeks to behave as judge and jury, deciding itself if the
terms have been breached and then immediately making repayment a debt (#2 Section 6.1).

Research Institutes and Universities/Colleges share most of their sources of funding (Research Council, Scottish Government, Levy Boards, EU) yet the academic freedoms of staff within these organisations is currently very different. It is not clear there is any justification for restricting academic freedom post-employment in Scottish Institutes and this is clearly at odds with the intent of the Bill but it needs this evidence to take measures to modify this. The committee could seek to discover why such restrictive contracts are being used to block academic freedoms of some members of the academic community. It is normal practice for the authors of any academic work to continue to explain what they did without restriction. The academic community will hold them responsible and not the administrators of their Institutions.

I have further evidence of interference in academic processes which has already been provided to a member of the Scottish Parliament. This is particularly sensitive, but it would show the committee the levels of interference and manipulation of academic freedoms that can occur to further a few individuals. It can be made available on request.
Submission from Mr Robert Fett
Higher Education Governance (Scotland) Bill

Dear Sir or Madam,

I am writing to oppose the measures set out in the Higher Education Governance (Scotland) Bill. I submit three main objections:

1. No adequate reason has been given for the Bill's introduction. Legislation without a clear and intelligible purpose is a waste of resources, both for the Scottish Government and the Universities who will have to comply.

2. Universities should be free of political interference in order to maximize their potential to explore new ideas, innovate and provide economic growth. Having been a student at the University of St Andrews, and as it happens a member of the Academic Council, I did not notice any governance issues that needed the Government's "wisdom" to fix. The University, having existed for over 600 years and having adapted during that time where necessary has proved itself perfectly capable of finding the best way to govern itself based on its own unique situation and circumstances.

3. The current role of Rector is a crucial element of the University's governance, and in particular provides the student body (the most important stakeholder) with influence as the chair of the Court. Modifying the method of election is unnecessary and would prove counterproductive to good governance. The student body has proved itself to be capable of electing excellent Rector's who care about their role, and bring new ideas and experience to their role of chair of the Court. As someone who was a member of Kevin Dunion's rectorial campaign team I can say with some authority how much the student body cares about this role.

Therefore, I urge you to seriously consider modifying this Bill or scrapping it entirely.

Yours faithfully,

Robert Fett
Fife Council welcomes and endorses the Bill’s aim to make university governance structures more transparent, accountable and inclusive.

However, it has some concerns relating to the threat to the autonomy of universities and the practical challenges posed by the legislation as detailed below.

**Q2 (b) and (c) Higher Education Sector’s current level of autonomy & lines of accountability**

The Council is concerned about the power the Bill gives to Scottish Government Ministers to make future changes to both the appointment of chairs and to the composition of governing bodies through secondary legislation, without the safeguard of full parliamentary scrutiny.

The new degree of Ministerial control and political influence over how universities function introduced by the Bill threatens the autonomy and independence of universities. In turn this could threaten the ability of universities to ensure academic freedom and act as sources of independent thinking, restricting universities’ ability to offer analysis and comment without fear or favour. This could risk universities’ academic standing in an increasingly competitive international environment and thereby reduce the benefits they currently bring to the Scottish economy.

**Q3 Other Measures Needed**

There is a need for the introduction of parliamentary scrutiny to safeguard the autonomy of universities. Sections 1, 8 and 13 of the Bill allow Ministers to enable future changes to the composition of governing bodies through secondary legislation. Section 14 of the Bill also gives Ministers an open-ended power to ‘make different provision for different purposes’. All of these should be properly exercised by Parliament through primary legislation.

**Q4 a) Appointment of Chairs to Governing Bodies**

The current HE Code of Governance already requires the chair of a university’s governing body to be appointed through a transparent process, following open advertisement, and sets limits on the period of appointment. It is unclear how appointing the chair through an election between competing candidates or by a wider electorate than the governing body itself, would deliver better governance.

The suggestion that Scottish Ministers should be able to set through Regulations the criteria for selection of a chair introduces a new degree of political control and influence.
Specifically for the University of St Andrews, it is unclear what role the Government sees for the University’s Rector who is already elected by the entire student body and whose function is to preside over the current University Court. The consequence of the legislation would be to reduce this ancient tradition to a purely ceremonial role.

Q4b) Requirement to include various persons within the membership of their governing bodies

Currently members of the University of St Andrews’ Court are trustees of a charitable foundation and, as such, act in the interest of the University as a whole rather than particular interest groups. Having members nominated by particular interest groups could place the individuals concerned in a difficult position.

The legislation also poses major practical challenges for HEIs. At the University of St Andrews, for example, fitting in the requirement for the composition of governing bodies with existing statute and ordinance prescribing the composition of the current Court will be problematic and time-consuming.

The power given to Ministers under section 8 to make further changes to the composition of governing bodies without the safeguard of full Parliamentary scrutiny introduces an additional level of potential political control that runs directly counter to the assurance given in the Consultation document that ‘The Scottish Government does not want to increase Ministerial control over universities’.

Fife Council
Fife House
North Street
Glenrothes
KY7 5LT

2 September 2015
Submission from Salvatore Finegan

Dear Sir or Madam,

I hope you are well. I am writing in order to voice my opposition to the Higher Education Governance (Scotland) Bill, and I hope that the legislative initiative is shelved.

I fear that the autonomy of the University of St Andrews will be greatly weakened and it will be vulnerable to direct political influence; its academic reputation will suffer; it will lose its edge, in a global market, to attract the best students, the best academic staff and funding; and that on the whole this will be bad for St Andrews, for Scottish higher education, for the economy, for the country.

It is neither clear whether the bill is even necessary. World class minds aren't made in Universities that suffer from changing government ministerial influences.

Regards,

Salvatore
Submission Ms Moyra Forrest

Dear Sir/Madam,

I am alarmed at much of the content of this Bill, and should like to highlight some of my concerns:

- the autonomy of Scotland's universities should be sacrosanct. It is part of a noble tradition of independence of thought and teaching in our culture, and valued by students and staff alike.

- political neutrality should never be compromised.

- the reputation of our universities, and their economic value, rest on autonomy and political neutrality. If we believe in a knowledge economy, then we should do all in our power to enhance it.

- I was privileged to study in two of our universities (St. Andrews and Strathclyde), and spent most of my working life in the universities of Strathclyde and Edinburgh. My personal experience was that students and staff from across the world held our universities in the highest esteem.

I should be grateful if you would record this as an objection to the Higher Education Government Bill.

Yours sincerely,
Moyra Forrest
Scottish Higher Education is not only a very successful sector in Scotland it is also one that is held in the highest regard internationally. I am therefore writing to express my utter dismay and concern at some of the proposals in the Higher Education Governance (Scotland) Bill.

Apart from being baffled as to why this Bill is being introduced (there appears to be no clear evidence of serious, systematic deficiencies in the sector) I am concerned that the proposals will undermine the autonomy of Universities in Scotland to the detriment of their standing (and hence funding) in the international arena. The proposals outline a level of governmental intervention that is entirely inappropriate for an autonomous sector; posing a danger to the Universities’ ability to ensure academic freedom and act as sources of independent thinking.

It seems to me there has been a considerable lack of clear thinking when this Bill was proposed and I urge its withdrawal forthwith.

Caroline Ford
August 2015
Submission from Simon Fraser

I grew up in Edinburgh and went to The University of St Andrews where I studied geography. I feel very privileged to have had a Scottish education and consequently have become involved in the development of the University over the last several years. Specifically I have sat on the 600th anniversary campaign to raise the awareness and reach of St Andrews on a global basis. I feel strongly that the opportunities for the Scottish education sector, and its great universities in particular, are great and with further innovation and expansion they can compete on a global basis to provide opportunities for many more like myself.

After graduating, I moved to the US and subsequently lived and worked in Asia. I also had the good fortune to study for my MBA at Columbia University in New York. There is absolutely no doubt in my mind that the success of any country is founded in the depth and quality of its education system. There are clear examples of this in many countries in Asia but particularly in Korea and Japan. And in the US the unparalleled success of the Californian tech industry is has been born out of Stamford and the other education establishments there. The healthcare and related industries around Boston clearly stem from the success of their universities as well.

Education is one area where the United Kingdom still excels and you can see the enormous spin-offs into research and development as well as commercial enterprises from the London Universities and also Oxford and Cambridge.

Scotland has an enormous heritage in education which has helped drive it's success in medicine, technology and other industries over several hundred years. Its ancient Universities are still remarkable leaders in both research and teaching and Scotland still clearly punches above its weight in both. Just look at how Edinburgh leads in so many research faculties and the impact things like Dolly the Sheep have had and the number of North American and Asian students who want to come to Scotland for both undergraduate and graduate studies.

For these institutions to remain at the forefront of both research and teaching they will continue to need to attract the very best teaching and student talent from around the world as well as from the UK. In order to do this it is imperative that they remain independent and flexible. Each one of The Scottish universities has something different to offer and they need to be able to retain their individual attributes.

It is unclear to me how the proposed new Scottish bill will help these institutions further build on their historical success. Indeed the proposals are highly likely that they will have the reverse effect as:
1. The autonomy of our Universities will be greatly weakened and will be vulnerable to direct political influence

2. Academic reputations will therefore suffer

3. They will lose their edge in a global market and will be less able to attract the best students, the best academic staff and funding

4. This will be bad for Scottish higher education, for the economy and for the country

5. All of this is unnecessary as we have a Governance structure that has proved itself it can work over many generations already that is not tainted by the short-termism inherent in the political system

In conclusion I think the financial impact and educational implications of the new proposal are not fully understood and will have both a short-term financial impact on research budgets and teaching capabilities and also a longer-term negative impact on the educational and economic future of Scotland. I sincerely hope that further thought and consideration will be given to the implications on our country from this ill thought out bill and ultimately sense will prevail and that the independence of our great ancient academic institutions will remain for the next 600 years.

Your sincerely,

Simon Fraser
Dear Sir,

I write to you in respect of the above proposed bill that has come to my attention. I would like to register my concern and opposition to these proposals based on my views below:

I was lucky enough to study for my undergraduate degree at St Andrews University in the late 70s. I have benefitted from that liberal and scholarly education every day since I graduated and am particularly grateful for the unique experience I had there both academically and socially. St Andrews strives to achieve excellence through its staff, its facilities and its alumni - indeed I believe it is now at a peak in all these criteria; but I also know through my recent involvement with the alumni and development board that this is achieved through a huge effort on the university council's part to recruit the best academic staff from around the world, to accept students of high calibre, and to secure financing to offer the best curricula possible along with research projects that are compatible at a world level. This is no mean feat in an internationally competitive field and with government finance cuts impacting both present and future budgets. I believe St Andrews currently holds a unique position in Scotland and beyond in its ability to attract students from throughout the UK and the rest of the world and to contribute substantially to research at an international level, despite being a relatively small university. In this respect its autonomy is crucial.

The current proposals encompassed in the Higher Education Bill challenge much of what makes St Andrews a successful and world ranking university. Any overriding of, or interference with, its academic syllabuses, staffing recruitment or student base would result in a dumbing down of its academic excellence and it would consequently lose its ability to attract both the best students from around the world and the best academics. St Andrews, along with many Scottish Universities, benefits from an international student intake which not only enhances the experience for all students, but also contributes substantially to its financing. Any threat to this intake would be detrimental to the social make-up of the university and the economics. Indeed this threat would impact all Scottish universities.

Essentially, I question whether these proposals are necessary and how the Scottish Government feel they would enhance the reputation and effectiveness of a Scottish university education? Students are encouraged to select the universities and courses that they feel would best suit their individual needs, interests and talents when leaving school. It is a privilege of every school leaver to exercise this choice and I believe students who are lucky enough to qualify for a Scottish University and the diverse choice of university courses currently on offer are truly fortunate. Why then counter this liberty in selection with a dictatorial approach to education and in particular higher education? If curricula are made to follow a formula decided from outside the individual universities then this apparent "choice" becomes redundant and universities (and indeed schools) lose and fail to strive for, uniqueness. The result will surely be that students wherever possible will opt for more liberally constructed courses in universities outside of Scotland.
I urge you to reconsider the effectiveness of your proposals. Please, please do not interfere with a system that is currently successful and enviable, and that will only be destroyed by overriding dogma from outside the universities’ own governance.

I await your response.

Yours faithfully,
Submission from David & Diane Fleming

Dear Sir

We are writing to express our objection to the current proposals set out in the Higher Education Governance Bill. We are horrified by these proposals. Our objections are based on the following observations:

1. We are unaware of any evidence to say that the current governance is unfit for purpose. This is especially true given that the institutions themselves are looking at their own governance, following the Kelvin report and verifying that it is in line with modern standards elsewhere and delivering appropriate outcomes.

2. We are appalled that such important matters are in part being dealt with by regulation and ministerial action rather than by primary legislation. It is totally inappropriate that a Government Minister should decide any facet of how institutions that are so long-lasting, valuable and universally respected are governed. He has no locus in such matters at all.

3. The need for the independence of the Rector, as Chair of the University Court is paramount. We cannot think of a better method of achieving such independence, and a for taking a view of the future, than the current method of election by the student constituency. The extremely distinguished list of people who have volunteered to serve in this role for over 150 years is testament to high esteem in which the post is held both within the University and in the country in general. Any short-listing procedure is a recipe for corruption of this independence.

We would be grateful if you would bring these observations to the attention of your committee, and ask them to reject the Bill in its entirety.

We are both graduates of St Andrews University, and hold the world-wide reputation of our alma mater in the highest regard. It has always been a beacon of academic excellence, independence of thought and inspiration, and should carry on being so without any Government intervention whatsoever.

With kind regards

David and Diane Fleming
Submission from Mr Alistair Galloway

Dear Committee Clerk,

I am to the Scottish Government writing as I have been made aware of the Higher Education Governance Bill, and as a graduate of St Andrews University, I would like to register my views - I strongly oppose this for the following reasons:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Alistair Galloway
Introduction

The General Council of the University of Edinburgh consists of graduates, academic staff and members of the supreme governing body of the University, the University Court. It is responsible for electing the Chancellor of the University, three Assessors to the University Court and its own Business Committee. By the Universities (Scotland) Act of 1858 it has the statutory right to take into consideration all matters which affect the well-being and prosperity of the University and to make recommendations as appropriate. This submission is made under these terms of reference by the Convener of the Business Committee (BC).

The BC shares the Scottish Government’s view that higher education governance should be modern, inclusive and accountable. It believes also that, in the words of the 2012 Review of Higher Education Governance in Scotland, ‘for universities to be successful, and in order to avoid undue influence from outside, they need to be autonomous institutions’. It notes further that in November 2014 the Scottish Government explicitly endorsed this statement in the Ministerial Foreword to its Consultation Paper on a possible Bill.¹

The BC expresses its concern therefore, that many of the provisions in the Higher Education Governance (Scotland) Bill (hereafter, the Bill) appear inconsistent with the overarching principle of institutional autonomy. In addition, some provisions do not sit easily with the legal responsibilities of governing body members as charity trustees; nor in some cases with good practice in governance. We note also that the provision for subsequent legislation to take the form of Ministerial regulations, bypassing the full parliamentary process, renders the nature of future developments somewhat uncertain.

Our detailed response to the Education and Culture Committee’s questions, set out below, is therefore founded on the belief that the provisions of the Bill appear to challenge:

- the principle and practice of institutional autonomy;
- the importance of universities’ charitable status;
- the development of good practice in governance; and
- the need for both the Bill and subsequent secondary legislation to be subject to the scrutiny of the full parliamentary process.

Questions 1, 2 and 3: general observations

The BC acknowledges that the governance arrangements of higher education institutions must be reviewed from time to time to ensure that they are up-to-date and fit for purpose.

The guiding principles of such a review must, we strongly believe, be those of autonomy and accountability, for on these foundations rest the success of Scottish higher education, its ability to contribute to economy and society and its global reputation.

Significant revision and reform, consistent with these principles, has recently been achieved through the sector’s commitment to the Scottish Code of Good Higher Education Governance (hereafter, the Code) which was introduced in August 2013. The provisions set out in this Code address all the key areas with which Part 1 of the Bill is concerned, most notably the membership and chairing of the governing body. The Code recognises that ‘governance is a rapidly developing field’ and so provides for a periodic review of governance arrangements. In November 2014 a first report on the implementation of the Code showed a high level of compliance with its provisions, with considerable progress having been made in respect of equality and diversity on governing bodies. A more extensive review of the Code itself will follow in early 2016 and will include a range of stakeholder perspectives.

Although the Code lays down a comprehensive set of eighteen Main Principles with supporting guidelines, it respects the degree of autonomy which the higher education sector currently enjoys, and its provisions are compatible with each institution’s ability to decide certain matters at institutional level. While it expects consistency of principle in each institution’s arrangements, it does not rigidly stipulate uniformity of practice. We regret that the provisions of the Bill do not appear to maintain a similar balance in respect of principle and practice, and we suggest that they appear to conflict with the Scottish Government’s clear statement in 2014 that it ‘does not want to increase Ministerial control over universities’.

It is important to note that under the Scottish Funding Council’s conditions of grant, universities are required to state each year that they comply with the Main Principles of the Code and follow closely its supporting guidelines. Through this mechanism the Scottish Government exercises its power to require universities to comply with certain governance standards as a condition of grant and so ensures accountability for public monies received.

In light of all these factors, we see no further need for legislative provision at this time. If the Scottish Government wishes to see more rapid progress in ensuring good governance in compliance with the Code, it already has a mechanism to achieve that which strikes an appropriate balance between institutional autonomy and accountability. Proceeding through legislation on the lines proposed would upset that balance.

**Question 4: specific proposals**

**Appointment of chair of the governing body:** the BC believes that the provisions set out in the Code for appointing a chair are sufficient and fit for purpose.

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With regard to the provisions in the Bill, the BC is strongly opposed to any requirement that across the sector the appointment of the chair should include an election from among candidates. Responses from many stakeholders to the Consultation on a future Bill highlighted a number of problems which might result from such a provision. Crucially, as the submission from Universities Scotland convincingly argued,\(^3\) it would risk disempowering the chair of the governing body and could reduce, rather than strengthen, accountability by severing the link between chair and governing body. We firmly believe that chairs have to be accountable to the body which they chair and we are disappointed that the cogent views expressed on this point in the Consultation have not found favour.

In the specific case of the University of Edinburgh, moreover, we would point out that the provisions of the Bill are not compatible with the current division of roles and responsibilities between the Rector and the vice convener of Court. These have been agreed and are set out in a formal and publicly available document.\(^4\) The primary role of the Rector is to preside at meetings of the University’s governing body; the Vice-Convener’s role is similar to that of Chair of the institution and is responsible for the overall leadership of Court and for its effectiveness. There is an important balance in the methods of selection of each of these officeholders: the Rector is elected by all staff and students, whereas the Vice Convener is appointed by the University through an open recruitment and interview process. Overall, therefore, the need for accountability is appropriately met.

On the matter of the appointment of the chair of the governing body, we do not think that further legislation is required. Were the Scottish Parliament to decide otherwise, however, we question the proposal to use Ministerial regulations, rather than the Bill itself, to bring about change. We do not regard this procedure as providing an adequate level of scrutiny, even although we note that the Bill provides for further consultation with stakeholders before any such regulations would be brought forward.

**Membership of governing bodies:** the BC agrees that a range of internal and external stakeholders should sit on the governing body, and that these stakeholders should include students and staff of the institution. But we believe that to specify numbers in each category is overly prescriptive and does not reflect the diversity of the sector.

There are serious difficulties with the notion of ‘representation’ being applied to members of the governing body. In accordance with the ‘Nolan’ principles of public life, charities law and indeed the Code, governors do not ‘represent’, and cannot be mandated by, any constituency or interest group. They must act solely in the interests of the institution and exercise collective responsibility to that end. It is thus difficult to see how and why trade union members should be identified as a distinct category of member, in addition to governors drawn from the generality of staff. Aside from the issue of principle, we also observe that unionised staff constitute less than 30% of all staff, and that other arrangements exist within virtually all institutions for more focused engagement between employers and trade unions.


\(^4\) http://www.docs.sasg.ed.ac.uk/GaSP/Governance/RoleofRector.pdf
The provision in the Bill that governing bodies should include persons appointed by being nominated by ‘a graduates association’ of the institution raises important issues of interpretation in the case of the University of Edinburgh. The General Council of the University of Edinburgh, as noted in the Introduction, is more than a ‘graduates association’; the title of ‘Graduates Association’ belongs to a quite different organisation in the University. The General Council, moreover, elects three assessors to the University Court, in contrast to the two specified in the Bill for nominees from ‘a graduates association’. The BC feels strongly that these arrangements should be maintained without alteration. We draw attention to the fact that the General Council Assessors, and indeed the Chancellor’s Assessor, provide an important channel of information and communication with the Court, by virtue of their attendance at BC meetings. This is an important element in governance which links the General Council with the governing body. More generally, it secures the inclusion in the Court of a larger number of people who are independent in their thinking than would be secured by the Bill and affords the university access to a wider range of skills of value to the institution’s governance.

Further, we note with some concern that the Bill gives Ministers the power subsequently to modify by regulations the categories of membership and number of members; and that it does not set a requirement to consult stakeholders before so doing. Such regulations, moreover, would not be subject to the detailed scrutiny of the full parliamentary process.

**Academic boards**: the BC agrees that a range of internal stakeholders should serve on academic boards, but the provisions of the Bill on this matter are overly prescriptive. We question whether legislative provision is in principle appropriate. The BC believes that the size and composition of academic boards should be decided by institutions and that, given the diversity of the sector in terms of internal structures and subject areas, a single model should not be applied to all. We note that in some universities the current proposals might in practice reduce the involvement of a significant number of academic staff. We accept, however, that matters relating to academic boards should be periodically reviewed. In this regard we consider that the provisions in the Code are adequate: institutions are expected to review the effectiveness of their senate/academic board and its committees in parallel with a review of their governance arrangements. The Code lays down that the governing body shall, where necessary, revise its structure or processes, and shall require the senate/academic board of its Institution to revise its structure and processes, accordingly.

**Questions 5, 6 and 7: academic freedom**

The BC welcomes the Scottish Government’s strong commitment to upholding academic freedom. We believe this aim is best served by preserving institutional autonomy and by retaining unaltered the definition of academic freedom in the Further and Higher Education (Scotland) Act 2005. The freedom to ‘develop and advance new ideas or innovative proposals’ is, we suggest, an unnecessary addition, since it is already implicitly covered by the existing definition. To include an additional element runs the risk of removing meaning from the existing provision, thus creating uncertainty over its interpretation and weakening, rather than strengthening, its force.
Moreover, we find no evidence that the existing definition is inadequate and therefore do not understand the statement in the accompanying Financial Memorandum to the Bill that ‘alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs’.

We note further that institutions are already held to account for the protection of academic freedom. The Code states as a Main Principle that every higher education institution must ‘...ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments’. The Scottish Funding Council places as a condition of grant compliance with this, as with other, aspects of the Code.

Conclusion

For all the reasons given, we are deeply concerned by the Scottish Government’s intention to proceed with the Bill as proposed. We believe that the existing approach embodied in the Code provides clarity about principles whilst preserving flexibility and a proper degree of institutional autonomy. We submit that the case for introducing arrangements which would afford Ministers the opportunity to impose a one-size-fits-all governance model on Scotland’s varied range of HEIs is not made out.

(signed)................................................................. Date: 1 September 2015
Professor Charles P Swainson
Convener, Business Committee of the General Council
University of Edinburgh
As Court member I am aware of the 2013 Scottish Code of Higher Education Governance which I believe is delivering the stated aims of the Bill “to establish a required minimum level of inclusivity, transparency and consistency across all HEIs”.

Certainly my own recruitment, on-going training and consultation as a Court member has been a very positive and professional experience and I believe highly effective in allowing the University to be well governed.

Some observations

Recruitment of the Chair within UWS appears to be a fair and open process with rigour and transparency throughout. To try to standardise the process may actually cause some difficulties and take away the autonomy and personal experience that is required to get the best possible candidate. The diversity of any Board – age, gender, ethnicity etc. and their collective experience is critical to business success, and this is no different within a University Court. This panoply of experience matched by academic rigour I think ensures a fair recruitment process that I believe is ‘owned’ by each University. This allows the appointment of the Chair to fit the culture, strategy and community of the individual institution.

At a time when Universities are rightly being encouraged to actively become more entrepreneurial and engage with the wider business community, increasing Government control, possibly limiting the ability to be flexible and respond to the needs of business, would be detrimental.

Response to the Committee’s specific questions below:

The Education and Culture 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?

   During my own recruitment I found the process very open and fair. There appeared to be a real understanding of the needs for good governance and the critical nature of building a Court that reflects a modern Scotland. I would therefore state that I believe that the current Code is fit for purpose.

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

I have a professional and personal interest in gender equality and diversity as a whole. I will continue to support and encourage other women and those from minority groups to seek roles within organisations at senior levels. From experience of other sectors (I also serve on the advisory committee of the Institute of Directors in Scotland) I believe that Scottish Universities are actually performing well on gender balanced Courts and all are striving to improve diversity in general.

I do have some concerns that proposed remuneration for the role of Chair would attract people who are perhaps seeking that role for the wrong reason. I see this role as one in which the individual is ‘giving back’ to the community and sharing their experience and knowledge to help others. I do not believe this should be a commercial transaction. I understand completely the paid role of the Non-Executive Director however I do not think that fits the ethos of what a place of learning should be. As with the introduction of any new system or process, it often takes time to ‘bed in’ and I would suggest that the new Code of Governance should be allowed to do this and then be reviewed as planned next year.

I believe an effective Chair should be a ‘critical friend’ to the Board/Court. This takes time to establish a relationship of this sort and the robust recruitment process is so important and must involve a degree of autonomy by those involved to use skills and judgement in selecting the appropriate person.

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

I believe we have to be very careful if we are trying to encourage and support more interaction with business and external stakeholders, particularly if it is perceived that universities may be seen to have a political in -put. This could detract or have a negative impact in a range of ways - from alumni becoming involved, businesses working with the university, attracting students from other countries, sourcing research funding etc.

Universities should be looking at where their specialisms are, market and celebrate their uniqueness.

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

I have a great deal of experience of the third sector and the importance of charitable status for raising and retaining vital funds for longer term projects – particularly capital projects which can often be a challenge to source funding for. I think this charitable status is one of the key areas that needs protected in order to continue to build on Scotland’s heritage in this sector. It is imperative to ensure that our universities can continue to compete on a world stage and develop campuses for the future. I am concerned that further legislation in this area will put unnecessary checks and balances
on universities when what we have in place appears to be working. In addition if this was the case then it could lead to Scottish HEIs losing their charitable status making them much less competitive or attractive than other UK HEIs.

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

The existing Code of Governance appears to me to be very thorough and is currently being adhered to by the institutions. Feedback on improvements and updates can be presented as they arise, through various channels. It is important that we do not stifle any future innovative thoughts or ideas by placing too big a legislative burden and therefore prevent new and improved ways of doing things from being implemented. There is so much talk of entrepreneurial activity for improving the economy of Scotland however we cannot forget that we need institutions to demonstrate, nurture and encourage intrapreneurial thinking too. Being overly prescriptive around legislative and non-legislative measures may stunt that.

Margaret Gibson 2nd September 2015
Submission from David Gill

Dear Sir,

As a member of the General Council of the University of St Andrews, I am concerned to learn of the above mentioned bill to be put to the Scottish Parliament.

Together with colleagues, alumni of St Andrews University, I am concerned that the autonomy of the University will be greatly weakened if this bill is enacted. It is never right that a University of such importance, and excellence should be made vulnerable by direct political influence. It is important that the high academic reputation of St Andrews, one of the very ancient universities is in the world, should have great freedom and never be made to suffer by legislation which might prove inhibiting and harmful. The university must always be free to develop a programme and reputation which will command international respect and attract students and academics of the highest quality.

In my view, shared by many, this legislation will be bad for St Andrews and can be argued to be quite unnecessary.

I trust that the Committee concerned will hear and accept my petition and rethink this Bill. I am,

Your faithfully,
Glasgow Caledonian University is responding to the invitation to submit views to the Education and Culture Committee on the Higher Education Governance Bill 2015.

1 Introduction

The Scottish Government has considerable power to use legislation to further its ends. Using such a powerful means to prescribe detailed governance arrangements for self-governing organisations implies a need to address a serious deficiency which the organisations themselves have proved unable or unwilling to address. When the international evidence base as provided by the OECD demonstrates the correlation between a high level of university autonomy and institutional success, government’s erosion of that autonomy should be for only transparent and clearly articulated reason. The Policy Memorandum accompanying the Bill is sceptical regarding universities’ capacity to secure good governance without legislation but provides no evidence to substantiate the scepticism. We propose that such evidence should be provided before the major step of legislation is contemplated further.

Glasgow Caledonian University is a successful, modern higher education institution with a statutory instrument originating from 1993 and updated for full compliance with equality legislation in 2010. Our statutory instrument was designed to ensure accountability and efficient and effective public value in the fulfilment of the University’s purpose: to teach, research, widen participation and engage with business and the wider community. This is allied to an enhancement approach to governance where we readily share, learn from and adopt others’ good practice with a view to promoting accountability, transparency and inclusion.

A key part of the rationale offered for the legislation is that of consistency. Consistency is important for standards and matters of quality in the delivery of core business – that is to say, where there is practical value in comparisons for those using universities’ provision. However, while governance needs to be determined by consistent principles of accountability and transparency, it can positively and without detriment, reflect the different history and nature of each organisation in a sector where diversity is counted as a strength.

The case for consistency is asserted rather than demonstrated in the Policy Memorandum. Consistency in the detail of governance, prescribed in legislation and government regulation, can be assumed to facilitate stronger state control - which is at striking variance with the Scottish Government’s acknowledgement of the value of university autonomy and its stated desire to protect academic freedom. The impact of close government control on the ONS classification of Scottish universities is set out in detail in sector responses. We share the profound concern expressed there about the consequent risk to financial sustainability.
2 Efficient and effective governance

The University is unequivocal in its wish to comply with the highest standards of governance: this is the cornerstone and best guarantor of the University’s success and sustainability. We have accordingly observed UK best practice guidance for the sector provided by the Committee of University Chairs (CUC), the Scottish Code on Good HE Governance, the SFC’s Financial Memorandum and the requirements of OSCR to maintain our charitable status as well as wide corporate good governance standards in ensuring that our arrangements are fair, transparent, robust and efficient.

The Court instituted regular effectiveness reviews of its performance and that of its Standing Committees many years ago, and this is part of our constant enhancement approach to governance. In considering the recommendations from the 2012 von Prondzynski report, we observed that the great majority of the recommendations reflected our existing practice. A few were inconsistent with our governing instrument, and others posed a philosophical or legal challenge or both (such as the payment of governors).

3 The composition of the Court and policy objectives

With a modern statutory instrument, we have fewer places determined by election or ex officio appointment and as such we have more capacity to shape the profile of the Court membership to meet the Court’s diversity objectives as well as vital skills requirements. An influential committee of the Court is the Court Membership Committee on which elected staff and student governors sit as members.

- **Membership diversity**: We are a University with equality and diversity at the heart of our mission - a University for The Common Good - and this is reflected in our approach to lay governor recruitment. Our recruitment methods are open, inclusive and embrace carefully targeted efforts to attract as diverse an application pool as possible. Our last recruitment round attracted a strong field. The shortlist was 50:50 female: male and the eventual number of governor appointments had the same 50:50 split. Our current lay membership has a reasonable and improving gender balance with 35% women, which rises to 41% across the full membership of the Court, and we continue to work to raise the proportion of women members. We are promoting diversity across other protected characteristics too. We currently have a female chair and vice-chair of Court, and of the 8 chairs appointed since our foundation in 1993, three have been women.

- **Alumni on the Court**: The Court membership includes governors who are alumni, and it is one element of our recruitment activity for lay governors to draw the opportunity to the attention of alumni and encourage applications from them. (We keep in close and regular touch with our alumni but we do not have a formally constituted body like the General Councils of the ancient universities to whom to give the task of electing or nominating members to Court.)
• **Trade Union membership**: While the electorates for our staff governors are inclusive, at least two of the three elected staff governor places are usually filled by TU officials. The idea that legislation is needed to ensure that trade unions have a strong presence on courts is unconvincing and not borne out by our experience. In universities where that is not the case, it can be taken as an indicator of the lack of union presence on the campus, which prompts the question even more acutely of why trade unions should have privileged powers to nominate to membership of the governing body.

• **An optimal size of Court - and unintended consequences?** The expansion of the Court which will result if the terms of the Bill are enacted means that the Court will increase beyond the best practice maximum of 25, the figure widely regarded as the maximum consistent with good and efficient governance. If the Court finds that the higher number is unwieldy and compromises robust and efficient governance, the only variable which can be adjusted downwards to keep within this maximum will be the number of lay governors it appoints. This, however, is to raise questions about the objectivity and impartiality with which the University is governed and senior management held to account. Moreover, the terms of the Bill show ministers seeking new, wide powers to vary future governance arrangements by regulation, including the power to alter further the constituencies which can nominate Court governors. This suggests that Government does not share the view that lay membership is an important guarantor of strategic decision making which is disinterestedly focused on the well-being and long-term sustainability of the institution.

• **How the Chair is appointed and appraised**: In the appointment of the Chair of Court the University has developed further its good practice in accordance with the Scottish HE Code. When the post was advertised externally last year, a job description was drafted. All staff and students were consulted about it and amendment was made in the light of some of the very few comments received as feedback. There followed a full recruitment process with a rich microsite developed for the purpose and a rigorous selection process conducted by the Court Membership Committee sitting as the Selection Committee. This, as noted above, includes staff and student governors who hold their positions on Court by virtue of election by the relevant constituency. The Committee’s recommendation requires the approval of the full Court.

The selection process for the chair and lay governors mirrors that for any appointment to the University, and it is axiomatic that expenses for those who are shortlisted and engage in the selection process are reimbursed.

The effectiveness of the Chair is appraised on an annual basis and student and staff governors participate in that exercise.
4 Transparency and accountability of Court

Modern governance means transparent, accountable governance. This is delivered through good, regular communications to promote an understanding of the University and the role, responsibilities and impact of the Court. The information universities are required to publish under the SORP, including a very full governance statement, is an important means of setting out how the institution is using its resources, their sources, how they are managed and how the organisation is governed. Numerous other published documents, either required (such as HESA statistical returns or the SFC’s Outcome Agreements) or routine practice (such as strategic plans) together with the use of the FOISA mean that universities deliver the services for which they receive public funding – as well as those for which they do not - with great transparency. Regarding the business of the Court itself, the policy is to publish Court minutes in draft soon after each Court meeting with the confirmed version appearing after the subsequent Court meeting. Articles, interviews and videos with Court members are increasingly produced, and we are looking at social media techniques. There are many opportunities, both structured and informal, for Court members to engage with staff and students in their own environments and to hear them talk about their work and study within the University. At least annually there is an open forum for all staff to meet with the Chair, Vice Chair, other Court members and officers to discuss the work of the Court and raise issues of governance.

5 Academic freedom

Academic freedom has always been fundamental to what it means to be a university. The internationally recognised guarantor of academic freedom is universities’ self-governing status and relative independence from government direction. There is therefore a perverse logic in Government seeking to strengthen academic freedom in the letter of the law while proposing to drive through HE governance legislation which will facilitate its own control of universities. That said, the elaboration of the definition of academic freedom is unexceptional and brings no material change.

4th September 2015
Glasgow Caledonian University branch of UCU Scotland response to the Education and Culture Committee on the Higher Education Governance (Scotland) Bill

We represent academic and academic related staff in Glasgow Caledonian University, and are the largest of the four unions recognised by the university.

We are happy for this submission to be made publicly available and shared in the usual ways.

If it was helpful to the committee we would be delighted to expand on our response and give further evidence in person.

We have answered the questions asked by the committee in order below.

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

Although the implementation of the new governance code (undoubtedly impelled by the public and Governmentat scrutiny following the publication of the Von Prondzynski report into governance), has led to some modernisation in the way university courts work, there remains much more to be done. For instance more regular publication of minutes etc, the appointment of more female Chairs of Court (from a situation of zero at the time of the original report), is to be welcomed but it is hardly adequate to the taks of creating modern governance for universities in the twenty first century.

Much of this was (too long) overdue, and there still remains the need for substantial improvement in the way courts work, position themselves in relation to the universities and communities they serve, and their operation as inclusive bodies.

These problems are structural, and not reducible solely to bad judgements or actions by individual members of senior management of universities or indeed of individual university principals (although failures in current structures and modes of operation are often the mechanism that allows such misjudgements to regularly occur).

The examples unfortunately are legion of university courts that have tolerated and acquiesced in management strategies that a more robust governmental
structure could have challenged - thus leading to more effective use of money provided by the public purse, and essentially, less misuse of staff time.

Although the Scottish government and the STUC has signed memoranda regarding the useful role played by Trade Unions in a modern Scotland – a position acknowledged by University Scotland, the failure by management to involve Trade Unions in meaningful discussions about managing change, when change is necessary has been at the root of the majority of recent local disputes in Higher Education. In almost all of these cases, university courts have not adequately scrutinised the positions adopted by management, thus allowing a wasteful period where staff are forced to oppose policy change dictat, which could have been prevented had adequate scrutiny by university courts, and involvement of the wider university community taken place.

One reason for this inadequate scrutiny is the lack of adequate direct representation of the wider university community within governing bodies themselves. Nominated representatives from Trade Unions and a Chair of Court directly elected by staff and students would help ensure that views wider than what can in effective be a narrow sphere of interests would be brought into debate and considered when performance is scrutinised.

With the best will in the world, it can be very difficult for lay members of court to be able to interrogate the narrative given by senior management, unless a wider perspective is also present. Trade Union nominees and elected chairs would be one element in helping provide this.

(2) The extent to which the bill:

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

The extent to which the majority of staff at universities tend to see courts as a talking shop, or a forum from which their voices are excluded can be seen by the customary low turn outs in elections where these exist for ‘staff’ governors. Even where a high turnout can be achieved, the fact that individual staff (who are not nominated by Trade Unions) have little mechanism to ‘report back’ or consult with the constituency that elected them, means little confidence exists in the current system. At Glasgow Caledonian, where some efforts have been made to increase dialogue with staff through a yearly ‘open meeting’ of staff representatives with their constituency, the meetings over the last four years have been deemed ‘successful’ if 20+ staff attend (of a possible cohort of over 1500). This low turnout is perhaps a reflection of the general disengagement of staff from the current governance set-up in Higher Education.

(b) may alter the higher education sector’s current level of autonomy
We see no threat to academic autonomy from the current Bill’s proposals for a change to governance. We believe there is a difference between autonomy for a university and ‘licence’ for management to operate in a manner that has little accountability to the wider university community and the Scottish public.

In past years, the main threat to academic autonomy has been through academic senates or courts acting more like a rubber stamp, than being challenging partners in wider university activities.

We do not see that this will arise at all.

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? Are further measures needed?

We believe that experience has shown (even with the ‘voluntary’ code of governance, that legislation is necessary to ensure effective change).

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.

We are strongly supportive of the chair of court being elected by all staff and students. Detailed comment would depend on the actual proposals, which may vary slightly of course due to the different historical practice in different parts of the sector.

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

We strongly support Trade Union and student nominees, who are seen as representative in other aspects of university life such as collective bargaining.

For further information please contact:
Higher Education Governance Bill and Glasgow School of Art

Introduction

There has been considerable discussion at respective Universities Scotland/CSC/Secretaries Group meetings about the potential generic impact of the Higher Education Governance Bill, if passed into legislation, on the Scottish Higher Education (HE) sector. This short paper reflects on the potential impact on the specific Governance arrangements of The Glasgow School of Art. At this stage these reflections are highly speculative as the Bill still has to move through several stages of consultation and various elements may well change as it receives scrutiny. The paper has the full support of both the Executive Group of The Glasgow School of Art and the Board of Governors of The Glasgow School of Art.

The Bill raises fundamental issues about the autonomy of The Glasgow School of Art (as well as for all Scottish HEIs) as the Bill proposes powers for Scottish Government Ministers, exercisable through secondary legislation, to decide what categories of person should be part of The Glasgow School of Art’s Board of Governors, how they should be appointed, and their conditions of service. That the legislation would give substantial powers to Scottish Government Ministers is highly concerning. Each line of the Bill proposes that politicians have additional powers to decide how The Glasgow School of Art is organised and governed.

The Glasgow School of Art is a Small Specialist Institution (SSI); the institution operates in a highly competitive international sector within which it is highly regarded. In the recent QS World Rankings the institution was ranked as one of the world’s top 10 art schools. To maintain this international competitiveness The Glasgow School of Art needs to determine its own structures in line with all relevant codes and best practices. Being forced to come into line with others in the HEI sector through one size fits all legislation is deeply concerning, particularly when no real clear need for any change has been articulated by the Scottish Government. The notes below highlight the inherent problems for The Glasgow School of Art with the legislation that is currently being proposed by the Scottish Government. In summary:

- It will add significant costs to The Glasgow School of Art.
- It will open up the appointment of the Chair of The Glasgow School of Art’s Board of Governors to a process of lobbying and campaigning around specific interests, rather than having an appointment made in the collective interest of the institution as a whole.
- It will result in a less democratic Governing Body for The Glasgow School of Art.
- It will adversely affect The Glasgow School of Art’s financial position in terms of its fundraising ability.
- The proposals contravene the Scottish Code and The Glasgow School of Art’s Statement of Corporate Governance. These are built on the principle of governing bodies acting in the collective interest rather than being vehicles for representatives of specific constituencies.
- The proposed legislation leaves organisation of governance and the structure of academic representation within The Glasgow School of Art open to the whims of whoever might be in Government at a particular point in time.
Before going into the details of how the proposed legislation would effect The Glasgow School of Art it is worth mentioning that an immediate consequence of the legislation proceeding would be the need for The Glasgow School of Art to seek legal advice on where it would now stand in relation to its Order of Council and its Memorandum and Articles of Association. Would it be The Glasgow School of Art’s responsibility to address its position through the Privy Council and Companies House, or would this be a Scottish Government responsibility? If it was The Glasgow School of Art’s responsibility to seek a change in its Order of Council through the Privy Council (something which is a very time-consuming process) any legislation would need to clarify how The Glasgow School of Art would continue to operate under the status quo in the meantime. When you look at the implications of change, listed below, you will hopefully get a sense of how disruptive and distracting this would be for a Scottish SSI focused on building its International position, delivering research and teaching excellence and offering Scottish students from all backgrounds access to a high quality arts education.

**Appointment of the future Chair of The Glasgow School of Art’s Board of Governors**

At the moment the position of Chair of The Glasgow School of Art Board of Governors is appointed through a process of external advertising, shortlisting by an appointing committee (formed from Governors) and interview. The Bill proposes that in future The Glasgow School of Art’s Chair of Governors should be elected. The exact nature of the electorate is not yet defined in the Bill. It could be that the appointing committee shortlists a number of candidates and these are then put to the electorate. This electorate could be the Board of Governors, but might also include The Glasgow School of Art staff or staff and students, depending on how Government Ministers choose to define the electorate.

**Implications for The Glasgow School of Art:**

- Finding an appropriate Chair of the Governing Body for an organisation like The Glasgow School of Art is extremely challenging. The role is in many ways unique given The Glasgow School of Art’s size, structure, and context. It is intellectually demanding and high profile and applicants for a role like this, like applicants for senior appointments within The Glasgow School of Art itself, may well be extremely reticent to go through an election process that offers no confidentiality. Historically, applicants for senior appointments within The Glasgow School of Art would have given presentations to staff and students as part of the job application process but this is now no longer seen as best practice by any of the international recruitment agencies operating in the HE sector or by HEIs themselves because of sensitivities of confidentiality.
- Having a very broad electorate such as staff and student body brings challenges in mobilising a large turnout. Even for student president elections at The Glasgow School of Art, the turnout is typically only 15% to 20% of students. This would make an election vulnerable to lobbying by specific interest groups, potentially aligning the appointment of the Chair of The Glasgow School of Art’s Governing Body to particular campaigns and view points rather than the collective interest of the Institution.
Membership of The Glasgow School of Art’s Board of Governors

The Bill would require The Glasgow School of Art to include within the membership of its governing body the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students’ association, and two graduates of The Glasgow School of Art nominated by the graduates’ association.

Implications for The Glasgow School of Art:

- The Glasgow School of Art currently has two members elected by the staff - one elected by academic staff and one elected by professional support staff. The Glasgow School of Art could not really limit the electorate of these two appointments to members of the respective unions defined in the Bill. If it did, it would not be allowing other staff (non-union members) to have a vote in who sits on the Board of Governors. So, in order to comply with the Bill, the institution would need to bring two more members of staff onto the Board, who were only elected by union members. This would mean one subset of The Glasgow School of Art staff would have the opportunity to vote for two Board appointments (union members), whilst another subset could only vote for one Board appointment (non-union members). The number of Staff Governors would have to be increased from 2 to 4 as a consequence.

- Interestingly, at The Glasgow School of Art, in recent history the Staff Governors elected by academic staff and professional support staff have been union members. However, the critical point is that who to elect must be a decision of the staff, and one that is based on the individual rather than their categorisation as a union official. That is the very embodiment of staff choice. The Glasgow School of Art is entirely open to increasing the number of staff Governors but on the basis that all are free from the undemocratic requirement of needing union membership to stand and be elected.

- For Glasgow School of Art it is also very important to point out that a more proscribed membership doesn’t gel well with the principle of governing bodies acting in the collective interest rather than being vehicles for representatives of specific constituencies, a principle stated in both the Scottish Code and Glasgow School of Art’s Statement of Corporate Governance.

- The Glasgow School of Art is very careful to use the value-based term ‘Professional Support Staff’ and not ‘Administrative Staff’, for all non academic staff.

- The Glasgow School of Art Board of Governors currently has the Student Association President as a member. The legislation would add another student elected governor to the Board of Governors. The key aspect of the relationship between the President, the student body, and The Glasgow School of Art is that it is non-politicised and personal. Scale is an appropriate aspect of this and The Glasgow School of Art considers that the current balance is effective and appropriate.

- The Glasgow School of Art does not have a graduate’s association like many other HEIs. This entity would need to be established to comply with the Bill - an extremely costly and time consuming exercise for a SSI like The Glasgow School of Art. Given that students completing The Glasgow School of Art’s programmes are, in effect, graduates of the
University of Glasgow, this matter is already addressed and, as such, further changes are unnecessary and confusing.

- If all the additional Board members prescribed in the HE Governance Bill were introduced at The Glasgow School of Art, the Board of Governors would become a much larger and ultimately unwieldy body, way out of proportion with the scale of the institution.

**Remuneration of the Chair of the Glasgow School of Art’s Board of Governors**

The Bill seeks to allow Scottish Ministers to make provision for remuneration and allowances to be payable to the chairing member of the governing body of an HEI. The Scottish Government has suggested this might be £512 per day for up to 6 days per year.

**Implications for The Glasgow School of Art:**

- Recent advertising for the Chair of Court at University of West of Scotland suggests a time commitment of 30 - 35 days per year. This is certainly much closer to the commitment of the Chair of the Board of Governors at The Glasgow School of Art than the suggested 6 days per year.
- The role of Chair of the Board of Governors at The Glasgow School of Art covers some roles that are performed by the Chancellor at other HEIs in Scotland, notably participation in graduation ceremonies etc. This would make a standardised remuneration problematic for the Chair.
- The burden of leadership of the Governing Body at The Glasgow School of Art is shared by many lay Governors who play an active part in chairing key Board Committees. If the Chair was remunerated there would be logic in remunerating other lay members of the Board. A payment structure not dissimilar to a NHS trust could quickly result. This would potentially cost The Glasgow School of Art up to £120k per year (£25k for chair and 12 x £7.5k for Lay Members). A considerable additional expense for a SSI like The Glasgow School of Art.
- The Glasgow School of Art considers that financial reimbursement for providing child care or other appropriate expenses to any Governors is much more sensible.

**Composition of the Academic Board**

Under this section the Bill proposes that the Academic Board (for The Glasgow School of Art this is the Academic Council) has a predefined composition of:

(a) the principal of the institution,
(b) the heads of school of the institution,
(c) persons appointed by being elected by the academic staff of the institution from among their own number,
(d) persons appointed by being elected by the students of the institution from among the students of the institution,
(e) such other persons as are appointed—
   (i) by virtue of an enactment,
   (ii) in accordance with the governing document of the institution, or
   (iii) in accordance with a decision of the governing body of the institution.
The academic board is to be constituted in such a way that:

(a) more than 50% of its members fall within subsection (1)(c) or (d),
(b) at least 10% of its members fall within subsection (1)(d).

**Implications for The Glasgow School of Art:**

- The proposals outline a structure that doesn’t necessarily fit with The Glasgow School of Art’s organisational structure. One small issue is that The Glasgow School of Art does not have a Principal, it has a Director.
- The Glasgow School of Art is currently composed of 3 schools plus a PGT/Research entity called the Digital Design Studio. Although not on the immediate horizon, over the coming years many other forms of structure might become appropriate for The Glasgow School of Art (the current schools are tiny compared to the norm for academic schools in the HE sector). The Glasgow School of Art would not want its future academic structure constrained by legislation.
- The proposals outlined by the legislation would increase student representation at The Glasgow School of Art’s Academic Council. The Glasgow School of Art considers its current arrangement to be highly effective and appropriate to the size of the student body and its relationship with sabbatical students.

**Classification of HEIs**

The Ministerial powers described in the Bill give rise to a fundamental business risk that HEIs might be reclassified by the Office for National Statistics (ONS) as Central Government (as has already happened for Scottish Colleges). Such a change would have significant consequences for The Glasgow School of Art.

**Implications for The Glasgow School of Art:**

- In the current economic climate to maintain its viability The Glasgow School of Art will need to make substantial investments in its estate. With the need to raise the capital required for investment from non-government sources, The Glasgow School of Art needs access to as many external funds as possible. The Institution is planning a very ambitious multi-million pound programme of campus development and also has the significant financial challenge of restoring the Grade A listed Mackintosh Building. Changing ONS classification of the organisation would potentially restrict borrowing and access to charity status etc. Losing charitable status would also reduce some VAT benefits applying to charities. This would penalise the Scottish sector versus the English sector, who are moving in the opposite direction as a result of student fees increasing as their government funding diminishes.
As a result, most English HEIs will soon be able to lose their current semi-public body status and, for example, opt-out of OJEU procurement requirements – which it is expected would reduce their operating costs by 10% at the same time that the Scottish sector is moving in the opposite direction and relying on public sector funding; funding which will be under significant pressure following the outcome of the current Spending Review.

Summary

Through reading this submission from the Executive Group and the Board of Governors at The Glasgow School of Art, you will realise that each line of the HE Governance Bill brings disruption to governance and academic management of the institution. The Glasgow School of Art values disruption, this is one of the core values of the School; The Glasgow School of Art also, however, values critical thinking and when you apply critical analysis to the terms laid out in the Bill it is clear that the potential disruption to the institution is significant and brings no clear benefit; the disruption will result in additional costs, weakened governance and academic management and potentially a change in ONS classification of The Glasgow School of Art. Nowhere, in either the debate surrounding the HE Governance Bill or in the Bill itself, is there any clear rationale as to the benefits that any part of the Bill will bring. Higher Education is an extremely competitive global activity. The Glasgow School of Art is one of Scotland’s key Higher Education Institutions and bringing in legislation that would weaken its governance will be damaging, not only to the Institution but also to Scotland’s global position in arts education.

The Glasgow School of Art
September 2015
Submission from Cameron Glasgow

Dear Sirs,
I am extremely concerned with some of the main proposals within the Higher Education Governance (Scotland) Bill which is due to pass through Parliament this autumn. It is my understanding that this new legislation will enable the Scottish Government to exercise greater control over the composition and governance of all higher education institutions in Scotland including the universities and that it will also enforce greater consistency among institutions, and thereby reduce their ability to adopt individual strategies. This will not only burden universities and the public purse with extra regulation and bureaucracy, it will stifle enterprise and jeopardise the positive contribution that universities make to the economy. I have not read one thing that makes the case for this greater control and cannot understand why it is necessary.
It is without doubt that Scotland’s academic reputation will suffer if this Bill becomes law – one of the strengths of this great country’s tertiary education system is the independence from political influence and the ability of its universities to follow the paths they see fit to attract the best students.
I urge that the Bill is not passed through in its current form.

Kind regards,

Cameron Glasgow
I endorse the content of the Advice Paper (15-01) issued by the Royal Society of Edinburgh in response to the Scottish Government's consultation on HE Governance Bill.

In particular, I agree that the strength and vitality of Scotland's HE sector would be compromised if it were to be meddled with by Government intervention. Freedom of thinking and independent governance is paramount to maintaining the vibrancy of Scotland's world recognised educational standard of excellence, any interference in which is totally superfluous.

Samantha Gordine
September 2015
Submission from Stephen Goddard

I would like to add my opposition along with many others to the proposals in the Higher Education Governance (Scotland) Bill. One of the attractions of applying to university in Scotland is the individuality of the institutions. I benefited from an education at St Andrews. The independence in Scottish Universities is something to be cherished but this bill seeks to undermine it. I fear politics will get in the way. In a global market the university needs to attract the best if it is not to become a backwater.

I see little benefit in making these unnecessary changes.

Yours sincerely

Stephen Goddard
**Submission from EP Gray**

**HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL – AS INTRODUCED JUNE 2015 – CALL FOR EVIDENCE**

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<thead>
<tr>
<th>What the Committee would like your views on</th>
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<td>The Committee’s role at Stage 1 of the parliamentary process is to report to the Parliament on the general principles of the Bill – that is, on its overall purpose.</td>
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The Committee invites you to answer some or all of the questions/issues below to help it in scrutinising the Bill and in reporting to the Parliament. If possible, please provide specific and practical examples in your response. There is no obligation to answer all of the questions.

<table>
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<th>The Committee's questions</th>
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1. **What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?**

The recent Scottish Code of Good Higher Education Governance (2013) is reasonable, satisfies all concerns around modernity, inclusion and accountability. It has encouraged all HEI’s to make appropriate changes and comply with it.

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

I can see no areas where the Bill would improve Higher Education Governance, in fact the reverse.

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

Having a specific category for nominated Trade Union members could politicise both the selection process (which Trade Union? which candidate?) and the general business of the Governing body. Decisions may be made for political reasons, rather than for the best long term interests of the HEI. Nomination is not a democratic process. The current process allows for election of staff members. The person elected may, or may not be a Trade Union member. Once they sit on the Court, according to the Scottish Code of Good Higher Education Governance, they should not vote according to a mandate by the
### Specific proposals

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

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

<table>
<thead>
<tr>
<th>a)</th>
<th>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</th>
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<td>Depending on the outcome of further consultation, Chairs could become a political appointment rather than an open and fair selection, which could damage the independence of the HEI’s. (and their charitable status)</td>
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<td>b)</td>
<td>To require HEIs to include various persons within the membership of their governing bodies</td>
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<td>There should not be a category of ‘nominated trade union member’ on the membership of the governing body. Nomination is not a democratic method of selection and not all</td>
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university staff are union members. This is discriminatory and could politicise the governing body which may lead to decisions being made on political bias rather than what is best for the institution.

- There should continue to be at least one elected staff member from both the academic and the support side.
- The original draft of the bill gave the HEI a choice of 1 or 2 alumni members. This should be reinstated to allow the HEI flexibility in how they constitute their governing body. These members should be elected rather than nominated, otherwise selection may not be open to all.
- As the composition of the governing bodies is under the control of the regulations set by the Scottish Minister, rather than under legislation, there is a risk that changes could be imposed which would not match the Scottish Code of Good HE Governance, leaving the HEI’s unable to match both.

- To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons *(including a minimum of 10% student representation)*.

The size of the academic boards should be left to the individual HEI. In most HEI’s there is already an agreed level of student participation.

**Academic Freedom**

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".
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<td><strong>6.</strong></td>
<td>Are there likely to be any significant constraints – other than legal constraints – on academic freedom? For example, the particular ethos within an institution; funding pressures; institutions’ policies on equality and diversity; etc.</td>
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<td><strong>7.</strong></td>
<td>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?”</td>
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Please use the adjacent space to provide any other brief comment(s) you wish to make in relation to the Bill.

By moving the detail of the appointments of Chair and Governors from Legislation to Regulations, the HEI’s are at risk of future politicisation of appointments with minimal consultation, restricting the ability of HEI’s to make the best decisions for their organisation. Given their significance to both the Scottish Economy and the current excellent reputation of the Scottish HEI’s, this should be a matter for debate at Parliament, not just at the discretion of a Minister,
Submission from Professor Rob Gray

Dear Sirs,
I must add my voice to those that have already expressed their anxiety about the present Bill. I cannot see that it will produce any good and it seems very likely to produce more unnecessary difficulties for the sector.

You will be aware of the arguments against this Bill but there are two that stand out for me personally with nearly 40 years of university experience. The first is a genuine concern about the almost constant intent to restrict, control and undermine universities and the university sector. This process has been going on for some 30 years and whilst the detriments are clear, it is far from obvious what improvements in education and research the process has achieved.

The second point is one which closely echoes the Royal Society's concerns. In essence, what problem are these proposals designed to correct? As the RSE says they are are "inappropriate, unnecessary and potentially counter to good governance"

On the available evidence I have every reason to believe that my own university operates to a very high level of good governance and these proposals are very likely to undermine, weaken and emasculate an already excellent and well-run international institution.

Thank you for the opportunity to comment.

Yours sincerely

Professor Rob Gray
Dear Sirs / Madams,

As a Scot and a St Andrews graduate I am horrified that Scottish higher education is to be changed from being a place of education and open debate to a political pawn, subject to the changing whims of politics.

Under government politicians - see section 13 etc - higher education establishments will be unified under the same regulations killing initiative, independence and ability to adapt to what is required for education and for the world stage into which their students go and from which their lecturers and professors are drawn.

Politics should not dictate to institutions where free speech is an essential.

For the sake of Scotland and its great reputation for education please do not pass this bill.

Yours sincerely

Vicky Grazebrook
Submission from Roger Greaves

Dear Committee Clerk,

As a member of the General Council of the University of St Andrews, I wish to express my opposition to the terms of the Bill, which in my opinion will have the following negative effects:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Yours sincerely,

Roger Greaves
Submission from Murray Grigor

I write as a graduate of the University of St Andrews, which over the last ten years has reached one of the highest academic and student satisfaction ratings in the UK.

To an already successful University came the present Principal and Vice Chancellor, Professor Louise Richardson, who was attracted to the position because St Andrews was the first university in Europe to instigate a course in Terrorism and Conflict Resolution, pioneered by the late Professor Wilkinson. Professor Richardson’s own specialism was also in this area, which was well known to the Senior Governor Sir Ewan Brown, who invited her to apply for her present position. Sir Ewan Brown, a graduate of the University of St Andrews, had already been recruited by his University peers for his outstanding business acumen. Together Richardson and Brown, and their accomplished colleagues, have worked tirelessly together to win outstanding results for students on an international scale. Principal Richardson has recently been invited to be the next Vice Chancellor of Oxford University, itself a telling endorsement on the recruitment procedures of St Andrews. Now that Sir Ewan has retired as the University’s Senior Governor, the Senatus Academicus of the University of St Andrews now requires the considered and essential opinions of its members to replace these two key positions for its continued success. Direct political influence, would only confuse, and no doubt greatly weaken recruitment of these two all important positions.

To end on a personal note, I have to thank the initiative of Professor Richardson, who invited Sir Sean Connery, who in turn invited me, to direct a film to mark the University’s 600 anniversary, as part of her main concern to increase the student Scholarship Fund. Our film, Ever to Excel, has since been a significant mover in raising funds for the Sir Sean Connery Scholarship Fund on an international basis. In its two year production I was struck on how well the University was run on its own governance. I would hate to see this diminished in anyway by unnecessary extra mural and less informed interference. This could only handicap the University, Scottish Higher education and the economy of the country. I can only appeal to the members of the Scottish Parliament to allow the University of St Andrews and all its younger siblings in Scotland to continue to flourish on their own initiatives. 'If it aint broke,' as they say in the USA, 'let’s not try to fix it.'

Murray Grigor,
Education and Culture Committee

Higher Education Governance (Scotland) Bill

Submission from Ronnie Guthrie

I am writing to you to portray my severe disappointment and deep concerns regarding the Scottish Government's Higher Education Governance Bill. I studied at St Andrews for 5 years to complete my undergraduate Masters in Earth Science (MGeol Hons) and immediately found employment with a renewable energy firm, based in Scotland, and so I am very thankful for the excellent quality of my Scottish education at Scotland's best University.

Firstly, I would like to question why this bill is needed in the first place, as there does not seem to be any systematic failure in the way Scottish Universities are managed. St Andrews is continually rated as one of the best Universities in the UK, drawing in students from across the world, for both its teaching and research quality - as are several other Scottish Universities. Strathclyde has produced swathes of engineers with the ability to work in environments from a rig in the North Sea to a flight engineer in Glasgow airport. Heriot-Watt has a renowned brewing masters degree, Glasgow veterinary surgeons that serve sheep from the Highlands to dairy cattle in the lowlands. What is the point of increasing red tape? How will this increase the quality of the contributions our Universities provide, not just to their academic field, but for all of Scotland and beyond in the wider world. What is the point in renaming the Principal to Chief Executive Officer? For one thing, this change makes the University sound more like a business than an academic institution. Principal suggests a figurehead of learning, of books and manuscripts, a learned person who has been recognised for the work they have done - work undertaken not for themselves but for the work itself, to advance mankind's understanding of a subject. CEO brings with it connotations of business, of the big guy looking out for profit, someone who is a slave to a company's pre-determined definitions rather than speaking out for the academic freedom and free speech of a University's staff. Your redefinition of academic freedom does nothing to mitigate the damages the bill will do for academic freedom, support, quality or standards and instead calls into question the whole reason of putting the bill forward in the first place.

Secondly, it is a University's independence, the ability to determine its own policies, to create its own identity to move forward, rather than follow the crowd and obey needless bureaucracy. The crowd, in this instance, being the state. Staff at Universities should focus their time on making sure their institution is the best it can be for their students and staff, not being hindered by red tape in abastardised form of the name of "democracy". I find it ironic that the Scottish Government led, by the Scottish Nationalist Party who have dreamed for so long of an independent Scotland in the name of self-determination, for a country's people to decide their own future themselves, then goes and imposes rules on our own national institutions that limit their independence. That isn't freedom. That isn't a better deal for future Scottish graduates who dream of something better. That is a step backward that will decrease Scotland's standing not only on a national stage but on a European and Global educational stage.
Thirdly, it is harmful to the democratic will of the University students of Aberdeen, Dundee, Glasgow, Edinburgh and St Andrews who directly elect a Rector to represent them and chair University Court. Rectors do tremendous work on behalf of students and their Universities, being respected individuals, usually from outwith your standard academic circle. The Higher Education Governance bill would diminish the Rector's role to a purely ceremonially one and would only be a puppet show of democracy. Democracy for show is no democracy at all. Rectors should retain their power and represent the students who voted them in. It is odd to invoke the autonomy of our university while committing clear ministerial interference, but stranger still to invoke democracy while destroying the democratic process.

I hope you will register my misgivings and consider carefully what your bill will do to the institution(s) that is so dear to my heart. I will leave you with a few simple words to sum up: "If it ain't broke, don't fix it".

Ronnie Guthrie
September 2015
Submission from Oliver Harrison

Dear Committee Clerk,

For the following reasons I opposed The Higher Education Governance (Scotland) Bill:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Thank you for your understanding.

Cordially,

Oliver Harrison
Submission from David Harris

Dear Sir/Madam

I am writing to express my concerns regarding the HEGS Bill currently being considered.

I attended the University of St Andrews some 30 years ago, moving up from the south east of England to do so.

In the past decade both my son and my daughter have themselves gone through the UK university system. Although our family were living in the North West of England at the time, my son included two Scottish universities on his UCAS application form and went on to study at St Andrews himself, while my daughter included two (different) Scottish universities on her UCAS application.

The reason for this family attraction to Scottish universities is quite simple: the Scottish university system as it stands is, on the whole, superior to that offered in England.

I would therefore appeal to you to reconsider this Bill. In my view its provisions will damage the reputation and inhibit the efficient operation of what are fine institutions in their current form.

I am tempted to apply the proverb "if it ain't broke, don't fix it", but that is actually too weak because not only do you have in Scotland a higher education system that is not broken, it is world class.

Yours faithfully

David Harris
Dear Sir

I wish to inform you of my objection to this unwarranted political interference in the higher education sector that exhibits little respect for the autonomy and diversity of many already well managed institutions. It completely ignores properly functioning, inclusive representational forms developed over years that do not fit with the proposed government model. It seeks to provide future governments with powers over this sector without the need for prior consultation. This government is planning, yet again, to announce a populist policy with no proper calculation of the true cost for those responsible for its implementation nor of the consequences of the unnecessary changes. I urge that this plan is reconsidered.

yours sincerely
The purpose of this letter is to provide the Education and Culture Committee my views on the proposals affecting Scottish Universities outlined in the above mention Bill.

I strongly feel that the current governance arrangements are highly effective and fit for purpose and I do not see the need for legislation at present. Universities are implementing the principles codified in the recently published Code of Higher Education Governance which is delivering the key objectives of the Bill. Therefore further change is premature.

Universities are autonomous bodies and have been the success story in Scotland for centuries and are the envy of the world. It is crucial that they remain autonomous academic institutions and free and free from political interference.

Scottish Universities regularly appear in the ‘top 100 world league’ and this is a great achievement for a country with only 5 million people. Most universities in Commonwealth Countries (especially in South Asia) have governance structures similar to our Institutions. As the old saying goes ‘if it ain’t broke don’t fix it’!

I have quite a few concerns relating to the Bill which I want to highlight.

- The arrangements for appointing chairpersons are already fair, transparent and accountable. Appointments go through rigorous processes and Courts (governing bodies) are fully involved in the process and ultimately make appointments. The calibre of candidates is high and having a more ‘public appointment’ type process involving an election, would reduce the number and quality of candidates.

- Universities are autonomous bodies with their own corporate plans. A ‘straitjacket’ approach is likely to jeopardise this autonomy and academic freedom. Government already exercises significant influence over Scottish Universities through outcome agreements and ring fencing of funding. Introducing more Government control would impact upon their financial position due to being prevented from making surpluses; limit the ability to engage with commercial partners and entrepreneurial activity. It could also impact adversely on their charitable status and make them less attractive for philanthropic activity due to a change in taxation rules. If such changes were introduced they would disadvantage the Scottish Universities sector compared to other UK Universities.

My serious reservations are mentioned in more detail below.

My responses to the Committee’s specific questions

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

   I do not have any concerns with higher education governance. As I have mentioned above universities are already implementing the recently introduced Code of Good Governance and there is clear guidance from the Committee of University Chairs. The sector needs stability and not change to ensure the Code is fully embedded.
Autonomy and academic freedom is fundamental to the success of all UK Universities as it allows them to directly respond to their students’ needs and to engage fully with the professions, industry and other parts of the national and international economy, including other universities and colleges. Governance already has a strong focus on inclusion and accountability through the requirement to include a wide range of independent members, staff and students on governing bodies and to have in place appropriate policies regarding equality and diversity.

2. The extent to which the Bill

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

I am not convinced that the levels of remuneration for chairpersons outlined in the Bill will bring a wider range of candidates forward. Universities already reimburse out of pocket expenses and financial reward is not a motivating factor for candidates. Attracting candidates from less financially rewarded backgrounds is a positive feature, but there is no guarantee that providing remuneration for the post will have this effect. Justices of the Peace are not remunerated and there is no evidence to suggest that candidates from poorer backgrounds are put off because of the lack of remuneration.

Diversity is a key aim of Courts and the Code and Public Sector Equality Duty are seen as sufficient to support institutions in this objective, with no requirement for further legislation.

Ministers claim that the Bill will assist in the creation of ‘an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance’. However they have not provided evidence that the current system is not working. I would strongly argue that governance is already transparent and inclusive.

In terms of accountability, there are clear divisions of duties chairpersons, Principals and Courts. I am concerned that the proposed ministerial regulation for chairperson appointments could reduce the effectiveness of Courts by damaging the relationship that the chairperson has with her/his governing body.

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

Autonomy and academic freedom is the key to our universities success as it enables them to formulate their own mission and strategies appropriate and relevant to their particular range of students and communities as well as enabling them to provide a distinctive offer to commercial and professional organisations in terms of partnership, entrepreneurial activity and innovation. Universities are not, nor should they be, clones. Their diversity adds value to the sector and therefore attempting to have a ‘one size fits all’ approach to governance would be damaging.

I feel that stakeholder engagement could be adversely affected by a perceived element of political involvement if the proposals are implemented.

(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector
The lines of accountability at present between Universities, public bodies and the Government and are clear and there are checks and balances to ensure that governance is handled appropriately. If a political dimension is introduced into the appointment of university chairpersons this could lead to divisions between sections of the Court which would ultimately damage institutions.

Universities are currently able to hold surpluses – which are vital for development, in particular with capital projects that are critical to attracting staff and students – and engage in diversification of income and work streams as well as philanthropic activity. It could have considerable financial implications if institutions are no longer able to engage in this kind of activity due to changes in their status. I have strong concern that, following the introduction of the Post-16 Education (Scotland) Act, where there has been increasing centralisation of the Scottish Further Education (colleges) sector, this Bill could result in greater control and centralisation of the university sector which would diminish the overall strength and value in the current sector.

Universities are not public sector bodies and reclassifying them as public sector bodies would have unintended consequences. For example they would not be able to generate /hold surpluses. Financial statements of public sector bodies are consolidated into the Scottish Government’s financial statements and ultimately into the UK’s financial statements. This would mean that the Scottish Government would be responsible for future liabilities (e.g. pension fund deficits) of universities. I cannot see how universities would be able to satisfy OSCAR’s charity test if they are controlled by Ministers.

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

I do not see a compelling case for legislation on university governance. The Bill presents a range of legislative measures, many of which are already included in the Code of Governance and therefore being implemented. Given that the Code was recently introduced, I would be interested to hear what analysis has been done on the impact of this Code and if any shortcomings have been identified which require new legislation of this kind.

As I have already mentioned, autonomy and academic freedom is at the heart of Universities. Any attempt by Ministers to impose consistency on a very diverse sector made up of autonomous bodies is a recipe for disaster. I am concerned that the increase in control that Ministers wish to introduce would adversely affect institutional autonomy and academic freedom. The system works effectively and in a timely manner. It would seem to me that adding a further layer of legislative complexity and duplication is unnecessary.

If good governance could be achieved through legislation then all of the developing countries in the world would have excellent governance.

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**

I am seriously concerned about the proposed power of Ministers to engage with the appointment of chairpersons of universities and the impact such powers could have to
exert control over a university. This would undermine institution autonomy and academic freedom.

I strongly believe that increasing the number of candidates, in particular from diverse backgrounds, is important and should be the aim of any good governance arrangement. However, there is a real concern that introducing an election process for the appointment of chairpersons could result in a reduced, rather than an increased, number of applications. Many candidates will be concerned that an election element would lead to failed candidacy becoming public knowledge and this is something that should be considered by the government. I would not put my name forward for election to any post.

The Government experimented with elements of elections in NHS boards and this did not improve governance of NHS boards or broaden the diversity of board members and the scheme was abandoned in 2013.

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

I welcome social partnership and the involvement of a wide range of stakeholders in Courts, but I am confident that this is currently in place and is reflected within the Code of Governance.

The Code of Governance expressly states that charity trustees should act impartially for the institution’s good and exercise their responsibilities in the interests of the institution as a whole rather than as a representative of any constituency. It would be essential that if governing members were to be representatives of specific interest groups that they understood that their role as a governor and a charity trustee would be to act for the good governance of the institution and not simply as a representative of their particular group which could result in a conflict of interests. This is a real concern for institutions and it remains unclear in the bill how this governance tension would be addressed.

It should be noted that Code requires members ‘not to act individually, or as representatives of a constituency or in informal groupings’ and indicates that ‘… Members nominated by particular constituencies should not act as if delegated by the group they represent. No member may be bound, when speaking or voting, by mandates given to him/her by others, except when acting under approved arrangements as a proxy for another member of the governing body’. This is in direct conflict with the Bill; I would like to know how Ministers intend to deal with this issue. Indeed, the Nolan Principles of Public Life require office holders to act in terms of the public interest, not under obligation of other parties or conflict of interest and to be objective, impartial and make decisions without bias.

While there may be value in seeking alumni to join the Court, and indeed alumni often apply to serve on courts of institutions where they engaged with their own higher education, it is not necessary to legislate for such membership. Equally it may not always be possible to secure the services of an alumnus who also has the requisite skills and attributes to fill a particular skills gap in any given vacancy at a given point in time which might leave a governing body inquorate under these proposals. It should be for individual universities to determine the specific membership requirements of its governing body taking into account the needs of the institution and the balance of skills and attributes across the existing court membership.

- **To require HEIs to ensure that their Academic Boards are comprised of no more than 120 people, and include various persons**
Universities are diverse autonomous bodies with academic freedom and vary considerably and therefore their Senates (academic boards) reflect this. There is also a degree of flexibility which allows institutions to co-opt experts aligned to their mission. Attempting to introduce consistency across the board removes institutional autonomy and is not considered to be acceptable and would limit the ability of Courts to be responsive and adaptable for the benefit of their own institution. It would be more appropriate to ensure that institutions should be able to set their own numbers.

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

**Academic freedom**

The Bill also proposes to 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.

Academic freedom is central to the ethos of universities. It has been a principle in Scotland for centuries and is seen as a key success factor as it enables flexibility, diversity and the ability to decide individually how to provide the high quality provision appropriate to the relevant market in terms of educating students, undertaking research, innovation and knowledge exchange. Therefore, the proposal to require universities to adopt a statement on their implementation of the statutory protection of academic freedom is unnecessary and potentially confusing.

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”.

Academic freedom is already covered in statutory instruments and contracts of employment and therefore providing a further layer of governance will not be helpful. I cannot identify any area that would be particularly enhanced by additional legislation.

The Bill is trying to replace the rigorous academic processes that are in place within universities as part of their autonomy and accountability. The Scottish Funding Council’s Financial Memorandum also provides statutory requirements on institutions to implement ‘statutory protection’ and place a condition of grant on compliance with this, in addition to other elements, of the Code.

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.

All universities have a desire to foster academic freedom and this is built into many of their processes. The area of difficulty may be when including post-16 provision as those
providing higher education in a further education (colleges) context are not governed in the same way as universities.

I am concerned that legislation could undermine existing institutional processes that foster academic freedom.

**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 out with the institution?"

I would expect to be clear that the views being expressed were those of the individual, rather than of the university, but this is the case at present, and therefore changing the definition unnecessary. It may be helpful to clarify the position and make it expressly clear that individuals exercising their academic freedom are doing so on their own behalf, and not representing their university, but this has not been an issue so far.

Yours faithfully

Asif A. Haseeb
Submission from Nick Haynes

I would like to register my objection to the Higher Education Governance (Scotland) Bill.

As far as I can see, no fundamental problems have been identified in relation to the existing system, and the new proposals appear to: undermine the autonomy of universities; introduce the potential for political influence without parliamentary scrutiny into the governance of higher education institutions; present dangers to academic freedom; and add costs and bureaucracy (changes to ordinances etc.), which have not been properly identified or thought through. The proposed legislation appears to be unnecessary and burdensome, without any obvious benefits to governance, transparency or finance. The requirement for union nominees (representing technical/admin/support staff) to governing bodies seems a retrograde step, as many institutions already have representatives from all the non-teaching staff (not just union members). The proposed removal of Rectors from their presiding roles in university courts and the abolition of the posts of Chancellor’s Assessors are unexplained in the policy memorandum - again it is not clear what benefits are envisaged by the new arrangements. Change simply for the sake of change does not seem to be an effective use of parliamentary time and taxpayers' money.

Yours faithfully

Nick Haynes

Kind regards,
Submission Dr Alison L Heap

I oppose the implementation of the Higher Education Governance (Scotland) Bill as firstly, I fail to understand the need for the proposed changes particularly as the HE Code of Governance, only introduced in 2013, is to be reviewed in 2016. Furthermore, Scotland’s HE establishments (in particular St Andrews University) depend on independence and institutional autonomy to ensure their successful performance. The new legislation will exert direct political influence over all HE institutions in Scotland and thereby reduce institutional autonomy and increase bureaucracy and regulation. Consequently, particularly in the case of St Andrews University, its global competitiveness will be jeopardised, as will its ability to attract the best academic staff and best students and to promote relationships with business and charitable funders.

Dr Alison L Heap  MA Hons. StAnd. English Lang.&Lit.
MB ChB Dundee
Submission from Andrew Henderson

Dear Sir/ Madam

I write to express my strong objections to the Higher Education Governance Bill that is due to be considered during the Parliament's Autumn session. I am a member of the General Council of the University of St Andrews (graduated in 1988) and disagree strongly with the Government's interference in the University's autonomy. The ability to work out its own future will be hugely weakened by this very mis-guided bill. St Andrews has a great and well-deserved reputation built up over many centuries. This will suffer and it will be viewed as a lesser centre of free thought than it had hitherto been. In a global market, reputation is king and means the University is able to attract the best of students, staff and funding. I implore you to think again and not to put this at risk.

The legislation has been ill thought-out and reeks of political interference of the worst sort. The Bill has attracted a bad reputation and will be bad for the University of St Andrews, higher education throughout Scotland, the economy in general and the Country.

I would therefore like to register my opposition to this Bill.

Andrew Henderson
Submission from Ian Henderson

I write to express my sorrow at the proposal in Scotland of legislation which will undermine the autonomy of the Universities.

Scotland benefits enormously from the excellence and diversity of its Universities. Each of Scotland’s Universities enjoys in its own, distinct way an exceptional level of international recognition and appreciation. Scotland’s capacity for effective education and research and the country’s reputation around the world will be damaged profoundly by any measures to limit the autonomy and distinctiveness of the Universities or to bring them under closer political oversight.

McGill University enjoys the closest links with Scotland’s Universities. Like my predecessor as Dean of the Faculty of Religious Studies, I am an alumnus of one of them. My predecessor as Professor of New Testament now teaches in Scotland, as, indeed, do many friends and colleagues. I have also seen first-hand the pernicious effects in other countries (France and recently Quebec) of governments which have sought to homogenize and too closely control Universities.

The outstanding international reputation of Scotland’s University system derives in no small measure from the capacity of each university to set its own course and realise its distinctive opportunities and strengths. The same variety and independence ensures that Scots will have access at home to the best in their desired fields of study and that their qualifications will be respected abroad.

I hope that Scotland’s legislators will respect the autonomy and expertise of the Universities and forbear to meddle too closely in institutions which have done and will continue to do so much for the country.

Thank you,
Submission from Richard S. Henderson

Dear Sirs,

I am concerned about the possible passage into law of the above bill. Quite apart from the general principle of enabling even further interference by the Scottish government in institutions of higher education, I am alarmed in the specific context of the Scottish government's specific and blatant attempts to intimidate my own university, the University of St. Andrews, during the referendum campaign last year. This was a very striking example of the way in which the current Scottish government clearly hopes to use any such new powers. It is absolutely imperative that these powers be denied to the current Scottish government, and very important that similar temptations be denied subsequent Scottish governments.

Yours faithfully,

Richard S. Henderson
I graduated in 1958 and consider the governance process of HEIs in Scotland to have developed over that period of 57 years and not to be in need of far-reaching reforms. Although my experience is mainly of one HE institution, the University of St Andrews, I am fairly sure that the differences between institutions are not substantial.

The Committee of Scottish Chairs under Lord Smith of Kelvin launched the Scottish Code of HE in 2013. In July 2014 a review showed that HEIs were making good progress in implementing the code. The Committee is committed to reviewing progress next year and compliance with the Code is a condition of grant from the Scottish Funding Council. It seems, therefore, that sufficient pressure already exists to encourage any HEIs whose governance procedures are deemed inadequate to meet current standards to update these processes.

The proposal that ministers could intervene would leave it open to any future administration to force changes without parliamentary scrutiny, which is quite undemocratic.

This response is couched in fairly general terms because I consider the general approach to be one of trying to solve a problem which does not exist or, possibly, a minor problem which could be solved by procedures which are already in train.

James W Henderson
August 2015
**Submission by Heriot-Watt University: 4 September 2015**

**SCOTTISH PARLIAMENT, EDUCATION & CULTURE COMMITTEE: CALL FOR EVIDENCE ON THE HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL (AS INTRODUCED, JUNE 2015)**

Institutional contact: Ms Ann Marie Dalton, Secretary of the University, Heriot-Watt University, Edinburgh EH14 4AS, Tel: 0131 451 3739, Email: ann-marie.dalton@hw.ac.uk

<table>
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<tr>
<th>The Committee’s questions</th>
<th>The University considers that substantial progress has been made in recent years in modernising higher education governance, as evidenced by the report on implementation of the recently introduced Scottish Code of Good Higher Education Governance. No objective evidence has been produced which demonstrates there are significant existing problems with higher education governance which need to be addressed through new legislation. Each University has its own constitution which sets out its governance arrangements. Any changes proposed to a university’s Charter or Statutes involve a process of detailed scrutiny and ultimate approval by both the Scottish Government and the Privy Council. In addition, Scottish universities are all registered charities in Scotland. As such, they are subject to the Charities and Trustee Investment (Scotland) Act 2005, which articulates the duties and responsibilities of charity trustees and the standards of governance to be attained. The Further and Higher Education (Scotland) Act 2005 also applies to all higher education institutions. Scottish Universities are accountable, via the Scottish Funding Council (SFC), for Scottish Government funds through the now well-established Outcome Agreements and the Financial Memorandum, which stipulate the outcomes expected from each institution. These include, but are not limited to, inclusion and widening access. (In the case of Heriot-Watt there is a high degree of correlation between SFC Outcome Agreement targets and the University’s Strategic Plan. The University is demonstrating, through progress towards meeting Outcome Agreement targets, a very strong commitment to sustaining and enhancing the contributions it makes to the Scottish Government Priorities, achieving, for example, a step change in widening access which exceeds the targets agreed with the SFC in the Outcome Agreement.) Beyond the above measures, universities are accountable through periodic reviews of their teaching and research activities by the relevant public authorities: the Quality Assurance Agency, and the Funding Councils’ REF exercise.</th>
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<tr>
<td>1. What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?</td>
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**The Scottish Code** provides the University with a framework for a high standard of governance with which it can comply, while providing the flexibility which supports efficient and effective operations at overseas as well as UK campus locations. As a Scottish university with a distinctive global dimension, such flexibility in Heriot-Watt’s governance is important and it will not be assisted by the proposed Bill.

### 2. The extent to which the Bill

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<th>(a) will improve higher education governance, particularly in the areas above</th>
<th>The Bill will not serve to improve governance. If anything it presents a threat to the continued progress that has been made in improving governance as evidenced by the first report on the Scottish Code of Good Higher Education Governance. As largely independent bodies, rather than executive agencies or non-departmental public bodies, universities must be allowed to determine the governance arrangements that will enable them to deliver their core objectives of teaching and research. None of the proposed provisions of the Bill contribute to the achievement of those objectives. The Bill is not suitable in supporting the aims of modernisation, diversity and accountability reported in 1, above. As we have indicated in other sections of this consultation, a one size-fits-all approach, which fails to recognise sector diversity, runs counter to wider aims associated with modernisation of higher education governance; prescriptive membership arrangements pose a threat to diversity and inclusivity across certain memberships and electorates as well as democratic processes. The same prescriptive rules might well serve to muddle rather than clarify lines of accountability. Scotland has a diverse range of higher education institutions, ranging from the Royal Conservatoire of Scotland to the University of Edinburgh. It makes little sense to seek to apply prescriptive rules of governance across such a diverse range of institutions while there remains the option to seek adherence to a strong set of principles of good governance implemented in a way which is appropriate to each institution according to its particular mission and objects. It is of particular concern that secondary legislation might be applied in the future which has a direct bearing on the governance of that same diverse group of individual institutions with little or no associated consultation.</th>
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<td>(b) may alter the higher education sector’s current level of autonomy</td>
<td>The Bill will limit universities’ independence by defining elements of governance in ways that do not apply to other charities or to other bodies that are outside the public sector but receive public funding. Any legislation which seeks to prescribe the composition of a governing body, or the means by which an organisation can select members to its governing body, is of itself a direct challenge to the current levels of independence exercised by Scottish higher education institutions.</td>
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The additional powers of Scottish Ministers under the Bill, when added to the current level of operational intervention by Ministers and the Scottish Funding Council and through the Scottish Code and the Post-16 Education (Scotland) Act 2013, raises a concern about the potential for Office of National Statistics (ONS) reclassification of Scottish HEIs as central government entities.

Heriot-Watt University is distinctive in terms of the strength and range of its partnership and collaborative links with business and industry. This means that the occurrence of any such change (commented on further below) could have a disproportionately adverse impact on this university, diminishing our position as a vital partner with business and industry to contribute to the success of the Scottish economy.

Has legal advice been sought on this by Scottish Ministers, and have there been discussions with the ONS to seek assurance that the Bill proposals and the powers to make regulations for further change will not put the classification of Scottish HEIs as charitable bodies at risk in the future? The financial impact of any such a change would be huge, posing risks to institutions’ relationships with business and with charitable and philanthropic funders. The University is keen to receive assurances from the Scottish Government on this area of risk, the possible future impact on charitable status discussed with the Office of the Charity Regulator, and whether the Scottish Government envisages the need to use their powers under the 2005 Charities and Trustee Investment (Scotland) Act 2005 to disapply section 7(4)(b) in relation to higher education institutions (the section of the Act which specifies that a body will 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).

The Bill raises fundamental issues about the sector’s level of independence and the role of institutions in public life, independent of government. In this role Scottish HEIs have been demonstrably very successful, earning an international reputation for world class academic excellence. They have been governed in accordance with their individual constitutions, all relevant legislation and the Scottish Code (and the relevant parts of the UK Corporate Governance Code). The matter of public accountability is adequately addressed through Scottish Funding Council Outcome Agreements and Financial Memoranda. The Bill, as proposed, creates the potential for tension and problems that could get in the way of dialogue on issues of far greater importance to the Scottish Government, relevant public bodies and higher education institutions themselves.

Higher Education Institutions are of course accountable through their funding bodies to government for the funds that they receive (Scottish Funding Council grants* to Heriot-Watt in 2014/15 amounted to 23% of the University’s total annual income [*recurrent teaching and research grants, strategic and capital grants combined], with the addition of SAAS-paid fees

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| (c) | may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector | The Bill raises fundamental issues about the sector’s level of independence and the role of institutions in public life, independent of government. In this role Scottish HEIs have been demonstrably very successful, earning an international reputation for world class academic excellence. They have been governed in accordance with their individual constitutions, all relevant legislation and the Scottish Code (and the relevant parts of the UK Corporate Governance Code). The matter of public accountability is adequately addressed through Scottish Funding Council Outcome Agreements and Financial Memoranda. The Bill, as proposed, creates the potential for tension and problems that could get in the way of dialogue on issues of far greater importance to the Scottish Government, relevant public bodies and higher education institutions themselves. Higher Education Institutions are of course accountable through their funding bodies to government for the funds that they receive (Scottish Funding Council grants* to Heriot-Watt in 2014/15 amounted to 23% of the University’s total annual income [*recurrent teaching and research grants, strategic and capital grants combined], with the addition of SAAS-paid fees |
the percentage of Scottish public funding against total annual income amounted to 28%). However, government is one of many stakeholders. The University highlights its concerns in other sections of this consultation about the potential impact of the Bill on its internal stakeholders and other external stakeholders. In relation to the latter, the Bill raises the prospect of a period of uncertainty in the standing of Scottish higher education institutions from their counterparts in the rest of the UK, other parts of Europe, the Commonwealth and North America, with a negative reputational impact on relationships with national and international peers and others they might seek to influence, extending to outside of the UK. This might extend, within a highly competitive market place, to influence adversely the decisions of individual high quality research academics of the kind that institutions would wish to attract as future employees, at a time when they need to be able to attract the very best talent. Furthermore, any threat of ONS reclassification of status would pose major risks to relationships with stakeholder funders, business associates and philanthropic bodies with resulting financial implications. In this scenario, Heriot-Watt University might experience a disproportionately adverse impact, given the particular strength of its partnership and collaborative links with business and industry.

Members of the Court with business backgrounds have provided their view that the Bill will not be helpful in supporting universities either in their roles as partners with business and industry as active contributors to the economy, or as attractive locations for the best talent.

| 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 Higher Education Governance. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed? | The University considers that the current requirements, which combine the requirements of the Scottish Code, the Scottish Funding Council (SFC) (via Outcome Agreements and Financial Memorandum) and existing legislation are sufficient, and that no further legislation is required. The SFC requirements, supported by the Post-16 Education (Scotland) Act, are already sufficient to ensure good governance and a tight relationship between Ministers and the higher education sector, while the Scottish Code is appropriate in its approach of defining the broad principles of good governance in practice and allowing individual institutions within a diverse sector to determine how best to implement those principles. The Bill provides a basis for directives from government on a potentially shifting basis. The University considers that the Bill will be counter-productive to the aim of improving governance and may be driven in the future by short term political changes rather than the evolving missions and governance needs of higher education institutions in the long term. Only two years have elapsed since the publication of the Scottish Code, with signs that full, or very nearly full, sector compliance with its terms will be achieved. Institutions’ Annual Accounts and Financial Statements for 2014/15 will include obligatory statements confirming compliance with the Scottish Code. We believe that these will show that the sector has embraced and adopted the governance requirements of the Code. It would be more beneficial for implementation of the Code to be reviewed in accord with the agreed timescale, and an |
appropriate length of time allowed for full embedding of the Code across the sector, without
the introduction of potentially conflicting legislation at this stage.

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<th>Specific proposals</th>
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<td>Please provide your views on the merit of each of these proposals below.</td>
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<td>a)</td>
<td>• 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</td>
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The University does not find merit in these Bill proposals and considers that the principles set out in the Scottish Code to be adopted in appointment of Chairs are adequate. We are concerned about the scope within the terms of the Bill for secondary legislation to be introduced and believe that all such legislation should be subject to careful scrutiny through an open consultative process.

The University supports open, transparent and fair selection processes for governing body Chair appointments, and considers its own recent Chair of Court appointment process an exemplar of good practice. An election process would seem an unnecessary addition to a rigorous process of candidate shortlisting and interviews. Depending on the outcome of the proposed further consultation/election process, Chairs might be appointed for political or other reasons besides individual merit measured against the approved criteria for the role.

In its response to the earlier consultation on the Bill, the University reported its view that, while institutions may choose to use an election as part of the selection process, the requirement to be publicly “elected” might deter a significant number of potentially excellent candidates, thereby defeating the Scottish Government’s objective to encourage a wide range of applications. There is potential for applications to be limited to those with political experience or ambitions and those with celebrity status. There is also evidence that women are less likely than men to participate in this type of process, with a potential impact on gender balance at least among governing body chairs. (In the current year 2015/16 54% of the University’s total Court membership is female, including a female Chair).

In the event that a final stage election process is introduced through the Bill, the University considers that only the Court membership – itself already broadly representative – should form the ‘electorate’, following receipt of recommendations from a broadly representative appointment committee. It is vital that university governing bodies have absolute confidence in the individual chosen to lead them; it is difficult to envisage how a unified and strong governing body can exist where this is not the case.

(Heriot-Watt has recently completed a lengthy process of selection of a new Chair of its Court.)
The success of that appointment, and the appointments preceding it, has been dependent on decisions led by the Court as to the criteria for selection and evaluation of candidates. The criteria have in good part been determined on the basis of the required match of individuals’ skills and experience to the University’s particular mission and objects, with the final decision made on the basis of detailed evaluation against the criteria, as well as a thorough understanding of the leadership qualities the role will demand. The proposals that Scottish Ministers will frame the criteria for selection of Chairs, and that a potentially wide electorate will make the final decision on the successful candidate, are an extreme departure from the University’s established (and successful) practice.

The University would not be averse to any proposal for external scrutiny of arrangements for the appointment and remuneration of governing body Chairs. It would be appropriate for any such responsibility to rest with the Office of the Scottish Charity Regulator.

Charities and Trustee Investment (Scotland) Act 2005 legislation already deals with the matter of remuneration for governing body members of all charitable organisations in a way that does not directly interfere with the governance processes and decisions of those autonomous bodies.

Heriot-Watt’s view is that legislation on remuneration, as an absolute requirement, is unnecessary and undesirable. However, neither do we agree that a Court Chair position should be an option open to only a limited number of individuals who are in a financial position where they can afford to take on time-intensive pro bono positions. One option might be to consider recompense to compensate for loss against an individual’s earnings. This might be appropriate given the significant number of working days each year that a Chair role requires. A similar financial allowance might also be offered to candidates who might otherwise incur costs in order to take up such a role (aside from the more usual reimbursable expenses), e.g. those with caring responsibilities for a dependant. This approach would support wider equality and diversity aims in a way which can remain appropriately tailored to institutions’ individual circumstances.

It is not clear from the provisions in section 2 of the Bill that all of the factors listed in the Scottish Code for consideration when deciding on remuneration for independent governing body members (including, amongst other things, reference to the provisions of charity law) will be taken into account by Ministers. The University would be keen to see draft regulations made during the Bill’s passage through Parliament, rather than after enactment of the Bill.

The University does not consider that there is merit in this proposal. Governance good practice is already stipulated in the Scottish Code of Good Higher Education Governance, which extends as far as guidance on particular governing body committee memberships. We are greatly concerned also that the legislation will enable Ministers to make future changes...
through Section 8 powers in the Bill and consider that such changes should require a further Act. Future changes could give rise to the unintended consequence of potential acute conflict with the provisions of the Scottish Code and the Post-16 Education (Scotland) Act 2013 for some higher education institutions.

The University remains strongly opposed to the stipulation that there be nominated trade union places on governing boards. We support the governance principle that staff governors should have concern for all University staff and should not represent any particular constituency*. It follows that a subset of the University’s staff should not be in a privileged position in relation to governing body positions. Nomination is not the most democratic method of selection; many university staff members are not trade union members (at Heriot-Watt University Scottish campuses only 32% of all staff are members of one of the recognised trade unions). Such a change would therefore be discriminatory – disenfranchising large parts of the currently engaged electorate – and could politicise the governing body, which may lead to decisions being influenced by political bias rather than in the best interests of the institution. Currently trade union representatives can and do stand for election to all staff category posts and, when elected, have been selected democratically by a full electorate.

("This aligns to explicit advice in the Scottish Code which advises that “members nominated by particular constituencies should not act as if delegated by the group they represent. No member may be bound, when speaking or voting, by mandates given to him/her by others, except when acting under approved arrangements as a proxy for another member of the governing body.” The Charities and Trustee Investment (Scotland) Act 2005 requires that trustees comply with the general duties set out in the Act, including acting in the interests of the charity as a whole, and putting those interests before the interests of the persons responsible for their appointment as a trustee. The Bill proposals could give rise to potential conflicts of interest and potential misconduct in administration of the Charity under section 66(4) of the Act.)

The stipulation of two (rather than one or two) alumni membership places is unnecessary and reduces the flexibility of individual institutions to determine how best to constitute their governing body within a capped maximum membership number of 25, to meet skills and experience needs and to meet requirements of balance across categories of membership – including the specific requirement for a clear majority of independent lay members. (In order to meet the latter requirement, to avoid recourse to reducing staff representation, Heriot-Watt has recently had to reduce its alumni member representation from two to one, via changes to its Charter and Statutes.)

The University does not support the proposal that alumni appointments should be made on the basis of nomination. It is appropriate for such appointments to be made fully democratically on the basis of election by the full membership of the alumni association in a
| **c)** | • To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons *(including a minimum of 10% student representation).* |
| | The University considers that there is no merit in the proposal to set limits on the size and composition of universities' academic boards, and to give Scottish Ministers the power to institute future changes through regulations. We strongly believe that it is for each higher education institution, in the context of their individual missions, objectives and resources, and within a highly diverse sector, to determine the most effective compositional make-up of its academic board. |
| | On a matter of practicality, specification of ‘heads of school’ in such a diverse sector could present problems for some institutions in terms of the legitimate academic representation they might need to meet the requirements of the roles and responsibilities of their academic board. The Bill proposals could result in disenfranchisement of a significant number of academic staff. |
| | Heriot-Watt is very supportive of the principle of student representation on committee bodies, and already includes such representation across a broad range of its decision-making academic, management and governance committees and boards. *(This will be extended further in 2015/16 with the establishment of a new Global Student Liaison Committee of the Court which will include a group of student representatives).* Student representation is already included in the composition of our Senate; however, we do not agree that the best way to make student representation more effective is to introduce a 10% threshold for membership on the Senate. Given the role and functions of the Senate, neither the Senate, nor the student body, would benefit in any obvious way from this stipulation, whereas both the University and the student body benefit significantly from student representation at the coalface of strategy and policy formulation within the University’s committee structure. |
| | The University would not be averse to the development of illustrative good practice agreed and disseminated within the sector including, inter alia, matters of balance within the membership – of elected / non-elected categories, or staff student ratios. |
| | We believe that Chapter 2 of the Bill, ‘Academic Boards’ does not serve any helpful purpose to enhance governance within Scottish higher education and should be removed from the Bill entirely. |
### Academic Freedom

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**

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<td><strong>5.</strong></td>
<td>The likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.</td>
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<td>The University believes that academic freedom can best, and indeed does, flourish within the current largely independent higher education sector. There is no current evidence to suggest that academic freedom is being restricted within the sector leading to a requirement to alter the current definition set out in the Further and Higher Education (Scotland) Act 2005. The University remains of the view that the principle of encouraging the development and advancement of new ideas or innovative proposals is implicit in the current legislation and is intrinsic to what universities are, and what universities do. While the sentiment behind the proposals is to be supported, they will not act to influence or bring about improvements in the day-to-day activities of individual academic staff members. There is a certain dichotomy between the purported desire to enhance academic freedom while at the same time increasing Ministerial control of Scotland’s universities, including in the area of its academic governance. The University would be strongly opposed to any change in legislation that might weaken the University’s definition as set out in its Charter.</td>
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<td><strong>6.</strong></td>
<td>The Bill states that academic freedom is to be exercised “within the law”. Are there 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.</td>
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| | This is an area where some tensions and constraints have always existed and will continue to exist – whatever the legislation. Academic members of staff may have the freedom to express views within the law, but may be, or may feel, constrained by the legitimate concerns, interests and sensitivities of others within their institution. The legal protection helps prevent unreasonable pressure being exercised on individuals by the institution but does not of itself resolve the unavoidable tensions between individuals. Any other constraints will likely vary across individual institutions. As an international university Heriot-Watt operates within a number of legal jurisdictions and the “within the law” stipulation carries a different meaning depending on location. A wide range of restrictions might apply to activities considered in the UK to be within the bounds of activity covered by the law on academic freedom. The new Prevent Duty Guidance for Higher Education Institutions in Scotland recognises the
"commitment to freedom of speech and the rationality underpinning the advancement of knowledge means that HEIs represent one of our most important arenas for challenging extremist views and ideologies." Changes to the definition of Academic Freedom will not assist, and may hamper, the ability of HEIs to fulfil this duty.

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<th>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?</th>
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<td>It is appropriate for individual institutions to establish policies which provide clarity for their staff as to the boundaries and the responsibilities of individual staff members when representing the institution as an employee and speaking or acting on its behalf, versus expression of their views as a private individual. The University does not consider that the implied elaboration of the legislation would be helpful. On the contrary, it could give rise to confusing and challengeable boundaries.</td>
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The major new powers for Ministers in the Bill fundamentally change the constitutional status of HEIs, and run contrary to previous assurances from the Scottish Government that they respect ‘responsible autonomy’.

The University considers that the Scottish Code stands as an exemplar of good governance practice. Any new legislation should be complementary to and aligned with the spirit of the Code.

The provisions in the Bill for future secondary legislation are a cause for considerable concern. Changes made through new legislation would require an open and democratic process and full Parliamentary discussion, whereas the Bill, as it stands, will allow for significant future changes (perhaps with minimal or no consultation) which could restrict the ability of Scottish HEIs to make the best decisions for their organisation and pose the risk of future politicisation of appointments. There is evidence that great deal of diversity and inclusiveness already exists within HEI governing bodies and there is a clear commitment to continue to make further progress in this aspect of governance. The Bill as introduced is likely to hinder rather than support this process.

It would be helpful to receive clarification from the Scottish Government on the following additional points:

a) The consideration that has been given to conflicting provisions in institutions’ governing instruments and the Bill, and how the Government envisages that these might be addressed if not through The Bill. It would be helpful to know also the projected cost of the subsequent process of amendment by individual institutions, and whether there has been consultation with the Privy Council on implications and anticipated timescale to institute
|   | required changes. b) Does the Scottish Government intend to use any general regulation-making powers to make consequential amendments to the Charter and Statutes of Chartered HEIs? c) When the different provisions in the Bill will be brought into force, and what is meant by “different purposes” in Section 22 of the Bill? d) Section 4 of the Bill provides for “rules” to be made by HEIs governing elections. What procedures does the Scottish Government consider will be used to make these “rules”, and will an external approval process be involved? e) Does the Scottish Government have any hard evidence that the stated objectives of the Bill will be met through the currently proposed provisions? |
Submission from Marion Hersh

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

A lack of accountability and transparency; lack of representation of black and ethnic minority and disabled people. Staff and students are insufficiently involved, where they should have the deciding voices. This has led or contributed to: (1) bad decision making e.g. proposals for large numbers of redundancies and even department closures at Dundee, Glasgow, Stirling, Aberdeen and Abertay; (2) a culture of bullying and intimidation; (3) capability management of disabled staff out of their jobs; (4) a lack of financial accountability with principals and senior management receiving very high pay increases while ordinary staff have seen their pay go down in real terms and their pensions reduced; (5) increasing managerialism and an associated devaluing of staff. Only 5 of 17 institutions asked by UCU to provide remuneration committee minutes and an explanation of the principal’s pay rise responded with full information. Previous elements of democracy have gradually been eroded with elected deans and heads of departments (where they existed) replaced by appointments and senior governors increasingly chairing court rather than rectors. In addition, not all institutions have rectors and at Dundee the rector has never had the right to chair court.

There are also a number of threats to academic freedom detailed in question 6.

2. The extent to which the Bill

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

See later answers

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

In principle no, though this will depend on how the bill is implemented. Clearly attention will be required to ensuring that (1) HE institutions remain independent and ministers do not interfere in their running; (2) there is appropriate oversight to prevent abuses.

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

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.

If properly implemented no. However, monitoring should be used to ensure that democratic governance and oversight are strengthened while avoiding ministerial interference in institutions and maintaining independence.
3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

I would suggest that the legislative measures are a good start, but that their impact will need to be monitored. Further measures will probably be required in the future. There may also be a need to strengthen compliance procedures.

There is evidence that this process has already led to some improvements in governance, with an increase in the number of women chairs of court and many Scottish universities signing up as living wage employers.

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

Proposals for elected chairs of governing bodies are to be welcomed. Maximum accountability is maintained by election by all staff and students. They should be extended to elected chairs of departments, facilities, schools and colleges and to principals, who should have a cap on their salaries. A role for rectors elected by students in addition to student representatives should remain and extended to the universities that do not have one. This could include chairing the governing body if the elected chair is unable to do this.

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

The inclusion of trade union and student representatives is particularly welcome and they will make a very valuable contribution. Other than that, I would suggest that: (1) trade union and student representatives should form the majority of the membership; (2) the role of business is reduced; (3) there is some representation of community organisations.

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

The proposals for diversity are welcomed, the restriction on size less so. Reducing the size would not necessarily increase attendance rates. Having a larger academic board is a way of involving a larger number of people in decision making. This is also something that should depend on the size and complexity of the institution.

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”.

Any strengthening of the legal definition of academic freedom is to be welcomed, as are the explicit freedoms to develop and advance new ideas and innovative proposals. In practice doing this may be depending on the availability of funding, but I recognise that this is out with this legislation.

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.

Any extension of academic freedom is to be welcomed. It would be useful to consider extending it to schools. The Westminster Prevent legislation makes the within the law provision problematical, since this directly attacks academic freedom. It is

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.

A number of proposals/threats to close departments and/or make staff redundant have been made on financial grounds and/or the perceived likely performance in the REF. Various factors, including perceptions of likely REF performance, affect internal allocations of funding. Perceptions about the REF pose a particular threat to departments perceived to be good on teaching and weak on research. A number of threatened and totally unjustified closures and redundancies have only been prevented by strong campaigns by UCU, students and the other campus unions. Better governance arrangements, including greater transparency and accountability, would hopefully avoid this. This would be further strengthened by giving the majority of governing bodies to trade union and student representatives

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

Some of the ways in which Westminster legislation inappropriately restrict academic freedom are dealt with in point 6.

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.

Increasing pressure to publish and obtain grant income and perform at an unrealistically high level put pressures on individuals which affect both academic freedom and research ethics. There are associated pressures to be careful about criticising funders and engage in discourse that potential funders may disagree with. Some areas of knowledge operate gate keeping mechanisms which make it more
difficult for new and more controversial topics to be published. There is also some gatekeeping of research carried out by individuals from minority groups and on women's, black, disabled and LGBT amongst other issues. The so-called research excellence framework (REF) also threatens academic freedom. The Trinity College policy on academic freedom annexed in the von Prondzynski report useful lists a number of threats to academic freedom, including strategic planning, particular of research; moves from a collegiate to a hierarchical governance model; research performance measurement with resource allocation based on meeting productivity targets; and fixed term contracts. Also these factors are present, often to an increasing extent. Academic freedom also affects teaching with regard to, for instance, content, presentation and assessment. It is threatened by, for instance, the increasing tendency to standardisation.

Westminster so-called anti-terrorist legislation, particularly prevent, poses a particular threat to academic freedom. For instance, the British Library has decided not to host the Taliban archive due to being advised by lawyers that some of the material would contravene the UK Terrorism Act 2006. It is to be hoped that the Scottish Government will ensure that the protections to academic freedom are sufficiently robust to avoid this type of problem.

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?"

Academic freedom should be understood and implemented as widely as possible. Even in a purely work context, individuals do not just work within an institution. They attend conferences, collaborate in projects nationally and internationally, act as external examiners and consultants and carry out other activities outwith their institutions. This all needs to be covered. In addition, academics are often seen as experts, public figures and opinion leaders and may therefore be asked or decide to express their views on a wide range of issues, often drawing on their academic expertise to do so. A recent example is the referendum. In that case institutions generally supported high profile individuals against outside pressures, but this will not necessarily always be the case and it is therefore essential that they have legal protection. This protection should also be extended to cover all HE staff not just academics.

Marion Hersh,
University of Glasgow, UCU NEC, personal capacity.
Submission from Martin Hillman

Good evening

I am writing to express my opposition to the plan at Holyrood to standardise the Scottish universities and impose regulation and bureaucracy on them. I can see absolutely no reason why St Andrews, of which I am a graduate, should be made more similar than it is to the University of the West of Scotland, Stirling or Aberdeen, QMU or Glasgow Caledonian. They all have their place in our nation’s much admired education system. The Scottish universities’ different qualities should be welcomed rather than removed, the enterprise which they all, separately show should be encouraged rather than flattened. The money that they have to spend should not go into box-ticking and the money the Scottish Government has to spend on education should go, indeed, to education, not to bureaucracy and jobsworthyness. I know of no evidence that any of our universities have failed to come up to the standards we expect or that anyone has suffered from a lack of civil servants to oversee our higher education. I see no reason for the sort of detailed interference in the running of universities that appears to be foreshadowed in the bill. I have no wish to see them subjected to political influence, or to fear that they might come to be seen elsewhere as susceptible to political influence.

I urge the complete abandonment of the bill

Martin Hillman
I am writing to express my opposition to the Higher Education Governance (Scotland) Bill. As a graduate of St. Andrews, I would like to ensure that its national and international standing is not compromised by a Bill that would undermine its autonomy.

The Bill does not seem to have any particular need, issue or problem to support it being passed. As it is, the University of St. Andrews operates independently and contributes positively to the economy and its competitive edge. Government interference will very likely hinder the university's ability to raise funds through grants and business related enterprise. Autonomy enables higher education institutions to function effectively, a loss of which will reduce St. Andrews' edge in attracting the best students and academic staff.

The negative impacts on St. Andrews and other Scottish higher education institutions are many, while the reasoning and justification of such a bill being passed relating to the problems it hopes to tackle remains unclear. It is for these reasons that I wish to express my opposition to the Bill.

Alexander Hoggard
September 2015
For the attention of the Committee Clerk

I am writing to express my concerns, as a graduate of two Scottish universities, about the impact that the proposals set out in the Higher Education Governance (Scotland) Bill. Given the current status of the Scottish Universities I fail to understand the need to impose the changes set out in the bill which have been so eloquently opposed by the Royal Society of Edinburgh.

I have seen the impact of a centralisation of control through the Academies programme in England and have serious concerns about the effect that the changes proposed in the Bill will have on the autonomy of the universities’ independence. I strongly believe that a demonstrable independence from political control plays a significant part in maintaining the reputation of the universities which is key to attracting both research funding and the best students at undergraduate and postgraduate levels. A strong independent university system must surely be beneficial to the whole nation’s economic and reputational standing.

At a time when funding for all areas of government expenditure is under close scrutiny, unnecessary projects, such as this, are hard to understand.

I would be grateful if you could ensure my concerns are put before the committee.

Regards

Paul Holloway
Dear Madam or Sir,

Having reviewed the Higher Education Governance Bill (HEG), I can see no reason for its genesis. The problem that it seeks to solve does not exist. Moreover, I believe that a fair degree of autonomy in the administration of universities and colleges is appropriate to their culture and purpose. I oppose the Higher Education Governance Bill.

Best wishes,

Duncan Hossack
Submission from Professor Jim Howe

Higher Education Governance (Scotland) Bill

To the Clerk to Education and Culture Committee

I am writing to record my strong opposition to the contents of the Higher Education Governance Bill which I believe is a wholly unnecessary intrusion into the affairs of the Scottish Universities which, by and large, have an enviable record of achievement in teaching and research, built up over very many years of hard graft, and have acquired an international reputation for excellence.

I write this as a Scot, a graduate of St Andrews University, and Emeritus Professor of Artificial Intelligence at Edinburgh University. The School of Informatics at Edinburgh University, which I helped to build over a lifetime, is currently the largest and most highly rated academic department in the UK in advanced computing, with significant links to Industry both here and overseas. That it exists today is due to the farsightedness of my senior colleagues who supported what in the beginning seemed to be an unattainable goal. They did so because of their faith in their colleagues' ability to deliver against their promises. No politician could have anything useful to contribute to such a creative process which is well beyond his/her ken. Indeed, my fear is that heavy handed political interference will do irreparable damage to the governance and operation of what ought to be amongst the most highly cherished institutions in Scotland. So, hands off!

Emeritus Professor Jim Howe
I am writing to express my extreme displeasure with many of the provisions in the proposed Higher Education Governance bill. Without going into a detailed critique, I have the distinct impression that the proposed bill is motivated by political activism and is also an attempt to further curtail the freedom of the citizenry.

Homogeneity is the enemy of academia. I come from a country (Germany) whose constitution places academic freedom before the right to peacefully assemble. The homogenisation of European higher education has taken that freedom almost completely away. I would hate to see this happen in Scotland.

Matthias P Hühn, PhD, MPhil (St. And.) MLitt (St. And.)
Associate Professor of Management Philosophy
University of Navarra
Dear Sir or Madam,

I am an American graduate of the University of St. Andrews, class of 1990. Although I no longer live in Scotland, I am opposed to the Higher Education Governance (Scotland) Bill because it is trying to fix a problem that does not exist. The reason I attended St. Andrews in the first place was because of its excellent reputation built over 600 years. Decreasing the autonomy of the General Counsel is a recipe for disaster, which will unleash political forces in an academic environment that needs to remain independent. Please reconsider this piece of legislation. Thank you.

Best,

-AJH
As a graduate of the University of St Andrews, a mother of a graduate of the same university and a grandmother of a first year student at Robert Gordon University I wish to object strongly to the proposed bill. Government interference in academic institutions fills me with horror as I see our democracy eroded.

I wish to make the following points -

* universities should be autonomous institutions free of political pressure
* the likely result of this bill would be an inability to attract the best academic staff and, I suspect, the best students to Scottish universities
* there is a distinct possibility that it would be extremely difficult to attract research funding
* universities should be about diversity - not the uniformity that this bill implies
* there is a grave danger that students, staff & funding from outwith Scotland will not be forthcoming
* this will be bad for the Scottish economy as a hole as it fails to compete in a global market

I feel this bill is not only unnecessary it is a serious retrograde step centralising power in Holyrood.

Elspeth A Hunter
Institute of Directors (Scotland) – Submission to the Scottish Parliament Education and Culture Committee Inquiry on the Higher Education and Governance (Scotland) Bill

The Institute of Directors (IoD) exists to help, support, advise and develop directors and board members and to set standards for their behavior. Our core aims are to improve directors, corporate governance and board operation and effectiveness. IoD Scotland has more than 1750 members operating in all sectors across Scotland.

A significant focus of our work is the development of good practice in corporate governance and we are a leading provider of training and advice on Director and Board room development. IoD Scotland is actively engaged in the promotion of Boardroom diversity, including a range of work to increase the representation of women on Boards.

IoD Scotland is opposed to the proposal to legislate on Higher Education Governance which we believe is unnecessary and inappropriate. We believe it is wrong in principle for the Scottish Government to legislate on the internal governance of autonomous charitable organisations such as Universities and that the proposals would undermine the autonomy and flexibility of Scotland’s Universities. We would particularly highlight the following concerns to the Committee:-

- Given the tremendous success of our Universities at home and abroad, and their exceptional international reputation, we are unclear what the problem is that this whole exercise is trying to solve. We recognise the need for the Scottish Government to hold to account organisations which benefit from significant amounts of public funding but it is hard to identify any delivery or performance issues which would be improved by the proposed changes.

- IoD Scotland is very concerned at the principle of interference into the board formation and appointment within independent charitable bodies. We are alarmed at the precedent that this move could set and the potential for similar moves to be widened across Scottish civic life.

- As a body established to encourage and set high standards of good governance practice, IoD Scotland has considerable concern over the moves to have specific ‘interests’ represented on the governing bodies of universities and to the suggestion that there be open elections to key posts. This model of appointment has not been found to be effective and is not one we would recommend.

- The success of Scotland’s Universities has been based on autonomy and innovation and we fail to see how the application of a ‘one governance model fits all’ strengthens this. The Scottish Government’s stated aim of ‘consistency’ is wrongheaded and fails to take account of the rich diversity of the sector. We are concerned that increased Government control and Ministerial influence over the operation of our Universities could have wide-reaching adverse consequences which could impact both on the future success of these insitutions and the wider Scottish economy.
IoD Scotland actively supports the development of good governance across all sectors. We believe that the Scottish Code of Good Governance for Higher Education was well considered, and provides an effective and proportionate framework within which higher education governance should operate. In our view, its status as a voluntary code, implemented on a ‘comply and explain’ basis, is appropriate.

We believe that the proposed measures could have an adverse impact on the operation and performance of Scotland’s vibrant, diverse and highly successful Higher Education sector and that a number of the detailed proposals, such as the proposal to elect Chairs and members of Governing Bodies and Academic Boards, do not accord with recognised good governance practice.

We note that the Scottish Government has reasserted the established and widely accepted view that for Universities to be successful they should be autonomous institutions. We believe that legislating on the internal governance of our Universities runs directly counter to this in both principle and practice. The ability to be flexible and responsive and to develop and innovate has been critical to the success of Scotland’s Universities both in the UK and globally and to the significant contribution they have made to Scotland’s economy.

If our Universities are to be able to continue to grow, develop and innovate in a fast moving and competitive global environment, we believe that it is vital that their autonomy is protected and that they have the ability and flexibility to develop governance arrangements which best suit their diverse needs.

We note also that Universities are autonomous charities and that as recently as 2013 the Scottish Parliament confirmed the view that it should not legislate on the internal organisation of such bodies. We believe this is an important principle that should be adhered to and breaking it serves as a dangerous precedent.

The Scottish Government has stated that it does “not want to increase Ministerial control over Universities but support them to refine their governance systems.” Taking this statement at face value we would respectfully suggest that legally binding and prescriptive legislation is, by definition, exerting control. If the Scottish Government truly wishes to ‘support’ the development of better governance – something to which the IoD remains strongly committed – then there are many other, better ways of doing this in a supportive and cooperative way rather than top-down legislation.

IoD Scotland is particularly concerned by the proposal to legislate on appointments to Governing Bodies – be that for Chairs or Members. As stated above we are opposed in principle to the Scottish Government legislating on the internal operation of autonomous charities. We believe it is critical that Universities – which are significant businesses, some with turnovers of several hundreds of millions of pounds – are able to appoint individuals who possess the skills, knowledge and experience to enhance the governance of the institution and that the institution itself is best placed to judge who that might be.
We note also that any effective Board, in any sector, should be cognisant of the *mix* of skills, knowledge and experience around the Board table and that the appointment process should therefore be able to consider the suitability of the individual in terms of their fit and contribution to the overall balance and composition of the Board. Again, we believe that this is best done by the institution itself and that each institution and Board will vary.

We wish to make clear that IoD Scotland is very supportive of improving diversity in Board rooms and indeed no organisation has been more active in taking forward work in this area in recent years. So too do we believe that Universities, like any business, should constantly review, refine and develop its arrangements for corporate governance and we will continue to support this process of continuous improvement in any way we can. The notion however that this is best achieved by legislation is in our view, at best, misguided.

We are concerned that legislation by its nature is prescriptive and leans towards a ‘one size fits all’ approach. We believe that part of the strength of Scotland’s Higher Education sector is its diversity and that individual Universities have been very effective at developing in a way that plays to different strengths and often in different markets. We believe that local governance structures should reflect that diversity.

We are particularly concerned by, and opposed to, the suggestion that Chairs or Members of Governing Bodies or Academic Boards should be elected as this will militate against the appointment of individuals and Board members who possess the necessary skills and capabilities to effectively oversee the institution and its strategic development. We believe that there are a great many other ways that Universities can be, and are, held to account for the use of public resources and by staff, students and other stakeholders.

We are opposed to the proposal that there should be ‘representation’ of specific groups or interests. This runs counter to one of the most central principles of good governance i.e. that all Board members should be responsible for the good governance of the institution as an entity and not specific interests. In our view the proposals in the Consultation paper are both wrong in principle and could actually be damaging to the effective governance of the institutions.

IoD Scotland is keen to continue to contribute to the on-going improvement of Higher Education governance and will gladly contribute to further discussions with the Scottish Government and stakeholders. However we do feel that the proposed Bill is wrongheaded and could lead to significant damage to a system which, while not perfect, has operated effectively for hundreds of years and has, especially recently, moved with the times.

David C Watt
Executive Director
IoD Scotland
14 September, 2015
Submission from Anne Irwin

For the attention of The Committee Clerk

I am writing to you to express my deep concerns about the proposed Higher Education Governance (Scotland) Bill. I am strongly opposed to this Bill on a number of grounds.

The proposals being put forward, which include the possible introduction of greater controls and restrictions with the intention of enforcing consistency among institutions, will only reduce their ability to adopt individual and appropriate strategies. One size does not fit all, and trying to force all into a single straitjacket of regulation can only lead to a reduction of all to a common denominator, rather than a raising of all to a higher standard. The new legislation will burden universities and the public purse with extra regulation and bureaucracy that will stifle enterprise and will jeopardise the contribution that universities, such as St Andrews, make to the economy.

The introduction of this Bill will also have the following additional negative results:

This Bill threatens the autonomy of the University, which will be greatly weakened, and it will be vulnerable to direct political influence with all the dangers that implies.

St Andrews occupies a leading position globally and domestically in the field of higher education. The loss of its ability to introduce the most appropriate policies and strategies to maintain this means that the high academic reputation of St Andrew will suffer, and it will lose its edge, in a global market, to attract the best students, the best academic staff and funding. This will be bad for St Andrews, for Scottish higher education, for the economy and for Scotland.

Finally, this legislation is not only harmful, it is unnecessary.

As someone who was lucky enough to have benefitted from the great educational opportunities offered by St Andrews, I urge you to reconsider the introduction of this Bill.

Anne Irwin,
Dear Sir

It must be clear to everyone in Government and beyond that the critical uniqueness of St. Andrews University rests not in its golf course, its scenery or even its history, impressive though these undoubtedly are. The creative genius of scholars, scientists, philosophers, artists over the years have created an unrivaled ambience, attraction and expectation of excellence that regulation can only damage, if it influences it at all. What can be the point of such interference? All the basic requirements of a university have long ago been met, exceeded and kept contemporary with the most forward trends.

This is true for all major educational institutions that have attracted students throughout the decades and centuries. I attended St. Andrews years ago BECAUSE of what it was, not because Government had tweaked it into nonsensical conformity. Today it has reached even greater heights through the inspiration and initiatives of distinguished faculty, extraordinary students, generous donors and visionary internal leadership - those who have a direct stake and front line role in its success. No "blueprint" control mechanism from a Government committee outside could improve on this, and is very likely to damage it, while spreading the perception of bureaucratic conformism without expertise, vision or zeal for the individuality of St. Andrews and its colleague institutions.

The effect on every aspect of Scottish life would be a disaster - economic, cultural, political, and - yes, educational.

Please, hands off!

Sincerely,

Nicholas Issacs
Submission from Hamish Johnston

Dear Sir/Madam,

I write to submit my opinions regarding the Higher Education Governance Bill.

Given the long-standing and well-documented problems the Scottish Government faces with deteriorating standards in primary and secondary education I have difficulty in grasping why the valuable time of Parliamentarians and their officials is being taken up with something where no significant problems appear to exist.

Any perceived concerns seem to be well covered by the Scottish Code of Higher Education Governance. Should there be any issues arising from experience of the application of the Code then these can be addressed through the review in 2016. It is wrong to seek to legislate while this programme is still running.

That said, I have two concerns about an important matter of principle: I believe that the Bill threatens the independence and individuality that are the reasons why our top universities are among the best in the world.

First, following the Bill's consultation stage, the commitment to maintain the autonomy of HE institutions and to respect their diversity and ethos was dropped in favour of standardisation. This 'sameness' will undermine the creativity and excellence that characterise our universities. The Bill will lead to a deterioration in teaching and research standards, and in the universities' contribution to the country's economy.

My second concern is the further threat to the autonomy and independence of our HE institutions that will arise from allowing Ministerial powers without adequate checks and balances.

The Bill makes detailed proposals about such things as the appointment of Chairs and the membership of Courts and Senates, yet proposes to give Ministers powers to issue subsequent regulations on these matters without the safeguard of scrutiny in parliament. This undermines confidence in the openness and integrity of the initial proposals and can only be interpreted as a device to enable ministerial control over how universities function. This does not sit well with other - worthy - expressions in the Bill of a desire to increase levels of academic freedom. These freedoms are indeed vital to ensure that universities can remain centres of independent thinking and opinion.

As I said at the start of this letter, I want our parliamentary representatives to spend their time tackling the real and urgent problems we see in the performance of our primary and secondary education sectors. Given these issues the Higher Education Governance Bill is irrelevant and unnecessary and should be dropped, allowing existing governance arrangements to take their course.

Yours sincerely,

Hamish Johnston
Submission from Mr Ian Johnson

I am grateful to the Scottish Government for the opportunity to participate in the consultation on the Higher Education (Governance) Scotland Bill. I am neither employed by a Higher Education Institution (HEI) nor am I a member of one of their governing bodies, but with degrees from two separate Scottish universities I have a personal interest in that sector.

I welcome the moves that there have been in recent years to increase accountability and transparency in public life, and hope that this will be taken forward in many other areas. From such a perspective I am concerned by a number of aspects of the Bill as published:

- If the public are asked to comment on proposed legislation, I would hope that the draft legislation gives a clear indication of how the Act will operate. However in this Bill a great deal of detail seems to be left in the hands of the appropriate Scottish Government minister to bring forward at a later stage. As a general rule I am deeply unhappy about Governments being given wide-ranging unspecified powers. If the detail is not available for public scrutiny or debate in Parliament when the bill is presented, then do not enact the legislation until it is available.

- The Higher Education sector is one of Scotland’s strengths. Within that sector a key element is that, even though the funding may come largely from public bodies, the institutions have autonomy from Government control and direction, operating within a loose legislative framework. I am concerned that in what is proposed the framework may be too tight, giving public authorities too much control over the way in which HEIs work – leading ultimately to a decline in the sector’s standing and role in the economy.

- As part of the move to greater accountability and transparency in public life, a key element has been encouraging the electorate to take ownership of their own future and to participate in elections. (Indeed this has been reflected in the Scottish Government’s own statements on the future structure of a Second Chamber at Westminster). The idea of ensuring that different ‘constituencies’ in the life of HEIs – such as staff, students – have an opportunity to be involved in the future planning and oversight of the university is entirely to be commended. Against this the notion of ‘nomination’ sounds decidedly archaic and anachronistic. The trend is to open election, not nomination! Why should a group like the trade unions be specifically represented? Why not other ‘special interest groups’ like single parents, LGBTI, people with special needs etc? If we believe in democracy then it must be democracy, with special interest groups taking the risk of facing the electorate.

- What is so special about the number ‘120’ that it should be the maximum size of a governing body? Different public bodies, such as Councils or even Parliaments, have differing sizes according to their needs. It may be that some institutions need larger academic bodies, others can manage with fewer. Can we not trust these able and well-qualified people to decide for themselves what they need? We so often hear in life generally that ‘one size does not fit all’. If we want Scotland to be a country where people are empowered to have a vision and to strive for it, then surely we need to allow people the freedom to take decisions for themselves – and not have their lives micro-managed by the Government?
Some HEIs have their governing body chaired by a Rector. Students who have had the opportunity to elect Rectors have at times indulged in the 'eccentric' notions of youth and occasionally elected people who were not particularly conversant with the ins and outs of Higher Education management and oversight. But that’s democracy! That’s what happens when we allow young people to participate in elections. We may not like the results, but we must accept and respect them. (And any hint by a politician that the electorate cannot be trusted to choose an appropriate leader could be walking on very thin ice!)

HEIs have traditionally been places where staff and students can explore, express, argue and debate, in freedom. It is a freedom that has at times been hard-won, and must be valued as there are many places around the world where such freedom is not available. In recent years freedom of expression has been a much-debated issue, not only in the context of HEIs but in the wider community, the media etc. We strive to be a liberal democracy, with freedom of expression – but when freedom of expression comes up against racism, incitement to hatred, abuse etc the question is asked “Do we need some restriction on such freedom?” Within the Western world we are still striving for the answer.

Within the academic sphere there are from time to time academics who put forward views on racial supremacy etc which, within the HEI academic context, should be capable of facing reasoned argument from colleagues. When does ‘academic freedom to debate your ideas’ turn into incitement to hatred, racism etc that breaks criminal laws or creates major offence? There may also be times when certain academics, whose views are widely out of line with the mainstream, wish to teach courses or conduct experiments that fly in the face of what the academic or wider community regard as ‘acceptable’ (Cf the 'medical' experiments conducted in Nazi Germany). Although such issues may be highly unusual, the existing phraseology on academic freedom allows HEIs to handle them much more easily than the proposed wording.

Ian Johnson
Dear Committee members,

I provide my considerations to the proposed Bill from the position of businessman, as a tutor on governance for the Institute of Directors and as a member of a University Court.

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?

There are no problems with inclusion, to the extent that the proposed Bill proposes a more restricted membership (for example by limiting staff representation to trade unions) than is currently in place. There is no problem with accountability as, at present, each institution has to report to charitable, regulatory and governmental bodies and its decision making processes are open for all stakeholders to observe. In terms of modernity the proposed Bill runs counter to a number of aspects of the most recent guidelines on good governance. In particular it implies that the Chair is the chair of the organisation rather than chair of the board (as chosen by the members of that board). By requiring the Chair to be appointed from a broad vote and providing the opportunity for Ministerial intervention it undermines the independence of the chair (one of the most critical elements of good governance). There are two issues of modernity that the proposed Bill does not address. Firstly, is that of the size of the governing body. There is not a single guideline that indicates that a governing body of 23+ provides a vehicle for good governance, in fact the best advice would be for a body of somewhere between 9-15. Second, is that of diversity. There can be no question that greater diversity enhances the quality of governance but, by focussing parts of the proposal on gender, the proposed Bill restricts the scope for governing bodies to exploit diversity in its broadest terms (for example ethnicity, nationality, employment experience, age, socio-economic categorisation etc).

2. The extent to which the Bill
(a) will improve higher education governance, particularly in the areas above
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

(a) The proposed bill will not improve higher education governance, in fact it will make it worse. It gives the impression that the university governing body is a representative group – this runs against the basic principle of governance that a governing body has to collectively act in the interests of the organisation (be it company, charity or university)
(b) Given that the universities are recognised as one of the strengths of Scotland’s society and economy, founded on their autonomy, it seems bizarre to undermine that autonomy. The autonomy of universities (as with the judiciary) has been seen for centuries as the cornerstone of a civilised society. Does Scotland not want to be seen as such?
(c) The proposed Bill will only introduce antagonism and confusion between governing bodies and Ministers.

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

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
This whole Bill is completely unnecessary. It does not provide evidence that there is a problem that needs fixing.

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.

Unnecessary. The main risk to academic freedom is the increasingly intrusive direction from the Scottish Government (via the SFC), which the proposed Bill only worsens.

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”.

I am very concerned that the proposed Bill will provide scope for Ministerial influence on the purpose, direction and, hence, academic content of the universities.

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.

See above. If there is pressure on academic freedom it derives from governmental requirements for institutions to be financially sustainable (and quite rightly) which knocks on to academics need to seek a broader funding base (which may influence research, class sizes etc). This proposed Bill has no impact on this.

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?”

To take an example that is close to home. Given that, during the Scottish Independence debate, institutions encouraged academics to engage in the debate and to feel free to take whatever position they wished to take (both inside and outside the institution), it does seem rather ironic to ask this question as the only attempts to close down the debate, that I am aware of, emanated from government.

Yours

Mervyn Jones
Submission from Dr Robert Jones

This Bill smacks of authoritarianism

Universities should be free of any political constraint (within the law) on free-thinking and the sharing of ideas.

Dr Robert Jones
Submission from Une Kaunaite

Dear General Council Members,

as a former student of St Andrews university I would like to raise my concern about The Higher Education Governance Bill, which is due to pass in the autumn.

From the information I gathered I believe that this Bill will cause damage to the existing situation. At the moment the University of St Andrews is ranked in 3rd place in the UK and I this Bill will weaken the autonomy of the university which allowed it to gain the reputation it now has.

In addition, the university will be more vulnerable to political influence and might lose its ability to attract the best students from all over the world.

As a former student who is especially proud of the University as it is now I would like to strongly recommend You to reconsider this Bill, because I believe that passing it would hurt the economy of the whole country.

I hope you will hear my words.

My Kindest Regards,
Une Kaunaite
Submission from Edward Kirby

Dear Sir or Madam,

While broadly approving of most legislation planned or already executed by the current Scottish Government. I must draw the line at the current Education Governance Bill that is about to be put to the Scottish Parliament. Yes, the Scottish universities are supported mainly by public funds, but once given the funds, I feel it is quite improper to take any active part in any active management of them. Yes it is of course perfectly reasonable to ask for regular reports that explain in reasonable detail where the money has gone, and to answer any questions that the Scottish Government wishes to ask. The Government is then, of course, fully entitled to make any comments or suggestions that it wishes, and to propose changes to the law if it wishes.

It is not, however, acceptable, for Government to interfere with university management, unless some gross mismanagement or crime has taken place. The danger of that is that whether intended or not, it would start to at least LOOK like political interference, and that is of course totally unacceptable to all of us.
Dear Sir or Madam,

The Higher Education Governance (Scotland) Bill

I write to express my concern at the probable deleterious effect of the proposed Higher Education Governance (Scotland) Bill on Scotland’s universities, and particularly my Alma Mater St. Andrews University. I appreciate and agree with the intention to ensure transparency, accountability and inclusivity in the governance of Scotland’s Higher Education institutions. However the proposed Bill removes the advantages of diversity, and by enforcing conformity risks seriously endangering the effectiveness of our world-class institutions, amongst them St Andrews.

In July 2013 the Scottish Code of Good HE Governance was promulgated to assure the quality of Scotland’s Higher Education institutions. This code specifically states that: “Scottish Higher Education comprises a wide range of diverse institutions with differing governing instruments, traditions and strategic mission. This Code is intended to reflect good practice in a manner which takes due account of this diversity.” A commitment to review progress in 2016 was made, and an interim review in 2014 showed good progress.

This proposed bill seems to constitute a premature intervention by the Scottish Government. It replaces the concept of good practice within diversity with proposals to standardise the management and operation of Scotland’s universities. Such proposals will have significant costs attached and are simply inappropriate given the wide diversity of size, structure, and academic specialisms within the Scottish Higher Education sector. This approach might perhaps be justified if significant and systematic shortcomings were evident in the governance of multiple Higher Education institutions. However, as pointed out by the Royal Society of Edinburgh in their February 2015 response, this is simply not the case.

St. Andrews University is committed to the provision of world-class research and teaching, to the benefit not just of its staff and students but also the reputation of Scotland for academic excellence and the benefit of Scottish industry. This Bill will be counter-productive to the pursuit of these goals.

As an example, proposals affecting the membership of Court are incompatible with existing ordinances and statutes regarding the composition of Court at St Andrews, and could result in the specific interest groups gaining seats on Council, potentially against the best interests of the university.
As a further example, the students of St Andrews highly value the ability of the Rector to represent their interests in the university Court. The current President of the Student’s Association states: “I have seen Rectors make immeasurable differences in the lives of students. It is essential that we protect this proud Scottish tradition for future St Andreans.” Emasculating the role of Rector to a purely ceremonial role would be highly counter-productive to the future good governance of the University for the benefit of all its members, students as well as staff.

In summary: “If it’s not broke, don’t fix it”. In these times of austerity, please do not waste the time and money of both the Scottish Government and the affected universities and other Higher Education institutions on this counter-productive legislation. At the very least, please defer the introduction of any further legislation until after a full review in 2016 of the Scottish Code of Good HE Governance.

Yours faithfully

Dr Michael Kay
Submission from Steve Langan

I am a proud Scot and a proud graduate of Glasgow University. I grew up in a council flat in Gourock and was the first person in my family to go to university, where I received a robust, challenging and free-thinking education which shaped me for the rest of my life.

So I was horrified to learn of the Scottish Government's attempts to exert greater control over the composition and governance of Scotland's universities and higher education institutions by means of the Higher Education Governance Bill.

Why seek to fix what isn't broken? Our universities and colleges are the envy of the world, and attract students from the rest of the UK, the EU, and far beyond, as well as from across Scotland itself. These young people come in search of a top-class, scholarly, independent learning environment, not one which is governed by political influence, cronyism or string-pulling. Surely students should be studying what the best academic minds in the country see fit to teach them, rather than a one size fits all education decided by committee, and possibly in an intake consisting of government led quotas, rather than academic merit?

History - my subject - shows that seeking to control higher education is never a healthy tendency.

Indeed, the dictionary definition of a totalitarian regime is one that attempts to "control virtually all aspects of the social life, including the economy, EDUCATION, art, science, private life and morals of citizens." (my caps)

This is not what Scotland is about and I urge members to vote against the Bill.
Submission from Nigel Lindsay

Higher Education Governance (Scotland) Bill

1. I am grateful to the Education and Culture Committee of the Scottish Parliament for the opportunity to offer evidence on this Bill. I do so as a taxpayer who is happy to support the excellent work done by Scottish universities, and who wants to see those Universities remaining free to develop and expand their work, each in its own way, and without the imposition of a central model.

2. Scottish Universities have built an extraordinary reputation for excellence over many decades and, in some cases, centuries. That excellence has been enhanced by the record of Scottish Universities in providing education not just to an elite but to all who can be shown to benefit from it.

3. Scottish Universities are not a homogeneous group, and each has its own characteristics. The “one-size-fits-all” approach of the Bill is inappropriate and likely to cause harm to the work, reputation, and functioning of Scottish Universities.

4. Within Scotland there are several sub-groups of universities. The ancient universities have worldwide reputations; the new universities are carving out niches for themselves within narrower subject ranges, and others such as Strathclyde and Dundee have developed specialisms of international importance. The different types of work done by the different universities require different forms of governance.

5. It is not clear what perceived deficiency in current governance arrangements the proposed Bill seeks to remedy. There has been no obvious public unease over the present diverse governance arrangements. A desire to standardize may lie behind the present proposals – if so, it should be resisted. It can be clearly seen in many other contexts that replacing local diversity with centralised standard practice has been a recipe for harm.

6. The present governance arrangements of the four ancient universities seem to me to represent a careful balance between the various interests involved in developing and maintaining a community of learning. They inhibit the pursuit of self-interest by academic staff by putting a student representative (the Rector) in the chair of the Court, and they balance other interests neatly and fairly. They include a “non-executive” function in the form of graduate representatives who can offer the advice of a critical friend when needed, and they represent the interests of non-academic staff effectively. There is no demand or need for change to these arrangements.

7. The proposal in the Bill to increase Ministerial control will fundamentally change the relationship between the state and the universities, to the detriment of both. It will lead to a loss of autonomy by universities, which is
likely to endanger their charitable status and their ability to secure further funding from donors.

8. The provisions of the Bill increase Ministerial control in a way that was not articulated in the consultation, and run contrary to the Scottish Government’s previous statements that it respected the principle of university autonomy and did not wish to increase Ministerial control.

I ask the Committee to take note of the points I have made in the eight preceding paragraphs, as general matters. I ask the Committee to take the view that the Bill seeks to address a problem that is imagined rather than real, that it will cause financial and reputational damage to the university sector in Scotland, and that it is not fit for purpose. In relation to the Committee’s specific questions, I offer the following responses.

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

I do not consider that there are any serious problems with higher education governance in Scotland. Universities now have to comply with the Scottish Code of Good HE Governance as a condition of funding. There is no need for further legislation.

2. The extent to which the Bill

(a) will improve higher education governance

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

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

- The proposals introduce Ministerial control over the internal governance of charitable organisations. They thus fundamentally erode the principle of institutional autonomy. The Bill endangers the future competitiveness of Scottish universities.

- The proposals would fundamentally change the relationship between State and institution, and subdue the role of universities in a democratic society.

- The ‘one size fits all’ approach of the Bill disregards the rich diversity of our universities, which is a valuable and positive feature of Scottish life.

- Some of the proposals, in particular for the appointment of Chairs by election rather than by the governing body and for trade union membership of governing bodies, contradict widely accepted principles of good governance.

3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?
• No – all necessary measures have already been enacted through the Scottish Code of Good HE Governance. The Bill is needlessly prescriptive which renders it more difficult for universities to adapt to changing governance needs.

• **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.**

• **Chair:** The role of Chair is of fundamental importance to the effectiveness of a governing body. As such, appropriate that the governing body should appoint the individual responsible for its leadership.

  • It is troubling that the Bill has taken forward this proposal despite 78% opposition in the consultation and without specifying the detail to enable proper scrutiny at Stage 1 of the Bill.

• **Composition:** It is inappropriate for Ministers to prescribe the composition of the board of what is an autonomous charity. While it is heartening that the Bill recognises the valuable contribution made to governing bodies by alumni, no case has been made for the proposal that Ministers should determine the number of such members

  • I am concerned that the proposals on composition have been taken forward despite 67% opposition in the consultation.

• **Academic Boards:** As with the composition of governing bodies, it is important that each academic community is able to determine the size and composition of its academic board (Senate) that reflects their respective academic structures and character.
**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 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.

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?”

- Academic freedom (within the law) is of course a fundamental value of academic communities. However, I believe that the existing definition and statutory protections are adequate, and I have not seen any convincing evidence to the contrary.

- I believe that the provisions of the Bill represent a clear threat to academic freedom, by seeking to replace university autonomy with closer Ministerial control. Government control over academic institutions has a baleful history, and should not be pursued.

I ask the Committee to take note of my evidence on the Bill. I invite it to conclude that the Bill is likely to do more harm than good, and that it should therefore be withdrawn.

Nigel Lindsay
Submission from Rhu Bruce Lockhart

Dear Members of the Scottish Parliament,

I write to you as a Member of the General Council of the University of St Andrews.

The University has distinguished itself in the Academic world for 600 years and the quality of its graduates, the excellence of its research, its economic benefits and its reputation are felt in most countries around the world. The notion that politicians might be better suited to govern the Scottish Universities in the interests of standardisation goes against the fundamental tenets of independence and diversity that underpin the distinguished work that they produce. This notion does not appear to stem from any proof of need nor does it offer the convincing prospect of any benefits that might flow from political control.

The introduction of a further level of control and accountability is an expense that the tax payer and the hard-pushed Universities can well do without.

In short I believe that the HEG Bill will strike at the Liberal values and Independence of these great institutions. They are as essential to our society as freedom of speech and a free press.

Drop the Bill. Waste of time. Waste of money.

Rhu Bruce Lockhart
SUBMISSION FROM SIR MOIR LOCKHEAD

Although I am Senior Governor of the University of Aberdeen Court, my comments on the Higher Education Governance Bill are provided in a personal capacity and are not necessarily the views of the University Court.

My observations on the Bill are, however, based on my experience of board level governance both within the charitable and private/commercial sectors. I also draw upon my previous executive experience of leading an organisation which is competing globally as well as nationally, namely as the former Chief Executive of First Group Plc.

I recognise that the Committee will receive a great many responses so I have focused my response on a short number of key issues below. I would, however, wish to emphasise my considerable concern at the direction this Bill appears to take our universities in, not just in terms of governance, but through the extension of Ministerial/political powers over universities which I believe would neither be in the best interests of universities nor, even more importantly, of Scotland.

Loss of Charitable Status and ONS Reclassification

The proposals for Ministerial powers over the governance of universities is of general concern as it represents a significant reduction in the autonomy of institutions from the State. It also has the potential to bring into question the charitable status/Office of National Statistics Classification of higher education institutions. Either outcome could be very damaging to the University of Aberdeen’s ability to succeed as an institution operating in a marketplace for higher education which is both global and highly competitive.

Reclassification as a government body could result in the University being unable to borrow or retain surpluses. This would inhibit drastically our ability to generate income, to borrow and invest in new facilities, something which could not be replicated by State funding. That investment benefits Scottish students as well as helping the University to compete with other universities around the world for students and staff. Reclassification would inevitably stymy incentives to work with industry and to commercialise academic activity, to the detriment of the Scottish economy.

A further issue which both reclassification and loss of charitable status would raise is with regard to fundraising and philanthropy. These are vital income streams that Aberdeen (as well as other Scottish universities) have dedicated significant time and effort to develop over recent years. Already at Aberdeen, through the support of donors, alumni and corporations, we have been able to realise transformational projects such as our new Library and the creation of new funds for the support of students. That support enables universities to make the support they receive from the State go further to the benefit of our students and our global reputation. However, it is support that we know would be far less forthcoming from donors if we were a government body or not a charity. The preservation of the current status of universities in both regards is, therefore, vital to this important source of funding.
Membership of Governing Bodies
At a general level I am not persuaded that it is either correct or helpful for Ministers to in effect be specifying (and later able to change) the detailed composition of governing bodies that are also autonomous charities.

With specific regard to proposing there be trade union membership of governing bodies, while the contribution and involvement of trade unions in institutional processes and decision making is essential, there is a fundamental difference when it comes to trade union representatives being nominated to a governing body with a mandate from a particular constituency while on the other hand they as a governor are also required to reach decisions in the collective best interests of the institution rather than one part of it. This can only result in a perpetual conflict of interest issue which undermines good governance and effective decision making.

I appreciate the opportunity to provide these comments to the Committee. I hope they will be helpful.

Sir Moir Lockhead
Dear Committee Clerk

I'm writing briefly regarding this Bill as a graduate of St Andrews (1972). It states that "our aim is not to increase ministerial control". But on the face of it that is precisely what it does by opening the door to increased layers of bureaucracy either now or in years to come.

What perceived 'problems' is this legislation designed to 'fix'? A new definition of academic freedom may only serve to restrict that freedom and impair the universities' ability to develop in their own individual ways.

Regulating the the selection of chairs of Court from a shortlist of appointable candidates: legislating on membership of governing bodies to make them "fully representative"--all this happens already, and the latter would be hard to reconcile with existing statutes.

Of equal concern is the proposal to 'rebrand' the Principal as the CEO. Universities are places of learning not multinational corporations.

Also there appears to be a suggestion that the post of Rector be abolished (if I have read this right). The Rector may at one time have been little more than a symbolic figure, but in recent decades-and I was a student during the reign of John Cleese-they have undoubtedly been an important conduit for the student voice and a force for change.

I am concerned at the Scottish Government's apparently increasing need to control education from top to bottom, as indicated by proposals this week for the testing of P1 pupils.

With a huge majority of Westminster MP's and the possibility of further gains in the next Scottish parliamentary elections, the urge to control is one that should be restrained.

Yours sincerely

Crawford Logan
I should be obliged if you would bring this letter to the attention of the committee.

I am deeply concerned at the Scottish Government’s proposals to interfere in the governance of Scotland’s universities.

My concerns are the following

1. The Committee of Scottish Chairs has already instigated the Scottish Code of HE Governance, which is currently going well and is due for a formal review in 2016. Surely, the time to consider changes is after that review? Why do you want two sets of changes going on at the same time?

2. A simple worry that governmental power over the governing bodies in universities will be deleterious to their ability to provide unbiased research and opinion. While I can understand that the government wants value for money, the way to ensure this is to look at the results, not to interfere in the manner in which these results are obtained.

3. Legislating on the size and composition of the various university bodies may possibly be acceptable, but prescribing that some members must be appointed by the unions – and therefore not by the body of staff as a whole – is biased and unfair to the people concerned. All members need to be totally independent in their considerations and not hampered by worries of what their union’s opinion would be. The appointment of members is already open, unbiased and wide; I do not understand why you are meddling in something which works so well.

4. The fact that this is being done through enabling legislation is absolutely disgraceful. Any later government can then apply politically biased decisions without a full debate – and without the vast majority of the electorate being aware of what is happening – and to the huge detriment of the universities.

5. As well as training the next generation of graduates, the universities are the source of a great deal of important and useful research, some of it of a politically sensitive nature. It is essential for the political health of this country that their academic freedom and diversity of views is actively nurtured. At the very least, I should like to see a clear statement to this effect at the heart of this new legislation. Then, when a later government does apply political pressure on the universities, there may be a chance of fighting back.

6. You should bear in mind that these universities are the jewel in the crown of Scottish education, and the key to our future independence and prosperity. Any changes you make should be very carefully thought through, well discussed, well understood and agreed by the universities themselves – who are the ones who best know how they operate and what the impacts will be on
their systems. This is not just some other part of the economy which can be changed one way and then changed back again in a couple of years. Our best universities are significant international players, but lasting damage is lasting damage.

7. Finally, I am outraged at the plan effectively to get rid of the post of Rector. As a graduate of St Andrews University, I have seen the enormous impact a good Rector can have, the very real feeling of being empowered in the university which he or she can bring. The students want a real representative, not a figurehead, a puppet.

Grace Lyon
September 2015
Submission from Rev Dr Peter G. Liddell
Higher Education Governance (Scotland) Bill

Dear Sir or Madam,

As an alumnus of the University of St. Andrews (1963), I am writing to register my opposition to the above proposed Bill. I have read the briefing document of the University's General Council and the Advice Paper issued by the Royal Society of Edinburgh. Both present cogent arguments. In particular, the introduction of direct political influence is quite unacceptable and damaging to the reputations of Scottish Higher Education institutions. My understanding is that independent higher education reviews are already being undertaken. The institutions should be supported in implementing their conclusions. The Royal Society Paper clearly explains the necessarily dual nature of the Principal's role as being both academic and developmental. These roles have been carried out with distinction and it would be perverse to replace it with that of CEO. To reduce the role of Principal/Vice Chancellor and indeed that of the Rector, to my mind, shows a complete lack of appreciation of their stature and unique contribution to the outstanding reputation which the ancient Scottish universities have achieved world-wide.

I should be pleased to be informed of whatever developments ensue from this period of public consultation.

Yours sincerely,

Peter G. Liddell
Submission from John MacColl

Dear Committee Clerk

As a University Officer at the University of St Andrews, a Fellow of the Royal Society of Edinburgh, and a graduate of the Universities of St Andrews, Robert Gordon University and Aberdeen, I am writing to express my deep concerns about the Higher Education Governance Bill which is due to pass through the Scottish Parliament in the autumn.

I am concerned about the undermining of universities’ autonomy through giving future governments significant potential influence and control without the safeguard of parliamentary scrutiny. I believe that this poses a danger to universities’ ability to ensure academic freedom and act as sources of independent thinking, offering analysis and comment without fear or favour. I also fear the consequent risk to universities’ academic standing and to the significant benefit they deliver to the national economy.

There has been no compelling explanation of the problem that the legislation is trying to solve. I have worked in the Scottish university sector for almost 30 years, and have found Scottish universities generally to be well run by the current arrangements of governing bodies, academic boards and Principals which interact effectively in the best interests of our country’s university system, in which the public rightly places a great deal of trust. I believe, in the words of the recent Advice Paper from the Royal Society of Edinburgh, that: ‘The governance of Scotland’s HE sector is not without challenge. But recent and on-going modernisation following the introduction of the Code and the Post-16 Education (Scotland) Act 2013, and in partnership with SFC, must be allowed to take its course. In the absence of any evidence of serious and systematic poor governance of Scotland’s HEIs, there is neither need nor justification for additional legislation or government intervention.’

Yours faithfully,

John MacColl
Submission from Ms Jean L MacDonald

The Committee Clerk

As a graduate of the University of St Andrews, and a former member of the Business Committee of the General Council, the terms of the above Bill are a serious cause of concern. “Scotland’s First University” has attained that position by means of independence and freedom to attract the best staff, students, funding etc.

Changes as proposed in the Bill would affect not only those working in the University, but those employed in the town and further afield.

Other Universities in Scotland would be similarly affected, and the detrimental effects of these proposals would be far-reaching.

I ask that a serious revision be undertaken.

Jean L MacDonald
Submission from Peter & Catriona Macdonald

We are both graduates of the University of St Andrews and as such are General Council Members of that university.

We write in that capacity to express our concerns about the Higher Education Governance (Scotland) Bill which, we feel, would greatly weaken the autonomy of St Andrews University making it vulnerable to direct political influence. This in turn would mean that the academic reputation of the University would suffer and that as a consequence it is highly likely to lose its edge in a global market where it strives to attract not only the best students but also the best academic staff as well as funding.

We feel that the impact of this legislation, if enacted, would be extremely bad for St Andrews as well as for Scottish higher education generally and the economy of Scotland as well as the country more widely.

The key point we wish to make is that in our view this legislation is entirely unnecessary and would be counter to the well-being of the University not only in Scotland but in the world.

We trust that you will ensure that the Scottish Parliament takes our views into account when considering this Bill.

Yours sincerely

Peter and Catriona Macdonald
To whom it may concern,

Some of the most glorious years of my life were spent at the University of St. Andrews in the late 1970's. One of the contributing factors to this was the uniqueness of the University. I am very concerned that this new Bill has the potential to take away some of the autonomy and unique features that St. Andrews currently has. Rather than turn the Scottish universities into a chain of similar institutions let’s move forward while continuing to retain the very special qualities of each college.

King regards
Caroline MacDonald
Submission Mr Archie R. MacGregor

To whom it may concern,

As a member of the General Council of the University of St Andrews, I am writing today in opposition to the Higher Education Governance (Scotland) Bill.

Having read the Bill (henceforth referred to as “HEG”), I find that there is no justification provided in the introduction arguing why there needs to be government regulation of “the composition of and appointment to the governing bodies and academic boards of higher education institutions” or to “revise the provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.”

While the Policy Memorandum claims that HEG is designed to increase modernity and inclusivity in higher education institutions, I do not see how any of the provisions of the bill specifically “modernize” university governance, nor do I see an advantage in “inclusivity” as defined by the Scottish Ministers. If HEG is ultimately for the good of the universities, governance must be left in their hands, and the benefits of inclusivity must be determined according to what each university thinks best. Furthermore, if transparency and accountability are issues, it would perhaps be better to propose a bill requiring university governance procedures and bylaws to be published and accessible to the public; a much simpler solution, than HEG attempts.

I am further concerned by the notably vague language used regarding the nature of these changes in provisions, and the procedures by which regulations will be created, as well as the policy directions toward which these regulations will be aimed. “Modernization” is an inherently vague term which I do not find to be a valid policy goal.

I notice that HEG allows for Scottish Ministers to form regulations regarding “criteria for selection”, “interview of candidates” and “shortlisting of candidates” for chairing members of governing bodies; however, before these regulations can be formed the Scottish ministers “must consult each higher education institution to which the regulations relate”. This creates two problems.

Firstly, if the appointment of chairing members of a governing body is to be determined according to what is best for the university, and the university itself must
be consulted, why do the Ministers need to be involved at all? The university could just as easily, and with less hassle, form its own bylaws for the appointment of chairing members. Secondly, if each institution must be consulted, the promulgation of any new regulations would have to be tailored to each university (in which case there is no possibility of standardization, and government interference is pointless), or there would be constant argument because of the different needs and circumstances of each university, such that the consultations would be indefinite in length, and the regulations would not be enacted in anything like a timely manner. In the first case, the government is interfering needlessly and without benefit to itself or the universities, and in the second the government would likely find itself in the center of a firestorm of conflict in trying to standardize regulations regarding chairing members across different institutions.

HEG Part 1 Chapter 1 Section 3 (b) mentions that Ministers must also consult “other persons” they deem “appropriate”. This vague statement could be used to justify interference in university business from just about anyone.

In sum, HEG Part 1 Chapter 1 Sections 1 and 3 come across as either wastefully ineffectual, and/or blatantly manipulative of university governing bodies. The allowances which HEG gives Scottish Ministers to interfere with, and manipulate the composition of not only university governing bodies but also academic boards, is overwhelming.

HEG Part 1 Chapter 1 Section 4 provides an outline of the composition of university governing bodies; however, Part 1 Chapter 1 Section 8 gives the Ministers full power to modify the categories of membership in governing bodies, as well as the number of persons within those categories of membership. This can be used to allow the Ministers to tailor governing body composition to individual universities (something which the universities do for themselves now) and can also be used to allow the Scottish government to manipulate the membership of university governing bodies for its own policy directives.

The same authority is provided to the Scottish Ministers in regards to university academic boards.

In short, one must ask: is the Scottish government seeking what is best for the universities through regulating their governance, and if so, how do they claim to know what is best for an individual university above what that university’s own governing body claims? Unless the Scottish government can meaningfully argue that there is a significant reason for why it must interfere in university governance, I must conclude that the primary outcome (regardless of intent) will be to hinder the effective appointment and election of university officials, and put the freedom of university decisions ultimately in the hands of civil servants under the authority of
their political masters. This would mean that university governance would be under
the constant sway and upheaval of changing political whims, and would ultimately
result in the enslavement of academic freedom to the fads of current policy, and
create a resultant loss of academic vigor, and quality research in Scotland’s great
universities.

While the actual compositions of governing bodies and academic boards provided
for in HEG do not seem to be unreasonable, my primary concern is the inclusion in
HEG of the provisions allowing for Scottish Ministers to change these compositions
at their whims. If HEG were simplified such that it simply required universities to
maintain governing bodies and academic boards with a certain percentage of
students, faculty, etc., I would not find HEG to be nearly so dangerous. (However, it
would still be objectionable because of its attempt to standardize the composition of
governing bodies and academic boards across the higher education spectrum
without regard to the individual needs and circumstances of each institution.) What I
find most disturbing about HEG is the allowance left to the Ministers to take a piece
of legislation and rework it, nearly completely, by regulatory fiat.

Thank you for taking the time to consider this response. I look forward to hearing
from you.

Yours faithfully,

Archie R. MacGregor
Submission from Donald MacGregor

- Dear Sir,
- I wish, as a member of the General Council of the University of St Andrews, to oppose the provisions of this unnecessary Bill.
- Reasons, in brief, are as follows:
- 1) the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- 2) its academic reputation will suffer;
- 3) it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- 4) this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- 5) it is unnecessary.

I would ask your committee to reject this Bill.

Yours etc
Submission from Mr Colin Mackay

Dear Sir,

As a graduate of St Andrews University, it is with great disappointment that the Scottish Government is proposing to introduce the above bill. My main complaint is that the autonomy of the University will be greatly weakened as it will be susceptible to political interference, which is something that is to be avoided.

I should be grateful if you would pass this comment to the appropriate person dealing with this.

Many thanks

Colin Mackay
Education and Culture Committee

Higher Education Governance (Scotland) Bill

Submission from Peter Mackay

As a former Under Secretary at the Scottish Office in charge of further and higher education in the late 1980s I wish to register a strong protest at the provisions of the Higher Education Bill now before the Scottish Parliament. I do so from my experience in the Scottish Office and my later experience as a governor of a Scottish University.

As the Royal Society of Edinburgh has commented much of the Bill is objectionable in principle but I am particularly concerned at the practical effects of the provisions which will require the chairman of the governing body to be elected by a constituency wider than the governing body itself. This will risk the appointment of chairs who have little knowledge of the work of the governing bodies, have few chairmanship skills and who are accountable to a constituency other than that they chair. While this already applies to the Ancient universities in relation to the office of rector, it is common practice for the elected rector to delegate the chairmanship on all matters other than those directly affecting students to the senior lay governor, chosen by the governing body. Certainly there is nothing in the experience of having rectors over the last three centuries for the ancient universities which justifies extending the principle of election more widely to the whole sector.

It is contrary to all the principles of corporate governance in the public and private sectors for the head of the governing body of major institutions responsible for budgets of hundreds of £millions and thousands of staff to be elected by a constituency other than the governing body itself (except in the case of NDPBs accountable directly to Ministers who appoint the members of the board and the chair). In the private sector chairs of major companies are appointed not by the shareholders but by the boards they are to chair. In the university sector it is the governing body and not an external electorate which has knowledge and experience of the qualifications of the individuals who are candidates for election to the chair and of the nature of the challenges facing the institution and it is to the governing body that the chairman should be accountable, not an external electorate.

Are Ministers going to give up, in favour of election, their right of direct appointment to the chairmanship of NDPBs or bodies such as Health Boards? If not, why impose on Universities (which are neither workers’ cooperatives nor government bodies but private charities) a principle which is not applied, so far as I know, to any other major institutions in the public or private sectors. The proposal is a solution in search of a problem and should be dropped.

I am sending a copy of this e-mail to my local MSP, Fergus Ewing.

Peter Mackay CB
September 2015
I am responding to the call for evidence from the Education and Culture Committee in regard to the draft Higher Education Governance (Scotland) Bill.

I write as a member of the Court of the University of Glasgow, on which I have sat since January 2010. I have a long association with the University and its Business School. I also have involvement with, and understanding of, public policy issues from my membership of the Calman Commission, which reported in 2009. In my business life, I am Chief Executive of the Telegraph Media Group.

I have seen the submission from the Chairs of the governing bodies of Scotland’s universities, and I wholeheartedly endorse it. I would like to add a few personal observations to what I believe are their compelling arguments.

Scotland is deeply blessed with its Universities. They are genuine centres of international excellence and dynamism that are among the best in the UK, and compete on equal terms with the highest ranking international institutions. The whole of Scotland benefits from that success, in which all Scots should take great pride. They are central to our heritage.

Their success is based on a number of factors - the high quality teaching, admirable infrastructure, partnership with business and the commercial sector, and independence from Government. The latter point is a really important one. Like my own industry, higher education is based on its genuine independence. Universities must be free to speak their minds, and be seen to be independent from everyone including Government, in doing so.

We upset that delicate balance - which has existed now for many generations - at our peril. The day we come to be seen...
as spokespeople for Government then we lose our *raison d’être*. If we undermine our Universities in this way it is not just students and the reputation of Scottish academia that will suffer, but wider Scottish public life which depends on a flourishing higher education sector. Scotland’s economic future and the vibrancy of its Universities are totally intertwined.

I believe that the Bill - however good its apparent intentions - would produce an unacceptable degree of Government interference in Scotland’s Universities and end up doing them irreparable damage both within Scotland and the wider UK, as well as in terms of international reputation. I would like to highlight three points.

First, any intervention into academic freedom must be based on powerful evidence of overwhelming social need. Here no case has been made out to justify such interference. There is no explanation as to why additional Ministerial powers should be necessary or why the current system - based on a sensible and trusted balance between legislative and self-regulatory measures to ensure good governance - has failed in any way. Furthermore, there has been no public debate on the issue, despite the importance of it to wider Scottish public life, as I set out above.

Second, leading on from the above point, the current system has in my view been working well. The Scottish Code of Good HE Governance, with which all Universities comply, enforces principles of good governance that have fostered diversity, equality and participation. That Code is reviewed regularly and if there is a case for further change, then the Government should make it out as part of that review which is due next year. Any rush to ill-thought through legislation in advance of that would be wholly precipitate.

Third, as a businessman, I am deeply concerned about the impact of these proposals - which may not have been foreseen by those drafting them - on the financial and commercial health of our Universities. It seems to me - as the paper from the University chairs explains well - that
these changes may lead to our Universities being classified as an arm of Government. The consequences of that would be devastating, not least in the capacity of Universities to work with commercial partners (such as my own company) from which students benefit enormously. Infrastructure projects - which are key to the international competitiveness of Scotland's Universities - would be hit badly as our ability to borrow and to maintain surpluses was undermined. This would put us at a terminal disadvantage with Universities elsewhere in the UK, and on the international stage.

For all these reasons, I would urge the Government to think again about these proposals. No case has been made out, change is precipitate and unnecessary and if implemented they would seriously damage the Universities that are one of the jewels in Scotland's crown.

**Murdoch MacLennan**  
Chief Executive  
Telegraph Media Group  

1st September 2015
The Higher Education Governance (Scotland) Bill

The Bill wrongly seeks to increase Ministerial control over Scottish Universities, whose independence is one of the factors that has led them to take extraordinarily high positions in the world rankings. The proposals for greater Ministerial control were not flagged up in the consultation, and should therefore not be pursued now. The changes proposed to the autonomy of universities will have a negative impact on their fundraising and competitiveness. There is no evidence that there are defects that need to be remedied and, even if there were, the Scottish Code of Good HE Governance provides a suitable and adequate remedy.

The proposals to prescribe the membership of governing bodies on a “one-size-fits-all” basis is wrong-headed. There are several different types of university in Scotland, and it is appropriate for each to be given the freedom to establish the type of Governing Body most suitable for its needs. I oppose in particular the proposal to reduce the number of alumni representatives to two. Alumni (or General Council) representatives provide a valuable and disinterested challenge function on Governing Bodies. I also oppose changes to the role of Rectors.

In relation to academic freedom, the greatest threat I perceive is that of increased Ministerial control.

I believe the Bill is unnecessary and harmful. It should be dropped.

L Macmillan
Submission from Elizabeth Macnee

I appeal to you not to introduce the new legislation on governance of our universities in particular my own alma mater, St Andrews, where the already excellent administration would be compromised. It is not necessary to better something that is best! And political interference in a robust historical institution is certainly not a reliable thermometer for quality assurance. St Andrews has world wide connections in good health because it is self governing.

Please do not interfere with our cultural heritage - enforce the legislation already in place in education before tinkering with unwanted, unwieldy wordings.

Elizabeth Macnee
Higher Education Governance (Scotland) Bill - Call for Evidence
Submission from Duncan MacNiven

The Committee sought evidence to inform its consideration of the Bill. I write as a graduate of Aberdeen and Robert Gordon universities and as a member of the Business Committee of Aberdeen University, on which I represent the graduate body.

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

No organisation is perfect and governance must be kept under review to ensure that it achieves the right outcome. But the proposals in the Bill (and in the review by Ferdinand von Prondzynski on which it is based) are not supported by evidence of governance shortcomings. Our universities achieve excellence on the international stage (four, including Aberdeen, are in the top 200 worldwide, and Robert Gordon is outstanding in terms of employment after graduation). The problems which they face - and which it is important to Scottish life that they tackle - are to do with bettering the student experience, improving the quality of research, and striving to get further up the world university rankings, within strictly limited funding. Changing the governance will not help their efforts, and indeed will tend to hinder, by distracting management attention.

**The extent to which the Bill will improve higher education governance, particularly in the areas above**

It seems to me that the Bill will tend to damage the inclusivity of governance of Aberdeen University. At present, the **graduate body** has four representatives on the Court. Two are prescribed by the Bill – and, while it would be open to the university to continue with four, I suspect that two would become the upper as well as the lower limit, in the interests of keeping the size of the Court manageable. The university would lose the considerable experience in many fields which the present four graduate members bring to the Court. It is of course important that the **student body** should be represented in the governance of the university. But it seems to me that that is already achieved in Aberdeen by the longstanding arrangement that the Rector chairs the Court (which is threatened by the Bill) and the two student representatives on the Court. I oppose giving **union representatives** a statutory place on the Court. It seems to me that the sectional interest of the staff could damage the universities’ striving for excellence, because staff will tend to be conservative, favouring the status quo at a time when the pursuit of excellence requires continual change.

**The extent to which the Bill may alter the higher education sector’s current level of autonomy**

I am concerned that the Bill would give Ministers too great an influence in universities’ governance. The Scottish Code of Good Higher Education Governance has recently ensured that universities’ governance meets modern standards. I do not see the need to legislate on the matter, and am concerned that the Bill gives Ministers
wide powers to alter the governance arrangements by regulation, subject to much less close parliamentary and public scrutiny than primary legislation.

The extent to which the Bill may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

I have nothing to add to what I have written elsewhere.

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

As I have made clear, I do not think that legislation is either necessary or desirable. My impression is that the consultation carried out by the Scottish Government before the Bill was introduced, demonstrated that there was much more opposition to than support for their proposals.

Yours sincerely,

DUNCAN MACNIVEN
Submission from Malcolm MacRae

Dear Clerk,

The Academic Freedom of our Universities.

You are no doubt aware of the concern among the older Scottish Universities about the changes proposed by the Scottish Government to the way in which our universities are governed.

Until now, governments of every shade have through it right to respect the freedom of our universities to govern themselves according to their own traditions. For the most part, this policy has ensured that our older universities have secured a standing internationally which has earned for Scotland an outstanding reputation for academic excellence. This standard can be maintained only if the traditional understanding of academic freedom is safeguarded. The spirit of competition, not least in crucial areas of research, guarantees that resources are used to maximum effect.

It would, I feel, be a most retrograde step if the Scottish Government were to interfere in the structure of the administration of the life of our universities, by changing posts and constitutional practices. The existing way of working is largely the product of the gradual evolution of life within what until now have been autonomous academic institutions.

I would urge that the present proposals withdrawn and that the Scottish Government engages much more fully with university Courts on any proposed change.

Yours sincerely,
Submission from Mr Robert MacSwain  
Higher Education Governance (Scotland) Bill

Dear Committee Clerk,

Greetings from the School of Theology of the University of the South in Sewanee, Tennessee, USA. My name is Robert MacSwain, and I am an American citizen of Scottish ancestry who is a graduate of both the University of Edinburgh (MTh, 1996) and the University of St Andrews (PhD, 2010). I moved to my current position in 2009 from St Andrews, and I have just been awarded tenure and promotion to the rank of Associate Professor (=Senior Lecturer).

As a graduate of these two Scottish universities, I am writing to express my concern about the Higher Education Governance (Scotland) Bill. It is difficult to over-estimate the significance of Scottish higher education to the entire world: the influence of the research done, the studies undertaken, and the subsequent careers of those who have received degrees at Scottish universities over the past several centuries is literally incalculable. In field after field—the arts, sciences, medicine, law, and divinity—Scottish scholars and students at Scottish universities have contributed to the personal, intellectual, spiritual, and financial well-being of global human culture.

Because of this remarkable heritage, Scottish universities continue to attract the best academics and students from around the world. Scotland owes much of its considerable prominence as a nation to its array of higher education institutions, both ancient and more recent. The Scottish Parliament thus bears an enormous responsibility to protect and maintain this precious resource for generations to come. However, in the considered expert opinion of the Royal Society of Edinburgh and the General Council of the University of St Andrews, the current Higher Education Governance (Scotland) Bill poses a serious threat to the integrity, autonomy, reputation, and competitiveness of Scottish universities.

Similar arguments about administrative oversight are playing out across the world, not least in the United States. However, when academic self-governance and freedom are undermined, the quality of both research and teaching often suffers—and morale certainly does. Individual universities must also be able to make specific decisions that are right for them, decisions that can only be made by those who live and work in those particular contexts. As the RSE argues, 'The vitality of Scotland's HE sector, the contribution which it makes to the nation's economy, culture, and society, and its success in a highly competitive international context, rest on the ability of its institutions to respond to opportunity and need, true to their mission but without undue government oversight....It is not clear why Government is now
proposing additional legislation that directly intervenes in the governance arrangements of HEIs.  

Please listen to the concerns of the Royal Society of Edinburgh and the General Council of St Andrews, and do not stifle your amazing universities with an unnecessary act of centralizing governance that will inhibit them from fulfilling their mission. I do not exaggerate when I say that this decision will have global implications.

Thank you for your time and attention.

Sincerely,

Robert MacSwain
Submission from Carol Main

4 September 2015

Dear Sir/Madam

I am writing in response to the call for evidence with regard to the Higher Education Governance (Scotland) bill.

I would like to object to the passing of the bill on the basis that it curtails the freedom of thought and operations of Scotland’s higher education institutions with unnecessary control in a way which is highly likely to be to their detriment.

‘One size fits all’ is not appropriate to governance of Scotland’s universities. The proposals in the new bill will add additional bureaucracy and regulation which will prohibit them from getting on with the job for which they have built up an enviable, world-wide reputation as educational institutions of extremely high quality at every level, including governance.

Existing governance arrangements are tailored to the needs of the institutions and, most importantly, their students, and follow the Scottish Code of Good Higher Education Governance.

Yours faithfully

Carol Main MBE
Submission from Mr Brian McBride
Higher Education Governance (Scotland) Bill

My name is Brian McBride, I am a graduate of the University of Glasgow, MA Hons in 1977. I was born and raised in Glasgow but now live in Camberley, Surrey. My career has been spent working for global technology giants Xerox and IBM, and as the UK or European head of Dell, T-Mobile and Amazon. I am currently Chairman of ASOS.com, the UK’s most famous global online fashion business, I chair Wiggle.com, an online cycling business, and am the Senior Independent Director on AO.com. I am also Senior Adviser to Scottish Equity Partners.

I have been a lay member of the Court of the University of Glasgow, since 2012.

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

When I read this question, and the proposed bill, I asked myself a question I always ask my companies when contemplating change. What is the problem we are trying to fix here? And it’s not clear to me what problem the Bill is trying to address, nor is this made clear in the Policy Memorandum about the Bill.

In my time on The Court of the University of Glasgow we have reviewed our governance, our composition and our procedures, and ensured we are aware of good practice inside and outside the sector, as well as following the Scottish Code of Good HE Governance. We also hold a 5-yearly externally-facilitated review of the governing body's effectiveness.

I have sat on a number of PLC Boards, Advisory Boards and the BBC, and have to say that the University Court is the most inclusive body I have been part of.

I don’t think anyone seriously doubts the large level of accountability the University of Glasgow and its counterparts face, to the governing body/Court, to its students and its wider community, and to Government via Outcome and other Agreements.

In summary, I do not know why the Government feels it has to legislate in this area.

2 The extent to which the Bill

a will improve higher education, particularly in the areas above

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

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

It’s by no means clear to me that the proposals within the HE Governance Bill will improve University governance. Universities do enjoy a high degree of independence from Government not just in Scotland but the rest of the United Kingdom and through much of the free world. In the Consultation Paper on the HE Governance Bill the Government stated clearly that it understands the
importance of University autonomy and said that it did not intend to increase Ministerial control. However, the Bill clearly contradicts this by proposing a significant increase in Ministerial powers over the universities.

I find the proposals, in Sections 8 and 13, to give a Government Minister power to determine the future composition of a university's governing body and of its academic board, quite concerning, and feel it would weaken the independence of the universities. I enjoy my role on the Court because of the independence we have, and I would have no interest in making up the numbers in what would then feel like a political body.

Similarly, the universities' status as independent charities could be threatened by such an increase in Ministerial powers. Lost charitable status would have difficult financial consequences, resulting in increased taxation and a reduction in philanthropic income. I am a donor to Glasgow University and would certainly revisit my contributions if it was not a charity.

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

No comments.

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

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

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

1. At Glasgow, the governing body is currently recruiting its next Chair. In doing so, we follow the transparent, inclusive and robust process required by the Governance Code. The job description was approved by the full governing body. The position has been advertised widely, and the University has stated that it would like to invite candidates from a diverse range of backgrounds. The selection process will involve an interview panel which will include a member of academic staff and a student. It will make its recommendation to the full Court, a diverse body which includes staff, students, alumni and independent members. The process so far feels very much at best practice.

2. It is important that the final decision on the appointment of the Chair is made by the governing body. This is so that the appointee will have authority with the
governing body, and also so that, should the Chair fail to address the duties of the role effectively, the governing body will be in a position to terminate the appointment.

3. The suggestion that a Minister should impose his/her wishes regarding the composition of a governing body is inappropriate, and also fails to allow for the diversity of practice that should exist among the universities.

4. I do not agree with the idea of including representatives of trade unions on a governing body. Governing bodies currently include staff representatives, who have influence because they are chosen by the staff of the institution and are there to represent their interests. Trade union representatives would be chosen by unions to represent the interests of their trade union. That would be counter to good governance. It is important that all governing body members exercise their judgment in the interests of the University and not of another organisation.

**Academic Freedom**

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.

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

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

I have no comments to add in this section.
Submission from Patrick Mallon

I am writing to voice my concerns about The Higher Education Governance (Scotland) Bill in the hope that this appeal will force my elected MSPs to reject this proposed legislation. I hope to outline my concerns below.

Having spent some time considering which university to attend myself, around six years ago, it was specifically the diversity of options and types of universities that Scotland had to offer that allowed me to find something that fit my preferences. To homogenise the HE sector would be to take away the edge that various universities have in different fields. For a country as small as Scotland to have as many institutions as it does is a reflection of the different niches that universities fill; and a clear sign as to why these places of learning should not be forced into the same neat box.

For me, it was the reputation, globally, of the institutions I attended that encouraged me to take a place firstly at Edinburgh University and then at St Andrews. I found both to be entirely different- for many of my friends and colleagues, Edinburgh was the perfect place for them- for me, it was not and I found the different structure, subjects on offer, and pastoral system at St Andrews to be ideal for my particular preferences. If the ancient universities are forced to change centuries of tradition and academic excellence, and abandon the educational developments that they have developed in the past five hundred years then they cannot possibly hope to compete in the same global market as they have in the past.

The more modern universities that operate in a different niche market often have the ability to change and adapt to offer more vocational courses and fulfil the needs of a growing number of students from the domestic and international market and should not be forced to merge their more business-centric managerial model with the traditional governance of the ancient universities.

One of the most valuable things about the HE sector is its autonomy. Universities are able to criticise and support any institutions or bodies when necessary. They are able to invest time, money, and resources in line with research interests and goals. They are able to seek funding from multiple different sources in order to achieve the strategic development, research, and academic plan for the particular institution. Having sat on the Widening Participation Steering Group at the University of St Andrews, I met with colleagues from the Scottish Funding Council, and know that government policy already already has sufficient influence on the strategic planning and budgeting of the university. The question then poses itself: why does the Scottish Government believe it has any right to cause detriment the autonomy of the HE sector? There should not be the possibility of a conflict of interest between the public funds tendered to a university and the strategic plan of the institution.

Any unnecessarily bureaucratic legislation that affects the HE sector in such a way as to weaken the autonomy and academic reputations in the Scottish HE sector, as well as weaken the Scottish economy, as this bill will, should not be allowed to pass into law and I urge this committee to take heed of these concerns.

Kind regards,
1st September 2015

Clerk to the Education and Culture Committee
Scottish Parliament

Dear Colleague

I am the EIS representative (Convenor) at the Royal Conservatoire of Scotland. I wish to express my concerns about the proposed changes in the HE Governance Bill before the Scottish Parliament.

I believe that our current, governance arrangements best serve the needs of the students and staff of the Conservatoire.

High calibre, singularly effective individuals are invited, indeed persuaded to serve, and act in an active and engaged manner, making highly significant contributions to the current and future strength and purpose of the institution. Elected individuals, in particular key strategic role of the Chair would be a much riskier method by which to form a governing body, leaving much to chance in respect of vision, performance and contribution.

I do not think that mandated union representation will do anything but present a conflict of interest, even though the remit of any Governor in the proposed bill, and in existing legislation clearly sets out the duties and responsibilities. Furthermore it is my view that my members could see this as having 'a foot in both camps', thus making effective relationships between the management and union members more difficult. We currently enjoy very transparent Management and Governance in the Conservatoire, with much freedom of communication, opinion and indeed a good measure of free speech.

Yours faithfully

Martin Mallorie
Lecturer, Design & Props
School of Drama, Dance, Production and Screen
Submission from Professor Willy Maley

Dear Committee

I wish to comment specifically on the matter of Academic Boards.

It would indeed be unfortunate were the Charities and Trustee Investment (Scotland) Act 2005 to prove an impediment to democratic governance of our universities, some of which were founded while Scotland was an independent nation. I looked through the Charities and Trustee Investment (Scotland) Act 2005 – all 80 pages of it – and could not find the relevant phrase about court members being “collectively or corporately responsible for all the activities of the charity”.

I then checked against the Policy Memorandum and realised that this phrase actually comes from the Paragraph 3.9 of “Guidance for Charity Trustees” provided by the Office of the Scottish Charity Register (OSCR). The 16 Scottish university charities are all quite distinct as organisations from the other 23,935 charities registered in Scotland. Looking through that register I noted that of all the sixteen universities listed only Glasgow and the University of the West of Scotland have “Court” in their registered titles. Charities are very varied in their income and outcomes. Who would want to compare the £780,630,000 income of the University of Edinburgh with the £2 income of the Perth Academy War Memorial Bursary Trust? Are we really comparing like with like here? Our universities, ancient and modern, deserve better than this.

This Bill is really all about Higher Education Governance, and I would hope that better counsel could prevail in this instance. At the very least I would expect a reference to an Act in a Scottish Government document to be followed by a direct quotation from that Act. For example, I note that on p. 38 of the actual Act itself, under the heading “Charity trustees: general duties”, the law states that:

“(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
(c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee –
(i) put the interests of the charity before those of the other person”.

These strike me as sensible provisions. In this case “the interests of the charity” are the interests of the University, and since the business of the University is research and teaching it is essential that academic input is at least held in the highest regard.

If it does transpire that the provisions of the Charities and Trustee Investment (Scotland) Act 2005 do mitigate against the academic senate acting as final arbiter on all academic matters then the Act itself must be cited in support of such a conclusion. My own judgment – shared by many academics – is that Senate, the
academic body of the university is our parliament, our Holyrood, and should have the final say on all academic matters: the core business of the university, namely research and teaching.

Universities are not merely private institutions. Nor should their charitable status conceal the fact that they are largely publicly funded, and an integral part of the public sector. Indeed our Universities are civic institutions that are vital components of our public sphere and of a future democratic Scotland. From the outset of this consultation process it has been clear from statements by Professor Ferdinand von Prondzynski and former Education Secretary Mike Russell that universities, since they receive public funding, cannot behave like private companies. I sincerely hope that this latest loophole can be closed and that we can have the accountability, clarity and transparency in university governance that the von Prondzynski review promised.

Professor Willy Maley
Submission from Frances Manwaring

Dear Sirs

As an alumni of St. Andrews University, I am deeply concerned about the likely impact of the proposed Higher Education Governance (Scotland) Bill. At a time when tertiary education is more competitive than ever internationally and when our students need the very best advantages they can get from the investment they make in their further education, it seems nonsensical to introduce a Bill that will weaken the autonomy of Universities in Scotland and therefore risk impacted academic reputation with the flow on effects of losing their edge in the global market, negatively impacting their ability to attract the best students, staff and funding. Quite apart from my concern about the level of political influence that the bill grants government, which I don't agree with at all, I believe the bill will be bad not only for St. Andrews, and Scottish higher education, but also for the wider economy of the entire union. I would therefore urge the Government to rethink and scrap this unnecessary Bill.

Yours faithfully

Frances Manwaring
To the Committee Clerk.

Dear Sir/Madam,

I am writing to express my deep concern over the general import of the HE Bill which is to go before Parliament soon. This is a retrograde set of proposals and I suppose the key question is that posed to you by the Royal Society of Edinburgh: what problem is the bill addressing? Remember the golden rule, 'If it ain't broke don't fix it!' Scotland's Universities are working well for us, they are internationally renowned and form one of our great contributions to culture, knowledge and enterprise. It has always amazed me that successive governments of whatever colour fail to appreciate the quality of British universities. Only in the USA are there comparable strengths - check out the situation in our European partners or in China, India, Japan! Our Universities are envied for their independance from government and for their diversity. Of course they will always be seeking more funding and Parliament must decide how much they can receive from the public purse but freedom of action will continue to give the best return for such investment.

Yours sincerely, Professor Aubrey Manning,
Submission from Claire Martin

Dear Sir/Madam, I am emailing to register my protest against the above bill, and its impact on the University that I had the enormous privilege of attending. My reasons for protesting against the bill are as follows;

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Yours faithfully,
I wish to state my objection to the above Bill which seeks to curtail the freedoms enjoyed by the great universities of Scotland and to politicise higher education in Scotland.

My great uncle, Sir James Irvine, was one of the greatest Principals of the University of St Andrews and my grandfather was Professor of Modern History. I was a student at the University from 1965-1969 graduating with MA (Hons) in Modern History.

The proposals made in this Bill seem to me to interfere in the great academic traditions of our world-renowned Scottish universities to their detriment and will cause untold damage to their international reputation and standing. They put at risk the financial viability of Scottish universities and threaten their ability to attract students, academic staff and funding. These proposals are pointless and should be dropped forthwith.

Caroline Marriage
Submission from R H McDougall

Dear Sir,

I was somewhat surprised to learn that the Scottish Government intends to introduce a Higher Education Governance Bill, as I was not aware that the running of our universities was giving rise to problems. Further investigation resulted in the following thoughts:

1. Legislation is supposed to address some problem or deficiency in the current situation. Unless the problem is explicitly defined, we cannot know what needs to be done to solve it, or the extent to which any proposed solution has been successful. The Bill puts forward proposals without defining the problem: this may confirm that there is no real problem and the Bill is simply Government interference. The fact that some silly proposals have already been withdrawn adds credence to this.

2. Perhaps someone has felt the need to do something just for the sake of being seen to be doing something. Wiser heads accept that if it ain't broke there is no need to fix it.

3. Scottish universities have been in existence for centuries (unlike the Scottish Government). Their autonomy has enabled them to develop over time structures, procedures and traditions which differ over institutions. These confer a unique character on each university, and, more importantly, have stood the test of time. Why seek to impose uniformity? The imposition of "one size fits all" solutions has contributed to the shambles which is the European Union.

4. Universities have developed ways of giving different constituencies a say in their governance, and the imposition of political correctness is unlikely to improve matters. The present proposals could be the thin end of a wedge leading to increased, and dangerous, political control. Furthermore, the need to amend existing statutes could be difficult and expensive, and, ultimately, probably to little effect.

5. Educational institutions are ultimately judged by their academic performance. The reputation of Scottish institutions is high, and the Government should be chary of risking any adverse effects through interference in their administration.

6. Having spent my entire career in higher education, albeit in England, I have witnessed the efforts of various Education Ministers. My overwhelming conclusions are:
   [a] politicians do not understand higher education, and
   [b] changes tend to be made for political, not educational, reasons:
   in other words, they benefit the government rather than the institutions and their staff and students.
7. The record of the Scottish Government in other levels of education does not inspire confidence in its ability to improve higher education.

8. There are plenty of **obvious** problems affecting Scotland today. Why is the Government devoting time, effort, and money to a non-problem?

Yours faithfully,

*R H McDougall*
BSc, PhD, CChem, FRSC
Submission from Daphne McFarlane

To the Clerk to the Education and Culture Committee

The Scottish Parliament

Dear Sir

As a graduate of the University of St Andrews I wish to express my opposition to the proposed Higher Education Governance (Scotland) Bill.

1. Greater government control over the Scottish Universities will result in extra unnecessary regulation.

2. The independence of St Andrews is vital for the maintenance of its high academic reputation.

3. St Andrews is now able to attract the best students and academic staff in the global market. To enforce greater consistency among institutions would reduce the individual strategies adopted by each. This would seriously affect the unique individual enterprise of St Andrews and its contribution to the Scottish economy.

I consider that this Bill is a retrograde step in the development of Scottish Higher Education and hope that more consideration will now be given to its likely negative effects.

Yours faithfully

Daphne McFarlane (Mrs)

MA Honours French and German
I acknowledge that this submission is late, but would be grateful if the Committee would record my concern.

As a former and current student of the University of St Andrews, I have concern about the implications of this Bill. Academic freedom and financial independence seem to me to be utterly vital to the character of the university. No one, surely, wants direct political influence in such institutions. I cannot imagine what honest motive the Government might have for pursuing this.

As you will know, the University believes that the proposed changes will seriously hamper its ability to attract academic staff and funding. These serious concerns and others are echoed by the RSE. The real damage caused is likely to emerge in the medium to longer term.

I encourage the Government to withdraw this Bill.

Scott McKenna
September 2015
Submission from Katherine McWilliams

To whom it may concern,

My name is Katherine McWilliams and I am a 2013 graduate of the University of St. Andrews and member of the General Council.

I would like to formerly submit my outcry and condemnation of the Higher Education Governance Bill currently under consideration. This bill would restrict the ability of higher education institutions to oversee their own governance and competitive strategy. It is not the place of the Scottish government to exercise any greater control over Scottish higher education institutions - certainly not at the current rate of funding.

I urge you strongly to dismiss this bill without another thought.

Kind regards,
I wish to register my opposition to the provisions of the Higher Education Governance (Scotland) Bill, which is due to be debated by the Scottish Parliament this autumn. In summary my objections include the following:

The autonomy of the senior Scottish universities would be greatly weakened and they would be vulnerable to direct political influence.

By enforcing greater consistency among higher education institutions, the new legislation would affect their ability to adopt individual and innovative strategies.

Scottish universities would be burdened with extra regulation and bureaucracy.

The role of Rector, the democratically elected representative of the student body, would be undermined.

Andrew McMillan BSc (St Andrews), CGeol, FGS
September 2015
Submission from Julia Melvin

Dear Sir

Re: Higher Education Governance (Scotland) Bill

I am a graduate of the University of St Andrews, as have been 4 generations of my family. I write to protest in the strongest possible terms to the proposed legislation which I consider would destroy those very institutions of which Scotland should be most proud: her universities, and in particular her ancient universities.

I can claim some perspective on this. Very recently I wrote the biography of Sir James Irvine, who was the greatest of the 20th century Principals of St Andrews. (James Colquhoun Irvine, pub. John Donald 2011) My book gives an overview of the 20th century history of the university and its governance; of how hard St Andrews fought at this time to retain academic autonomy and how this strength has led directly to the current, distinguished academic position that the University of St Andrews now holds. Its governance, honed and refined over the decades of the 20th century has reached at this time its apogee. Keep it that way.

Unlike the universities south of the border, the governance of the four ancient Scottish Universities is a democratic one, but not in any political sense. Politics has no place in the Athenian ideal of higher education that is offered in the Scottish universities. Good governance in any institution is multilayered: so it is with St Andrews, where for instance the role of Rector is not merely decorative, it is a deeply cherished element of that governance.

To tamper with the Scottish Universities, the jewel in Scotland’s crown, is to run the almost certain outcome of grave loss to Scotland’s economy. The heavy hand of the State would have the tendency to stifle the enterprise culture that is so alive in these universities; any political manipulation of our universities would have the effect of lessening academic prestige and the freedom to look for the best academic staff and the best students.

This Bill represents the very worst of parliamentary posturing and tampering. Since long before the Enlightenment, Scotland has illuminated the rest of the world with the power to think independently and penetratingly.

DO NOT THREATEN THAT PRECIOUS INDEPENDENCE; LEAVE OUR UNIVERSITIES ALONE.

I remain

Yours faithfully

Julia Melvin
Submission from Dr James Miller TD

Dear Sir

I’m writing to you, as a graduate of the University of St Andrews (1979), to express my sincere concerns regarding the Higher Education Governance Bill, and especially its potential effects upon the University of St Andrews.

I consider that the autonomy of the University may be significantly weakened. It may become vulnerable to unhelpful, and even dangerous, direct political influence. As a consequence, it may lose its edge as a leading British university, in a global market, and thus fail to attract the best students, the best academic staff and funding. As a consequence, its academic reputation could well suffer significantly. This would be bad for St Andrews, for Scottish higher education, for the economy, and for the United Kingdom. I believe that it is not only potentially harmful, but it is unnecessary, with no obvious potential benefit.

Yours sincerely

Dr James Miller TD
Submission from Lesley Monaghan nee Toft.

Dear Sir,

I have been dismayed to learn of the proposals for bringing ‘consistency’ to higher education institutions in Scotland. I graduated from St. Andrews in 1961, and have always been grateful for the opportunity to attend a university that was, and still is, outstanding in Scotland, the UK and the world. I read the bulletins with pride, knowing that St. Andrews still holds a high position in all the ‘league tables’, and contributes greatly to the sum of human knowledge through its research in a wide variety of fields.

With the proliferation of places of higher education throughout Scotland, and the target of having 50% of students taking degrees, it is naive in the extreme to believe that standards across the board will remain as high as they were in my day. If the aim of this bill is to create ‘greater consistency’ among institutions, there will inevitably be a race to the bottom as far as standards of teaching and learning are concerned. One does not make people more intelligent simply by conferring degrees on them.

The other aspect of these proposals that disturbs me is that universities will inevitably lose their independence, and presumably be overseen, scrutinised, judged and taken to task by civil servants, whose aims may well be more political and financial than academic. Universities should aim to foster academic excellence and rigorous research. This bill will foster bland mediocrity!

Yours,

Lesley Monaghan nee Toft.
Higher Education Governance (Scotland) Bill – Submission from Margaret Morton, Co-opted Member, The University Court, University of Glasgow

Submission to the Scottish Parliament's Education and Culture Committee

I write as a lay member of The University Court of The University of Glasgow for over five years, Chair of Estates Committee and a member of Finance Committee to express significant concern regarding the content and implications of the Higher Education Governance Bill. My background experience is across sectors, including as a partner in the commercial property department of a major Scottish law firm and as Head of Fundraising at Barnardo’s Scotland.

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

I do not believe there are existing problems with higher education governance, in particular around modernity, inclusion and accountability, which require legislation.

1. Universities are required to review governance regularly to ensure governance is accountable, effective, inclusive, and relevant to changing times. This includes an annual review of compliance with the Scottish Code of Good HE Governance and a five yearly externally facilitated review of the governing body's effectiveness.

2. Governing bodies are accountable: to Scottish Government through the financial memorandum and outcome agreements, which require compliance with the Scottish Code of Good HE Governance as a condition of funding from the Scottish Funding Council; to the University community, which is strongly represented on the governing body; and to the wider community. Wider community engagement has been seen at Glasgow, for example, in the extensive consultation the University's governing body has undertaken on the Campus Estates Strategy.

3. Governing bodies are inclusive and modern. At Glasgow, for example, the Court includes independent lay governors drawn from a wide range of backgrounds from across the public, private and not-for-profit sectors and also internal members from across the University, including academic staff, support staff and students.

4. Governance is strong and is regularly reviewed. It is not clear from the Bill and its accompanying documents what the Scottish Government believes is wrong with higher education governance and why it feels a need to legislate in this area.
The extent to which the Bill

a. will improve higher education, particularly in the areas above

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

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

1. The proposals within the Bill will not improve university governance. Indeed, they present serious risks to the independence of universities and their ability to contribute to Scotland's future success.

2. Universities have a high degree of independence from the Scottish Government. This is important if they are to continue to be ambitious institutions that contribute strongly to Scotland's economy and society. In the Consultation Paper on the Bill, Government stated clearly that it understood the importance of university autonomy and said that it did not intend to increase Ministerial control. However, in direct contradiction to this, the Bill proposes a very substantial increase in Ministerial powers over universities.

3. The proposals, in Sections 8 and 13, to give a Scottish Government Minister power to determine the future composition of a university's governing body and academic board are alarming and would undermine the independence of universities.

4. A possible consequence of increased Ministerial powers is that Scotland's universities could become classified by the Office of National Statistics as 'Central Government' bodies and, as such, would be required to live within constraints in relation to annual public spending allocations and borrowing. This would seriously curtail entrepreneurial activities and reduce the benefit they bring to Scotland and their competitiveness with other UK universities.

5. At Glasgow, we have recently committed to a £450M programme of capital investment in the campus over the next ten years, which will also have a major impact on the economic wellbeing of the city. We are funding this largely through the University's own enterprise in generating private income and running annual surpluses retained for investment. This enterprise and investment would be jeopardised by the proposals in the Bill. The funding strategy for this investment is not reliant on Government capital funding: £250M is to be funded by historic and future operating surpluses; £100M by new borrowing; £50M by property sales; and £50M by philanthropic giving.
6. Universities' status as independent charities could be threatened by an increase in Ministerial powers. Lost charitable status would have difficult financial consequences, including increased taxation and reduced/no philanthropic income.

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

I believe the current balance between legislative and non-legislative measures is correct. Legislation requires compliance with the principles in the Scottish Code of Good HE Governance. The Code is a well-considered document that establishes clear principles but allows for diversity of practice across a range of diverse institutions.

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

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

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

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

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

1. At Glasgow, the governing body is currently in the process of recruiting its next Chair. In doing so, we are following the transparent, inclusive and robust process required by the Scottish Code of Good HE Governance. The job description was approved by the full governing body. The position has been advertised widely externally and the University has explicitly stated that it would like to invite candidates from a diverse range of backgrounds. The selection process will involve an interview panel including include lay members of Court, a member of academic staff and a student. It will make its recommendation to the full Court, a diverse body including staff, students, alumni and independent members, for decision.

2. It is important that the final decision on the appointment of the Chair is made by the governing body to ensure the appointee will have authority with the governing body and also so that, should the Chair fail to address the duties of the role effectively, the governing body will be in a position to terminate the appointment.

3. The proposal that a Minister should make detailed requirements regarding the composition of a governing body is inappropriate and fails to allow for the diversity of practice that currently exists, and should exist, across universities.
4. The inclusion of representatives of trade unions on universities’ governing bodies would constitute poor governance. Governing bodies currently include staff representatives, who have influence because they are chosen by the staff of the university. Trade union representatives would be chosen by unions to represent the interests of the trade union, which would be counter to good governance. It is of fundamental importance that all governing body members exercise their judgment in the best interests of the University and not as a representative of another body.

5. It is inappropriate for a Minister to determine the composition of a university's academic board or Senate whose responsibilities focus on core academic issues, such as curriculum and academic standards. This is a matter of internal governance.

**Academic Freedom**

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.

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

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

Margaret Morton
3 September 2015
Submission from Susan Moore

I am writing about the Higher Education Governance Bill and wish to lodge my opinion that this would be a disaster for Scottish universities, in particular for St Andrews. I graduated from St Andrews many years ago, but follow its progress in the world with great pride and would be very sorry to see its independence in any way jeopardised. The proposed bill can in no way enhance the high international reputation that St Andrews holds, and will threaten its ability to attract the highest calibre of lecturers, researchers and students.

I therefore urge you to drop this bill which cannot help St Andrews in any way.

The independence and quality of its universities is something that Scotland should be proud of, not something to be threatened.

Best wishes

Susan Moore
I would like to comment on one particular aspect of the proposed Bill, namely the removal of the explicit statement that the Academic Board of each University will remain the final arbiter on academic matters.

Especially in the old universities of Scotland, Senate (the Academic Board) has served as an essential regulatory authority in all matters relating to the academic core activities of each university, as prescribed in legislation going back more than 150 years, and inherent in the old universities even longer than that. To have final authority in academic matters taken away from the Academic Board would substantially undermine the academic integrity and strength of each university. The impact of such a measure should not be underestimated: the vitality and development of a university depends to a large extent on the ability of its academic community to directly influence decision-making on educational and research matters. The Court or Governing Body is not equipped to deal on its own with academic policy at this level. If the Governing Body is given final and absolute authority over all aspects of university governance, fundamental and long-term academic judgment would undoubtedly be marginalised by managerial interests.

This is not a worst-case scenario, but a real and present risk, clearly demonstrated already for example at the University of Glasgow. There, Senate (the Academic Board) has worked with Court, in constructive partnership often involving protracted negotiations, to find solutions acceptable to both the academic and managerial interests of the University. As in modern democratic governments, having a separation of powers is not only beneficial, but essential, and ensures a measure of accountability and consensus without which government would lose all credibility. Universities, too, are very complex institutions with major academic, financial and public responsibilities which can sometimes appear to be difficult to reconcile. To have final and arbitrary power located solely in the Governing Body, many of whose members by their own admission are not aware of the full academic implications of some of their decisions, would risk damaging Scottish universities permanently.

The explanation for the removal of this part of the legislation, as offered in the accompanying Policy Memorandum, is wholly inadequate. To change the whole governance of Scotland's leading academic institutions merely in order to comply with OSCR guidelines, which are naturally designed for all kinds of charitable bodies, is totally unacceptable and absurd. It would surely not be difficult to devise a simple exclusion clause, exempting universities from this particular part of the Charities and Trustees Investment (Scotland) Act of 2005. I totally accept that Scottish Universities do need to comply absolutely with the requirements of their charitable status (which is very important) - but to make one particular detail of Charity regulation the reason for changing the fundamental balance of good governance in all of the Scottish universities would be a disastrous misapplication of this regulation, way beyond its original intent and purpose.

I sincerely hope the HE Governance (Scotland) Bill will be amended, to ensure that the Academic Board of each of Scotland's great universities will continue to have final authority in all academic matters. This is essential for their future strength, and for the well-being of research and higher education teaching in Scotland.

Thomas Munck
Professor of Early Modern European History
University of Glasgow.
Submission from Frank Lorenz Müller

Dear Sir or Madam,

As an academic and researcher working for one of ancient Scotland’s universities I am writing to you to express my deep concern about the “Higher Education Governance (Scotland) Bill” currently being deliberated on by the Scottish Parliament.

While I am finding it hard to see which specific and pressing problems the proposed legislation is designed to tackle, it brings with it significant risks for the success of the great institutions that make up Scotland’s thriving tertiary education and research sector.

I am seriously worried that the provisions of the bill will be detrimental to the independence and individual distinctiveness of Scotland’s universities, will increase the risk of governmental intervention, will favour "consistency" over variety, will jeopardize academic freedom by establishing the practice of having this crucial notion defined by politicians and – as a consequence – will damage the international and scholarly standing of our great universities.

As you will no doubt know, the Royal Society of Edinburgh, Scotland’s national academy of science and letters, has characterised the proposals as “inappropriate, unnecessary and potentially counter to good governance”. The RSE concluded that there was "neither need nor justification for additional legislation or government intervention".

As someone who is proud to make a contribution to our thriving and diverse university sector, I would like to urge the members of your committee and the Scottish Parliament more widely, to take seriously these grave concerns about the proposed legislation.

Yours faithfully,

Frank Lorenz Müller
I write as a member of the General Council of the University of St Andrews to express my deep concern and reservations with regard to The Higher Education Governance (Scotland) Bill and to request that it is withdrawn.

My concerns are as follows:

1. No evidence has been provided of serious and systematic deficiencies in the governance of Scotland’s higher education institutions to merit additional government influence and control that will undermine the autonomy of the sector.
2. The proposed regulation places an additional administrative and financial burden on higher education institutions with no clear governance benefit, and puts in place requirements that in practice would be contrary to good and accountable governance principles.
3. Additional government influence runs undesirable fiscal risks; these may result in significantly increasing the financial burden on the Scottish Government of financing the higher education sector and erode the benefits delivered to the national economy.
4. There is no demonstrable need to redefine academic freedom, as this is already a statutory obligation.

Need for additional government oversight

It is understandable that the Scottish Government and Parliament seek to ensure the highest standards of governance within the higher education sector. The Scottish Code of Good Higher Education Governance has prompted ongoing review and modernisation of governance in the sector in a way which permits each institution to retain autonomy and adopt governance principles which best reflect its own constitution. In the absence of demonstrable evidence of significant governance failures I struggle to understand the value of imposing additional homogenising legislation. I fear that unjustified government intervention will at best weaken existing good practise and at worst undermine the ability of institutions to attract the best students, academic staff and research funding.

Membership and Leadership of Governing Bodies

The Bill’s proposals with regard to membership of institutions governing bodies do not take into account the fact that members of these governing bodies are charity trustees and bound at all times to put the interests of the charity before their own interests, or those of any other person or organisation. It is entirely inappropriate, and contrary to best governance practice, to prescribe representation from specific interest groups, especially if this may put members in conflict with their primary function within the institution.
Competent leadership of the governing bodies is essential to their proper function. To achieve this the chair must have the confidence and support of the membership. The Bill’s proposal that the chair should be appointed by a wider constituency than the membership of the governing body may seriously jeopardise this confidence and is in opposition to current understanding of good governance practice. It is akin to legislating that the First Minister should not be nominated by Parliament. The proposals as framed additionally risk unnecessary politicisation of these roles and may promote short-term interests un-aligned with those of the institution. In the case of those governed by the Universities (Scotland) Acts from 1858 the proposals are less democratic and accountable than those processes already in place. I also question whether this proposal is in accordance with the OSCR’s regulations for charity governance.

I can see no demonstration that the Bill’s proposals in relation to these functions would contribute to enhanced transparency and democratic accountability and worse could result in outcomes that seriously undermine the operational effectiveness and ultimately the international standing of globally recognised institutions.

Fiscal Impact

The proposals in the Bill additionally risk unintended financial consequences. I believe that in the case of St Andrews, less than 25% of its annual revenue comes from the Scottish Funding Council. Additional legislation may be viewed as imposing undue government influence with the consequence that the Scottish higher education institutions, which are currently independent, are brought on to the Government’s balance sheet. This risks deterring or indeed rendering impossible other important sources of income including research grants, enterprise initiatives and endowments. It may also jeopardise the institutions charitable status. This would consequently put an additional financial burden on the Government to maintain the higher education sector.

Academic Freedom

The principle of academic freedom is already a statutory obligation. Introducing a requirement to ‘explore new ideas’ seems tautological in the context of institutions whose priorities are education and research.

In the absence of any evidence of poor governance there is neither need nor justification for additional government intervention. This Bill at best imposes a costly administrative burden and at worst undermines the principles of academic autonomy, weakens internationally recognised institutions and undermines their fiscal stability. I therefore request that it is withdrawn.

Jennifer Murray
September 2015
Submission from Susan Murray

Dear Sir,

I am horrified to discover that the Higher Education Governance Bill for Scotland contains so much that is against the principles of individual universities having their own authority.

This is a shocking introduction of state interference. The way universities flourish is for them to develop their strengths themselves, and not be watered down to the lowest common denominator. It is best left to each university to find its own area of excellence and pursue that, which in itself will encourage the high fliers and good brains to seek that university.

This will water down the very high standards of the best of Scottish universities, including my own, St Andrews. Fewer students of high calibre will be attracted, and the best brains will go elsewhere...to England or USA.

I am amazed that the Scottish Government can want to introduce this. Perhaps they have not thought it through. I hope there is still time for deliberation and change.

Yours faithfully,
Submission from Professor Peter Mills  
Higher Education Governance (Scotland) Bill

Dear Sir

I am writing to protest the introduction of the planned Higher Education Governance Bill which proposes to modify the academic structure of Scottish Universities. Our Universities are leaders in the Scottish reputation for excellence in teaching and research and bring in substantial income to Scotland by attracting overseas students and large research grants to the benefit of our economy and wider social standing. This reputation could be put at risk by imposing changes in their structure which seem unnecessary and counter to the recommendations of most Academic Bodies in Scotland. My own Universities of St Andrews and Glasgow are very concerned about the impending bill which is inappropriate and will adversely affect the independence, reputation and flexibility of Scottish Universities within the tough markets for Higher Education and Research.

Peter Mills

Professor Peter R Mills
Dear Committee Clerk,

I would like to express my unequivocal opposition to the Higher Education Governance Bill. I think the bill is damaging to the higher education sector in Scotland and to the people of Scotland in general.

I believe that the proposed bill undermines the necessary independence of the university, and if it passes it will result in a weaker higher education sector. One of the most important functions of the University is to offer alternative views and toanalyse reality in alternative ways. Any increase of governmental control over the governance of the university will constrain and damage the ability of academics to do their job independently; even very subtle interventions can have a lasting damaging impact.

This effects will trickle down to the quality of education and the ability of students to be critical thinkers, a skill that is increasingly necessary.

There are many examples in the world of the consequences that government influence in academic institutions can have, including my own country of origin, Spain, and the former Soviet Republics in the twentieth century. The academic institutions in neither of these examples have been able to recover yet from their intervention. I am not suggesting that the bill will be as dramatic as these two examples, but any step into those directions, even by a democratically elected government, is a step in the wrong direction.

Sincerely,

Miguel Nacenta
Dear Committee members,

I am writing in my personal capacity as an academic at the University of St Andrews. I am currently elected by my science and medicine professors as their representative on the University Court. I am a scientist and my published work is public record.

I have already responded to the public consultation. I prefix my responses with some general comments.

Scottish Universities are over-represented in the top of the world rankings based on population. Scotland produces a disproportionate share of the world’s scientific research including that which is most influential. Scottish Universities attract students from over the world to study at them, bringing prestige and income to Scotland. Scotland’s civic society has remained distinct from an English or British one, precisely because its civic institutions have remained outside the control of government. The Scottish government has said ‘Higher education in Scotland is the mainstay of our knowledge economy and makes a significant contribution to the economic success of the nation. Yet it is not just about the economy: higher education in Scotland is a civilising force which has had a major influence on creating the country and society we are today.’

Scotland has a diverse University sector and as might be expected has different governance arrangements. One of the most disappointing aspects of the original Prondzynski report, the consultation, the Bill and accompanying comments has been the lack of research to identify best practice, problems and comparators. I struggled to find any evidence that other systems were serious considered? Scotland’s Universities took their inspiration, as did many of its public bodies, from overseas; why has this tradition been neglected. Public institutions in America, (the University of California system in particular), in England, in Switzerland, in Australia and New Zealand are well represented in the higher reaches of league tables. Their governance is de facto and in some case de jure highly autonomous from their funding governments. One does not prove the other, but surely a sensible process might have sought to test correlations.

In reading some of the contributions to the report, the consultation, the Bill and the accompanying papers it is hard to avoid the conclusion that for many they worked backwards from predetermined desired outcomes rather than make any serious attempt to analyze the current situation. Change of this magnitude surely require the most serious consideration?

Questions are in italic, responses in bold.

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

The Scottish Government has pointed out the strengths and benefits of the Scottish University system. No such evidenced report exists for the problems, therefore it is unclear what problems the Bill even attempts to solve.

At St Andrews, academic elected members are gender balanced and include self-identified member(s) of the LGBT community. This is an ‘accident’ of the electoral process, the students who are also elected by their community are currently all male. Free elections do not always produce entirely representative results, this is a feature of democracy.

2. The extent to which the Bill
(a) will improve higher education governance, particularly in the areas above
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

(a) Nowhere has it been articulated the problem the Bill seeks to solve. So the answer is the Bill can not improve governance.

(b) The Bill confers upon Ministers the power to regulate by secondary legislation University governing bodies and senates. Whilst the current elected Government has given assurances it would not interfere in Universities for political ends, it cannot bind its successors. History shows that powers given to an Executive will be used for political ends when there is a political advantage. By granting Minister the right to use secondary legislation and the use of broad language, autonomy in practice as a meaningful concept is extinguished. Upon enactment of un-amended Bill, autonomy is dependent upon the whim of the Executive. I would note, this is contrast to other developed nations which have sought to enshrine autonomy recognizing that the political process is ill-suited to the direct control of complex institutions with long-term horizons such as Universities. The democratic will, I argue, is legitimately and best exercised through an arms-length arrangements where broad principles laid out by elected representatives are turned into detail by autonomous Institutions.

(c) By taking such powers, Ministers will ensure they personally become the ultimate arbiters of the sector. This is a role they are unsuited for, have even less time for and will, therefore, be delegated to officials. The broad powers envisaged will ensure that the job preservation instincts and short-term political considerations come to dominate the behavior of University governing bodies.

Whilst no one can prove these changes will damage the University system, it seems in my judgment highly likely they will. I would have though the onus to show any major changes will actually benefit Scotland and its Universities should fall upon those who advocate changes.

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

That the Scottish Parliament is now debating a law which determines the size of senate reach, gives Ministers extensive undocumented powers to regulate governance (through an enabling Act mechanism) and favours specific political constituencies is evidence of legislative overreach. This legislation will reduce University autonomy to an empty phrase, it would be better and more honest if the problems of autonomy were articulated to justify its destruction.

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

University Chairs, as a condition of funding, are already appointed in an open way by the code of governance. For what purpose need Scottish Ministers take powers to regulate who may or may not be appointed and control the process that leads to appointments?
The disenfranchising of non-unionized staff seems retrograde in terms of promoting an inclusive environment.
No evidence is adduced that this number is anything other than a figure plucked at random and quite why it is to be the business of government Ministers is beyond my understanding. On what basis is the judgment of Ministers and officials to be substituted for Academics and students in determining education standards at world leading Universities?

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”.

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.

As an academic with over twenty years of service at St Andrews, it will not enhance any research or teaching that I am aware of at St Andrews. In fact, I have for my entire career felt free and used this freedom to critique University decisions on academic grounds. In writing this letter, I am exercising my academic freedom. For the first time in my career, I have considered the consequences of doing so.

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.

At St Andrews, there are none. Civil debate is supported and encouraged. The legislation will in time reduce academic freedom.

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?”

Yes. Academic freedom is clearly understood to protect a person from Government or University sanction for researching any topic or expressing a view grounded in academic expertise. Freedom of belief (the right to private views) is likewise protected. For example, although science entirely discredits creationism, no test of religious belief is applied to any member of scientific teaching staff.

To summarise, it is my belief that the analysis and research that went into the report, the consultation, the Bill and the accompanying notes would reflect poorly on any any developed country. That they
have emerged in a country with world renown for its intellectual endeavors is a source of regret.

It is my hope the parliament will save the Government from itself by amending the Bill to ensure Scotland does not extinguish University autonomy.

Yours sincerely,

Professor James Naismith
Dear Colleague

Higher Education Governance (Scotland) Bill

We write as stakeholders in, and friends and supporters of, the Royal Conservatoire of Scotland. The Conservatoire is a unique cultural and educational institution and we believe that its status merits singular consideration when considering governance arrangements. We are therefore concerned about the intention to introduce legislation that aims to achieve greater consistency of approach to governance across what is a diverse higher education sector.

Membership of the Conservatoire’s Board encompasses the skills and insights required to guide the development of a national cultural asset – it includes appropriate representation from the cultural sector. We would therefore question the wisdom of what is being proposed in terms of mandated membership for certain groups and the election of the Board’s Chair, which strike us as being overly prescriptive. An election process would inevitably lead to the unwelcome politicisation of the role of Chair and, quite possibly and quite unnecessarily, sow the seeds of division in a small and tightly-knit community.

Our level of engagement with the Conservatoire is positive and we welcome the Conservatoire’s initiative in inviting key stakeholders to its AGM, which presents an opportunity to hold the Conservatoire’s Board, and its Chair, to account in a transparent manner.

.../...
We greatly value the pivotal role that the Conservatoire plays in Scotland’s cultural life. It is a Scottish success story and its governance should be judged on what it delivers. On that basis, we would fundamentally question the need to introduce new legislation in respect of the Conservatoire’s governance at all.

Yours sincerely

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<tr>
<th>Fergus Linehan, Director</th>
<th>Roy McEwan OBE Chief Executive</th>
<th>Kenneth Osborne&lt;br&gt;RSNO</th>
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<td>Edinburgh International Festival</td>
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<th>Alex Reedijk FRC General Director</th>
<th>Laurie Sansom Artistic Director &amp; Chief Executive</th>
<th>Christopher Hampson, CEO/Artistic Director</th>
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Introduction

NUS Scotland has, for many years now, been calling for increased democracy, transparency and accountability within Scottish universities (and colleges, where student representation, particularly, saw some great successes through a much more inclusive approach to developing a code of good governance than was seen in universities), and we were a full member of the von Prondzynski review of higher education governance, and very supportive of that report’s recommendations.

While the Post 16 Education (Scotland) Act, and the legal requirement that gave for universities to adhere to principles for good governance as a condition of grant, and the Scottish Code of Good HE Governance that resulted from that, were a move towards better governance structures and processes, we believe the latter fell short of introducing a strong enough framework for ensuring that basic democratic principles are followed by all HEIs, across the board. We fully endorse the notion of ‘responsible autonomy’, but believe that the balance has tipped too far away from responsibility. It is absolutely right that our universities are in receipt of over a billion pounds of public funding each year, but we must see greater public responsibility in return for this.

In summary:

- We believe the Bill presents an opportunity, through legislation, to address three main shortcomings with higher education governance: a lack of a genuine democratic culture in governing bodies; a lack of transparency and accountability over how decisions are made, and who makes them; and, a lack of fair representation and diversity on governing bodies.
- An attempt at voluntary, self-regulation—through the Scottish Code of Good HE Governance—has failed to result in the changes in culture and practice we believe are necessary to address the above shortcomings, and legislation is now required.
- Defined places on governing bodies for staff and student unions is to be welcomed, enhancing the representativeness and transparency of governing bodies.
- We wholly support the principle of elected chairs of governing bodies. Far from abolishing rectors, or diminishing the democracy of our institutions, elected chairs would ensure a genuine, democratic say, for staff and students, in the leadership of the governing body, who should be working on their behalf.
- We remain unconvinced of the need for an election/selection panel, and would not want to see unnecessary bars or limits placed on any candidate. However, if there is to be any sort of panel, there must be a triple lock protection: full transparency around that panel and their decisions; no institutional involvement; and, it should not attempt to identify preferred candidates.
The Bill still falls short of the original von Prondzynski review in two key regards: improving the diversity of, and fair representation on, governing bodies, and tackling senior level pay.

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

The von Prondzynski review (2012) clearly stated in its opening paragraphs that despite the complex legal framework on the status of HEIs in Scotland, our HEIs are independent public bodies, and therefore are not accountable to private shareholders, but to students, staff and wider society. Our universities are, rightly, in receipt of well over a billion pounds of public funding each year, however, we believe they could and should do much more to evidence their public good in return for this funding.

NUS Scotland believes that the best way to ensure this accountability is to open HEI governance to democratic participation. Students and trade union representatives should be involved at every level of institutional governance, and decisions should be made transparently to ensure opportunities for public scrutiny. We work closely with member students’ associations, and have identified a number of shortcomings in the current governance arrangements of HEIs in these areas. These include: a lack of a genuine democratic culture in governing bodies; a lack of transparency and accountability over how decisions are made, and who makes them; and, a lack of fair representation and diversity on governing bodies.

**Lack of democratic culture on governing bodies**

Through our work with member students’ association, we have consistently come across problems with associations being able to genuinely engage in the governance of their institutions. While many students’ association are able to take part in university court meetings, many student representatives feel that these meeting act merely as a rubber-stamp exercise to validate decisions that have already been taken by the Principal or at committee level.

This problem is often reinforced by the appointment process for chairs and lay members of the court. Chairs, whose role ought to be to foster informed debate, are often appointed with little scrutiny or input. At present there is a trend within institutions to simply appoint from within the governing body, which we believe should never necessarily be the standard. While it may at times might be fully appropriate to appoint from within, particularly at turbulent times, universities are ever evolving places, and this should include the evolution of the role of chair, ensuring that fresh talent is brought in. To do otherwise means we run the risk of creating a revolving door.

Too often, senior managers will make up a majority of those in attendance at meetings, and as such the majority of conversation. While we recognise they are non-voting, we are unaware of any major instances of votes actually being taken at governing bodies, and they do retain full rights to...
speak to agenda items. It is vital that the lay members and staff and student representatives are the ones who set the tone and direction of meetings.

**Lack of transparency over decisions**

In addition to a lack of participation and democratic culture on governing bodies, there is a distinct lack of transparency over governance decisions. This leaves little opportunity for genuine democratic decision-making where a multitude of views are taken into account. The impact of this type of decision-making is exemplified by the ever-increasing principals’ pay packages in Scottish HEIs.

Decisions on senior management pay are usually taken in remuneration committees, which more often than not comprise solely of members appointed from the governing body, and the Principal themselves, in some instances even remaining in committee during discussions related to their own pay. This means there is little oversight, few opportunities for scrutiny by the wider community and often non-existent involvement of staff and students. Because there is no legislative requirement to allow student and staff participation on all committees, student officers have to often spend a considerable amount of time arguing for their right to participate in these committees. For example, the University of Aberdeen Students’ Association only secured an observer place on the university’s remuneration committee after a number of years’ of asking to be included.

Furthermore, even where institutions publish information on decisions as an exercise to increase transparency, students and staff are often unable to scrutinize the work of committees or working groups prior to when decisions are made. For example the student-led campaign that called on the University of Edinburgh to divest from armaments and fossil fuel companies struggled to find information on the university’s investment review and decision on divestment. More pressingly, in a context of governance reform, as discussed below, NUS Scotland believes that staff and students should have a seat on remuneration committees, to provide greater transparency and representation when it comes to senior pay. A freedom of information request to all Scottish universities revealed some extremely worrying trends, including 70% of universities refusing to release the full minutes of remuneration committee meetings where principal pay was decided.

**Lack of fair representation and diversity on governing bodies**

We believe that all governing boards would benefit from a balanced membership that reflects the composition of the group of people the body takes decision on behalf of. As highlighted by research conducted by NUS Scotland in 2014, despite recommendations made through the HE Code of Good Governance, university courts are still dominated by men¹. We do not believe the current approach of self-regulation is sufficient to ensure fair representation on boards, and will be calling on the Scottish Government to legislate on 50% women representation on all boards of public institutions.

¹ [http://www.bbc.co.uk/news/uk-scotland-28513539](http://www.bbc.co.uk/news/uk-scotland-28513539)
Governing bodies also suffer from a lack of diversity in terms of wider protected characteristics, and a failure to properly reflect the diversity of the populations they serve. Despite a recommendation from the code of good governance that institutions should monitor and report on the diversity of their governing bodies, there is no statistical evidence currently held and many of our member students’ associations have also raised concerns over the lack of diversity of professional backgrounds of court members.

The extent to which the Bill will improve higher education governance

**Elected chairs of governing bodies**

NUS Scotland recognises that the Chair of the governing body holds an important role in the governance of our HE institutions. We believe that as leaders of our institutions, chairs should come from diverse backgrounds, have the confidence of the institution’s most important stakeholders (staff and students), and be elected in a democratic manner.

In order to ensure that the Chair is chosen in a democratic and transparent way, and that they will represent the interests of all key stakeholder of an HE institution, students and trade union representatives must lead every stage of the selection process. We fully support increased transparency and democracy of governing bodies, and welcome the proposals to move to electing chairs or HE institutions. We believe that this process should be transparent and democratic, and led by students and staff every step of the way.

We recognise that some institutions have expressed concerns over how the introduction of elected chairs would impact the role of the rector in ancient universities. We believe that when functioning well, the rector role is very similar to that of an elected chairs – it ensures the chair of the governing body exercises their role with a sensitivity to the views of the key stakeholder of the institution (students and staff), and that they are accountable to those stakeholders. Therefore, rather than threatening the role of the rector, rolling out elected chairs throughout Scottish HEIs would extend and strengthen the proud democratic history of Scottish universities’ rectorship. It is worth noting that the proposal for elected chairs in the Von Prondzynski review were also based on extending the benefits of the rector model beyond the ancient institutions.

**Student and trade union representation on governing bodies**

NUS Scotland believes it is crucial the governing bodies of HE institutions are representative of an institution’s stakeholders. Students and staff are a vital part of our institutions, and must be a part of the decision-making process of these institutions. This view is also set out in the Scottish Code of Good HE Governance, which described one of the main purposes of HE Governance to be “promoting an appropriate participation of its key constituents, including students and staff”.2

Section 4 of the draft Bill includes provisions for a minimum of two elected staff representatives, one trade union representative from academic staff, one trade union representative from support staff and two representatives appointed by the students’ association, as well as two representatives appointed by the graduates’ association. While many institutions already include student and staff representatives in their governing bodies as recommended in the Code of Good HE Governance, these provisions in the Bill would secure staff and student representation through legislation. NUS Scotland are strongly supportive of this proposal, and fully endorse its inclusion in the final Bill.

**The extent to which the Bill may alter the higher education sector’s current level of autonomy**

While we fully recognize the need of any further regulation to fully respect the autonomy of Scotland’s HEIs, we do not believe the proposals set forward in the current bill alter that autonomy in a notable way. The proposed changes would not require institutions to implement any substantive policy changes; rather, they address the processes through which decisions on substantive issues are taken. We fully endorse the notion of ‘responsible autonomy’ for our institutions. Where we have concerns is around the weight lent to both aspects of that, and are of the view that there has not been enough responsibility in return for the significant sums of public funding our institutions rightly receive.

We would reject the assertion made by some in the sector that the Bill poses such a threat to institutional autonomy that it places the charitable status of institutions at risk, and raises the concern of ONS reclassification, as seen in our colleges. There has been no suggestion from ONS that this would be the case, with the scale and extent of reform seen in colleges being markedly different to that proposed for our universities, and in their submission to the original consultation on a HE governance bill, the Scottish Charity Regulator, OSCR, stated that the proposals “...should not therefore impact on the institutions’ charitable status.”

**The correct balance been struck between legislative and non-legislative measures**

With the development of the Scottish Code of Good Governance, undertaken by the Chairs of Scottish Courts, an attempt was made to make the majority of governance reform non-legislative; however, we believe that this simply did not go far enough, or result in a tangible and meaningful code or outcome and, as such, it is now necessary to seek reform through legislation. While many HEIs have voluntarily taken on board some of the measures proposed in the Scottish Code of Good HE Governance, others fall short of delivering on democratic, inclusive and transparent governance.

When it was announced that the Committee of Scottish Chairs would be undertaking the development of the proposed code, NUS Scotland raised serious concerns. Chief among these was the concern at the system of self-regulation being adopted, and the potential for a weakened code
as a result, which would now seem to have been a very real one. As we have stated in evidence before, we are wholly supportive of university governance being underpinned by ‘responsible autonomy’. However, we have often felt that this balance was tipped firmly to the side of autonomy, with little responsibility.

Getting a much more transparent and democratic form of governance was vital to ensuring that institutions were demonstrating genuine public benefit for the public funding they receive. But the code did not do that. From the start of this process we were of the opinion that it was not the chairs’ job to rewrite the original VonProndzynski report, but rather to find a way to take his recommendations and apply them across the sector through a code. Instead, it selectively picked those it wanted, ignored the ones it didn’t, and watered down those it took on.

The appointment of chairs of governing bodies

As stated above, we believe electing chairs of governing bodies would be very beneficial for strengthening the democratic culture in university governing bodies. At its core, elected chairs provide a defined link between staff and students – who we would argue are the two single most important stakeholders an institution has – and the governing body. Moreover, two of the main arguments against elected chairs we have heard, would appear to be based on fallacies.

Firstly, it has been argued that by electing chairs we may get to a situation whereby the chair doesn’t enjoy the ‘confidence’ of the governing body. However, while there is no evidence to suggest that would be the case, it also undermines the role of the chair and governing body. Governing bodies, as with all trustee boards (as the governing body essentially is, given the charitable status of our HEIs) should act as critical friends to institutions, on behalf of their stakeholders – staff and students. We would seriously question any governing body, and the role they are carrying out, that did not put their trust in a chair who had trust put in them by staff and students.

Secondly, it is often argued that there is no need for chairs elected by staff and students because staff and students already have representatives on the governing; however, this misrepresents the position of staff and student representatives. As institutions are (rightly) quick to point out – and a point entirely accepted, understood and respected by student representatives – when decisions come before a governing body, staff and student members do not have a representative role on governing bodies. They are there as full members, and bringing a representative role, as opposed to an independent one, into their membership of a governing body would go against the spirit, if not the actual letter, of trustee law. Essentially, staff and students do have a ‘representative’ role on the governing body. Elected chairs would not undermine this legal role as a trustee, but would ensure that staff and students are able to directly have a say in the person chairing the governing body, and an advocate the act on their behalf, instilled with their confidence and trust, in addition to the student representatives they send to a governing body.
At the same time, in recent weeks we have seen arguments against the proposals center around a notion that the Bill would remove rectors, which in turn would remove a vital link between, voice of, and advocate for students, by removing their right to chair court and sidelining them on court. However, this would seem to miss the role and responsibilities of rectors as they currently exist, and misinterpret the policy intention of the Bill. Most importantly, there have been repeated reassurances that the Bill would not abolish the role of rector, but instead seek to roll it out, and strengthen it, across all universities. Currently, each university that elects a rector also appoints from the governing body a 'senior governor', the role of whom is to chair court (normally, but not always, when the rector is unable to) but more worryingly, and against the spirit of rectors, act in all other ways as a chair of the governing body. The below details the specific circumstances at each of the universities where a rector exists.

- **Edinburgh:** Has developed a 'Statement on the role of the rector and vice-convener of court'[^3] which states that "The role of the Vice-Convener of Court is similar to that of Chair of institution in many other Universities in that the Vice-Convener is responsible for the leadership of the University Court and will preside at Court meetings in the absence of the Rector."

- **St Andrews:** According to their website, at St Andrews the role of senior-governor is to: "...preside over meetings of Court in the Rector's absence but, more importantly, to undertake all the other responsibilities expected of a chairman. This involves ensuring that the Court fulfils its objectives in a proper and effective manner, reviewing the performance of the Principal and convening various committees."[^4]

- **Dundee:** Under their own regulations, the rector has no right to chair and instead they have a chairperson "...elected from among its members who are not students or salaried staff of the University."[^5] A 'governance and nominations committee' determines the process for this election, with that committee being chaired by the chair of the governing body.

- **Aberdeen:** According to their own 'Guidelines for court meetings' "The Senior Governor is responsible for the leadership of the Court and plays a key role in securing good working relationships with the Principal and the Senior Management Team. In common with the other "Scottish Ancients", the right to preside at meetings of the Court is preferred to the Rector by the University's (Scotland) Act. The recent practice has been for the Senior Governor to chair Court"[^6]

- **Glasgow:** The governing body appoints a convener who "...is responsible for the leadership and effectiveness of Court and for ensuring that the University is well connected with its stakeholders" and is "the key liaison between Court and the University senior management."[^7]

[^4]: [https://www.st-andrews.ac.uk/about/governance/key-officials/senior-governor/](https://www.st-andrews.ac.uk/about/governance/key-officials/senior-governor/)
[^7]: [http://www.gla.ac.uk/media/media_414679_en.pdf](http://www.gla.ac.uk/media/media_414679_en.pdf)
As can be seen from the existing practice around rectors, while there is a strong, and proper, democratic ideal in having an advocate for staff and students elected by staff and students, in reality the actual role of being a true ‘chair’ of court (going wider than the simply chairing court meetings) is taken on by a member of the governing body, appointed from within and by the governing body. Rather than limiting, if not outright abolishing (as some have argued), the democracy and representation that comes with a rector, we believe the Bill gives an opportunity for democracy and representation to be strengthened by having a genuinely elected chair of the governing body, not simply a figurehead with the actual role being carried out by an unelected lay member of the governing body.

In terms of processes for election, we would maintain our support for the original von Prondzynski review, with a constituency of all staff and students of the institution. Students’ associations already have the systems in place for elections, the vast majority, if not all, now having quick, simple to use and cheap online voting systems in place. While we fundamentally do not believe there should be any bar or limit place on candidates for election (as the von Prondzynski review also stated must be the case) we would be willing to work across the sector to reach a consensus on some form of pre-election panel process, to draw up the list of election candidates. However, while we remain unconvinced of the need for any attempt to ‘shortlist’ candidates, if an election panel were to be taken forward there must, as a bare minimum, be a triple lock on the process of:

1. **Selection criteria:** Selection should not be done to try and identify preferred candidates, but simply to ensure all candidates would be able to undertake the role if elected. This was a recommendation of the von Prondzynski review.

2. **Representation:** In order to ensure a degree of ‘independence’ from the institution—as a governing body should—any selection panel should not consist of any institutional members. Instead, it should be made up of the three governing body constituencies – staff, students, and lay members.

3. **Transparency:** In order to maintain some sort of confidence in the process, any election panel must produce a final report which details all the election candidates considered any the reasons for any candidates not being put forward for election.

Finally, and as we have long argued for, we are supportive of a general principle contained within the Bill that chairs should receive some form of compensation. While chairing stops short of a full-time role, it is entirely right that no candidate is dissuaded from putting themselves forward for the role, or committing a reasonable amount of time, because it is entirely unremunerated. Similarly, there is a strong case to be made for ensuring lay members are reimbursed for expenses incurred, including lost wages. The alternative is to continue with the status quo of chairs and lay members coming from the same backgrounds – financially secure, often retired, and predominantly from business. We recognise concerns around remuneration of chairs, and the relationship this could
create between chair and institution; however, we would argue that if the chair is an appropriate (and appropriately independent) one, then this should not be born out.

**Requiring HEIs to include various persons within the membership of their governing bodies**

As mentioned above, NUS Scotland has concerns over student and staff members’ ability to genuinely take part in the decision-making at their institution under current governance regulation. We believe securing places for student, staff and trade union representatives would be very beneficial to increasing transparency and democracy in HEIs, and would enable key stakeholders to better contribute to debate over key-decisions at their institution. We believe that having representatives of these stakeholders on governing bodies will go a long way to ensuring that our institutions are run to the benefit of students, staff and the wider community.

However, we believe that student, staff and trade union representatives should also have representation on key committees of the institution. Currently, the governing body may often act merely as a "rubber-stamp exercise", where decisions have effectively been made at committee level or well in advance of governing body meetings. Student and trade union representation on all governing body sub-committees would further foster a culture of democracy and transparency in HEIs. This is particularly the case for any nominations committees (for either members of the governing body, or for the principal) and remuneration committees.

**Key issues not covered by the Bill**

While we are strongly supportive of the above two proposals, we would like to highlight that in its current form, the HE Governance bill does not address two key issues of concern to NUS Scotland, both of which were raised as areas for action by the von Prondzynski review.

**Fair representation and diversity**

At the moment, the draft bill does not address the serious concerns over a lack of diversity among governing body members. NUS Scotland has long been supportive of moves to increase the representation of women – including through the use of quotas – within our institutions, given they make up the majority of our campuses yet remain underrepresented in positions of leadership, particularly on governing bodies. Equally, the need to make serious progress on the issue of fair representation of boards is one shared by the then Cabinet Secretary for Education, Mike Russell, who stated, during the debate at stage 3 of the Post 16 Education (Scotland) Act, that:

"No one is defending the woeful record of university and college boards. The boards themselves have accepted that the gender balance on them is atrocious—indeed, in some cases, it is more than atrocious. We need to get that situation changed quickly."
The use of quotas as a means to achieve fairer representation of women on governing bodies gained prominence in 2012, with the publication of the VonProndzynski, which was explicit in its preference to see the introduction of quotas for governing bodies. At the time this was strongly welcomed by NUS Scotland and staff trade unions, and, along with the wider report, was endorsed by the Scottish Government. NUS Scotland had strongly urged the adoption of such a recommendation in our submission to the review on the basis that women make up the majority of our universities, yet are hugely underrepresented on governing bodies and we believed that quotas were (and are) necessary to ensure that we translate legal equality between men and women into de facto equality by guaranteeing women's presence in leadership, where too often they go underrepresented.

NUS Scotland has previously undertaken research, via a freedom of institution request, on the numbers of women members appointed to their governing bodies. Of those institutions who responded the figures showed that 32% of appointed members of governing bodies were women, worryingly low in itself but also masking large disparities across the sector, including some institutions with figures as low as 14%.

On the issue of wider diversity, and perhaps more worryingly, only 40% of institutions had set targets for increasing the wider equality and diversity of their governing bodies, and only 30% were issuing regular reports on progress on equality and diversity targets with regards to governing body membership. Both of these were requirements of the Scottish Code of Good HE Governance, showing that voluntary, self-regulation has thus far failed to yield success across the sector. We believe all institutions should do all the can (not least under their existing equalities duties) to do more to promote and extend the diversity of their governing bodies, across all protected characteristics, making them representative of the communities they serve.

**Senior management pay**

While ensuring that students and trade unions are represented on governing bodies and committees will go some way in increasing accountability over senior management pay, we do not believe these measures to be sufficient to address the unreasonable pay increases in the sector over the past few years. We would call on the Scottish Government to examine the possibilities to legislate on a defined pay ratio between the highest and the lowest paid members of staff; to bring senior management on to the same pay scale as other staff members (as recommended by the von Prondzynski review); and to ensure senior management do not receive pay increases above those awarded to the rest of the staff (also recommended by von Prondzynski).

At the same time, it is vital that, as we seek to extend the transparency and accountability of governing, that we do the same with governing body sub-committees, and particularly those dealing with senior level pay. By having staff and student representatives as full members would result in a greater diversity on panels, balancing opinions and stakeholders; this was something also recommended by the Hutton Report of Fair Pay. That report found that university principals
have the highest pay ratio on the entire public sector (15.35). Follow up research by NUS Scotland found that in Scotland this ratio goes up to 16.10, that there are 88 individuals at Scottish universities who earn more than the First Minister (£140,000), and only one university Principal earns less than this.

It is clear from these figures, and given the backdrop of tight financial circumstances across the public sector, the higher education sector needs to take strong action to tackle inflated senior pay. Similarly, attempts by the University and College Union to, via freedom of information request, obtain minutes and details of remuneration committee meetings have proved difficult, with very little transparency from many institutions.

For more information, contact:
Philip Whyte
Policy and influencing manager
Philip.whyte@nus-scotland.org.uk
Submission from Mrs Shan Nash

Dear Sir/Madam,

I wish to register my opposition to the Higher Education Governance (Scotland) Bill.

It is absolutely vital that future generations have the same access to the first class education that I did at one of Scotland’s most important and respected universities; in my case St Andrews, without political interference of any sort.

The idea of legislating a standardization of universities and colleges is totally wrong and against everything that Scotland should stand, and has stood for in the past. These institutions must be able to decide for themselves how best to operate, attract a wide range of students and staff and continue to serve their local communities. It puts at risk the unique academic reputation of universities like St Andrews and is totally wrong and unnecessary.

I would be grateful if you will pass my concerns and comments to your committee.

Yours sincerely,

Shan Nash {Mrs}
Submission from Lynn Neville

I am writing to let you know that I am concerned about the Higher Education Governance (Scotland) bill and would like you to note my opposition on the following grounds:

The University of St Andrews currently attracts students from all over the world and this unnecessary bill, by exerting undue influence on the autonomy of the University will have a detrimental effect. This will have a major effect on the local and national economy and will diminish the student experience for those Scottish students who come here. St Andrews is seen as excellent academically at the moment, but this will be reduced by the bill with the consequent loss of ability to attract the best researchers and UK national and international research grants.

Thank you for taking note of my objection.

Lynn Neville
Higher Education Governance (Scotland) Bill.

Evidence to the Scottish Parliament’s Education and Culture Committee

from Professor Andrea Nolan, Principal & Vice-Chancellor of Edinburgh Napier University

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

and

The extent to which the Bill

(a) will improve higher education governance, particularly in the areas above
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

and

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

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

I believe that higher education governance in Scotland is modern, inclusive and accountable. Importantly the sector has demonstrated a commitment to and a record of self-review and continuous modernisation and improvement through, most recently, the development of the Scottish Code of Good Higher Education Governance and institutional governance reviews.

However, we are not complacent, and I recognise that there is more work to be done, for example to progress gender balance on governing bodies where institutions individually and collectively are taking measures and have made public commitments to address this.

I do not believe that the proposals on the face of the Bill will improve higher education governance in the aspects mentioned above. The most concerning aspects of the Bill which could potentially damage governance in the longer term and which may substantially alter the higher education sector’s current level of autonomy are the proposals for delegated powers in relation to the process for appointing chairing members of governing bodies and their remuneration; and in relation to determining the membership of governing bodies and academic boards.
These provisions in sections 1, 2, 8 and 13 of the Bill, supplemented by section 20 would increase the level of control which Scottish Ministers can exercise over higher education institutions and provide for the level of control to be further increased without recourse to primary legislation in future. This is a fundamental change and a departure from often expressed cross-party political support for responsible autonomy in the higher education sector. It opens up the prospect of considerable Ministerial influence over institutional strategy and academic governance in future.

The question also arises as to whether increased control of the sector by Scottish Ministers following enactment of the Bill as introduced or through the subsequent use of delegated powers could cause the Office of National Statistics (ONS) to reclassify higher education institutions as central government bodies or cause institutions to fail the Scottish charity test under the terms of section 7(4)(b) of the Charities and Trustee Investment (Scotland) Act 2005. In respect of the latter concern, which would result in less favourable tax treatment for higher education institutions, I recognise that Scottish Ministers have the power to dis-apply section 7(4)(b).

Reclassification as a central government body by ONS would have a profound impact on Edinburgh Napier University, on our ability to develop an optimum investment strategy and on the nature of the business we could undertake. For example, our recent £75m investment in the renewal and upgrading of our estate at the Sighthill and Merchiston campuses was funded 60% through commercial borrowing, 13% by disposal of property and 27% from accumulated reserves. ONS reclassification would all but rule out an investment strategy of this kind, reducing our ability to use our resources efficiently to provide an excellent and modern experience for our students and make a positive impact on our local economy. ONS reclassification would also restrict the commercial activity the University could engage in because of inflexible budgetary controls and is likely to make us less attractive to philanthropic donors. These are examples of activities through which the University leverages the public funding we receive to add value and economic impact at home and overseas.

Much of what is proposed in relation to governing bodies and academic boards in sections 4 – 7 and 9 – 12 of the Bill is a statement of existing practice. The main exceptions are certain of the proposals for representatives of particular interest groups on governing bodies which do not reflect current practice, to varying degrees, in institutions and the proposed limitation on the size of academic boards which also does not reflect existing practice in some institutions.

The membership of the Court of Edinburgh Napier University currently includes the elected President of the Napier Students’ Association; one other elected student office-bearer selected by the Students’ Association; a member of staff elected by and from the academic staff; a member of staff elected by and from the non-academic staff; and a member of staff appointed by the Academic Board from the membership of the Board.
The proposals would add two additional members of staff, nominated by recognised trade unions and two representatives of a graduates' association to the governing body of Edinburgh Napier University. The proposal that additional staff members be appointed by nomination by recognised trade unions from among their members would be a less inclusive addition to the practice of appointment by election by staff as not all staff in any category are trade union members. Those appointed will be bound to serve only the interests of the institution and not the constituency which nominated them, as is recognised in paragraph 47 of the Policy Memorandum. Edinburgh Napier would have to establish and provide ongoing support for a graduates’ association in order to comply with section 4(1)(f) as it doesn’t currently have such a structure.

The restriction on the size of academic boards would not affect Edinburgh Napier and the other proposals for academic boards on the face of the Bill are consistent with the University’s current arrangements. However, it would be of concern that Ministers could in future alter the composition of academic boards as this seems inconsistent with a commitment to academic freedom.

All institutions, including Edinburgh Napier would have to address conflicts between the proposals on the face of the Bill, their existing governance documents and the principles of good governance with which institutions are obliged to comply as a condition of grant from the Scottish Funding Council (exercising its power under the Post-16 Education (Scotland) Act 2013). In Edinburgh Napier’s case there may be a requirement to seek amendments to the University’s founding Order of Council in order to comply with both legislation and good practice, particularly in relation to maintaining a clear lay majority on the governing body.

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.

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

There are existing legislative frameworks, through which governance arrangements can be changed (in the case of Edinburgh Napier University, the Further and Higher Education (Scotland) Act 1992). The Post-16 Education (Scotland) Act 2013 already requires institutions to comply with any principles of governance which appear to the Scottish Funding Council to constitute good practice in relation to higher education institutions. Thus it is not clear why further legislation is necessary.

The Bill consists of provisions which are already existing practice, provisions which would do little to enhance existing practice and potentially damaging provisions for delegated powers. The reasons for taking the delegated powers in sections 1, 2, 8 and 13 of the Bill set out in the Delegated Powers Memorandum do not appear to be evidence based. They refer to a level of detail which might be required, to a hypothetical need to make prompt changes and to respond to changes in future
practice. I am unaware of any historic precedent of a circumstance requiring sudden change in higher education governance arrangements, and consider that the indication that regulations to be brought forward in due course might include a "considerable level of detail" highlights the prospect that such regulations could result in significantly increased Ministerial control.

I note that the policy aim of the delegated power under section 1 stated in the Policy Memorandum, paragraph 28, was to establish a minimum level of openness, transparency and consistency (or, in the Delegated Powers Memorandum, paragraph 9, inclusivity, transparency and consistency). However no argument is advanced as to what minimum level is appropriate in a very diverse sector, whether it is presently absent or why new legislation is considered necessary to achieve it, although it has been noted that the matter was considered too crucial not to be addressed in legislation. The Bill, in proposing this delegated power does not address the 'crucial matter' and does not appear to deliver or guarantee into the future the desired policy objectives outlined other than the simple consistency that regulations, which could take any and many forms, will be made by Scottish Ministers.
Academic freedom

The likely practical effect of the provisions on academic freedom.

I do not believe that the provisions on academic freedom in section 19 of the Bill will have any practical effect. The difference between the proposed wording and the wording in the Further and Higher Education (Scotland) Act 2005 does not appear to be a material change. In addition to the obligations created by the 2005 Act, universities are obliged under the Post-16 Education (Scotland) Act 2013 to comply with principles of good governance which include a requirement to ensure academic freedom. It is not apparent that the stated policy aims of strengthening the protection of academic freedom and ensuring that the protection of academic freedom is more comprehensive and transparent (paragraph 63 of the Policy Memorandum) are advanced by the proposed new wording.

Are there likely to be any significant constraints – other than legal constraints – on academic freedom?

There is a threat to academic freedom contained within the Bill in the form of the delegated powers proposal in section 13. This provides that Scottish Ministers may modify, without limit, the membership of academic boards by regulation, with limited parliamentary scrutiny of any such future proposals. This provision potentially allows for significant Ministerial control and influence over institutions’ academic policies, practice, standards and regulations through the ability to specify membership of the body responsible for these matters.

Are the situations in which relevant persons can exercise their academic freedom clear?

The obligation placed on post-16 bodies by the proposed wording in section 19 of the Bill is clear. Specifying the limits to the exercise of academic freedom which arise from other obligations under the law or in relation to professional standards and similar matters is not within the scope of the Bill and does not need to be.
Dear Sir / Madam

I write to you over my serious concerns regarding proposals set out by the Scottish Government for a Higher Education Governance Bill.

The Scottish Parliament agreed, in passing the Post-16 Education (Scotland) Act in 2013 that the HE sector should be responsible for ensuring its own high standards of governance, regulated at arm’s length by the Scottish Funding Council (SFC). I agree with the Royal Society of Edinburgh’s assertion that it not clear why Government is now proposing additional legislation that directly intervenes in the governance arrangements of HEIs.

In particular the forthcoming legislation stands to substantially change the appointment of the Chair of the University Court, a role filled by The Rector in the four ancient universities. In these four universities, The Rector is democratically elected by students and given the right to chair the Court, and is trusted by those students to ensure their voices are heard at the highest levels of university governance.

As I understand it under the new legislation, their process for election would be replaced by an undefined panel which would pre-screen, interview, and shortlist candidates before even a single student vote could be cast. Where exactly might this lead? Will the Scottish Government in future insist that political parties or individuals who wish to stand for any public office first be vetted by some Government appointed and approved panel, the electorate disenfranchised from its basic rights?

It sounds far-fetched but this seems to be what is proposed here. The Rector is the voice of the students, not the Government.

There are a number of other proposals within the Bill that also subtly hint at creeping political influence (e.g. the proposal of legislating to put union representatives on governing bodies) endangering both the crucial autonomy of HEIs and possibly jeopardising their independent charitable status.

As the Scottish Government has not produced any evidence of poor governance of Scotland’s HEIs, I don’t see any requirement for additional legislation or the considerable expense and resources that this will entail.

Yours sincerely,

Andrew.B.Niven.
Submission from Adam Ogilvie

Dear Sirs

I am proud to be a St Andrews alumnus.

It distresses me greatly to think the institution might become subject to the dead hand of interfering political short-terminism hiding behind career bureaucrats.

St Andrews University is 600 hundred years old and no longer a child. Politicians could try and learn from the University’s success in earning the respect of the wider world.

Thank you
Adam Ogilvie
Submission from Mr Andrew Wingham Ogletree

To whom it may concern,

Having read through the Higher Education Governance Bill it appears that the Scottish Government wishes to control everything about each of Scottish Universities stripping each one of its identity, curtailing each one's ability to make decisions specific to its unique demographic of students, faculty and staff and severely burdening each institution with costs of complying to the bill as stated. The consequences of this bill will be to homogenize a diverse and vibrant community of academic institutions which will not only destroy any and all healthy competition among them to be better, but will fetter their ability to compete globally. This will severely hurt the academic integrity of each institution by not being able to attract and keep talented faculty, which will therefore make the universities in question less attractive to the best and brightest students in Scotland, the UK, the EU and the world including the US and Canada.

As a graduate of the University of St Andrews, I find it appalling that the Scottish Government would seek to destroy the identity and integrity of its oldest university. Having been founded over 600 years ago, St Andrews has educated some of Scotland’s and the world’s greatest minds. Three signatories of the American Declaration of Independence attended or received degrees from St Andrews, including: James Wilson, one of six original justices appointed by George Washington to the Supreme Court and founder of the University of Pennsylvania Law School; John Witherspoon, President of Princeton University (formerly the College of New Jersey); and Benjamin Franklin, founder of the University of Pennsylvania. St Andrews attracts many international students and its reputation abroad not only is good for Scotland, but Scotland’s other great universities.

Furthermore, the universities with which St Andrews, Edinburgh and Glasgow compete such as Oxford and Cambridge are not fettered with the same exhaustive and intrusive governmental meddling. Ivy League universities in the U.S. including Harvard, Yale, Princeton, Univ. Pennsylvania, Dartmouth, Brown and Cornell do not have any governmental meddling at all. If Scotland’s universities are to compete with these world-renown institutions, then they must be free to do so without interference from any political regime which takes power.

In brief if this bill is passed in any form, it will do the following:

- undermines the Universities’ autonomy through giving future Governments (political parties) significant potential influence and control without the safeguard of parliamentary scrutiny – this despite the assurances given in the Consultation document;

- endangers the Universities’ ability to ensure academic freedom and act as sources of independent thinking, offering analysis and comment without fear or favour the
consequent risk to Universities’ academic standing and to the benefit they deliver to the national economy (St Andrews delivers £12 benefit for every £1 received in government funding).

Furthermore, the bill in no way addresses the practical challenges posed by the legislation. And, the fact remains that there has been no compelling explanation of the problem that the legislation is trying to solve.

The Scottish government has not thought through the financial and economic impact the bill has on the universities themselves and to the future of the Scottish economy:

- reductions in institutional autonomy will harm Scottish universities’ global competitiveness as well as relationships with business and charitable/philanthropic funders;
- increased Ministerial control will jeopardise Universities’ charitable status
- increased Ministerial control could prompt the Office of National Statistics (ONS) to reclassify HEIs as central government bodies (this has already happened with colleges). This could impact the University’s ability to undertake entrepreneurial activity and access research grants. Considering research grants make up on third of St. Andrews annual budget, the very existence of the institution would be severely at risk.

In conclusion, this bill will only bring hardship on the institutions it purportedly wishes to protect. The thought that politicians who may not have attended, graduated, taught or worked at these institutions somehow have the best interests of the institutions in mind and somehow know what is best for these institutions is not only stupid but arrogant. The majority of the universities already have very specific bylaws and procedures in place to make processes transparent and fair. There is no compelling argument as to what the Scottish government seeks to remedy.

I ask that you withdraw the bill immediately.

Yours sincerely

Andrew Wingham Ogletree
Higher Education Governance (Scotland) Bill – call for evidence
Submission to the Education and Culture Committee

Introduction

The Open University in Scotland appreciates the opportunity to outline its views on the HE Governance Bill as introduced to Parliament in June 2015.

The Open University (OU) believes that robust but inclusive governance is central to its mission of being open to people, places, methods and ideas. The OU’s founding principle – widening access to higher education by adopting an open access policy – continues to drive everything the University does. Its model of open, supported learning has given The OU significant reach and as a consequence it is the only Higher Education Institution (HEI) operating across all four nations of the United Kingdom. National offices in each of Scotland, England, Wales and Northern Ireland ensure that The OU’s provision is appropriate and helps to deliver on specific priorities in each nation.

Governance arrangements

The OU receives public funding in support of its operations in each nation from the governments of Scotland, Wales and Northern Ireland and from the UK Government, which has responsibility for higher education policy in England. Consequently, The OU’s governance arrangements must be and are organised such that they recognise, take account of, and can operate within the increasingly divergent policy environments in existence across the UK.

The Director of The OU in Scotland is the Vice-Chancellor’s delegate and is responsible for the delivery of services to students in Scotland. In line with the rest of the Scottish higher education sector, the teaching of OU students resident in Scotland is funded by the Scottish Funding Council (SFC). The OU is accountable to the SFC for this funding.

However, in light of its UK-wide operation, the governments of Scotland, Wales and Northern Ireland agreed that the University is regulated by the Higher Education Council for England (HEFCE); therefore, OU governance arrangements lie in England.

The policy memorandum accompanying the Bill states that The OU is excluded from the definition of HEIs subject to Part 1 of the Bill – the part concerning governance arrangements – on the basis that “it is a single institution established elsewhere and operating across multiple jurisdictions which might otherwise be made subject to conflicting governance requirements.”¹ The University believes that this is a reasonable and proportionate approach to its unique status and is supportive of this provision.

Specific proposals

¹ http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd-pm.pdf
The OU notes the submissions made by Universities Scotland, the Committee of Scottish Chairs and by other Scottish HEIs and shares some of the concerns expressed about the Bill in its current form; it may also be worth noting that the University previously submitted a detailed response to the Scottish Government’s consultation ahead of the introduction of the Bill. The OU welcomed the introduction of the Scottish Code of Good Higher Education Governance and continues to believe that the Code can and does make an important contribution to governance of the sector.

Academic freedom

The OU was incorporated by Royal Charter in 1969. Section 21 of the second schedule of the Charter states that:

[A]cademic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges.

Part 2 of the Bill serves to add the development and advancement of “new ideas or innovative proposals” to the existing definition of academic freedom. The University believes that this new definition would accord closely with its own definition and is therefore supportive of such a change.

As this definition is largely already in place within the University, The OU does not anticipate any significant changes in terms of practice – teaching, learning or research – or that this change will encourage any new restraints.

Contact

For more information or to discuss any aspect of this submission or The Open University’s work in Scotland, please contact Kenny Stewart, Communications and Policy Manager, at kenny.stewart@open.ac.uk or by phoning 0131 549 7961.

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3 http://www.scottishuniversitygovernance.ac.uk/
4 http://www.open.ac.uk/about/documents/about-university-charter.pdf
Higher Education (Scotland) Bill

Written Evidence from OSCR – The Education and Culture Committee

1. Introduction

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (‘the 2005 Act’) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,800 charities registered in Scotland, and this includes Universities and other higher education institutions (HEIs).

The Committee issued a call for written evidence on the Higher Education (Scotland) Bill (the Bill) in June 2014, and below is OSCR’s submission which is focused on Questions 2 and 4. OSCR welcomes the opportunity to provide comment on the Bill having previously commented on the Scottish Government consultation. In forming our view we have considered our overall vision, which is of charities you can trust and that provide public benefit, underpinned by the effective delivery of our regulatory role.

2. Written evidence

2.1 Context

The Committee has had outlined a number of questions. OSCR response is specific to Questions 2 and 4.

In considering the proposals in this Bill OSCR has reviewed how they would work alongside the 2005 Act. HIEs, as charities, are subject to the requirements of the 2005 Act. In addition, the members of HIE governing bodies are charity trustees and are therefore subject to particular duties under the 2005 Act. The two areas specifically considered are the proposals’ alignment with section 7(4) (b) of the 2005 Act, which relates to Ministerial powers of direction and control over charities, and section 66, which sets out the duties of charity trustees.

2.2 Ministerial Control

2.2.1 Context

As charities, HIEs must meet the charity test as set out in section 7 of the 2005 Act. Under this, to be registered as a charity an organisation must pursue only charitable purposes and it must provide public benefit. Under section 7(4) (b) an organisation

1 Qu2: The extent to which the Bill (a) will improve higher education governance (b) may alter the higher education sector’s current level of autonomy, (c) may affect the lines of accountability between Scottish Government, relevant public bodies and the higher education sector. Qu4: Provide views on the merits of each proposal.
will however 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.’

It is worth noting at this point that section 16 of the Bill defines ‘governing documents’ for older universities, charter universities and designated institutions. These definitions of ‘governing documents’ are not in each instance the same as the constitutional documents we have considered. Our assessment is based on the definition of constitution in section 106 of the 2005 Act.

2.2.2 Ministerial control assessment

The assessment of ministerial control is complex, and the view we outline below is based on the information we have had to hand. There are two questions we have had to consider:

- Firstly, whether the Bill when enacted will form part of the HEIs’ constitutions as defined in the 2005 Act (as described above, this differs from the definition of ‘governing document’ set out in section 16 of the Bill)
- Secondly, if they do form part of the constitutions, whether these powers in the constitution allow Ministers to direct or control the organisations’ activities.

HEIs have a variety of constitutional structures falling into three categories:

- Ancient (or older) universities
- Chartered universities
- Designated institutions (post 1992 HEIs)

Our view is that the Bill, when enacted, will not itself form part of the constitutions of charter universities or of designated institutions. The trustees of these bodies will require to comply with the legislative requirements of the Bill, and in due course may require to amend their constitutions to ensure their governance provisions are compliant with it.

However, in respect of the older universities (Aberdeen, Edinburgh, Glasgow and St Andrews) we consider that Part 1 of the Bill will form part of their constitution. This is because the Bill amends the Universities (Scotland) Act 1966, (‘the 1966 Act’) which in our view forms part of their constitution to make the appointment of university courts subject to the provisions of Chapter 1 of Part 1 of the Bill. In addition the Bill repeals section 7 of the 1966 Act, which provides for the composition of the senates. Provision for their composition is provided in Part 1 Chapter 2 of the Bill.

As a result of this, we have considered whether, taken as a whole, these powers allow Ministers to direct or control the older universities’ activities. We have considered this on the basis set out in our published guidance\(^2\) on these issues, and in the light of previous cases. Considerations here include:

\(^2\) [http://www.oscr.org.uk/charities/guidance/meeting-the-charity-test-guidance/ministerial-direction-or-control](http://www.oscr.org.uk/charities/guidance/meeting-the-charity-test-guidance/ministerial-direction-or-control)
How important or central to the organisation’s overall activities are the functions that Ministers can control?

Can Ministers take the initiative in making an organisation do something, or can they merely react to a request from the organisation or third party?

Can Ministers use their powers whenever and however they wish, or are there limits to this?

Part 1 of Chapter 1 makes provision for the appointment of the chairing member, remuneration payable to that member and the composition of the governing body. It also gives Scottish Ministers express powers to make regulations in these areas.

In order to undertake the assessment of whether Scottish Ministers have the power of direction or control, we must consider Chapter 1 of Part 1 of the Bill and the powers for Ministers contained in it.

In summary these are as follows:

1. Appointment of the chairing member

Here Scottish Ministers would, following consultation, be setting criteria within which one of the older universities could appoint a chairing member. While this does give Ministers the power to specify in some detail how the recruitment could be conducted, it does not give Ministers the power of appointment or removal of a chairing member (which we would consider to be a strong indicator of Ministerial control). Moreover, regulations cannot be made without consultation with the older university involved.

2. Remuneration payable to that member

Here Scottish Ministers may by regulation make provision for remuneration payable to chairing members of a HEI. This does allow Ministers to exert a degree of control over an HEI’s decision on this particular issue. Our view is that this would not in itself amount to an ability for Ministers to exert control in a way that is central to the activities of the HEI. Again, Ministers must consult with the older university involved before making regulations.

3. Composition of the governing body

Section 4 of the Bill provides for the composition of the membership of an HEI’s governing body, in particular specifying numbers of members to be appointed by staff, student associations, trade unions and graduates’ associations. Section 8 gives Scottish Ministers the power to make regulations to vary these categories and numbers. These sections do not give Scottish Ministers the power to appoint or nominate members to the governing body: this power lies with the various nominating bodies. Nor do they give Scottish Ministers the power to remove members of the governing body (which might amount to an indication of control by Ministers). In our view therefore they do not give Ministers any power to control the HEI’s activities.
4. Composition of the academic board (‘Senate’, ‘Senatus academicus’)

Chapter 2 provides for the composition of the academic board of an HEI, in particular specifying the maximum number of members, categories of membership and the percentage of members to be appointed by staff and students. Section 13 gives Scottish Ministers power to make regulations to vary these categories and the percentage of members appointed under a particular category. These sections do not give Scottish Ministers the power to appoint members to the academic board. Nor do they give Scottish Ministers the power to remove members of the academic board (which might amount to an indication of control by Ministers). In our view therefore they do not give Ministers any power to control the HEI’s activities.

2.2.3 Overall

Our view is that the provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4) (b) of the 2005 Act.

Section 8 of the Act gives Ministers the power to make regulations to modify the categories of membership set out in section 4 and the numbers in each category. Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions these amounted to ministerial control. Similarly, Section 20 of the Act gives Scottish Ministers wide power to make such further regulations ‘as they consider necessary or expedient for the purposes of or in connection with this Act’. Should such regulations be made in respect of Part 1 of the Bill when enacted we would have to consider to the impact of these measures with respect to ministerial control.

2.3 Charity Trustee Duties

Members of a HEI governing body are also a charity trustees and as such have duties and responsibilities set out in section 66 of the 2005 Act. These duties include:

(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
   (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
   (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
(c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—

  (i) put the interests of the charity before those of the other person, or

  (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question

We have considered particularly the requirements for the composition of the governing body set out in section 4 of the Bill, and whether these would be likely to prevent the charity trustees of HEIs from fulfilling their trustee duties. These are issues we commented on at the consultation stage, and we have looked at them again in the light of the Bill as introduced. We would note that these are not matters which can cause a charity to fail the charity test, but cover the conduct of charity trustees in particular situations.

We have looked at the provisions of the Bill for governing board members to be nominated by particular bodies or groups. It is not particularly unusual for charities to have charity trustees nominated by other bodies or groups. As quoted above, section 66 of the 2005 Act specifically sets out how charity trustees should act in situations where conflicts of interest arise between the charity and any person responsible for their appointment. Given the overall size and composition of the governing bodies provided for in the Bill, we do not see anything to prevent any conflicts of interest arising for charity trustees nominated under the provisions in the Bill being dealt with in a way that enables the trustees to meet their duties.

Also, OSCR recommends to charities as a matter of good practice that an effective governing body should ensure they have among their members the right skill set and mix. This is also stated in Principle 9 of the Scottish Code of Higher Education Governance. Again, given the overall size and composition of the governing bodies provided for in the Bill, we do not see that the provision for charity trustees to be nominated in terms of the Bill will be incompatible with good practice in this respect.

4. Overall

OSCR welcomes the opportunity to give a view to the Committee on this Bill, and hopes they find the evidence useful. We have though highlighted our considerations in respect of ministerial control, and also highlighted that members of HEIs governing bodies are also charity trustees and have duties under the 2005 Act that should be considered alongside these legislative changes. Should there be any further questions about our evidence please contact Nicola McBain (Engagement Manager, Policy and Partnerships) at nicola.mcbain@oscr.org.uk
Submission from Most Revd. Dr. Raffaele Arcangelo Yusuke

Dear Sir or Madam,

I am a graduate of The University of St. Andrews and a member of General Council. I have strong issue about The Higher Education Governance (Scotland) Bill. Currently I am living in Japan but if I have an issue to the University, I can critique and as a member of General Council, I have a right to advice university.

however, if this unnecessary Bill may pass the parliament and politics control the Autonomy of the Universities and Higher educations,

Not only loose my right and also damages this Bill makes is unknown. just look up on the internet how Minister of Education destroying all the tradition and giving bad images to other countries and loosing foreign Students who are most of the University income.

This Bill is also a great discrimination to oversea graduates as we are not needed anymore and will not be able to have a say to my own graduated university and who paid most of the income of the University. I simply feel The Bill is saying “thank you for your money but we Scots don’t need you anymore.” and I feel deeply hurt.

even more, I feel just because I am not a Scots Man, my sacrifice to your country was totally waste and I am a person that should be get rid of.

When I stayed in Scotland, people were kind enough not to discriminate over sea students. However, this Bill is totally unacceptable for all over sea students out side of Euro and insult.

if Scots still have a gentleness, I ask whomever in the position to think and stop this whole nonsense,

From a man who still feeling Scotland is the Best place in the world.

Yours sincerely,
Submission from Mr Brian Pack

Response to Education and Culture Committee: Call for Evidence on the Higher Education Governance Bill

Dear Sirs

I have a close interest in university governance as a governor of the University of Aberdeen and as Convener of the University’s Operating Board. I write in a personal capacity but based on my experience as a governor to emphasise my particular concerns regarding the proposals around election of Chairs, membership of governing bodies and academic bodies and the potential impact on the University’s status as a charity and its ONS classification as a non-government body.

In general terms, the proposals will undermine institutional autonomy and in several areas without an obvious reasoned justification. Having experienced board level governance in the private, public and charitable sectors, I know that the University of Aberdeen takes good governance, accountability and public confidence to be of the utmost importance. Within our Court, we have debated and discussed our governance arrangements extensively at regular intervals, particularly over the last two to three years in response to the Scottish Code of Good HE Governance. Given that it is only in the past year that the Code has been adopted by the Scottish Funding Council as a condition of grant and only two years since the passing of the Post-16 Education (Scotland) Act, the case for further legislation in this regard, in the context of many other national priorities, is lacking.

Ministerial Powers

I am concerned that the Bill introduces extensive new powers for Scottish Ministers to specify and alter various aspects of the internal governance of universities. This is not in keeping with the current model of governance and the relationship between universities and the State which has served Scotland well. That the Bill will introduce political control of the governance of universities is at odds with universities fulfilling their role in society as a voice which is independent of government. This is an issue which should be of concern to the Committee and wider Scottish society, particularly as the justification provided for taking these powers is, at best, vague.

Chairing of Governing Bodies

I consider the proposals for the election of chairs to be of particular concern and to the detriment of good governance in our universities. A chair must have the confidence of the governing body and, for that reason, must be selected and appointed by that governing body. A chair who is elected by specific sets of stakeholders is in effect in a politicised role, potentially beholden to particular interests and as a result not able to exercise independence in ensuring the governing body reaches ‘corporate’ decisions made in the best interests of the institution. It is accepted that governing bodies should have a majority of independent members. It would, therefore, be completely at odds with this core principle of governance if the chair were not also independent.
Membership of Governing Bodies

I am not persuaded that it is appropriate or beneficial for the Scottish Government to specify in detail the composition of the board of a charity. In particular, the proposals to require trade union membership of governing bodies would create significant difficulties in the governance and management of institutions. Trade Unions, rightly, have a role within universities and there are mechanisms within the wider governance structure of most universities through which they are represented to reflect that role. However, there is a fundamental conflict of interest in there being a ‘trade union’ member of a governing body, which is irreconcilable with good governance. Again, I am of the view that this proposal will be to the detriment of good governance and is an area that is inappropriate for Government to determine.

Composition of Academic Boards

For similar reasons, I do not view the proposals for Government to legislate on the composition of Academic Boards to be appropriate. These are matters that should rightly be determined by the academic institution itself in order to best reflect its local circumstances and academic structure.

ONS Classification and Charitable Status

I am aware that there is concern within the sector that the Bill’s proposals for Ministerial control over governance could result in either ONS reclassification as a government body and/or loss of charitable status. Either outcome would be disastrous for universities and their ability to function as competitive institutions that we should be encouraging and expecting to be more entrepreneurial whether that is in regard to fundraising and philanthropy, working with industry, or commercialising research. Damaging these will ultimately damage the ability of universities to invest in facilities for Scottish students and the best interests of wider Scotland.

Which takes me to my final point. As a governor, my focus is on securing an internationally successful future for our university. I know this is a goal that the Scottish Government shares. I consider autonomy to be fundamental to the achievement of that goal. I would urge the Scottish Government to reflect further on whether these proposals will inhibit or enable the achievement of that shared national goal of international success.

Yours sincerely

Mr Brian Pack OBE
Submission from Ms Nicola Pacult
Higher Education Governance (Scotland) Bill

Dear Committee Clerk and the Scottish Parliament

As an alumnus of St Andrews University, and representing my late father and my elder daughter, also alumni of St Andrews, I am gravely concerned that the proposed HE Governance (Scotland) Bill will weaken the autonomy of the university and make it susceptible to direct political influence.

I strongly feel that the Scottish Parliament should not interfere with the governance of any Scottish university, let alone that of my alma mater, St Andrews.

I furthermore think that if the bill goes ahead, the academic reputation of St Andrews will suffer, it will cease to attract the best students, academic staff and funding; this will fundamentally damage St Andrews, Scotland and its economy and Scottish higher education in general.

This bill is totally unnecessary – St Andrews has successfully managed its own affairs for 600 years, why should it be subjected to interference from government now?

I very much hope you will amend this bill and will leave St Andrews and all other higher educational establishments well alone!

Best wishes

Nicola Pacult
Submission from John Patrick Pazdziora

I am writing in my capacity as a member of the General Council of the University of St Andrews to express my deep concern regarding the Higher Education Governance (Scotland) Bill. I wish to vigorously support the objections which were raised by the Royal Society of Edinburgh in their advice paper—namely, that despite good intentions, the proposals in the Bill are duplicative, self-contradictory, and needlessly meddlesome.

By allowing central government officials to dictate how higher education institutions must select the chair of their governing body, and by unilaterally determining the membership composition of those governing bodies—including, alarmingly, appointments which foster conflicts of interest—the proposals alter the higher education sector’s autonomy for the worse. In its attempt to correct problems which do not, in fact, exist, the Bill undermines the very academic freedom it seeks to preserve. Such backward-thinking legislation would, if passed, be a serious embarrassment for Scotland, to say the least, and would reflect very poorly on its capacity for self-governance.

These proposals risk doing profound damage to Scotland’s universities, stifling their economic growth and eroding their academic reputation. I must join both the Royal Society of Edinburgh and my colleagues from the General Council in urging that the Higher Education Governance (Scotland) Bill be withdrawn.

Yours Sincerely,

John Patrick Pazdziora, B.A., Pg.Dip., Ph.D.
Associate Professor of Foreign Languages and Literature
College of Liberal Arts
Submission from Tony Pay

Dear Sir

Before my comment, I have to declare ‘no interest’.

Although I live, though choice, in Scotland, I was born in Oxford. I was at university there, although my college, Balliol, has strong Scottish connections. Best of all, my wife is a Maths graduate of St.Andrews!

**Higher Education Governance (Scotland) Bill: Comment**

1. The ‘Chairing Member’ may be remunerated. However, he or she will probably already be a paid, professional member of the staff of the organisation, with staff such as secretaries to assist in what will without doubt be onerous duties.

2. Three categories of membership come from paid bodies essential to the running of the organisation. The first is from the teaching staff, and chosen by election by those staff. The second, also from the teaching staff is simply nominated by the Trade Union of the teaching staff. The third, a member of the support staff, is also nominated by the appropriate Trade Union.

3. The work of these members, and in particular the meetings of the governing body, will presumably take place during their normal working day.

4. Two members of the student body, and two members who were once members of that body, are also chosen to be members. There are no provisions for their payment: their work will presumably be voluntary. The former members may well be in a position to afford both the time and the expense of this, and be happy to help their Alma Mater.

5. However, the student members may not only have to pay their expenses – post, phone, travel – but be distracted from their studies. However unlikely, there may even be a conflict of interest if their examiners serve on that same committee.

Why, therefore should they not be remunerated in some way beyond having this on their C.Vs.?

Tony Pay
Submission from Ms Gail Patrick

Higher Education Governance (Scotland) Bill

To whom it may concern
I am emailing to protest against the above Bill.
Having graduated from two Scottish Universities and taught both at one and a third, I am fiercely protective of the reputation, tradition and independence of all of them. These are crucial in the present quest to compete with world-wide competition to attract both staff and students as well as funding so that our universities continue to be a source of pride to us all.
Each university has to be allowed to retain its individuality to maintain that position. At the moment all ARE different. To force them towards consistency and uniformity with red tape in respect of the governing body, which has operated successfully for centuries, is both unjustified and dangerous. Please reconsider this unnecessary and damaging proposal.

Gail Patrick
Dear Sir or Madam,

I should like to make a strong complaint about the proposed legislation on Higher Education institutions in Scotland.

It seems that these institutions would no longer be able to control their own governance.

I urge you to consider that those with the ability and creativity need to be able to run universities without as much political interference as is being proposed.

I very much oppose the bill.

Pamela Paterson
Submission from Diana Paxman nee Ford

The Clerk to the Education and Culture Minister

Dear Sir

I am writing to oppose this bill which appears to seek political influence over Scottish universities. I refer in particular to my alma mater St Andrews where I was a most appreciative student in the 1950's,

The university gave me a splendid education and experience then and has gone on to achieve world fame for its achievements, and now comes high up in the list of successful and preferred universities. St Andrews in particular has a proud history stretching back six centuries – all this while staying independent and without the need for government interference.

Therefore this bill is worse than unnecessary and in fact could damage its outstanding academic reputation and its unique character and reputation.

I therefore urge your committee to quash this bill most thoroughly and leave this sector of Higher Education to continue to flourish under its own very effective governance.

As a proud graduate and continued supporter of St Andrews University I sincerely trust this bill will not come into being.

Yours faithfully

Diana M Ford
Submission from Tim Pelargus

Dear Sirs,

Herewith I express my concerns and opposition regarding The Higher Education Governance (Scotland) Bill.

I do not think it is in the interest of academia, its employees, students, and beneficiaries such as the private economy, public institutions and the health sector in terms of its dependency on world class research and development. It is against this background that I oppose the proposed bill.

As a matter of fact I also think that it would have negative repercussions for Scotland's academic and economic competitiveness in the long run.

Please note my opposition to this bill as a general council member of the university of St Andrews.

Regards,

Tim Pelargus
Submission from Ms Victoria Peterkin

Dear Sirs,

As a proud graduate of Edinburgh University, I am concerned to hear that the government plans to impose greater control over the governance of Universities.

The current arrangements have stood the test time. The plea for consistency is not a useful argument.

Increased bureaucracy strikes me as superfluous and expensive.

Edinburgh University is renowned the world over as a centre for excellence in teaching and research.

It is vital that its autonomy is maintained and it remains free from direct political influence, if this situation is to continue.

Please reconsider the consequences of this intended legislation.

Yours sincerely

Victoria Peterkin
Dear Sir or Madam

I am writing to express my considered opinion - after paying considérable attention to the national debate on this issue - that the proposed 2015 Higher Education Governance Bill will be bad for Scottish higher education, bad for the economy, and bad for the country.

The new legislation seeks to enforce greater consistency among institutions, thereby reducing their ability to adopt individual strategies. How can that be anything other than a bad idea?

The Bill will burden universities and the public purse with extra regulation and bureaucracy, exactly the curses of modern political life that stifles enterprise. This will jeopardise the positive contribution that universities make to the economy.

In the opinion of many eminent commentators - political and entrepreneurial, as well as academic commentators - the legislation is not only harmful; it is superfluous.

The Scottish universities and their General Councils have strongly opposed these proposals. The Royal Society of Edinburgh, as well as various other bodies, has been extremely critical.

I wish to add my own, modest but professional, criticism of the proposals.

Scottish education has been the root of Scottish success for five centuries or more, the root of the Scottish (and the world’s) industrial revolution, and the root of the Scottish Enlightenment. Any move by the political establishment to threaten this area of Scottish pre-eminence, is cause for the greatest concern.

The Higher Education Governance Bill offers exactly such a threat. It is a threat to the autonomy of the Scottish universities, to their creativity and to their originality.

This is especially serious for my own Alma Mater, St Andrews, which has produced generations of excellence based precisely on its creativity and originality.

The Royal Society of Edinburgh even goes so far as to state that the Bill will produce the opposite of ‘good governance’. The Society describes the proposed strategy as "a level of government intervention that is wholly inappropriate for an autonomous sector." The Society suggests that the whole Bill should be withdrawn.


The autonomy of the Scottish universities is an area that should be untouchable. The SNP has proved to be remarkably adept in governing and very shrewd in its political judgements. I believe we have here one example of the SNP making a mistake: for the Bill in question shows political, philosophical and educational misjudgements. The existing Scottish Code of Good HE Governance
(July 2013) already achieves the objectives of the Bill, without imposing the negative elements of ministerial interference - with all the risks that are implied therein.

The opportunity for Chairs of governing bodies to be elected by people from outside, is an invitation to political and/or commercial interference in the affairs of research and education institutions. This is most inadvisable. This runs counter to all the Scottish experience of HE governance gained through the 500 years of excellence I previously mentioned. Having worked personally with universities in UK and USA, and also in Austria, Switzerland, France and in French West Africa, I can assure you and the Education and Culture Committee, that the independence of the Scottish universities is a precious asset: it must not be diluted or destroyed.

I urge the Education and Culture Committee to reconsider the whole issue in its September meeting, and to send the Bill back to the drafters for a profound rethink.

I hope that Scottish university professors, students and graduates will be vocal and numerous in expressing similar opinions to my own.

Yours sincerely

Robin Edward Poulton, MA (Hons), PhD

St Andrews University 1965-69
Higher Education Governance (Scotland) Bill
Response to the Call for Evidence by
the Education and Culture Committee of the Scottish Parliament

Professor Ferdinand von Prondzynski
Principal and Vice-Chancellor of Robert Gordon University and Chair of the
Review of Higher Education Governance (2011-12)

The Higher Education Governance (Scotland) Bill is a measure designed by the Scottish Government to implement some key proposals from the Review of Higher Education Governance that I chaired and which reported in January 2012.

For the avoidance of any doubt, I remain committed to the proposals my panel made in 2012, and I am of the view that the substantive intentions of the Bill are appropriate and timely. It remains important that governance is open, transparent and inclusive, while also being effective and capable of supporting the educational, scholarly and material aspirations of Scotland’s universities. This was the balance we were aiming to strike in our proposals.

The Code of Good Governance drafted under the direction of the Committee of Scottish Chairs marked an important improvement in governance arrangements. This did however still leave some issues to be addressed, which by their nature would require legislation to be implemented.

In terms of the method of implementation chosen in the Bill, it is my view that it would be preferable for Parliament to legislate directly for the key measures proposed, including the appointment/election of governing body chairs, rather than to leave the implementation to ministerial regulations; this particular method would create uncertainty about future governance and could be seen as compromising institutional autonomy. As other submissions will rightly have emphasized, it remains vital that universities are not classified as state bodies and do not have their charitable status compromised.

The key substantive aims of the Bill are however sound. The arguments for the reforms are set out in my governance review, and it is not perhaps necessary for me to rehearse them again here. I remain committed in particular to the need for a more inclusive approach to appointing governing body chairs. This is needed in part to avoid the impression that governing bodies are not accountable to anyone other than themselves, which could be said to be the current position. This places them in a very different position from other non-state bodies – company boards for example are accountable to shareholders and can be removed by them; there is no equivalent (or any) stakeholder group to which governing bodies of universities are accountable. Direct accountability of universities to government would be inappropriate, so that the method we recommended would be the best solution and in line with the principles of the ‘democratic intellect’.
I accept that it is necessary for a governing body to have confidence in its chair. To secure this, we recommended that there would be an open recruitment and selection process run by the governing body, which would include interviews and shortlisting. This would ensure that all those presenting themselves for election would have the confidence of the governing body.

It is to be hoped that these reforms can take place against a backdrop of constructive dialogue, with a recognition of the importance of institutional autonomy and integrity, but also a recognition that universities must be able to work with the support and engagement of the wider stakeholder community. I should perhaps emphasise that the proposals of 2012 were not directed specifically again governing bodies as they were then operating, and my own personal experience with governors and chairs has been excellent. But it is important that the system carries public confidence and secures stakeholder engagement.
Submission from Louise Proctor

Dear Clerk to the Education and Culture Committee,

As an alumnus of the University of St Andrews, I would like to voice my opinion in opposition of the Higher Education Governance (Scotland) Bill.

I feel that this unnecessary act will negatively impact upon on the autonomy of this great institution, and its reputation.

Kind regards,

Louise Proctor
Dear Sir

As a graduate of the University of St Andrews, I am writing to express my extreme opposition to this proposed legislation.

Having practiced professionally as a chartered accountant, and indeed been the President of a major international accountancy body, I am convinced that any sort of government regulation should be kept to an absolute minimum as it stifles the real work of the institution at which it is aimed.

With respect to St Andrews, I am opposed to these proposals for the following reasons:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Please convey my views to your political masters and mistresses.

Yours faithfully

NEIL PRICE
Submission from Samira Qassim

Dear Sir/Madame,

I am writing concerning the Higher Education Governance Bill due to pass through the Scottish Parliament in autumn.

As an alumni student of St Andrews I cannot see how the proposed changes will advance academic performance and potential, nor for Scotland's broader academic institutions, historic and modern.

I oppose the bill on the grounds that it compromises academic autonomy, does not make clear the problem it is trying to solve and appears an unnecessary bureaucratic intrusion. As the church was separated from the state, and the judicial system from the executive branch of government, I see no good reason for the government to now have greater say in the running of its universities.

While I appreciate that great things come out of government and academic partnership, it must above all be a partnership for true innovation to thrive. Great ideas will never come out of institutions telling the government what they want to hear for fear of reappraisal. In the pursuit of knowledge, independence and freedom are requisite for breakthrough knowledge. Further it does not make sense to curtail an institution's autonomy while demanding greater academic freedom. This is a complete contradiction.

Moreover a one size fits all entirely compromises the benefit to Scotland's higher education institutions, which are broad and varied with very different needs. There must surely be better ways to help academic institutions without ruining the reputation of your world leading institutions in the process. Ignoring the time that goes into developing world class standards of education, as global standards are only set to increase along with competition, seems rather unwise. In my current work I see just how many new educational institutions are being founded in emerging economies. Great insinuations such as the University of St Andrews, the University of Edinburgh and the University of Glasgow have made historic contributions to the advancement of knowledge, consider for example David Hume and Adam Smith, whose very independent and original ideas will forever be remembered for advancing the state of our collective knowledge. A Bill that puts parameters on the independent pursuit of knowledge, and potentially hampers the ability of institutions to gain funding for research could absolutely compromise whether Scotland will in future deliver thinkers of the same calibre.

This Bill must be seriously reconsidered, if not repealed entirely, if it is to be a help not a hindrance to Scotland's academic institutions.

Yours sincerely,
QUEEN MARGARET UNIVERSITY COURT

RESPONSE TO CALL FOR EVIDENCE ISSUED BY THE SCOTTISH PARLIAMENT EDUCATION AND CULTURE COMMITTEE

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

1  PREFACE

The Court of Queen Margaret University welcomes the opportunity to respond to the Call for Evidence issued by the Scottish Parliament’s Education and Culture Committee on the Higher Education Governance (Scotland) Bill, introduced in the Scottish Parliament by the Scottish Government on 16 June 2015.

We note that the Committee’s role at Stage 1 of the parliamentary process is to report to the Parliament on the general principles of the Bill – that is, on its overall purpose. We preface our response to the specific questions posed in the consultation with broader observations and comments on the overall purpose of the Bill.

In our response to the original consultation, we set out a number of concerns regarding the impact of the legislative proposals on our current governance arrangements, but concerns also about the wider implications of the proposals for higher education governance and for institutional autonomy within the Scottish HE sector. While we recognise that a number of our concerns, shared by the majority of consultation respondents according to the Scottish Government’s own analysis of responses, have been allayed by amendment to the proposals, a significant number remain. Furthermore, the published version of the Bill has introduced new causes for concern that have not been the subject of consultation.

Our primary concern, set out clearly in our response to the draft Bill, remains that Scottish Ministers consider it appropriate to legislate on the internal organisation of autonomous charities. We remain concerned about the underlying presumption that there needs to be uniformity of approach within the sector and that further change needs be driven by statutory measures.

Having now considered the Higher Education Bill as introduced, we remain concerned about a number of the assumptions concerning existing governance arrangements within the sector, and about the impact and cost of the proposals. In particular, we do not consider that the Scottish Government has demonstrated why legislation on this matter is required.

We consider that the Bill, as drafted currently, represents a fundamental shift in the relationship between Ministers and autonomous higher education institutions, with Ministers exercising considerable power through secondary legislation to decide the categories of composition of governing bodies, the manner of appointment and conditions of service. These are not matters on which the Scottish Government sought views during the Bill consultation.

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1 Consultation on a Higher Education Governance Bill; Analysis of written responses, The Scottish Government, April 2015
In terms of the financial impact, we consider that, while the Financial Memorandum attempts to calculate the \textit{direct} costs to Universities of the proposals, it does not address the wider financial implications of the Bill. This includes the implications of any threat to HEI's charitable status arising from any future increase in Ministerial powers, and the additional costs arising from action required under secondary legislation.

We share the concern of others in the sector that increased Ministerial control may lead to universities being reclassified by the Office of National Statistics (ONS) as 'Central Government'. We consider too that there is significant opportunity costs involved in individual universities across the sector engaging in what is likely to be a complicated and lengthy process for amending their governing instruments.

We have set out detailed comments on the costs and the financial implications of the Bill in our response to the call for evidence from the Scottish Parliament Finance Committee. For completeness, those comments are set out in this response also.

2 CALL FOR EVIDENCE

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

(Question 2): The extent to which the Bill;

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

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

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

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

We have brought together our responses to three questions above, as the matters set out in the questions are inherently connected. Our response is set out in Section 3 below.

3 QUEEN MARGARET UNIVERSITY COURT RESPONSE

Policy Intent and Existing HE Governance arrangements

We preface our comments by noting that the Education and Culture Committee’s call for evidence states that the policy intent of the Bill as ‘to enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose’.

The specific requirements are summarised as requiring 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, and to include various persons within the membership of those governing bodies. It also requires that HEIs ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending \textit{ex officio}; a majority of elected members representing staff and students; and a minimum of 10% student representation.

In common with all Scottish Universities, we are responding to the questions set out above from a position of subscribing fully to the Scottish Code of Good Higher Education
Governance. For Queen Margaret University, specific elements of the proposals eg concerning the size of the academic board, election of staff and student association membership to the board have been enshrined in the University’s governance arrangements for a number of years, so are supported in principle and in practice.

We have serious concerns around the underpinning rationale for the Bill ie that Scottish Ministers consider it appropriate to legislate on the internal organisation of autonomous charities. We are concerned also about the potentially detrimental effect of the legislation on the representation of elected members of staff of the University, the potential impact of an election process on the pool of candidates for Chair, and the potential financial impact of the legislation, not only in terms of direct costs, but in terms of the potential loss of charitable status. We provide further explanation on each of these concerns below.

In response to Question 1 in particular, we have not moved from the position set out in our response to the Bill consultation, which is that the policy reasons supporting the Bill do not accurately reflect existing governance arrangements within the sector, and in particular, the most recent modernisation of governance within the sector following the implementation of the Scottish Code of Good Higher Education Governance (hereinafter referred to as ‘the Scottish Code’).

We consider that the underlying policy aims of the legislation ie to increase accountability and transparency, is being achieved already through the Scottish Code. This principle is enshrined within Main Principle 11 of the Scottish Code, which requires that Universities adopt rigorous and transparent procedures.

Practices for the appointment of Chairs are consistent across the sector, with candidates shortlisted and the appointee chosen through open and transparent processes. The selection panel overseeing this process includes staff, students, and independent external governing body members. The final decision/approval is by a body that includes students, multiple staff members, and external stakeholders ie the governing body. These arrangements apply not only to the appointment of Chairs but to the appointment of other external (lay) governing body members.

We question seriously aspects of the proposals as they relate to representation on governing bodies. As we stated in our original response to the consultation, it is a central principle of good governance that members act in the interests of the corporate body and are selected on the basis that they are accountable for the good governance of the institution, rather than for representing the interests of specific groups.

Universities in Scotland are constituted as Charities. As a consequence, they are subject to the provisions of the Charities and Trustee Investment (Scotland) Act 2005 (‘the 2005 Act’), which requires that governing body members, in their roles as trustees, must act in the interest of their charity.

For that reason, we are concerned at the proposal that members of governing bodies are appointed as the nominees of particular interest groups. Such members may find themselves subject to a conflict of interest whereby they cannot exercise the mandate of the interest group that nominated them without breaching the general duty of charity trustees to the good governance of the institution and the specific requirements of the code. Nominated members of governing bodies may find that they frequently have to declare a conflict of interest and refrain from participating in the business of the governing body, or that their continued participation puts them at risk of misconduct in the administration of the charity.
Conflict with Governing Instruments

The governance of higher education institutions is defined in various governance instruments that have the force of law. For Queen Margaret University, that includes the Queen Margaret University Order of Council, approved by the Privy Council, and the University’s Articles of Association governing its activities as a company limited by guarantee. We consider that the provisions of the Bill are in conflict with these instruments, which make provision for the membership and conduct of governing bodies and academic boards/senates which is different from that set out in the Bill. That position will apply to each of the HEIs in Scotland.

In the case of Queen Margaret University, it would be arithmetically impossible for the University to comply with the requirements proposed by the legislation while adhering to the requirements contained within the University’s statutory instrument and within the Scottish Code ie that governing bodies should have no more than 25 members, with an independent majority.

The Bill sets out specific requirements in terms of representatives of particular constituencies (Section 4 refers). A number of those requirements are already accommodated within the University’s current Order of Council, including 2 persons elected by staff and 2 persons appointed by nomination of the Students’ Union.

The University is in the final stages of securing Privy Council and parliamentary approval for a proposed amendment to its Order of Council which would accommodate whatever regulation is introduced concerning the process for appointing the Chair. However, other stated requirements would not be accommodated, including provision for two persons appointed by Trade Unions and two persons appointed by being nominated by a graduates’ association. Importantly, the requirement for four additional specific constituencies within the composition of the Court would impact on the balance of lay and ex officio membership and on the maximum permissible members on the Court. It could mean that members openly elected by various categories of staff would be replaced by the nominees of interest groups supported by only a minority of staff.

The University’s current Order of Council provides for ‘between 12 and 16 lay members’, with a proposal to reduce the minimum to 11 plus the Chair under a revised Order of Council. Under the new requirements, and without altering the current composition, the ‘non’ lay membership would total 12², resulting in an even split between independent lay members and ex-officio or non-lay members. Were the Bill to pass into legislation in its current form, the University Court would need to consider either increasing its total membership (in breach of the Scottish Code), or reviewing the other current categories of staff membership. Any such change is likely to involve the University in going back to the Privy Council for further amendment to its governing instrument.

We would ask the Education and Culture Committee to note that the process of securing Privy Council and Scottish Government approval for an amendment to the University’s Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. It is likely that several governing bodies will require to seek amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days. This has not been factored into the Financial Memorandum that accompanies the Bill.

² Principal, 2 x Vice Principals, 2 x Students, 2 x elected staff, 1 x Senate appointee, 2 x TU and 2 x Graduates’ Association = 12
We consider that the Bill raises a separate issue about what should happen if an institution does not have a recognised trade union for academic or ‘support’ staff, or if there are multiple recognised trade unions for these categories of staff.

Under current arrangements within the University, it is open to members of staff who are members of a trade union to nominate colleagues to stand for election as an academic or other staff member of Court. In these circumstances, the staff electorate decides which candidates will represent their interests most effectively on the basis of candidate statements.

In terms of the academic board, or equivalent, the Bill requires HEIs to ensure that their academic boards are comprised of no more than 120 people and include Principals and Heads of Schools attending ex officio, a majority of elected members representing staff and students, and a minimum of 10% student representation.

The Queen Margaret University Order of Council as currently stated does not set out in detail the composition of its academic board (the Senate), but rather states simply that the Court ‘shall establish a Senate which shall be constituted and regulated in a manner specified by the Court from time to time on the recommendation of the Principal’. Consequently, there would be no requirement to amend the QMU Order of Council to bring it in line with legislation. However, there would need to be some interpretation of the term ‘Head of School’ and some minor adjustment to the current composition in terms of student membership. The Senate is currently constituted so as to ensure always that the elected staff and student membership is in the majority.

We do not consider that the specific membership of the academic board, or the manner in which those members are appointed in an autonomous institution, is an area that should be governed by legislation. The specific composition and membership of such boards should be governed by the specific needs of the institutions in question and should reflect the diversity of institutions in the sector. We do not consider that the proposals have demonstrated that there is need for a single uniform approach across all institutions in Scotland.

Importantly, we consider that, in determining the composition of governing bodies and academic boards, which are part of universities’ autonomous self-regulation, the Bill affords to Ministers substantial new powers that fundamentally change institutions’ constitutional status. This is in direct conflict with previous assurances from the Scottish Government that it respects ‘responsible autonomy’. Such powers have the potential to change institutions’ charitable status as explained below, and the potential for Universities to be reclassified as ‘central government’ by the Office of National Statistics.

_Election and Remuneration of Chairs and Charity Status_

We have not moved from our original position on the matter of the election of the Chair, being concerned that election from a pool of candidates by a constituency other than the Governing body risks politicising the role of the Chair and turning the process into a contest along political or ideological lines. We have a serious concern that election will limit the pool of candidates on the basis that appointment is subject to public contest. We are particularly concerned that this will impact on the potential pool of female candidates.

On the matter of remuneration of Chairs, we consider that governing body membership carries a strong public service ethos which is an important motivating factor for those who participate. Remunerating chairs risks the erosion of this ethos. Remuneration of the chair alone would also create a significant symbolic imbalance between the chair and other governing body members, which could adversely affect the unity of the governing body.
Importantly however, we consider that remuneration of the Chair is problematic in relation to charities’ law. Governing body members of HEIs are charity trustees. The Charities and Trustee Investment (Scotland) Act 2005 makes clear that trustees should be remunerated only in exceptional circumstances, usually for providing some service other than serving on the governing body. The unpaid nature of governing body membership is considered an important facet of the distinction between governors and the executive.

The 2005 Charities Act, under Section 67, states that a charity trustee must not be remunerated from charity assets unless certain conditions are met. We do not consider that this important aspect has been addressed in the published draft Bill or in the supporting guidance. While we note that the Office of the Scottish Charity Regulator commented on the Scottish Government’s consultation proposals, we consider that the Bill as published provides Ministers with significantly more power over institutions than was suggested in the consultation.

**Financial Memorandum – Impact of the legislation**

We consider that, in determining the composition of governing bodies, academic boards and senates, which are part of universities’ autonomous self-regulation, the Bill affords to Ministers substantial new powers that fundamentally change institutions’ constitutional status. Such powers have the potential to change institutions’ charitable status as explained below, and the potential for Universities to be reclassified as ‘central government’ by the Office of National Statistics.

The Office of the Scottish Charity Regulator (OSCR) sets out a number of indicators that organisations must meet to pass its ‘charity test’. One of the indicators that may disqualify an organisation from charity status is the extent of Ministerial control. Such control may include:

- Power to add to or amend the powers given to boards of management;
- Consent/ approval required in relation to making a material change in the constitution;
- Consent/ approval required to make a change to the constitution.

In our original response, we stated that this would appear to have implications for any legislation that provides for Scottish Ministers prescribing changes to an institution’s constitutions, including appointments. While we note that the Office of the Scottish Charity Regulator (OSCR) commented on the Scottish Government’s consultation proposals, we consider that the Bill as published provides Ministers with significantly more power over institutions than was suggested in the consultation.

The loss of charitable status would result in HEIs losing their entitlement to 80% relief from non-domestic rates. We consider that loss of charitable status would also severely prejudice institutions’ capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions which do not have charitable status.

Equally, reclassification by the ONS would jeopardise Universities’ status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support. Such re-designation would prevent universities from retaining annual operating surpluses, place restrictions on their ability to borrow funds and reduce their ability to enter into commercial partnerships.

As part of its deliberations, we think it would be useful for the Committee to consider what further advice the Scottish Government has taken from OSCR on this matter ie beyond the
original consultation, and what opinion has been offered by OSCR? However, it is important to note that the Scottish Government cannot give undertakings regarding future decisions of the ONS or the Regulator. The proposed legislation can therefore result in unintended consequences over which the Scottish Government does not have control.

**Recruitment of the Chair**

On the matter of Recruitment of the Chair, we note the estimated costs attributed to this exercise as set out in the Financial Memorandum that supports the Bill. We do not recognise the basis on which such costs for other bodies and individuals have been calculated. We consider that the costs attributed are a significant under-estimate.

The Financial Memorandum suggests that the ‘potential selection of candidates for chair might involve open advertisement and selection of candidates based on suitability for the role of chair’ (emphasis added). Such transparency is a requirement under the Scottish Code.

While we accept the approximate costs attributed to reimbursement of candidates’ reasonable interview expenses, we do not accept the costs attributed to external advertisement and to the management of the appointment process.

The Financial Memorandum states that the cost of recruitment is approximately £3000 in staff costs and £2000 in external publicity costs for recruitment of a Chair on a four year recruitment cycle for the Chair.

The recruitment cycle for the Chair at QMU is three years, rather than the four suggested in the Financial Memorandum, with equivalent costs being incurred within that 3 year cycle depending on whether or not an incumbent Chair’s term is extended by the Court.

Our experience is that the cost of placing a modest advertisement within a national Scottish newspaper is of the order of at least £5000. In addition to the costs of paid advertisement, there are costs attributable to staff time in managing the recruitment and appointment process.

By way of illustration, the current process for appointing the Chair of Queen Margaret University is overseen by the Nominations Committee under powers delegated by the University Court. The Nominations Committee, which includes Court lay members, staff and student members, shortlists and interviews candidates, before selecting a preferred candidate and making recommendation for approval by the Court. As far as is practicable, this process is managed so as to dovetail with the ordinary schedule of Court and Committee meetings. This minimises the cost in terms of members’ time and other expenses.

We anticipate that, were the University required to conduct a wider election for the position of Chair, depending on the composition and size of the electorate, and the process for nomination and election, then this would represent significant additional cost in terms of staff resource. In particular, the staff time required to publicise the election, obtain nominations, arrange ballot papers, verify and count votes and address any issues arising from process would be significantly greater than that currently involved in such recruitment. Without knowing the specific detail of the proposals, it is difficult to quantify the full extent of the additional cost to the University.

**Remuneration of Chairs**

On the matter of remuneration of Chairs, we would reiterate the view that we set out in our response to the consultation, which is that governing body membership carries a strong public service ethos which is an important motivating factor for those who participate.
Remunerating Chairs risks the erosion of this ethos. Remuneration of the Chair alone would also create a significant symbolic imbalance between the chair and other governing body members, which could adversely affect the unity of the governing body.

The unpaid nature of governing body membership is an important facet of the distinction between governors and the executive. Under existing arrangements, financial considerations should not be a bar to any potential candidates for the position of chair, because expenses available to governing body member can include any lost earnings and childcare costs incurred as a result of governing body membership.

Importantly however, we consider that remuneration of the Chair is problematic in relation to charities law.

Importantly, we reject completely the basis on which the remuneration of the Chair has been calculated, and in particular the number of days attributed to undertaking the role.

We are currently in the process of recruiting for a new Chair. In setting out for applicants the requirements of the role, we have stated that the time commitment will vary from week to week, but the likely overall time commitment required is approximately 50 days per year. In breaking down those 50 days, we have provided for the full Court meeting on at least 6 occasions per academic year, including a two-day Away Day on campus.

The Chair is required to Chair or attend meetings of Committees of Court throughout the year, and to meet occasionally with Court members on an individual basis. Currently, the Chair of Court convenes the Nominations Committee, and is in membership of the Finance and Estates Committee and the Senior Management Remuneration Committee. There is background reading associated with each of these meetings. The Chair of Court is also expected to be available to provide informal support to the Principal and Vice-Chancellor, the University Secretary and members of Court. In addition to the requirements set out above, the Chair is expected to attend events held by the University, including the annual graduation ceremony in early July, professorial lectures, social and celebratory events.

In summary, were the costs to Queen University calculated on the basis of the daily rate set out in the consultation, the remuneration of the Chair would be of the order of some £26k, not including reimbursement of reasonable expenses.

Future costs eg arising through secondary legislation

As we have stated above, we have concerns around the costs arising from the practical implications of the proposals as they impact of current governance arrangements of HEIs in Scotland. The provisions of the Bill are in conflict with existing governance instruments, such instruments having made provision for the membership and conduct of governing bodies and academic boards/ senates which is different from that set out in the Bill. It is likely that several, if not most, governing bodies will require amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days. There are implications also for time allocated for Parliamentary scrutiny. We consider that none of these costs have been factored into the Financial Memorandum that accompanies the Bill.

None of the above includes the opportunity costs of engaging in a complicated and lengthy process of revision to the University’s governance arrangements.
Academic freedom

It is suggested that the replacement of the current legal definition of academic freedom is with a view to 'strengthening it and making explicit the freedom to develop and advance new ideas and innovative proposals’. In our view, the likely practical effect of these provisions will be neutral on the basis that these freedoms are exercised already under the current definition. In our response to the consultation, we stated that we did not disagree with the inclusion of a reference to the freedom to encourage new ideas in the statutory definition of academic freedom. However, we stated also that the existing definition of academic freedom contained within the Further and Higher Education (Scotland) Act 2005 would extend to the freedom to encourage new ideas by reference to the freedom to question and test established ideas and received wisdom and to present controversial and unpopular points of view.

Academic Freedom has clear legal and regulatory protection under existing arrangements. Mechanisms currently exist that provide for changes to definition without the need for legislation. The Scottish Code of Good Higher Education Governance sets out a clear expectation in this area as a Main Principle, and compliance with this is already a condition of public funding through the relationship of the Code and the SFC Financial Memorandum.

In this regard, it is difficult to see how additional legislation enhances the existing arrangements which presently enable Scottish Ministers and the SFC to make such orders that are sought under the proposed legislation.

Keir Bloomer
Chair of University Court
Queen Margaret University
4 September 2015
Submission from Queen Margaret University branch of University and College Union

At a quorate members meeting of Queen Margaret University branch of University and College Union on 2nd September, I, as branch president, was unanimously requested to write on behalf of members in support of UCU Scotland’s response to the consultation on the Higher Education Governance Bill.

In particular we would like to draw attention to the following.

There is clearly a problem with governance in Higher Education in Scotland. QMU is by no means the worst offender, but still staff have no direct means to influence governance in the institution. As representatives of the staff for the purposes of terms and conditions and policies, the unions have no access to senior decision making. The current governance model gives too much power to senior management, who are then in a position to brief the members of Court, with almost no accountability and no opportunity to be questioned by an independent representative of the staff. This leads to an unhealthy managerial approach within the institution, in which decisions are taken by senior managers and then passed down the hierarchy to staff with minimal opportunity for challenge. This is leading to depersonalisation of staff and opportunities for managers to abuse their power. It is important to open up decision making to public scrutiny and to allow for the professionalism and autonomy of collegial decision making amongst staff. A more open governance model would not damage university autonomy, but would rather give that autonomy to those professionals who deliver the education, research and scholarship, rather than as currently, the senior managers to treat universities as businesses, free of accountability to the constituencies which the institution should be serving.

QMU is currently seeking to appoint a new chair of Court, which highlights the lack of transparency, and veneer of openness which masks decision making by a small, unaccountable group of managers. Staff have been ‘invited’ to make suggestions for the next Chair of Court, but the selection and appointment is made by a closed group of managers using unknown criteria, who are unaccountable for their decision. Having a chair elected by staff and students, and having Court members representing the community in which the university is situated (especially those who tend to be excluded from participation in the benefits of university scholarship) would make Court more accountable.

As the only independent and democratic bodies representing staff at the institution, trades unions should play an important role in making governance more open and accountable. There should therefore be trade union nominees on Court. Trade union representatives currently have no guaranteed access to Court (unlike senior managers). The staff of a university constitute its principal asset, and so the opportunity for staff to elect onto Court representatives who would best represent their interests, via independent trade union structures, would be in the best interests of the university as a whole, and therefore would not breach Nolan principles.

We note that the von Prondzynski commission represented all the major university stakeholders – rectors, chairs of court, principals, staff unions and students unions –
and produced a reasoned set of proposals to reform higher education governance. We believe that the Higher Education Bill should endorse all of these recommendations. Already the chairs of Court have ensured that the Code of Governance which was approved last year was watered down from the proposals of the von Prondzynski report. It is important that Parliament does not allow Universities Scotland to dilute the current Bill and seeks to implement higher education governance of the highest standards of openness, transparency and accountability.

Yours sincerely

Eurig Scandrett
UCU QMU branch president
Dear Keir and colleagues

I have been approached by Sheila Williams, one of the elected staff members of Court, concerning the written response by QMU’s UCU branch to the consultation on the Government’s Higher Education Governance Bill. Sheila and I had a very helpful discussion and I have decided to write to you to clarify any potential misunderstanding.

I believe it is important to recognise the purpose of the written response, which is part of a consultation on the Higher Education Governance (HEG) Bill. This Government Bill is designed “to strengthen governance in the higher education sector in Scotland” and to ensure that legislation supports the Scottish Government’s desire for “modern, democratic and accountable processes to inform governance arrangements in higher education institutions”. The need for legislative change was identified through a series of processes set up by the Scottish Government, and in particular the 2012 Review of Higher Education Governance in Scotland, undertaken by a Commission chaired by Professor Ferdinand von Prondzynski, on which there was representation from all sectors of higher education.

The principal purpose of UCU’s consultation response was to support the Scottish Government’s proposal to reform higher education governance and to improve the balance between autonomy, accountability and good governance. In particular, UCU believes that it is in the best interests of staff, students, the university as a whole and indeed the wider society, to have universities that are more accountable to the communities that they serve, and in particular that the Chair of Court should be elected by staff and students of the university, and that there should be trade union representation on Court, both aspects of the HEG Bill.

In my response to the consultation, I referred to the current process of selection of Chair of Court at QMU. I should make it clear that this is not a criticism of the integrity of the individuals involved in the process of selection. I have no reason to suspect that anybody involved with this selection process is acting with anything other than the best of motives to make the current structure work in the best interests of the university. However, the point is, they are only able to work within the current structure, whereas the purpose of the HEG Bill is to reform that structure. I know that the vacancy for Chair of Court has been widely advertised and I have been made aware that elected staff members and student union representatives have been fully involved in the process of selection of UCU’s Chair of Court. It is, however, a process of selection, within parameters set by a management structure. I have no reason to believe that those who participate in the process do not adhere to high principles in their selection criteria, or
that candidates are rigorously assessed against professional standards. However, this is very different from an open and democratic process of election with subsequent accountability of the successful candidate to those who elected them.

I personally believe that QMU’s Court conducts its affairs in good faith and in many ways with exemplary integrity. I would have my criticisms, as would other staff, but that is not the purpose of the consultation response. QMU acts within the constraints set by legal structure. As a representative of staff it is my responsibility to reflect the position that these legal structures would be improved by the reforms proposed by the current HEG Bill.

In my response I also draw attention to what UCU members believe is one of the impacts of an inadequate level of openness and accountability in governance: unhealthy managerialism throughout the university, inadequate opportunity for independent challenge to decision-making, depersonalisation of staff and the erosion of opportunities for collegial decision making. These concerns have been brought to the attention of senior managers by trade unions through the appropriate channels available and are currently subject to negotiation. However it is our belief that a greater requirement for openness and accountability of university governance as a whole would reduce the risk of these problems arising.

UCU is of course the largest trade union representing academic and related staff in higher education in Scotland and indeed at QMU. I have been elected by and am accountable to members through an open democratic process, to represent the independent and collective interests of staff, based on experience and articulated through democratic structures. The way in which these views have been expressed in the consultation response is my own. If the tone of my consultation response gave the impression of a public criticism of QMU and individual Court members then I apologise. I remain accountable for my actions to UCU members.

Yours sincerely

Eurig Scandrett
QMUUCU Branch President
Submission from Frank Quinault

Higher Education Governance (Scotland) Bill

Response to the Consultation

I write as a retired member of staff of the University of St Andrews, where I held various senior appointments, including that of Assistant Principal for External Affairs, during my 35 years of service. I also had a long and close association with the Royal Conservatoire of Scotland, which included membership of its Academic Board. I have acted as an external reviewer of numerous universities and other HE institutions in Scotland, England and South Africa, and I continue to serve as a member of the Icelandic Quality Board for Higher Education.

Throughout my long involvement with higher education, in all institutions and indeed all countries of which I have personal knowledge, institutional autonomy has been a fundamental principle. Governments must, of course, ensure that the HE institutions which they help to fund, and which are so important to the economic as well as the cultural health of a nation, are properly regulated. In Scotland this has been achieved in the best possible way, by allowing each HEI the freedom to create a system of governance that is aligned with its particular mission and individual circumstances, rather than having to conform to a prescribed and uniform template. I cannot prove that this has been crucial for the past and present success of Scotland’s universities, but I firmly believe it to be so. Outside intervention in their governance should only ever be justified by clear evidence that something serious is amiss.

Neither the Bill itself nor the Explanatory Notes provide any such evidence. Moreover, Scottish HEIs are already reviewing their own governance arrangements in accordance with the admirable Scottish Code of Good HE Governance, which incorporates a ‘comply or explain’ principle. I see no need whatsoever for a new Bill at this juncture.

The proposed Bill is not just unnecessary: it is potentially harmful, because it includes provisions that could undermine institutional autonomy. The areas of concern have been set out with great clarity by the Royal Society of Edinburgh, in its response to the Consultation, and with all the authority of that august academic body. I endorse all that they have said and conclude, with them, that the proposed Bill should be withdrawn.

Frank Quinault,
Submission from Martyn Quick

Higher Education Governance (Scotland) Bill

To Whom It May Concern,

I am writing to express my concerns about the above bill. As someone who has been employed in the UK Higher Education sector all my working life and within a Scottish University since 2004, I appreciate that the Scottish Government hopes to strengthen Higher Education within Scotland. However, I am unconvinced that the introduced bill is the best way to achieve this goal.

As I understand it, the bill is principally attempting to unify the way that individual universities within Scotland are governed. I am afraid that I fail to see why a one-size-fits-all method should be applied here. As far as I can see, there is no actual case made as to why the proposed unification is needed. There are a wide variety of Universities in Scotland, in terms of size, age, and academic focus, and I see little reason to believe that all such institutions should be governed in identical ways.

Indeed, there is good reason to believe that the Scottish Higher Education system is in excellent shape at this point. My own institution continues to perform well in many UK league tables and is widely respected across the world. I am also well aware that similar positive statements can be made for many other institutions in Scotland. I see little in what is proposed that will improve upon these successes and surely the greatest danger is that the actual upshot will be damage to our Higher Education system. There is concern within the sector that the proposals will introduce greater, and unnecessary, bureaucracy that will burden universities and provide a drain on their funding.

As an academic contributing to the daily life of Universities, we currently admit excellent students and personally I can honestly say that it is a pleasure to teach them and open their eyes to the wonders of my subject. I do not want to see this position to change and I am concerned that this bill could seriously damage our position.

In addition to reading the bill, I have also looked briefly at the Royal Society of Edinburgh’s Advice Paper (February 2023). The latter august institution makes a number of serious points that do not seem to have been taken sufficiently seriously within the bill. I agree with their statement that “the proposed intervention could only be justified by clear evidence of serious systematic deficiencies in the governance of the sector.” However, it is unclear to me that such deficiencies exist and I have failed to find an attempt to provide such evidence.

In the end, I find it hard to ignore what inappropriate for an autonomous sector.

Yours sincerely,
Martyn Quick
I wish to object to the proposed HEG Bill for the following reasons

- the problem that the bill is designed to solve has not been adequately identified
- it increases the risk of government control over Scottish Universities and risks the loss of freedoms to innovate and form productive partnerships
- far from improving governance it is actually a retrograde step for Councils and Courts.
Submission from Reverend John Ray

Dear Sir,

I write as a General Council member of the Scotland’s oldest university, as somewhere who loves the place, and also as one who has followed with pride the way the University has developed, especially in its national and international standing, during recent years under the leadership of Louise Richardson.

Others will make more sophisticated arguments. As one who matriculated in 1946, and has, thanks in large part to St Andrews, had a life full of positive international experience, the simplest comment is

‘If it ain’t broke, don’t meant it!’

Does more regulation, more cost, more control help realise the good motive of politicians for greater justice and equality? I think not.

It’s a back handed compliment to St Andrews, and Scotland’s loss, that the Principal is leaving for Oxford, but it also underlines the progress made at this one University, which has used its freedoms to gain a cutting edge in the global market to attract and keep the best students.

My wife is a medical graduate of Edinburgh University and the story will be the same there.

The opening to direct political influence and the inevitable drag of increased bureaucracy is bound to slow up those individual strategies which operate to the common weal.

And has any convincing case been made for bringing forward this bill?

Yours faithfully,

Revd John Ray, OBE MA
Submission from Sebastian Reetz

For the Committee Clerk,

I am writing to you as a Scottish University graduate. I view the proposed HEG Bill as a threat to the autonomy of my alma mater, which has up to this point proven its ability to assemble a thriving student body and a world-class education with very little government assistance. I find the proposed bill to be, at the very least, unnecessary and, at the very most, constraining to the point of disaster.

Therefore, I urge all concerned to reconsider this bill. There are many better ways of stimulating Scottish educational institutions in the long-run.

All my best,
Sebastian Reetz
Submission from Sir Bob Reid  
Higher Education Governance (Scotland) Bill

The success of an educational institution is best measured by its outputs. The most important of these are its students and its research. Students are inspired by their lecturers and research is stimulated by the positive and creative environment in which it is located. Freedom of thought and communication reside within that environment. A university is not a teaching environment it is a learning opportunity provided by academic achievers.

The leadership of these institutions will have its own individuality but it should have two objectives in common, the education of its students to realise the value of knowledge and the desire to push the boundaries of that knowledge out into the hitherto unknown.

I have had the privilege in my life to work in two great industries, energy and the railways and finally in the world of finance. In all three regulation was necessary to protect the public interest and to contain the activities within the boundaries defined by democratic governance. The boundary is an elusive objective and constantly runs the risk of becoming a static infertile containment.

For a university the elimination of the boundary must be an ultimate objective and with that will come the graduation of young people with unclosed minds pushing new ideas and solutions. When the parliament considers legislation on Higher Education it should therefore concentrate on creating the environment which will attract creative and exciting leadership and which will take the Institution and its students forward. If the end point is an institution bound by compliance in an apparatchik type world or a world in which the David Humes and the Maxwells will prosper the game will be either won or lost. This will be the most important piece of legislation to come before the House whether it unleashes or binds these great institutions will be the test. History has shown the success of our people has been founded on their education. To prepare for such an important debate I would suggest, Parliament would be wise as a first step to establish a committee or commission to examine the future of our universities to which the intellectual achievers in our community and beyond and those from commerce and industry who receive and develop the output from the universities and who in their own situations have seen the positive and negative impacts of regulation. With the benefit of their output the government can then begin to review its current policy. Time must be made to think deeply and well on this vitally important sector of our society. To take time and counsel is a sign of strength not weakness.

Sir Bob Reid
Submission from Sanjay Raisinghani

Dear Sir,

I am an alumnus of the University of St Andrews, and I am writing to you today to appeal against the passing of the forthcoming "Higher Education Governance" Bill.

The arguments provided by my alma mater, as well as much of the Scottish Academic community, are as follows:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Please reassess your stance regarding this Bill, and acknowledge that it may do more harm than good to our institutions. Scotland has for centuries been a beacon of higher education, attracting students from around the world - I hope you will work to strengthen the foundations, to keep it this way for generations to come.

Thank you for your time and attention.

Kind regards,

Sanjay Raisinghani
Submission from Elizabeth Rickards

I am writing to you to express my dissatisfaction with the proposed Higher Education Governance Bill. It is clear from the proposals that individual universities will be adversely affected by its introduction. I am most concerned to learn that universities will lose their independence and be subject to direct political interference. Given that Scotland was home to one of the intellectual hubs of the Enlightenment, I find it baffling that the Scottish government now seeks to undermine the intellectual independence of its universities. Please remember the inspiring words of John Stuart Mill Philosopher and Lord Rector of the University of St. Andrews 1865-1868: ‘A university exists for the purpose of laying open to each succeeding generation..... the accumulated treasures of the thoughts of mankind. These proposals would be similar to introducing a bill into the House of Commons whose aim was to curb the independence of the BBC.

I advise students from all over the world on their university applications. St Andrews and other Scottish universities have a worldwide reputation for excellence. As a graduate of St Andrews I feel pride when I encourage students to apply, knowing full well that this may turn out as one of the best decisions of their lives. If the Scottish government introduces regulations which affect the excellence of the research and teaching quality at its universities, their worldwide reputation for excellence will be harmed. This, in turn, will not just affect student recruitment but also the Scottish economy, and in the longer term such a decision would erode the sense of pride which Scots so rightly have in their higher education institutions.

Yours faithfully

Elizabeth Rickards
The Committee’s questions

Response of Dr Andrew P. Roach, Senior lecturer in History at the University of Glasgow, writing in a personal capacity

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

From initially favouring the proposals of the von Prondzynski report I have viewed the resulting legislation with mounting unease. While concern about the way in which universities have come to be managed in recent years is widespread across the sector, there is a danger of imposing inflexible governmental regulations in exchange for overbearing management models. Scottish universities have made considerable progress towards inclusion of all sections of society, more than their English counterparts. There are certainly questions about accountability to students, funders and the wider public which universities should address: whether they should be directly accountable to government raises questions of academic freedom which I think deserve greater consideration. As for modernity, it would seem to me to be more important that higher education governance should effectively deliver the goals of higher education, rather than pursue modernity for its own sake.

2. The extent to which the Bill

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

The move to elected chairs of the governing body is to be commended. Historically, universities are democratic institutions and their outstanding periods of success in the nineteenth and twentieth centuries have coincided with a large degree of democratic governance. With this in mind it is surprising that the bill makes no mention of the crucial relationship of the governing body to the academic board. Any staff representation on the governing body would have greater credibility if drawn from the academic board. If this is not what ministers have in mind in drawing up the categories of representation on the governing body then at least two members must be drawn from the academic board because the relationship between the executive and operational wings of a university are probably the most crucial to any HEI. Glasgow University has for instance 6 academic “assessors” taken from senate on the University Court.

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

The minister’s ability to vary the composition of the governing body must occasion disquiet. Elections of Chairs of governing bodies is a long established principle in several countries and need not raise any conflicts with institutional autonomy.

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

HEIs are both research and teaching bodies. As teaching bodies they are responsible to the Scottish government in so far as the government provides funding for a proportion of students. In some cases more than 50% of students are not funded by the Scottish government. While any government should keep some oversight of the higher education sector, micro-management is neither necessary nor desirable. In terms of research academics have their own initiatives and
in addition, may be responsible to a number of funding bodies, beside the government. Scottish universities have achieved their high ranking in the world partly through the perception that they are independent. This is in contrast for instance to the Far East where many institutions are better funded, but seen as beholden to their financial backers.

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? Are any further measures needed?

I was happier with the Code of governance as being a more flexible document. The bill seems to enforce an unnecessary uniformity on Scottish HEIs. I am concerned that the von Prondzynski report seem to recommend a more democratic independent HE sector; I’m not sure this bill will result in anything of the kind.

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

I don’t see any problem with this, but see above.

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

There are advantages in the insistence of representation of various groups on governing bodies. However, the standardisation across all Scottish HEIs seems unnecessary.

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

This seems reasonable, but their role within the university and relationship to the governing body is left undefined and the risk is that they could be made irrelevant which would not be in the best interests of the institution or higher education and research more generally.

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

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The definition of academic freedom is a difficult one and several colleagues have stated that since there is an unspoken consensus among academics as to what academic freedom is and crucially, when it is being infringed then it's best to leave well alone. However, since working definitions exist and have been put into practice notably in Ireland, then the proposal does not seem unreasonable. I would be wary of qualifications such as "within the law" as much university research concerns the desirability or viability of changing the law, e.g. drugs research and proposals of possible legalisation, issues concerning the age of consent, travel abroad to fight for or against ISIL etc could all be construed by malign spirits as not "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.

I would say yes, but perhaps that is the price to be paid for academic freedom. You should be able to say the unsayable, but there may well be consequences. As long as tenure is guaranteed, facing a degree of institutional scepticism about your ideas may be inevitable and legislation should not micro-manage. I'm aware that this is the lesser of two evils.

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?"

On q7 for similar reasons to those outlined in q6 academic freedom has to apply even to views expressed outwith the institution, provided that the view or action is not itself breaking the law. It would be too easy frame criticism of an academic's views along the lines of "bringing the institution into disrepute" which could render academic freedom meaningless. Obviously, academics breaking the criminal law are liable to prosecution.

- See more at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/90819.aspx#sthash.CQIw7Jgg.dpuf
The following constitutes RGU’s response to the questions posed by the Education and Culture Committee:

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

The Board agreed with the theme of the review of HE Governance conducted in 2012, i.e. that openness, transparency and inclusiveness in an appropriate manner were important and strengthened confidence amongst staff, students and stakeholders. The Board responded positively to the *Scottish Code of Good HE Governance* (which had been recommended in the 2012 Review) and moved quickly to review and where appropriate revise its governance arrangements in a comprehensive implementation for the Code. Some examples of changes made include:

- Students as members on the Nominations Committee (a staff member has been on the Committee for some time).
- Reinforcing the Board’s commitment to diversity, notably in setting targets for gender balance.
- Agreeing a mechanism whereby payment/expenses can be made to Board members as a means of strengthening inclusivity.
- The introduction of an open and transparent recruitment process for the position of Chair.

In responding to the *Code* it is considered that key aspects of modernity, inclusion and accountability have been addressed.

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

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

   As indicated in 1 above in responding positively to the *Scottish Code of Good HE Governance* the Board is of the opinion that it has in turn addressed key aspects of modernity, inclusion and accountability.

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

   Several aspects of the Bill provide for the Scottish Ministers to exercise significant new legislative and executive powers in relation to key elements of university governance; the appointment and remuneration of Chairs, the composition of the university governing body and the composition of the academic boards.

   We are concerned that any extension of effective Ministerial control may lead the *Office of National Statistics (ONS)* to reclassify Scottish universities to the general government sector under the European System of Accounts (ESA2010). Were such a threat to the university’s autonomy to materialise, it would impact on the university’s financial management and impact on its ability to retain annual operating surpluses, borrow funds for investment and increase income through commercialisation activities at a time of increasing financial constraint in the public sector.
A further concern to the Board is the unintended consequences of the new powers, which could potentially jeopardise the university’s charitable status. Were this to occur, it would have negative implications for tax and the ability to raise philanthropic funding to support investment and student academic scholarships.

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

The Bill does not itself set out the legal substance of the proposed governance arrangements, but rather leaves it to ministerial regulation, thereby opening up the possibility of future changes to governance based on decisions that are not subject to public scrutiny or debate and compromising institutional autonomy.

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

There is an existing balance in terms of legislative and non-legislative measures. There is already substantial legislative provision, including Section 45 of the Further and Higher Education (Scotland) Act 1992, which gives the Privy Council wide-ranging powers to make provision for the constitution of the governing bodies of HEIs (and which established RGU’s current governance arrangements in 2006). The principal non-legislative measure is now the *Scottish Code of Good HE Governance*, which is nonetheless a mandatory requirement of the existing Financial Memorandum between Scottish HEIs and the Scottish Funding Council (clause 17 of part 1 and clause 3 of part 2 of the Financial Memorandum refer).

As noted above, the proposed Bill would vest significant new powers in the Scottish Ministers, including the ability to modify primary legislation by Order. Such powers, whilst expedient at Westminster, would undermine the Scottish Parliament’s own legislative competence and deprive legislation adopted in future of the extensive parliamentary and public scrutiny it deserves. The Board is extremely concerned, therefore, that the Bill, as drafted, raises fundamental issues about autonomy and institutions’ roles in public life independent of Government: these were not matters which were part of the Scottish Government’s consultation.

4. **Please provide views on the merit of each of the following proposals:**

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

The procedures laid down in the *Scottish Code* are recognised by SFC as “the principles of governance which appear to constitute good practice in relation to higher education institutions”. The changes made with the introduction of the *Scottish Code* require every institution to follow transparent and open selection processes for its Chair. The university has adopted these processes, which include open recruitment and the inclusion of a student and staff member on its Nominations Committee.

It is important that the Chair of governing body has the confidence of that body, and is in a position of authority with the governing body and the university’s executive officers. There is concern that the proposal to appoint a Chair of the governing body in accordance with a process set out in regulations made by the Scottish Ministers is not consistent with principles of good governance and would potentially reduce the accountability of the Chair to the governing body.
• To require HEIs to include various persons within the membership of their governing bodies.

There is concern that the requirement to expand governing body membership prescriptively could have negative consequences on the balance of skills and responsibilities of the governing body. While the university values the contribution of trade unions it is not supportive of ‘reserved’ spaces on the Board for such a constituency. A process whereby trade unions might be encouraged to put forward members for selection, who would then be subject to election by the academic and non-academic staff of the university as a whole, would seem to be a more acceptable/appropriate position.

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

With regard to Academic Boards, the Board does not consider it appropriate to legislate for a particular size of Academic Board across Scotland and believes that its composition should be flexible and able to adapt to the dynamic external environment in which individual universities operate.

5-7. Views on the proposed strengthening of the current legal definition of Academic Freedom?

The Board notes that there has been a strengthening in the obligation on universities in respect of Academic Freedom which was not included in the consultation paper. It is also suggested that there is a disjunction between the purported enhancement of Academic Freedom and the increased Ministerial control proposed for institutions – again this is an issue of institutional autonomy.

In conclusion, the Board of Governors of RGU seeks to comply with the highest standards of governance and will continue to do so. It considers that these proposed new powers, with greater Ministerial control, are unnecessary to maintain and enhance those standards of governance. The powers are disproportionate and lacking in the specificity required to allow appropriate ongoing parliamentary and public scrutiny, and may damage the highest standards that they are ostensibly aimed at securing.

30 August 2015
Submission from Mr James Robb
Higher Education Governance (Scotland) Bill

Dear Sir

I write to express my concern and opposition to the proposed Higher Education Governance (Scotland) Bill which I feel is unnecessary and risks weakening the autonomy of the Scottish Universities making them vulnerable to direct political influence. This is highly undesirable and risks stifling freedom of academic thought, loss of reputation of Scottish Universities, some of whom achieve world ranking, which would, in turn, lead to difficulties in attracting the best students and academic staff.

Yours faithfully

James Robb
Robert Gordon University Students’ Association

Higher Education (Governance) Scotland Bill

Education and Culture Committee - Call for Evidence

Introduction

The following paper constitutes the Robert Gordon University Students’ Association’s (RGU:Union) response to the Education and Culture Committee with regards to the Higher Education (Governance) Scotland Bill. RGU:Union represents seventeen thousand students at Robert Gordon University (RGU) and believes that the work to create more democratic, inclusive and transparent governance is a positive step for the higher education sector.

At RGU:Union, we are supportive of the work being done, and very supportive of the recommendations of our Principal, Ferdinand Von Prondzynski in his review of higher education governance. While we are glad that the sector has introduced new steps such as the Scottish Code of HE Governance, we still feel that there is scope for the introduction of legislation that can ensure that public funded bodies, such as HEIs, are accountable to their members, and are democratic and transparent in their decisions.

RGU:Union responds:

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

While we feel that governance (in our institution at least) has made improvements over the past years, we still feel that it is vital that HEIs ensure that student representation is instilled throughout all levels of governance, as is a requirement, as opposed to a preference. Governance of institutions must ensure adequate representation of stakeholders; both students and staff. We feel that current issues in the sector are that student and staff members are not included at all levels, and would encourage the Committee to ensure that this is achieved in the bill.

Further issues are that where students and staff are represented, it can be seen that many representatives are included as a ‘check box’ exercise to approve decisions already made by senior management. The culture of governance seems to allow for some decisions to be made privately with little debate on topics. It can be seen that student and staff are only informed of decisions after the work has been undertaken. We would like to encourage the Committee to ensure that decisions in governance are made transparently and with the full inclusion of staff and student members.
1. What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability? (Continued)

With regards to accountability, we feel that current governance practice does not make board members accountable to students and staff. Examples of this would be the appointment of chairs, which can be appointed with little scrutiny or input from students or staff of an organization. We would encourage the committee to introduce democratic processes to ensure that governors are accountable to members.

Finally, it can also be seen that a current issue in governance is the lack of diversity and balance of membership. We feel that governance committees should strive to reflect the individuals they represent. We would encourage the Committee to ensure that HEIs develop a clear characteristics matrix to adequately appoint individuals reflect the student and staff community.

2. The extent to which the bill:

   a. will improve higher education governance, particularly in the areas above;

   We believe the bill will have a positive impact on addressing concerns around student representation and the election of chairs. RGU:Union believe that student representation should be at the heart of higher education governance as they are the most vital part of our institutions. We would expect to see student representatives and students’ association representatives as part of governance membership, at all levels as well as in committees such as remunerations. We are strongly supportive of inclusion of student representatives from the draft bill.

   We are also in support of the bills proposal for elected chairs. We feel this proposal will allow governing bodies to be more accountable to their members. We would have a preference to ensuring that elections are open to all, and that all students and staff have the ability to engage with elections. However, we also want to ensure that elected chairs have the confidence of the board and can be accountable. We would welcome an open election, and any shortlisting process proposed must include representation from staff and students. We would also encourage provisions to ensure elected chairs are both accountable to the electorate and the governing body. This process should be made to be as transparent and democratic as possible, and led by staff and students. We are supportive of the election of chairs proposed in the draft bill.
b. may alter the higher education sector’s current level of autonomy:

There are aspects of the bill that raise concerns as to the power of Scottish Ministers to exercise new legislative powers that could have a significant impact on HEIs governance or classification. We are supportive of a bill going forward that has wide consultation and review from a range of stakeholders, however, it could be concerning if the bill made it possible for alternative legislation to impact HEIs. Our view is that this bill should ensure nationwide compliance with key governance principals, but that HEIs should still retain suitable autonomy.

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

RGU:Union is supportive of the development of the Scottish Code of Good Governance, however we do not feel it ensures compliance with basic principles of governance that we would like to see. RGU:Union believes that good governance should not be optional, and that the development of the Code by the chairs involved them picking and choosing recommendations from the Von Prondzynski report, as opposed to outlining ways to apply the recommendations sector wide. We feel that the introduction of legislation to ensure student representation at all levels, and democratic processes will be a valuable addition to HEIs governance.

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

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

RGU:Union is supportive of the proposal to elect chairs as they are a highly significant member of HEIs governance. We would support the recommendations made in the Von Prondzynski report, and would encourage any regulations made by Scottish Ministers to ensure that student and staff representation is at the heart of any election process. We would understand a requirement for a pre-selection/shortlisting process, and would insist that this process is democratic and transparent with student and staff inclusion.
to require HEIs to include various persons within their membership of their governing bodies;

RGU:Union is very supportive of the proposal to include various persons within membership. In particular, we believe securing places for student representatives is essential for a representative board. We would encourage the committee to ensure that all student representatives are given the ability to actively take part in decision making, and to not be treated as a legislative requirement, but instead as a valuable and respected voting member.

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

RGU:Union does not see the relevance for the bill to limit academic board membership. We feel it HEIs should still retain autonomy to be flexible around academic board membership to reflect constant changes in the intuition. However, RGU:Union would be supportive in ensuring that academic boards include relevant student representatives appointed by the students’ association. This membership should remain flexible as many institutions have vastly different representative structures for students where in some cases it may be appropriate for student presidents to represent, while in others faculty or school specific representatives could be in attendance. We would prefer to allow membership to be flexible for institutions, but to ensure that particular groups such as students and staff are always represented.

Conclusion

RGU:Union is broadly supportive of the introduction of legislation on higher education governance in Scotland. We are supportive of the recommendations made in the Von Prondzynski report (although, it can be noted that many of these recommendations are not seen in practise at Robert Gordon University). Our priorities for the bill would be to ensure that the student voice is guaranteed in all levels of governance, that the election of chairs is introduced with democratic and transparent processes, and that governing bodies are accountable and transparent to all members of an organisation.
To the Clerk

Dear Sir----------------I am much concerned about this Bill. It is totally unnecessary and this extra regulation will jeopardize the positive contribution Scottish Universities make to the Scottish economy. The political interference will prevent high-caliber academics seeking University appointments. I am an Alumni of St. Andrews University which has managed to govern itself with great success for over 600 years.

Yours sincerely, A.Wilson Robertson

Alastair W Robertson
Submission from Heather Robinson

Dear Sir/Madam,

I am a current PhD student at the University of St Andrews and am writing to express my opposition to The Higher Education Governance (Scotland) Bill. I am uncomfortable with the consequences it will have on Scottish higher education and, particularly, on my alma mater, St Andrews.

I fear that the autonomy of the University will be greatly weakened and that it will be vulnerable to direct political influence, which is totally unbecoming for a higher-education institution in 21st century Britain. As a consequence, I feel that the academic reputation of St Andrews will suffer, particularly in the global market where it fights to attract the best students, the best academic staff, and the best funding, on behalf of Scotland.

This wholly unnecessary Bill will be bad for St Andrews, for Scottish higher education, and consequently for the Scottish economy and Britain as a whole.

I strongly urge you to withdraw it from consideration.

Best regards,
Heather Robinson
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 touch-stone 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 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.
Stewart Maxwell  
Convenor, Education and Culture Committee  
M4.14  
The Scottish Parliament  
EDINBURGH  
EH99 1SP

Dear Stewart,

Higher Education Governance (Scotland) Bill

Firstly, thank you for the opportunity to speak to the Education and Culture Committee on 25 September. I very much welcomed the opportunity to highlight the Conservatoire’s concerns in respect of the Higher Education Governance (Scotland) Bill. In the course of our discussion, you invited participants to follow up our various contributions with a supplementary letter, so I am writing to you now to elaborate on some of the points that I made and to make you aware of some issues that were not covered in our discussions.

The Bill relies upon the von Prondzynski Review, which made it clear in its introduction that it simply had not had time to consider the circumstances of the Conservatoire and the other Small Specialist Institutions (see para 7.5 of the report of the review). In the case of the Conservatoire at least, the one-size-fits-all Bill appears to be flying entirely blind. The Conservatoire endorses the broad objectives of the Bill in seeking transparency, inclusivity and accountability in our governance arrangements, but we believe we are achieving those shared objectives by working within the Code of Good Governance, which recognises that SSIs in particular may need flexibility in how its principles are applied. It is hard to see how statute would provide the kind of flexibility that the Conservatoire needs.

In the context of Scottish higher education, the Conservatoire is distinctive in a number of ways — structurally and culturally. Amongst our distinguishing features are:
• Scale and intimacy. Scale matters in finding the right form of governance. We count our students in 100s, not 1000s. We have 44 full-time academic staff and an Academic Board of 13.
• We are a not-for-profit limited liability Company with shareholders who include our 2 elected staff Governors and the President of our Students' Union – together they hold 50% of our share issue.
• We are a cultural/performing arts institution every bit as much as we are an academic institution.
• Our AGM at which the Chair of our Board, myself and senior colleagues report on performance and current issues facing the Conservatoire is held in public. All staff, students and external stakeholders are invited to attend and our shareholders can formulate resolutions. All students and staff also have the right to attend Board meetings as observers.
• We are not a member of UCEA.

Simply put, we are not a university.

We know that our current governance arrangements work for the benefit of the whole Conservatoire – and most importantly for our students – and for Scotland. What the Conservatoire community needs and gets from our governance arrangements, and the interplay between our Board of Governors and our management and supporting governance structures reflects our unique ecosystem, which we believe would be compromised through the enactment of the Higher Education Governance (Scotland) Bill.

In asserting that view, I am confident that I have the support of the entire Conservatoire community - our students, staff, Board of Governors, Academic Board and external stakeholders (including all national companies) are united in the view that the Bill is unnecessary and potentially damaging for the Conservatoire.

The President of our Student Union said in her submission to the Committee:

*Our current governance structure works perfectly well within the Conservatoire and equally represents staff, students and relevant external bodies in a fair and just manner.*

Our EIS representative said in his submission:

*I believe that our current governance arrangements best serve the needs of the students and staff of the Conservatoire.*
In summary, our collective concerns are:

- An electoral process for a Chair will be disruptive and divisive and would inevitably politicise the role. Further, it will not be guaranteed to deliver a Chair with the skills set that the Conservatoire needs.
- The Conservatoire has positive relationships with a number of Trade Unions – including the Musicians Union, Actors Equity and the EIS, but we do not recognise any union in terms of the Trade Union and Labour Relations (Consolidation) Act 1992. Notwithstanding, under section 4 (2)(b) of the Bill, three trade unions might be held to be recognised, thus rendering impracticable section 4(1)(c) which mandates one person being nominated to the Board by a recognised trade union representing academic staff.
- We need a very specific range of skills and insights on our Board and we need to keep it to a manageable size. Mandated membership for specific interest groups would inevitably create a much bigger, and quite possibly less effective, Board. We already have 24 Governors – that is a ratio of 1 Governor to every 2 (give or take) full-time members of academic staff. More specifically, we would face significant practical problems in relation to having graduate association appointees when we do not have an association able to make such appointments.

When it comes to the Conservatoire, the key question for the Scottish Government is – In framing the Bill, how is it going to preserve the uniquely Scottish, democratic and effective form of governance enjoyed by the Conservatoire community which is strongly defended by its main stakeholders, including the elected representatives of its students, academic and non-academic staff and its trade union representative? To impose anything else upon the Conservatoire community against its will would seem anything but democratic and counter to the spirit of the Bill in its pursuit of transparency, inclusivity and accountability.

With very best wishes

Jeffrey Sharkey
Principal

cc: Members of the Education and Culture Committee
Dear Sir/Madam,

Re – HE Governance Bill

Consultation Paper on a Higher Education Governance Bill – Submission from Royal Conservatoire of Scotland Students’ Union

As the SU president and elected representative of the conservatoire student body I endorse the views of the paper submitted by the conservatoire. Our current governance structure works perfectly within the conservatoire and equally represents staff, students and relevant external bodies in a fair and just manner. Due to our size and specialist nature the proposal of the ‘one size fits all’ policy is counterproductive to our needs. The students’ voice is heard loud and clear in all matters with two student representatives on the Academic Board and Board of Governors; but any student and staff member is welcome to observe should they wish to.

Kind regards,

Ankna Arockiam, SU President
Submission from Ondřej Roztomilý

Dear Sir or Madam,

As a graduate of one of the University of St Andrews, I am greatly concerned about the substance, structure and expected outcomes of the Higher Education Bill. While I wholeheartedly appreciate the efforts to increase transparency, accountability and inclusivity of the sector (and the Bill's aim to "support the institutions"), I believe the proposal serves none of those.

I fully support Royal Society of Edinburgh's both assessment of the bill as "inappropriate, unnecessary and potentially counter to good governance" as well as the reasons given in their response in full.

It has been a great experience (both a challenge and a honour) to study at University of St Andrews and as I wish it to grow to its full potential for the students and the region, I urge you to withdraw or completely revise the proposal.

With my very best regards,

Ondřej Roztomilý
Submission from Christine Russell

Dear Sir/Madam,

As a graduate of St Andrew's and a member of the St Andrew's General Council, I am writing to express my concern over the proposals contained in the Higher Education Governance Bill.

St Andrew's has been growing in reputation and popularity both with prospective applicants, and more importantly with assessors of higher educational establishments. It is very highly ranked in the field of research, and highly regarded by other academic institutions. It therefore seems inappropriate to make changes to its current management structure and control at this time.

While a particular university is achieving notable success in its present structure, it seems totally counter-productive to introduce a new level of management linked to political parties, with their own agendas, in an attempt to make all such institutions conform to a common standard. Such a move could prove to be destructive in the funding of on-going research projects, and have a damaging effect on morale and innovation.

I can't see that it would be beneficial in any way at all to either the academic staff or to the current and future students. I hope the proposed changes will be reconsidered, and ultimately abandoned. There is nothing to be gained by such change at this time.

Christine Russell
Higher Education Governance (Scotland) Bill: a response to the Scottish Parliament's Education and Culture Committee

AP15-18 September 2015

Summary

- The strength and vitality of Scotland’s Higher Education (HE) sector have long been recognised nationally, including by the Scottish Government, and internationally. The sector is already modernising its governance and recent developments have increased its accountability to the Scottish Funding Council and other public bodies. The Royal Society of Edinburgh (RSE) has seen no evidence of the need for legislation or that the provisions of the Bill would enhance governance.

- The RSE considers that the Bill undermines the principles of institutional independence and autonomy. These are key pillars of a dynamic and successful sector, allowing institutions to maintain the flexibility required to compete on a fast-moving global stage. There must be a clear distinction between receiving public funding from various sources and being a public sector body. Treating Higher Education Institutions (HEIs) as the latter will lead to unintended consequences and affect their ability to compete. Governmental intervention of this scale is a retrograde step.

- The provisions set out a detailed ‘one size fits all’ approach to the governance of the sector. They fail to recognise the rich diversity of Scotland’s HEIs and the benefits flowing from this diversity. The Bill confuses consistency of approach with consistency of standards. It is right for the Scottish Government and Parliament to demand consistently high standards across the sector, but this will not be achieved by enforcing one approach for all.

- The RSE is concerned that a number of provisions would undermine, rather than strengthen, Higher Education governance in Scotland.

- The RSE re-emphasises that the election of the chair by any electorate broader than that of the governing body itself could undermine good governance. It would have the potential to “politicise” the role and damage the crucial trust and confidence that the members of the governing body must have in their chair, if the body is to be effective.

- The selection process through which the chair of a governing body is appointed is both a key and controversial element of the Bill. It is inappropriate and undesirable that the process is not set out in the Bill but deferred to the drawing up of regulations on which MSPs will have limited influence.

- We also re-emphasise our concern that prescribing that a trade union representative is to be a
member of the governing body may lead to significant conflict of interest, where the union is rightly in opposition to the governing body. The Bill and its accompanying documents offer no solution to this issue.

- A well-functioning academic board is vital to the continued success of an institution. As HEIs review their governance in light of recent developments, it may be timely to review arrangements and agree changes with the academic board. The detailed ‘one size fits all’ approach of the Bill, however, is inappropriate and potentially unworkable for some HEIs.

Introduction

1. The Royal Society of Edinburgh (RSE) has previously commented on the proposals for a Higher Education Bill as set out by the Scottish Government in its consultation of January 2015. That response was prepared by a Working Group of Fellows with substantial experience of and expertise in governance and management issues, including in the Higher Education (HE) sector. The same group has prepared this submission to the Education and Culture Committee’s call for evidence and the response been approved by RSE Council. The group does not include any serving HE Principals or chairs of governing bodies. The RSE would be happy to provide oral evidence on the Bill, if the Committee would find it useful.

2. The RSE’s position on the proposals now reflected in the Bill has not changed. The RSE considers that the Bill represents entirely inappropriate and unjustified intervention by the Scottish Government into the governance of an autonomous sector that has proved itself a success for Scotland. Further, the RSE continues to raise concerns that a number of the provisions contained within the Bill are counter to current understanding of good governance.

Current HE Governance

3. The vitality and strength of the HE sector in Scotland are well-recognised both nationally and internationally. The sector attracts some 15 per cent of the UK Research Councils’ investment in research and innovation, despite Scotland representing only eight per cent of the UK population. Under the recent Research Excellence Framework exercise, 77 per cent of the Scottish research submitted was judged as world-leading or internationally excellent, and over 85 per cent was judged to have an outstanding or very considerable impact, both above the equivalent UK average figures. The Scottish Government itself notes that the sector has “a well-deserved reputation world-wide for providing high-quality and reputable higher education”.

4. This evidence of success suggests that the sector has been broadly well-governed to date. In contrast, neither the Scottish Government nor the Von Prondzynski report on which the Government has based much of its rationale for the Bill, has set out any evidence of significant deficiencies in governance that require to be rectified through legislation.

5. We do not suggest that there have not been specific instances of challenge in the governance of Scotland’s Higher Education Institutions (HEIs), nor that the sector need not heed on-going developments in the understanding of good governance. Rather, we point to the progress that has been and is continuing to be made in modernising the governance arrangements of HEIs, for example through the Post-16 Education (Scotland) Act 2013 and the introduction of the

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Scottish Code of Good HE Governance (the Code) in 2013. We question the need for this progress to be overlaid by additional legislation.

6. The principles set out in the Code already address transparency, accountability, representation and equality, the same issues as are put forward in justification of the Bill. The Scottish Funding Council has made compliance with the Code a condition of grant, stimulating each HEI to review its existing arrangements and holding them accountable for maintaining a consistently high standard of governance. This process is on-going and the Code will be subject to review in 2016.

7. Issues of gender equality and inclusion have become increasingly high profile across the sector in recent years, as they have across society. HEIs have established and embedded their own principles on these matters into their policies, strategies and the membership of committees, as appropriate for their own circumstance, within the framework of the Code. Progress is being made, as evidenced by the number of awards attained across the sector under the Athena SWAN programme, and by the increasing numbers of female principals, vice-principals and chairs of governing bodies. While there remains room for further development, there is no need for legislation to overlay current efforts. A ‘one size fits all’ approach would likely deter, rather than support, change.

8. The RSE recognises that, to date, the Scottish Government has been a strong and constructive supporter of the HE sector. We suggest that the resources of both Government and Parliament would have significant impact if directed at supporting HEIs to meet some of the fundamental challenges of the day: tackling diverging policies on tuition fees and funding; the impact of the digital revolution on teaching, learning and research; how to effectively contribute to communities; maintaining research leadership on an increasingly competitive global stage. The provisions of the Bill, however, neither recognise nor address the challenging dynamic context in which Scotland’s HEIs operate.

The impact of the Bill on governance, autonomy and accountability

9. We have seen no evidence, provided by the Scottish Government or others, that the provisions of the Bill would lead to enhanced modernity, inclusion or accountability. Our concerns centre around three key issues: that the Bill undermines the sector’s autonomy and independence; that the wide election of chairs may disrupt the functioning of governing bodies; and that the representation of trade unions on governing bodies raises potential for serious conflict of interest. We note that the Scottish Government, in the policy memorandum accompanying the Bill, states that it “does not consider that the policy aims of this Bill could be satisfactorily met by the current Code or by an amended Code”. It fails, however, to provide either justification for this claim or evidence that the provisions of the Bill will lead to more modern, inclusive or accountable HE governance. In particular, it fails to address or attempt to allay the concerns raised at the earlier consultation stage that a number of the provisions are inimical to good governance.

10. The principles of independence and autonomy are fundamental pillars of a vibrant and successful HE sector. The most successful HE sectors in the world, in the US and the UK4, are also amongst the most independent of government. However, the extent to which the Bill prescribes governance arrangements for Scottish HEIs undermines the independence and autonomy of the sector in Scotland and contradicts the Scottish Government’s own claim that

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4 The US and the UK hold all 10 of the top 10 and 46 of the top 100 university rankings in the world. QS World University Rankings, 10th Edition (2014/15), QS Quacquarelli Symonds Ltd, September 2014
the aim of the Bill “is not to seek increased ministerial control over our institutions⁵. This is a retrograde step.

11. The Bill limits the ability of Scotland’s HEIs to adapt to an ever-evolving environment. Their continued success in the highly competitive global context depends upon maintaining the flexibility to respond to opportunity and need in the most appropriate manner for each individual institution, true to its own ethos. The Scottish Government has previously recognised the diversity of the sector as a strength but its desire for consistency of approach, rather than for consistency of standards, takes no heed of the historic and practical differences in governance and strategic and operational management of each institution. For example, it cannot be practical for the University of the Highlands and Islands, a federal institution composed of 13 diverse academic partners and covering half of Scotland’s geography, to implement the same governance arrangements as the Royal Conservatoire of Scotland.

12. The HE sector attracts substantial funding from various public sources, but it is important to maintain a clear distinction between receiving public funding and being a public sector body. HEIs are not public sector bodies. Treating them as such will lead to unintended consequences, for example with regard to their actual or perceived independent charitable status and ability to raise funds from elsewhere; and affect their ability to compete, especially when universities in the rest of the UK maintain their autonomy.

13. Nevertheless, the HE sector must, of course, be answerable for the publicly-funded support it receives. HEIs are currently accountable to the Scottish Funding Council through a number of mechanisms, including the SFC Financial Memorandum with individual institutions and SFC Outcome Agreements, Strategic Dialogue and institutional visits which ensure that institutions’ strategic plans are in-keeping with Scottish Government priorities. Other governance and statutory requirements are in place with the Office of the Scottish Charity Regulator (OSCR), the Quality Assurance Agency for HE in Scotland (QAA), the Higher Education Statistics Agency (HESA), the Scottish Public Services Ombudsman, the Information Commissioner and the Auditor General for Scotland. These mechanisms currently strike an appropriate balance between autonomy and accountability.

The wider package of HE Governance reform

14. The Scottish Parliament, when passing the Post-16 Education (Scotland) Act in 2013, agreed that the HE sector should continue to be responsible for ensuring its own high standards of governance, regulated at arm’s length by the SFC. It is not clear why, in the absence of any change of circumstances, the Scottish Government is now proposing additional legislation that directly intervenes in the governance arrangements of HEIs.

15. The Scottish Code of Good HE Governance has already led to significant modernisation of the governance arrangements of Scotland’s HEIs. Implementation of the Code is being monitored and the Code itself will be subject to review in 2016. We suggest that this would be an appropriate point at which to re-assess the need for further measures, legislative or otherwise.

Appointment of chairs of governing bodies

16. The lack of detail on the process by which HE institutions would be required to appoint a chair of the governing body is a key failure of the Bill. As the Scottish Government notes in the Policy Memorandum that accompanies the Bill, there was much opposition to earlier proposals around

⁵ Consultation paper on a Higher Education Governance Bill, Scottish Government, November 2014, p3 and p6
the selection of chair and marked differences in stakeholder opinion⁶.

17. We recognise that section 3 of the Bill places a duty on Scottish Ministers to consult on the regulations that will set out the selection process. Nevertheless, the Ministers would have the final say as to what goes in the regulations and, under the affirmative procedure, the Parliament would be limited to affirming or rejecting the regulations as a whole, with no option to amend them. We consider arrangements for the selection of the chair of the governing body, which will have significant impact on the performance of the governing body, to be a fundamental feature of the proposals rather than a minor detail. As such, they should be clearly defined within the Bill before members of the Scottish Parliament are asked to vote on its passage.

18. We re-emphasise the overriding need for the governing body to have full confidence in the impartiality and leadership abilities of its chair, and for the relationship between the chair and Principal to be mutually supportive but challenging. A process culminating in an election by any electorate broader than the governing body itself cannot guarantee either of these two crucial elements. It risks “politicising” the role and increasing the influence of people with either a very temporary stake in the university or others with clear vested interest. It may result in a chair beholden to a particular constituency rather than one able to pursue the best interests of the institution as a whole. In addition, turning the process into an election campaign will be likely to narrow, rather than widen, the pool of candidates, deterring people who are not comfortable with public campaigning and self-promotion but who may be well qualified for the role.

19. For these reasons we reject the assertion that an election process would increase transparency and accountability, or that the unspecified weighting of votes referred to in the original consultation document would ‘reflect the democratic ideal’. The governing body could already be considered a ‘balanced and representative’ electorate, consisting of senior management, staff, student and lay members, all of whom are obliged to act in the best interests of the institution.

Membership of governing bodies

20. We refer again to the Scottish Code of Good HE Governance which sets out a number of Main Principles (9 – 11) on the composition and size of the governing body and the appointment of members to it. The Code sets high standards for good governance while respecting the rich diversity of Scotland’s HEIs. The Bill, in contrast, sets out requirements that are overly prescriptive, inappropriate and in some cases unworkable.

21. The central concern is the provision for the inclusion of trade union representatives on the governing body. The law is clear that, as charity trustees, members of the governing body are bound to act in the best interests of the organisation as a whole, not any one particular constituency. While the Policy Memorandum states that this would apply to trade union representatives, it fails to address how potential conflicts of interest on issues where the unions are rightly in opposition to the governing body would be resolved.

22. It is important to distinguish between the role of an organisation’s governing body, which requires a relatively small group of people with the right calibre and mix of skills, and the part played by representative bodies, such as trade unions, which can challenge the governing body on the composition and delivery of the institution’s strategy. This distinction has important implications for the capacity in which persons are appointed.

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Academic boards

23. A well-functioning academic board that has a clearly-defined and constructive relationship with the governing body is crucial to the on-going delivery of high quality teaching and learning within an HEI. We recognise that the size and composition of academic boards vary across the sector, reflecting the history, traditions, current needs and legal frameworks of Scotland’s diverse HEIs.

24. However, we are concerned that the Scottish Government, in setting out prescriptive, detailed proposals for the size and composition of academic boards within the Bill, is once again confusing consistency of approach with consistency of high standards. Arrangements that are appropriate for one institution will not be appropriate for another and may undermine, rather than enhance, the functioning of the academic board and the institution more widely.

25. As HEIs consider their governance procedures following introduction of the Code, it may be timely for governing bodies to review these arrangements and agree changes with the academic board. However, it is neither desirable nor appropriate for prescriptive, ‘one size fits all’ legislation to overlay this process.

Academic Freedom

26. The RSE maintains that the proposal to replace the current definition of academic freedom with a new definition that includes provision to encourage exploitation of new ideas is unnecessary, with no evidence of the need for such a change. However, the concept is unobjectionable.

Additional information

Advice papers are produced on behalf of RSE Council by an appropriately diverse working group in whose expertise and judgement the Council has confidence. This advice paper has been signed off by RSE Council.

In responding to this consultation the Society would like to draw attention to the following RSE publications which are relevant to this subject:

- The RSE’s submission to the Scottish Government, Consultation on a Higher Education Governance Bill (February 2015)
- The RSE’s submission to the Steering Group appointed by the Committee of Scottish University Chairs, The Scottish Code of Good HE Governance (January 2013)
- The RSE’s submission to the Scottish Parliament Education and Culture Committee, Post-16 Education (Scotland) Bill (January 2013)
- The RSE’s submission to the Scottish Government, Report of the Review of Further Education Governance in Scotland (February 2012)
- The RSE’s submission to the Review of HE Governance (‘Von Prondzynski Review’), The Governance of Higher Education in Scotland (September 2011)

Any enquiries about this Advice Paper should be addressed to Susan Lennox, RSE Policy Officer, slennox@royalsoced.org.uk. Responses are published on the RSE website www.royalsoced.org.uk
Submission from Wendy Russell

To whom it may concern:-

The proposed Higher Education Governance Bill has been drawn to my attention. Consequently, I have taken time to review the proposals set out and the amendments made following the consultation in November last year.

I wish to express my concerns about this Bill and the effect that it may have on Universities in Scotland, including my Alma Mater. The University of St. Andrews. I have noted with approval the development of the University of St Andrews in recent years both academically and in relation to its research. both of which are renowned globally. One of my sons is currently studying at St. Andrews where he is able to draw on the expertise of a world-class academic body.

With regard to the proposed Bill, I am unsure as to what problem it sets out to answer as I have not seen any compelling reason outlined so far. Therefore, I fail to appreciate what benefit might accrue to Higher Education in Scotland by undermining the autonomy of individual Universities through a significant ramping up of influence and control from future Governments. I can only see such a move damaging the reputation and academic standing of the University which would have a deleterious effect on the national economy. Moreover, I firmly believe that the academic freedom of Universities must remain so that they can continue to undertake and offer independent thought, analysis and indeed challenge.

My concerns extend to what appears to be some serious financial implications associated with implementing and achieving compliance with the Bill once enacted, particularly relating to the proposal for remuneration of Chairs. After a career in health research and education, the potential impact of this legislation on the ability of St. Andrews to continue to be awarded research grants is of great concern to me.

I would ask you to reconsider this Bill before further progress is made through parliament.

Wendy Russell
Submission from Gareth J M Saunders

The Higher Education Governance (Scotland) Bill I am writing to express my deep concerns about the proposed Higher Education Governance (Scotland) Bill. I am an alumnus of both the University of St Andrews (BD, 1993) and the University of Edinburgh (MTh, 1999), and currently work for the University of St Andrews in the digital communications team, a department of Corporate Communications. The notes to the proposed Bill simply states that the intention of the Bill is to “[make] provision to improve and modernise aspects of the governance of higher education institutions”. A cunning use of the word “modernise” that implies that Scottish universities must be governed in archaic and out-dated ways. But beyond that sentence there appears to be no argument whatsoever to state what appears to be the problem that is being addressed.

The policy memorandum, published on the same day as the Bill, states in paragraph 5 that “The Review of Higher Education Governance in Scotland was prompted by concern that the existing models were in need of update, not because they had failed, but because the time was right to consider their ongoing fitness for purpose.” This appears to be a case of: if it ain’t broke: tweak it.

I fully endorse the intention to enable “more transparency and inclusive participation in higher education governance” but the outlined solution (to a very thinly argued problem) does not guarantee that and furthermore could cause more harm than good.

If I understand it correctly, the Bill proposes that the governance of all Scottish universities will become standardised, exactly the same across the board. I can appreciate why that may be attractive to central government: you will have only one model to understand. But it destroys the uniqueness of each institution. It is an approach which fails to listen to local knowledge and experience. I know that St Andrews hasn’t stood still for the last 600 years in terms of its governance. But what we have just now works. It is fit for purpose, and the position of Rector holds an important role in terms of balance and representation.

What this Bill is proposing threatens the autonomy and academic reputations of our universities. It opens them to the vulnerability of direct political influence. That is not a good thing. It places unnecessary pressure on the proposed members of court and academic boards by dictating their composition and size, not to mention the powers given to Ministers to make future changes to the composition of university senates and courts. One size most certainly does not fit all.

If pushed through this will prove to be a costly exercise, in terms of finance, reputation, and market leadership of our educational gems. I therefore would like to reiterate my deep concerns about the suitableness of this Bill, and would urge that it be withdrawn.

Yours faithfully

The Reverend Gareth J M Saunders
I wish to add my name to those who are protesting at the proposed HEG bill.

Before I allude to the specific academic issues, I note with alarm the tendency of the present Scottish Government to centralize essential services (police, fire, ambulance), despite the claims made by the Yes Campaign during the recent Independence Referendum that the SNP stood for a revival of local political engagement and accountability.

The current HEG bill seems to perpetuate the same misguided policy.

The Higher Education sector in Scotland is extremely varied, and that is entirely to be applauded. But it is hard to see how a unitary administrative structure could serve the needs of institutions as disparate as colleges of further education (e.g. Borders College), specialist technical institutions (e.g. Scottish Textile College Galashiels), distance-learning colleges (e.g. the University of the Highlands), alongside 'traditional' universities.

The performance of the University of St Andrews, of which I am a member, enjoys international recognition: its recruitment and fund-raising differ fundamentally from other more 'regional' universities.

How are these institutions to be compared? Where are their common needs? How is equivalence to be achieved?

Is there any evidence that current governance is deficient or inefficient?

And if that were to be the case, why has the evidence not been made public?

This proposed legislation seems misguided: it addresses a problem which does not exist by suggesting a procrustean structure of governance which will inhibit higher education institutions from pursuing policies tailored to and appropriate to their very varied needs.
Submission from Campbell Scott

I graduated from St. Andrews University in 1971 and am therefore a member of its General Council. I am currently a research scientist at a large US information technology company. As such, I am concerned that the subject Bill, if passed, will do irreparable harm to the academy quality, vitality of research and traditions of Scotland’s first university and its peers.

Each of Scotland’s Universities is unique. My brother and many of my friends went to Edinburgh. Other friends went to Glasgow and Aberdeen. One was in the first class to matriculate at Stirling. We all have different experiences to share and compare, adding to the diversity of our individual lives and our common culture. In Higher Education, one size does not fit all. From my perspective of 44 years since graduation, 6000 miles of distance, and a worldwide view of academic institutions, their students as interns, and their graduates, Scottish Universities rank among the best in the world. There is thus no need for government oversight of the entire system. Let the best institutions govern themselves in the way that has been successful for centuries or decades as the case may be, adapting and reinventing as times dictate.

By all means, if there are specific problems with a particular institution that the Scottish Parliament can identify, it should have the authority to step in and help it to solve them. But as they here say in the States, “if it ain’t broke, don’t fix it”.

Sincerely,
Campbell Scott
4 September 2015

Dear Sir

As the Chairman at the Scottish Association for Marine Sciences, a world leading Marine Research Institute and academic partner of the United Nations University and the University of the Highlands and Islands, based near Oban with a truly multinational group of expert scientists, I have been involved in looking at the Higher Education Governance Bill being proposed by the Scottish Parliament. I am increasingly surprised and dismayed at the content of the bill. On behalf of the Scottish Association for Marine Sciences I would like to highlight our concerns and record our view that this is legislation is unnecessary, and indeed might be the catalyst to destroy the excellence that Scotland has achieved in Research and Higher Education over many centuries. I make this observation based on the fact that direct Government intervention always has unintended consequences, and whilst most of these cannot be foreseen there are some that are very likely and which should be taken into account now in your deliberations.

Two of the more obvious areas that might cause significant difficulty for us in the HE Sector are:

- The likelihood of universities being classified as public bodies by the Office of National Statistics which as we have seen in the college sector has caused significant problems for the UHI including significantly increased financial overheads.

- Ministers being able to regulate on HE matters without the need for further legislation or scrutiny by parliament, or consultation with the sector. This is a basic failure in good governance and is particularly disappointing given the stated aim of the bill. Governments tend to follow either the majority interest
or voting patterns, and in Scotland neither are likely to favour our small Highland communities' interests and respond to our unique challenges. We see direct evidence of that in the Crofting Land Reforms which are unworkable.

Finally, I cannot understand why this legislation is being brought forward at this time. I have seen no problem that needs to be resolved (unless the Government sees Academic freedom of speech as a threat). We are in a particularly rarefied atmosphere here in Dunstaffnage, but we have not had representations from academics about academic freedom, staff or students about lack of representation on our governing bodies, and in any case the new code of practice for HE covers this and we are committed to reviewing and implementing the code. Why are we not letting the code bed in and waiting to see if it achieves its aims before thinking about legislation?

I would therefore urge you to consider allowing the Code of Practice for HE to be fully embedded, exercising your own governance control over that process and monitor its success. If it fails and cannot be recovered then by all means propose legislation, but I fear that doing this right now will only destroy what is one of Scotland's key jewels, its Higher Education and Research capability.

Yours faithfully

_Angus Ross_

Commodore Angus Ross
Chair of SAMS Board
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.

For more information on this response please contact the SCDI Policy Team at

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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 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 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\(^1\). 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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Call for Evidence on the Higher Education Governance Bill
Response from the Scottish Council of Jewish Communities

The Scottish Council of Jewish Communities (SCoJeC) is the representative body of all the Jewish communities in Scotland. SCoJeC advances public understanding about the Jewish religion, culture and community, by providing information and assistance to educational, health, and welfare organisations, representing the Jewish community in Scotland to Government and other statutory and official bodies, and liaising with Ministers, MSPs, Churches, Trades Unions, and others on matters affecting the Jewish community. SCoJeC also provides a support network for the smaller communities and individuals and families who live outwith any Jewish community, and assists organisations within the Scottish Jewish community to comply with various regulatory requirements. SCoJeC also promotes dialogue and understanding between the Jewish community and other communities in Scotland, and works in partnership with other organisations and stakeholders to promote equality, good relations, and understanding among community groups.

In preparing this response we have consulted widely among members of the Scottish Jewish community including, amongst others, Jewish students studying at post-16 education bodies in Scotland, and Jewish Student Chaplaincy Scotland, which provides support to students studying at post-16 education bodies throughout Scotland.

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

Higher education governance should not only be concerned with the financial stability and day-to-day administration of post-16 education bodies, but also with the well-being of those who study, teach, and carry out research in such institutions. We are concerned that, in practice, the current governance system does not always facilitate a fair hearing for students, many of whom are living away from home, and therefore from their established support network, for the first time, and who may, therefore, be more than usually vulnerable. This is particularly an issue for students who may have been discriminated against or victimised, on account of a protected characteristic.
2. What do you consider the extent to which the Bill:
   a. will improve higher education governance, particularly in the areas above?

   We consider that, in its current format, Part 2 of the Bill (Academic Freedom) will be a detriment to higher education governance: whilst it strengthens the rights of one sector (academic and research staff), these statutory rights are not balanced by equivalent responsibilities towards the student body, and it is therefore likely that the rights of students will be weakened. Please see below for further information.

   We do not have any opinion as to the likely impact of the other measures included in the Bill.

   b. may alter the higher education sector’s current level of autonomy?

   We have concerns about the potential for “autonomy” to be abused as an excuse for practices such as allowing donors to influence policy or staff appointments.

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

   We have no comment on this question.

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 Higher Education Governance. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

   The Scottish Code of Good Higher Education Governance is a much more balanced document than the Bill, recognising not only the rights of the academic and research staff, but also their responsibilities, and the rights of students. It states (p8) that the “main principles” of the Governing body are, amongst other things to:

   “ensure that [the Higher Education Institution] observes good practice in regard to equality and diversity;”

   and

   “foster a suitable environment whereby knowledge may be advanced and the potential of learners fulfilled;”

   Furthermore, it states (p9) that:

   “The governing body has a duty to enable the Institution to achieve and develop its mission and primary objectives of learning and teaching and research.”

   We particularly note that “learning” is listed first.

   We are concerned that providing one group of people in post-16 education bodies with a strengthened statutory right to academic freedom whilst their associated responsibilities, and the rights of the larger student body, remain non-statutory, is unbalanced, and
sends the wrong message to the Governing Body, academic and research staff, and students. The Code defines risk (p14) as: “the threat or possibility that an action or event will adversely … affect an organisation’s ability to achieve its objectives”, and we fear that, by increasing the power of those who already, of necessity, have the greatest influence, without also introducing statutory safeguards, this Bill risks exposing the most vulnerable to discrimination and even abuse in situations in which that power and influence may be misused. That does not “ensure … good practice in regard to equality and diversity”, and is an obstacle to “foster[ing] … the potential of learners”.

4. 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.

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

We have no comment on these issues.

5. 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 likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

On the contrary; it is irresponsible to widen the statutory definition of academic freedom, and strengthen the requirement for post-16 education bodies to “uphold” that freedom while not also imposing equivalent statutory responsibilities to protect those who may suffer detriment from careless or malicious use of that freedom. Even under the current legislation, we are aware of situations in which members of academic staff have employed or sought to employ their academic freedom in a manner that conflicts with the duty of care that they owe to students.

We have evidence that the manner in which some academic and research staff have expressed views about the situation in the Middle East has contributed to both Jewish and Israeli students feeling compelled to deny or hide their Jewish identity at the very
time in their lives when they should have the freedom to explore it.

The issue is not that some academic and research staff hold views about the situation in the Middle East; that is their right. Nor is it simply that they have expressed those views in public. What concerns us greatly is the manner in which some staff have done so, for example, by publicly campaigning against research collaborations with Israeli academic institutions, to deny visiting Israeli academics a platform, and even actively demonstrating against Jewish Student Society meetings relating to Israel, with a view to disrupting them and ultimately preventing them taking place, with the result that students are prevented from being able to examine the issue and express their own views.

For example, one postgraduate student told our 2015 inquiry into What’s Changed about Being Jewish in Scotland?\(^1\) that “grading is absolutely not objective when writing about the state of Israel or anything Jewish related.” She was disturbed that her presentation of a “fairly left wing paper about Israel and the US and their use of nationalist rhetoric to justify the war on terror” did not receive an academic critique, but only comments such as “Israel should not be called Israel but Palestine”, and that Hamas should not have been referred to as “a terrorist group”, despite the fact that it is formally recognised as such by the UK Government. The student believed that her academic freedom to investigate a particular point of view had been denied, and that she had been penalised on account of her tutor’s political views.

In any event it is not clear what “academic freedom” adds to “freedom of expression”, as discussed in paragraph 74 of the Policy Memorandum, or what different rights have to be balanced with those of others to go about their lives unmolested. As that paragraph notes, “the previous duty required post-16 education bodies to have regard to the desirability of ensuring academic freedom”. We strongly believe that to be the preferable position, since freedom of expression can never be unqualified (as the Convention recognises), and “having regard” requires the individual or institution exercising the right to conduct an assessment of the relevant benefits and disbenefits to all those who might be affected by that exercise. If, however, the impression is given that “academic freedom” is some form of enhanced freedom of expression, there is a danger that unqualified endorsement could be interpreted as a free pass.

We therefore regard it as essential that any statutory strengthening of the right to academic freedom must be accompanied by the introduction of a statutory duty of care to strengthen compliance with obligations under the “Prevent Duty Guidance for Scotland”\(^2\) (see below, p.8).

\(^1\) What’s Changed about Being Jewish in Scotland?  

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

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 concerned that the import of “within the law” is unclear, in particular, with regard to whom the burden of proof would lie. Would the Bill, for example, require a victim to prove that a member of the academic or research staff had acted outwith the law, or the latter to prove that he or she had not acted in an illegal manner? But in either case, a member of staff would benefit from the prima facie protection provided by Part 2 of the Bill while a student who had been intimidated by remarks made by a lecturer would not – i.e. the person who already has the upper hand and, for example, by the way in which he or she grades papers, is able to influence the student’s future prospects, would appear to be the one to whom the Bill affords greater protection. That is not equitable.

It is conceivable that academic freedom could be constrained by the ethos of an institution; for example, an institution twinned with a university in China might feel constrained to limit outspoken support for Tibet, or not to work with Tibetan students, academics, or researchers.

It is also possible that some academic and research staff may feel intimidated by aggressive demonstrations or abusive rhetoric whether by students or their academic peers. For example, one member of academic staff told our 2013 Being Jewish in Scotland inquiry3 “Especially in Dundee, the academic community is influential and academic life is very badly polluted by anti Israeli feeling. … I’ve been described by a fellow academic as being “suspiciously knowledgeable about Judaism”.

In addition, as we have described below, under “Academic freedom for members of the student body”, it is apparent that students’ academic freedom – a significant omission from the Bill – may be constrained by the political or other prejudices of the academic staff. It is not acceptable that one set of academic freedoms can be allowed to prevent the academic freedom of others, but the Bill does not even begin to address the issue of competing academic freedoms. The potential for lengthy and divisive court cases when such conflicts of rights exist is apparent from the litigation under the Equality Act 2010.

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 extent and, indeed, limitations of the proposed academic freedoms are not clear from the Bill documents since, although the Policy Memorandum states (paragraph 59) that the Review’s recommendation was that the definition of academic freedom should be “based on the definition contained in Ireland’s Universities Act 1997”, which includes

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3 Being Jewish in Scotland (Scottish Council of Jewish Communities, 2013)
http://www.scojec.org/resources/files/bjis.pdf
that the relevant freedoms should apply “in or outside the university”, the Bill itself does not state whether Part 2 (the new section 26 of the Further and Higher Education (Scotland) Act 2005, also applies to ideas, views, and opinions expressed or advanced outwith a post-16 education body.

We are concerned that certain views, even if expressed outwith a post-16 education body, could impact negatively on students studying at that institution, and, therefore, on the ability of the relevant member of academic staff effectively to carry out his or her teaching role.

The issue should not be where an individual happens to express a contentious view, but his or her locus standi to do so. Someone talking about the results of his or her research should be protected whether in a university or external lecture, a letter to the editor, or pub conversation, but the same person expressing personal prejudices, political opinions, etc should not be protected either in the lecture theatre or the pub even if they are indirectly related to his or her academic work.

**Students’ Academic freedom**

We are surprised that the Bill limits the right to academic freedom to people engaged in teaching, the provision of learning, and research, and does not extend it to those studying at post-16 institutions. We are aware of occasions when the academic freedom of both individual students and properly registered student organisations have been suppressed, in some cases by members of academic staff of the same or another post-16 education body.

On one occasion, for example, the Edinburgh University Politics and Economic Society invited a senior diplomat from the Israeli Embassy in London to address its members, and face what, it was anticipated, would be searching, and in many cases highly critical, questions about his country’s policies. Unfortunately, the society was put under such pressure from various organisations within and outwith the university that it felt compelled to withdraw the invitation. In the event, another student society stepped into the breach and took over the organisation of the meeting, but it was so disrupted that the speaker was not able to say a single word. Videos of the event show a group of demonstrators, one of whose leaders was a member of the academic staff at another university, intimidating the student audience, some of whom can clearly be seen to be frightened at the verbal, and occasionally physical violence of the demonstrators. The noisy and disorderly demonstration prevented the speaker from being able to say anything – the demonstrators would not even permit him to respond to their shouted claims and criticisms, and the event was abandoned after around half an hour. It does not bode well for the ability of academic authorities to exercise their “autonomy” responsibly, that university security stood by with their arms folded and did nothing to intervene to protect the freedom of expression of the speaker, or the academic freedom of the students who wished to hear – and indeed question – the speaker. In fact the university authorities refused to allow the police access despite the fact that they were
present outside the theatre and aware of the mayhem within. This is clearly the antithesis of academic freedom, since the students were prevented (by, amongst others, a member of academic staff) from hearing and questioning a particular point of view.

We are strongly of the opinion that the academic freedom of students freely to invite a wide range of speakers (except when the person concerned has a history of fomenting hatred and/or violence), and to express opinions contrary to those of the academic staff (provided also that these views do not foment hatred and/or violence), should also be protected under this legislation, and not be subject to manipulation by a contrived “majority” that in fact constitutes a tiny minority of the student body.

Equality and Diversity

As we have already observed, one of the “main principles” of the Scottish Code of Good Higher Education Governance is to “ensure that [the Higher Education Institution] observes good practice in regard to equality and diversity”. Although post-16 education bodies are, of course, required to comply with the Equality Act 2010, since we are aware of a number of failures in regard to equality and diversity issues, we regret that, since equality law is reserved, this principle could not be strengthened by inclusion in the current Bill.

A senior academic who participated in our 2013 Being Jewish in Scotland inquiry told us, for example, of having had to intervene to support a medical student who had been told in so many words by his professor to choose between his intended profession and his religion. The professor, who happened to be a vice-principal, then asked, “why should the university give a dispensation from our rules; why can’t you give one from yours?,” and when the academic explained that Judaism has no provision for dispensations, he was told, “Well you should!” (which, the senior academic further commented, is simply meta-discrimination: instead of “you should behave like me” we have “your religion should behave like mine”).

Another student at a different medical school told us she was “being hounded for taking off Jewish holidays, and refusing to sit exams on Friday evening” (the Jewish Sabbath) and was “repeatedly summoned for dressing-down from professors, the dean, and the head of the school. Others who were off (including Muslims) were advised not to fill in absence form but just to ‘be ill,’ and were not subjected to the same harassment.” In a caricature of equality legislation, she was told by the Dean that “because this is a secular university, we don’t need to take any account of students’ religion”, and by another professor, whose class she missed on Friday afternoons (during the winter the Sabbath begins around 3.30pm), and who was also on the admissions committee, that she was “not doing your people any favours as we’ll think twice about taking anyone with a Jewish name in future.”

It is evident that the situation has not improved; a student who participated in this year’s What’s Changed about Being Jewish in Scotland inquiry told us: “As a student having a university that refuses to reschedule my exams around Jewish holidays and Shabbat
(the Jewish Sabbath), *I was told by my university that either I sit exams on Shabbat or I fail, period.*"

In another disturbing case, a student who was repeatedly the target of antisemitic jibes from fellow students, both face-to-face and on social media, told us that she no longer went to the Business School or library, and was worried about attending a class workshop *“due to fear of being harassed or attacked”* (in fact, she uses the word “fear” no less than five times in her report of the situation). Although the student submitted a formal complaint to the university, its procedures were so drawn out that she was further disadvantaged by not feeling able to attend classes or informal group activities.

It is troubling that, when the Jewish Student Chaplaincy Scotland, has intervened, with the support of the Scottish Council of Jewish Communities, to assist Jewish students who find themselves subject to such abuse, our concerns have been dismissed by senior university staff who appear not to recognise that there have been failures in the institution’s compliance with the Equality Act 2010 and the Scottish Code of Good Higher Education Governance, as well as the “Prevent Duty Guidance for Scotland”, which states (paragraph 95) that “Universities have a responsibility to care for their students and we would expect, as part of the pastoral care and support available, there to be sufficient pastoral support for all students according to the needs of the particular institution. This is seen as a key element of compliance with the duty.”

We are very conscious that students are particularly vulnerable in that their entire future may be affected by the treatment they receive from a single member of staff during a single course, and indeed that their membership of a particular institution may be as brief as one term and that they are unlikely to have the resources for protracted legal action, so there is an incentive for the institution to extend proceedings until the problem literally goes away, as has happened in several of the cases referred to above.

We are also conscious that changing procedures for the future, or disciplining staff after the event, does not assist the victim whose life has been ruined, and we therefore favour not only a statutory code, but also the creation of a swift, cheap, and accessible way of enforcing it.

**Equality Impact Assessment** (Policy Memorandum paragraphs. 71-2)

We are surprised that the Equality Impact Assessment “concluded that the Bill’s provisions are neither directly nor indirectly discriminatory on the basis of [any of the protected characteristics].” As we have described above, widening the definition of academic freedom, and strengthening measures to uphold academic freedom among the teaching and research staff while not extending similar rights to students, is likely to create a situation in which students may be victimised by a minority of unscrupulous staff with a particular axe to grind, be that political, racist, sexist, or discriminatory in any other way. Those most vulnerable, especially to intimidation by the very people who hold their futures in their hands. We note that there are other contexts, such as sexual offences, in which the potential for the abuse of a position of trust or authority has been
regarded overriding the consent of an otherwise competent young person. We have cited more than adequate evidence above that this is a real and not only a theoretical risk, and would therefore urge that legislation should address this potential for the abuse of power in this context too.

**Human Rights** (Policy Memorandum paragraph 74)

Similarly, whilst we agree that “section 26 clearly engages article 10 of the Convention … [and] strengthens the protection of this right … [for] persons involved in teaching and research”, we are concerned that the corollary of this is that protection has been reduced for individual students and groups of students who may have even less redress than at present if a “controversial or unpopular point of view” expressed by a member of the academic staff happens to abuse or denigrate an aspect of the students’ identity, or penalise them academically for putting forward a view that is at odds with that held by a member of the academic or research staff.

**In summary**

Balancing freedom of expression and freedom from intimidation and harassment is already a fraught legal area. These proposals for strengthening academic freedom do not assist academics or institutions to find the point of balance, but instead provide a defence for the bullies rather than their victims.
HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

Submission of written responses to the call for evidence issued by the Education and Culture Committee of the Scottish Parliament.

Introduction

SRUC, Scotland’s Rural College, leads the way in delivering agricultural and rural research, education and consulting to rural communities. It is a company limited by guarantee and a registered Scottish Charity whose principal purpose is to advance education, science, research and environmental protection and rural improvement in the rural and land-based sectors, both domestically and internationally. SRUC, although having higher education status, is unique in the HE sector as it also delivers a significant amount of further education, research and commercial consultancy to students and clients.

Response to the call for evidence

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

The HE sector has invested significant time and effort into improving accountability and promoting inclusion through the preparation and adoption of the Scottish Code of Good HE Governance (the “Code”).

The Code is reflective of the diversity of governance in the HE sector and has sufficient flexibility to allow institutions, regardless of size, to comply with the main principles without imposing rigidity, unworkable structures and additional resource requirements on them.

Compliance with the Code is a condition of the funding of SRUC by the Scottish Further and Higher Education Council (the “SFC”).

The Code was only introduced in August 2013 and it is still developing and improving. In the two years since it was introduced it has improved the inclusion of students and staff in the governance of institutions and increased transparency of the activity of HEIs, for example, with the specific requirement for the publication of Board and Committee papers.

As part of its routine annual governance review process, SRUC has recently completed a full governance review to ensure fitness for purpose and to provide confirmation to the Board that it is compliant with the principles contained in the Scottish Code of Good HE Governance. The annual review process is used to ensure that the composition of the Board of Directors and the structure of its main Board
Committees have the appropriate mix of skills to be able to respond effectively to business needs whilst continuing to represent the interests of students, staff and stakeholders.

Having completed the review of governance, SRUC remains committed to good governance in the delivery of all aspects of its activity. The Code has been particularly helpful as a frame of reference and will continue to be so as it develops and is reviewed by the HE Sector. Also of assistance has been the Scottish Government’s promotion of gender balance on Boards which SRUC is committed to working towards achieving.

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

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

SRUC is concerned that the Bill does not take into account the diversity in organisational structure or the breadth of activity undertaken by HEIs and that it is seeking to impose a restrictive, “one-size fits all” governance which would not be appropriate to all institutions. We do not believe that it will achieve an improvement in governance, but instead might create a conflict between the Chairman and the Board of directors.

SRUC is a small, specialist institution offering further education, higher education, skills training, research and consultancy to the agricultural and rural sectors. SRUC is a private company limited by guarantee, registered in Scotland and has charitable status. As a limited company, the governing body of SRUC is a Board of Directors, and they are collectively responsible for the oversight of the management and regulation of the company. The Board of Directors are appointed in accordance with the Company’s Articles of Association and in accordance with the provisions of the Companies Acts. As SRUC is a registered charity, they are also trustees.

The Board of Directors ensures that SRUC complies with the provisions of the UK Corporate Governance Code 2014 published by the Financial Reporting Council in so far as they are applicable to a company limited by guarantee. In addition the Board of Directors ensures that SRUC complies with the provision of the Code.

Although a higher educational and research institution a major part of SRUC’s activity, and a crucial source of its funding, is commercial and the directors who sit on the Board of Directors require to be of sufficient calibre to effectively supervise and guide that important part of the business. Only 35% of SRUC’s activity is the delivery of education (and of that approximately 20% is Higher Education and 15% Further Education).

Following completion of its governance review, SRUC therefore believes that it has now reached a point where its governance, which is unique to it in the HE sector, is fit for purpose and that it now needs time to establish and function before being further changed. The annual review and reflection on governance which SRUC undertakes allows SRUC to ensure that it continues to be effective, inclusive and accountable to students, staff and stakeholders.
In recruiting Board members SRUC selects those with the necessary skill sets to oversee both the educational and the commercial activity. If the Bill is enacted as published then there is a real risk that the membership of the SRUC Board would, by virtue of having to include specific categories of members, no longer have the necessary breadth, depth and variety of skills which the Board requires to successfully operate and fulfil its role as governing body.

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

The Bill if enacted as drafted will inevitably alter the level of autonomy with which the sector and SRUC currently operate. The imposition of prescribed categories of Board member, who are appointed ex officio rather than on merit, will impede the ability of the SRUC Board to effectively run the business (particularly the 80% of activity which is not concerned with Higher Education), creating a Board which is not fit for purpose and which is too large for the efficient running of the organisation.

Only 20% of SRUC’s activity relates to HE and this should be considered alongside the relative size and significance of SRUC’s non-academic activities, within and beyond Scotland – i.e. commercial, consulting, livestock health schemes, veterinary services, etc. They comprise the majority of SRUC and are critical to its future, and provide further evidence of our genuinely unique configuration and mix of activities.

SRUC needs a governance model that is appropriate for all of its business and to meet legal obligations the Board of Directors of SRUC operates within company legislation, ensuring compliance with the UK Corporate Governance Code 2014. The Board also ensures that SRUC is compliant with the Scottish Code of Good HE Governance. It has undertaken annual reviews of its governance to ensure that it has a board of directors which is the appropriate size for the size of the organisation. Those reviews also ensure that the board has members possessing the relevant mix of skills and experience to oversee effectively the direction of the business.

The Bill does not take into account the vast differences in sizes between HEIs and will require significant additional resource to manage recruitment of Board members and to service the requirements such a large Board will have.

There is also a not inconsiderable risk that the enactment of the Bill will lead to a reclassification of SRUC as a “central government entity” rather than as a “non-profit institution serving households” by the Office of National Statistics (the “ONS”) as the control of the institution might be seen to have passed from the Board of directors to the Scottish Ministers.

The Bill, if enacted as published, will pass the power to decide how the Chairman of SRUC should be appointed, how long that person should remain in office, the remuneration of the Chair and the composition of the Board of directors. In addition the Bill would pass power to the Scottish Ministers to make regulations to determine the internal structure of governance in SRUC, particularly in relation to the composition of the Academic Board.
The power given to the Scottish Ministers would be to make regulations in relation to the items listed above and there would be no Parliamentary scrutiny or debate of these regulations.

The cumulative effect of these regulations could give rise to the ONS reclassifying SRUC as a central government entity which would leave us facing restrictions on the ability to both create and to retain surpluses, materially impacting on our ability to invest in the future success of the institution. The reclassification would bring an end to our Infrastructure Strategy which is currently being implemented to use monies generated on asset disposal to fund our ten-year strategy to improve campus facilities and bolster our regional presence and educational delivery in Scotland.

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

The Scottish Parliament has previously decided that the SFC, rather than Ministers, should ensure that there is appropriate governance in HEIs and this is effected through compliance with the Code, a requirement of our SFC funding. There is in place a clear line of accountability between the SFC and SRUC for our compliance with the Code.

The introduction of the new powers will weaken that line of accountability, taking responsibility for ensuring effective governance from a neutral body to the Ministers, putting the institution at risk of political interference not just in our HE education but also in the 80% of our activity which is not directly related to HE education.

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? Are any further measures needed?

As a company limited by guarantee SRUC operates in accordance with the provisions of the Companies Act 2006 and in compliance with the relevant provisions of the UK Corporate Governance Code published by the Financial Reporting Council. It should be noted that UK corporate governance is not subject to legislation but rather it is for companies to comply with regulations.

SRUC considers that this compliance with the relevant provisions of the UK Corporate Governance Code and the Scottish Code of Good Higher Education Governance is appropriate to the business model which SRUC operates.

Legislating in the manner proposed by the Bill does not allow for any flexibility in the operation of institutions nor allow them to respond to economic and business needs in a timely and efficient manner. SRUC believes that the continual evolution of the Code, responding to changes quickly and efficiently, is the best way to ensure that good
governance will continue to apply to all parts of our activity, educational and commercial.

Accountability for the expenditure of public funds is currently achieved through the Scottish Funding Council’s Financial Memorandum and the Outcome Agreement process. This allows for the funding and expenditure to be tailored to each individual HEI and will provide more transparency and accountability than the imposition of a large Board which lacks the necessary skill set to run the organisation.

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 Chair — SRUC is a company limited by guarantee and in terms of its Articles of Association it is for the directors of the company to appoint one of their number to the role of Chairman. It is particularly important for SRUC to ensure that the Chairman has the appropriate skills for the role and has the support and confidence of the other board members.

Given the unique nature of the mix of educational and commercial activity which SRUC has then the Chairman needs to have a strong understanding of the business. It is not clear how an appointment process which is not bespoke to an individual organisation could lead to the appointment of a Chair with the necessary skill to effectively run the business.

Membership — the rigid requirements to appoint specific members to the Board will impose on a small organisation a Board which is larger than is considered effective or appropriate for the size of the business. There is no guarantee that the members appointed in the manner set out in the Bill would have the independence, experience and necessary breadth of skills required to deliver informed scrutiny of the organisation at a non-executive level. There would therefore be a risk that the oversight of the management of the business would no longer be in accordance with the statutory requirements of the Companies Acts and Charities legislation.

Members appointed from specific interest groups would be at a greater risk of being conflicted on matters being considered by the Board than other non-executive directors and would require to be excluded from certain decision making processes.

The inflexibility of the Bill will cause difficulties for those institutions, such as SRUC, who recognise more than two Trade Unions and whose recognised Trade Unions are not
differentiated between academic and non-academic staff. SRUC also has a significant proportion of non-unionised staff.

SRUC does not have a graduate association. It is not clear whether it would require to set such an association up in order to allow the appointment of the Board members which the Bill requires. If SRUC were to have to set up such an association then this would require significant additional resource to establish and then run an association and at the present time SRUC does not have the resource to create such an association. If the Bill is enacted as drafted then SRUC would look to the Scottish Government to fund the establishment and running costs of an alumni association for SRUC.

**Academic Board** – SRUC has reviewed the composition and remit of its Academic Board and intends to embed the role of the Academic Board more closely into the structure of the organisation but with a membership of a size proportionate to the size of the organisation. The SRUC Academic Board has authority delegated to it by the SRUC Board of directors and acts to provide strategic guidance on academic matters to the Board. The Bill if enacted would permit Ministerial interference in the internal structures and operation of SRUC and therefore on academic matters within the organisation.

**Academic freedom**

SRUC supports the academic freedom of its staff and will continue to do so. Giving powers to Ministers to make regulations, which will not have been independently scrutinised by Parliament, could infringe on the autonomy of institutions and introduce a political dimension to decisions, impacting on the academic freedom currently enjoyed.

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*SRUC appreciates the opportunity to present their views on the Bill to the Committee. If there are any questions about our response then please contact Helen Howden (Deputy Company Secretary) at helen.howden@sruc.ac.uk*

4 September 2015
Higher Education Governance Bill: Scottish Trades Union Congress Response

The STUC is Scotland’s trade union centre. Its purpose is to co-ordinate, develop and articulate the views and policies of the trade union movement in Scotland; reflecting the aspirations of trade unionists as workers and citizens.

The STUC represents over 590,000 working people and their families throughout Scotland. It speaks for trade union members in and out of work, in the community and in the workplace. Our affiliated organisations have interests in all sectors of the economy and our representative structures are constructed to take account of the specific views of women members, young members, Black/minority ethnic members, LGBT members, and members with a disability, as well as retired and unemployed workers.

Introduction

The STUC has long been concerned about governance in the Higher Education (HE) sector in Scotland. We were, therefore, pleased to take part in the von Prondzynski Review and supported its findings.

The STUC was concerned by the length of time that passed between the reporting of this review and the drawing up of this Bill, however, we are, on the whole, very supportive of the legislation and we look forward to welcoming the provisions when they are brought into force.

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

The STUC played a full role in the Von Prondzynski review. This review took extensive evidence from the sector, trade unions, students and others around the functioning of universities and the appropriateness of their governance structures. This review made good recommendations to improve governance arrangements which this Bill now looks to implement. The Von Prondzynski review was set up in the light of governance failings within the University sector and proposed reforms so that there would be no more incidents that could bring the sector into disrepute, squander public money or put at risk the educational outcomes of students.
Throughout this work the STUC has consistently held the position that the von Prondzynski review was positive and set out useful recommendations that were necessary to improve the governance and the functioning of our Higher Education sector in Scotland. We have however, been concerned by how some of this work has been implemented to date, in particular the Code of Governance prepared by the Chairs of Court. This document is of a very low quality, reflecting the fact that it did not take account of the principles of good governance in its preparation. The STUC strongly believes that a Code of Governance is still necessary for the Higher Education sector, and would like to see a new draft prepared in line with the process that was undertaken in the Further Education sector.

In addition the STUC is concerned that there were recommendations in the von Prondzynski review that are not included within this Bill, specifically those on the appointment, appraisal and remuneration of principals; and the establishment by the Scottish Funding Council of a Scottish Centre for Higher Education Research. The STUC would hope to see this rectified as the Bill passes through Parliament.

Despite these concerns the STUC is convinced that this legislation is both useful and necessary and will make a contribution towards good governance in the Higher Education Sector.

(2) The extent to which the bill:

a. will improve higher education governance

The STUC believes that the proposals within the Bill have the potential to improve education governance particularly the proposals around elected chairs and reserved trade unions seats.

We were disappointed, however, that the legislation did not seek to deal with the make-up of remuneration committees. Transparency of remuneration committees and high awards for principals, out of step with pay decisions taken for other staff within the university, continues to be a problem for the sector. In addition the decision making processes of these committees continues to be opaque. The STUC’s affiliated union, the UCU, submitted Freedom of Information requests on this issue in 2015. Of 17 institutions asked by UCU to provide remuneration committee minutes and an explanation for a principals’ pay rise, four
refused to send any information and a further 8 redacted minutes, in some cases making them unintelligible. This work highlights the ongoing lack of transparency in the sector, and a need for remuneration committee reforms to be included in the Bill.

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

This Bill is not about Government controlling Universities, it is about good governance. Good governance procedures mean that the sector will function better and as a result spend public money better. In this way the autonomy of the sector would be secured in the longer term by ensuring that institutions are better able to govern themselves and can show transparent and well evidenced decisions around how they spend public funds. Better governance structures will also help the University meet the educational needs of students and better support the economic development of Scotland.

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

Academic freedom is a core value of the University sector but this does not depend on universities having no lines of accountability between the Scottish Government and other public bodies. It is reasonable that where significant public funding is put into a sector, as is the case with Universities, that the use of this funding is effectively scrutinised by the Government and others. The STUC does not believe that this Bill significantly alters already established lines of accountability and, as set out in our answer above, better scrutiny and accountability within the institution itself, ultimately makes for better run and more responsive institutions.

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

The STUC continues to believe that the Code of Good Governance has a significant and vital role to play in the creation of good governance throughout the HE sector. Unfortunately the Code that was produced by the Chairs of Court does not meet the necessary standard to achieve this aim. There are many weaknesses in the Code and the STUC
continues to believe that the recommendations made by the Code are simply not significantly stretching to change practice for the better throughout the sector. It is our view that this work was of a poor enough quality to require it simply to be redone and that any new code produced should be created in line with the principles of good governance.

The example of good governance that is followed within the NHS, along with the code of governance produced for the FE sector, shows what can be achieved when the work is done properly and when a genuine emphasis is placed on partnership working. This could still be achieved in the HE sector, but unfortunately not while using the existing Code.

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

a. 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 STUC believes that this is a key recommendation that has the potential to improve governance and the transparency of governance processes within the HE sector. We do however remain concerned that a vetting process will take place before candidates are presented for election. We are concerned that this process would place an unreasonable level of power in the hands of the vetting committee. The STUC is clear that elections for chairs should meet accepted democratic norms and should therefore allow the electorate a genuine choice of a range of candidates, even those that do not please the university centrally.

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

The STUC believes that this is a key area of reform within the legislation and is particularly pleased to welcome the trade union seats. The inclusion of trade union seats is in line with the wider Fair Work approach that we are taking in Scotland, which recognizes that role and the value of trade unions. Having reserved seats for trade unions, students and others, helps to ensure a plurality of interests are represented on the governing body, which helps to produce governance decisions that are responsive to the needs of the university as a whole.
c. To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons.

The STUC is supportive of this proposal.

(5) The likely affects of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

Better learning and teaching would be a result of good governance practices. Universities, like other institutions, will face difficult decisions and budgetary pressures at times. Good governance does not remove these pressures but allows the institution to more effectively deal with them. By hearing the voices of staff and students effectively within the governing body, the university can make decisions that better reflect the educational experiences of those most directly involved in education.

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

It is possible for academic freedom to be constrained in a number of ways. These were explored fully within the Von Prondzynski review. It is therefore important to have academic freedom protected by law so that academics and other staff working within the sector are able to rely on this definition to protect themselves and their work.

(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?

Our view is that it should go beyond simply their work in an institution. Clearly work within the university should be covered but we are also clear that academics are often seen as public figures and opinion leaders. An example of this might be the 2014 referendum on Scottish independence where institutions largely supported high profile
individuals against perceived pressure but it cannot be guaranteed that this will always happen.

We are also clear that academic freedom should apply not solely to academic staff. The development of ideas and knowledge may be led by academic staff, but the process will involve academic related and support staff too. We believe that they should also be covered and protected by any definition of academic freedom.
I am writing to express my concerns about proposals in the Higher Education Governance (Scotland) Bill and the effect I believe they will have on Scottish Universities and, in particular, the University of St Andrews, of which I am a graduate.

I have no doubt that, if the legislation is passed, the autonomy of the University will be seriously weakened and it will be vulnerable to direct political influence. As a result, its academic reputation will suffer and it will, inevitably, lose its edge, in a global market, to attract the best students, the best academic staff and funding, all of which would, in my view, be catastrophic.

Not only would it be bad for St Andrews but it would be bad for Scottish higher education, for the economy and for the country. And it is unnecessary.

Yours faithfully,

Catherine Sell
Submission from Jane Selby

Dear Sir/Madam

I am not the only one who is disheartened by Parliament's suggested changes to the education in Scotland, and especially how it will affect Universities. I am an alumnus of St Andrews University and am persuaded of the following:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
- it is unnecessary.

Please consider these points in all discussions of this matter

Yours faithfully

Dr Jane Selby
Submission from Mr Flora Selwyn

Sirs,

Please add my strongest opposition to this dangerous HEG (Scotland) Bill. My reasons are as follows:

- governmental interference, often wholly based on a lack of understanding of University governance.
- a complete contradiction between, on the one hand: “Our aim is not to increase Ministerial control over institutions, but to support our institutions to develop their own governance systems to enable them to continue to reach their full potential” - Para 2 of the Consultation. and on the other hand the six areas of changes proposed in the consultation paper in November 2014 (one or two of which have already been dropped) which would effectively take over the running of the Universities.
- the threat to abolish, or completely weaken, the position of Rector, as well as Chancellor’s Assessor.
- gross negative financial implications right across the board, both in the University sector and for the country as a whole.
- no possible need for this unnecessary and absurd Government interference. Universities have, since their inauguration, developed "their own governance systems to enable them to continue to reach their full potential." Does Government intend re-inventing the wheel?

I support entirely the response of the Royal Society of Edinburgh, viz:

- “The RSE considers that the proposals...are inappropriate, unnecessary and potentially counter to good governance...We suggest that the proposals are withdrawn.
- “Institutional autonomy and independence are fundamental principles that underpin the successful performance of Scotland’s HE sector. The proposals outline a level of governmental intervention that is entirely inappropriate for an autonomous sector.
- “The proposed intervention could only be justified by clear evidence of serious, systematic deficiencies in the governance of the sector.”

Yours etc, Flora Selwyn
Submission from Ben Shaps

To Whom it May Concern,

I am a member of the General Council of St Andrews University.

I want to express my strong disagreement with the above bill for the following reasons:

· the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
· its academic reputation will suffer;
· it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
· this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;
· it is unnecessary.

Yours,

Ben Shaps
I am submitting this response to the Committee’s Call for Evidence on the Higher Education (Scotland) Bill as an elected member of the Court of the University of Glasgow. The response reflects not only my experience as a governor of the University but also my experience of, and responsibility for, governance in a variety of other fields, namely as Secretary to the Post office; Company Secretary of Girobank plc; governor of St George’s Hospital Medical School University of London; trustee of the Industry and Parliament Trust; Chair of the Glasgow City Heritage Trust and of the Scottish Council for Learning Disability. The views expressed below are confined to those areas where that experience is directly relevant.

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

   In my view, there are no problems with higher education governance which require or justify this legislation. That is not to say that the institutions are perfect but rather that mechanisms already exist for ensuring best practice - the Scottish Code of Good HE Governance for example, which has already made a significant impact on HE governance. Compliance with the Code is a condition of public funding and therefore an important lever.

   Similarly, it is difficult to see what specific problems of accountability the legislation is seeking to address. HE institutions are already accountable to Government through Outcome Agreements and to their own community through elected governors representing academic staff, support staff, students, and alumni. And at Glasgow, the presence of a city councillor on Court provides an avenue of accountability to the wider community.

   So far as inclusivity is concerned, the governing bodies already include a wide variety of those who could be described as stakeholders. At Glasgow, the Court includes members of academic staff, support staff, students, the graduate body (the General Council) the local community (a Glasgow City Councillor) and a number of independent members with business experience in both the public and private sectors. It is not clear how the Bill’s provisions would improve this existing and effective practice.
2. The extent to which the Bill
(a) will improve higher education, particularly in the areas above
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of autonomy between the Scottish Government, relevant public bodies and the higher education sector.

It is unlikely that the Bill will improve higher education, since its focus is governance and governance alone cannot do that. And insofar as it deals with governance, it is likely in my view to do more harm to higher education than good, for the reasons set out below.

The Consultation Paper on the Bill stated that the Government did not want to increase Ministerial control over Higher Education Institutions. Unfortunately, the effect of Clauses 4, 8 and 13 is to do precisely that, and therefore alter the current level of autonomy significantly.

The consequences of this increased level of Ministerial control could have a direct and serious effect on the institutions which would affect their ability to provide even their current level of investment in higher education:

- First, the control exercisable under these provisions could lead the Office for National Statistics to classify the institutions as central government bodies. This would both impact on their funding options, as retaining surpluses for future investment would no longer be possible, and cause their borrowing to be counted against Government debt. It would prejudice the entrepreneurial activity which has brought considerable financial and reputational advantage to Scotland, by restricting funding and making private sector partners more difficult to find.

- Second, there is a risk that the proposed level of control could cast doubt on the institutions’ charitable status. At worst, this could have significant tax implications and even if the doubt were slight, it would be sufficient to prevent investment by e.g. foundations whose constitution permitted lending only to charities.

As a member of the Glasgow University Court, I have a particular concern that these two issues could put at risk the planned £450m investment in campus development which will have a major impact on both the University and the city, for that money will only be secure if the University has access to private funding and retained surpluses.

In addition to the potential financial implications, the perception of universities as a department of government would do reputational harm here and abroad, where the independence of the higher education sector is prized - and evidenced by the number of foreign students coming to study here and contributing to the economy by doing so.
In my view, these factors together raise the possibility that the Bill’s proposals could result in damage to higher education in Scotland, by affecting both investment in, and the reputation of, the institutions.

3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?
My views on this question are covered by the answer to Question 1 above.

4. The Bill proposes a number of specific changes to higher education governance:
   - to require HEIs to appoint a chair of their governing body in accordance with a process set out in regulations made by 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.

The provisions in the Bill relating to the membership of governing bodies, and in particular to the appointment of a chairing member, give me serious concern, both as a governor of the University of Glasgow and in the light of my wider experience.

It is not possible to give a definitive view on the provisions for the appointment of a chairing member as these are to be specified at a later date in regulations - in itself, a surprising provision given the central role of the Chair in any system of governance. In my experience, the personality and attributes of a Chair are key to the effective functioning of any organisation, as is the confidence the governing body places in her or him. A robust, transparent, and widely acceptable appointment process is therefore essential. This is, I believe, well illustrated by the recruitment process for a new Chair presently underway at Glasgow, where the job description has been agreed by the Court, the job widely advertised, and the interview panel will include a member of the academic staff and a student; the panel’s recommendation will be put to the full Court for decision. This process follows that set out in the existing Governance Code, and would seem to cover all that should be required.

So far as membership of the governing body is concerned, the Bill’s prescriptive approach to specifying its composition:
- increases the risk that HEIs will be perceived as a department of government, with the consequences set out above;
- reduces the existing flexibility of governing bodies to recruit members of differing skills and experience as circumstances change, and to meet each institution’s particular needs;
- fails to recognise explicitly the importance of academic staff on the governing body other than through a trade union nomination (thus incidentally disenfranchising the many academic staff who are not union members)

Further, it is not clear how the inclusion of two Trade Union nominees, in addition to existing staff representatives, will improve governance. Governing bodies already include staff members who represent staff interests, and it is difficult to see what other interests Trade Union nominees could have which would be consistent with their role as charity trustees of the HEI.

**Conclusion**

It is my view that this legislation is unnecessary, as the areas it covers are already covered by the Scottish Code of Good HE Governance. The Bill in its present form carries significant risk for the future financial health and reputation of the Scottish HE sector.

It is hoped that the result of the Committee’s Call for Evidence will be a conclusion that further reflection is needed on the requirement for legislation, and how the unspecified problems the Bill seeks to address might best be met without it.

Morag Macdonald Simpson CBE
31 August 2015
44 Erskine Hill,  
Polmont,  
Stirlingshire,  
FK2 0UQ.  

20 August 2015.

The Clerk to the Education and Culture Committee,  
Room T3.40,  
The Scottish Parliament,  
Edinburgh,  
EH99 1SP.

Dear Sir/Madam,

THE HIGHER EDUCATION GOVERNANCE BILL

As a graduate of the University of St. Andrews, albeit a long time ago in 1958, I recall with pleasure learning of the tradition of intellectual freedom which was a characteristic of the university’s history and which was still treasured by the student body during my time as an undergraduate.

Nothing exemplified this proud tradition better than the pier walk after chapel every Sunday, when the student body continued the centuries-old tradition of accompanying the visiting preacher to his boat to ensure that he … and in the past it was, I think, always ‘he’ … was not intercepted and detained by the authorities for some alleged heresy spoken from the pulpit. Just as the church was a place where intellectual freedom could not be constrained by the secular authorities, so the university was a self-governing institution where freedom of thought and freedom to express that thought was cherished.

I view with alarm some of the proposals contained within the proposed Higher Education Governance Bill which, it seems to me, threaten the very foundations of this freedom by making the university vulnerable to overt political influence … to put it kindly … or political interference, to be more blunt. Just as we see local authorities’ priorities ‘influenced’ … to be generous … by the fiscal priorities of the politicians forming the ruling elite in central government, so I fear that universities will be open to similar ‘influence.’ (As an instance of my fear, who can argue that the BBC’s traditional impartiality in political matters is not under threat at this very time by politicians determined to bring the broadcaster to heel?)

Many of the proposals contained within the proposed Higher Education Governance Bill are, quite simply, unnecessary. You will be familiar with the views expressed by the Royal Society of Edinburgh … that the proposals are inappropriate, unnecessary and potentially counter to good governance; that they outline a level of governmental intervention that is entirely inappropriate for an autonomous sector; and that they only be justified by clear evidence of serious, systematic deficiencies in the governance of the sector.

Telephone: 01324 711 368  :  e-mail: sandy.simpson@talktalk.net
Submission from Harold Sharples

Dear Sir

I wish to register my opposition to the adoption of the proposed "The Higher Education Governance (Scotland) Bill" in its present form.

I am appalled by the potentially adverse effects it could have on my very dear Alma Mater, St Andrews University - let alone the other fine Universities included in its scope.

The historically wise use of the autonomies granted to Institutions like St Andrews is what has allowed their leaders to fashion a treasured educational heritage of which Scotland can be justly proud.

Nothing, either within the bill’s outline, or arising out of any personal or reported experiences leads me to suppose or believe that the powers being denied are at all justified or in the least called for.

I see this enabling legislation as an unnecessary and unjustified draconian intrusion on many much loved institutions.

Please, I beg you, let good sense prevail: Amend or withdraw it.

Kind regards,
Submission from D W DShaw

Dear Sir

I am appalled at the contents of this Bill and urge its rejection. Among the many objectionable features is the proposed introduction of bureaucratic interference with individual universities' affairs, stifling initiative and enterprise, inhibiting advances in education and damaging the welfare of students and staff.

Yours faithfully

D W D Shaw
As a graduate of the University of St. Andrews, I would like to express my objections to the Higher Education Governance Bill. St. Andrews attracts students from all over the world, who usually return to their home countries with an intensely high regard for Scotland in general and for St. Andrews in particular. Here in the US, I have also met Americans who studied at Glasgow, Edinburgh and Aberdeen who feel the same way. They select these universities based on their individual reputations and I have never heard any of them suggest that Scottish universities would benefit from greater regulation.

In my personal experience of the US education system, I have seen how a proliferation of rules and regulations, an excessive focus on consistency, and a large bureaucracy sap the joy from teaching and learning and give our schools a pervasive air of depression and paralysis. Recently, a teacher in a neighbouring state asked me to act as a supply teacher for her for one week, in a subject where I have an M.Litt. degree, and I was not able to get permission to do so because my credential evaluation (a statement required for anyone who earned a degree outside the US) was done by a company that happens not to be on her state’s list of approved evaluators. No one at the school where I was asked to supply had any doubt about my credentials or ability, but they were not allowed to use their own judgment. They rarely are. The end result of this is that our system does not attract the best and brightest teachers, but rather those with a high tolerance for bureaucracy and oversight, and even they are dispirited.

For the excellent universities of Scotland, the freedom to decide on their own strategies and policies can only be a good thing. They are already aiming very high and drawing ambitious students from a global pool. As we say in this part of the world: if it ain't broke, don't fix it.

regards,
Submission from Dr Alasdair Spratt

Dear Sir or Madam

I am writing to express concerns about The Higher Education Governance (Scotland) Bill, due to pass through Parliament in the autumn.

The autonomy of Scotland's Higher Education institutions is something the value of which cannot be put into words; research, exploration and discovery thrive on freedom. It is important to the future of Scotland that we maintain a cultural environment which enables individuality and diversity of institutions as well as completely unquestionable and independent academic freedoms, not only for academia, but for attracting the very best researchers, teachers and students.

The Executive Summary states that "the aim of the legislative change that is proposed is not to increase Ministerial control over institutions, but to support them to develop and refine their own governance systems". No-one of course would question an institution developing and refining its system of governance or being supported in doing such, and this bill may well have some noble intentions regarding the promotion of democratic and accountable processes. However, it is not for Ministers to impose a blanket approach on a range of unique institutions; forcing pegs of all sort of shapes and sizes into one seemingly convenient notch will only impose unnecessary burdens and dilute into faux-consistency a sector which is built upon and thrives upon its diversity.

The very inclusion of the reassurance quoted above in the Executive Summary has obviously been thought necessary, and ironically does itself frame fears most succinctly. It is certainly an extremely worrying aspect that this bill would appear to leave open the door for Ministers to exert influence, completely unnecessarily, upon independent institutions. Does this bill in fact amount to 'power through the back door', while allowing the government to remain seemingly distanced?

I struggle to see what are the drivers behind this proposed legislation or what Scotland and its institutions will gain from it.

Yours sincerely

Dr Alasdair Spratt
Submission from Lorna Souter

To the Committee Clerk,

I would like to register my grave concerns regarding the proposed Higher Education Governance (Scotland) Bill.

The new legislation will enforce greater consistency among institutions, and thereby reduce their ability to adopt individual strategies. It will burden universities and the public purse with extra regulation and bureaucracy that will stifle enterprise and jeopardise the positive contribution that universities make to the economy. I do not believe the case has been made, and the legislation is not only harmful; it is superfluous.

I have further concerns that, with this legislation, the autonomy of the universities will be greatly weakened and they will be vulnerable to direct political influence. Having studied at our oldest university, St Andrews, with all its vast heritage of learning, I fear its academic reputation will suffer under this legislation. It will lose its edge, in a global market, to attract the best students, the best academic staff and funding. This will be detrimental for St Andrews, for Scottish higher education, for the economy and for the country of Scotland which is extremely concerning when the legislation is entirely unnecessary.

I sincerely hope that the Bill will be dropped.

Yours faithfully,

Lorna Souter
Submission from Helen Stell

To the Committee Clerk - HEGB

As a graduate of St Andrews University, I am extremely concerned about the Higher Education Governance (Scotland) Bill which is due to pass through the Scottish Parliament this autumn.

I am concerned that the autonomy of the university will be greatly weakened and it will be vulnerable to direct political influence. Its academic reputation will suffer. It will lose the ability to attract the best students, staff and funding in a global market. It will be bad for St Andrews, for Scottish higher education, for the economy and for Scotland, and it is not necessary.

Yours indignantly,

Helen Stell.
In addition to the comments below, I must stress the importance of the Rector to the student body and insist that the remit of this role is in no way diminished. They play a vital role in representing and supporting students, which would come to an end under these proposals. The quality of the ‘student experience’ would indeed suffer.

I would like to express my concern over the proposals included in the The Higher Education Governance (Scotland) Bill currently going through parliament. I am a graduate of Scotland’s first University and the third oldest in the English speaking world, St Andrews. I have 10 years’ experience of working within a range of HEIs, including the University of Oxford, King’s College London and the University of Edinburgh.

Scotland’s universities are amongst its greatest economic assets, they are world-leading in their research and impact, and provide learning and teaching experiences of the highest quality. They may be centuries-old and steeped in tradition, but they embrace change where it is worthwhile and remain at the forefront of discovery, innovation and learning. Ministerial interference in the governance and management of these institutions will significantly undermine their ability to adequately maintain such high standards for the following reasons:

- Partisan influence of successive governments will hinder their autonomy
- Their academic reputations will be diminished
- A blanket policy will not be to the benefit of all institutions and will result in their being unable to compete both within the UK and internationally.
- This will have a negative impact which will reach far beyond Higher Education.

Moreover, the changes are completely unnecessary and demonstrate a complete lack of understanding of the nature of HEIs and how they function.

Deborah Stitt
September 2015
Higher Education Governance (Scotland) Bill - Call for Evidence

Submission from David Stutchfield

As an elected non-teaching staff member of the Court of the University of St Andrews, I have the following personal comments about the proposed bill:

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

   Since the introduction of the Scottish Code of Higher Education Governance, and the changes by each University to meet the code, I see no issues with modernity, inclusion or accountability. I do not understand what problem the bill seeks to address, I do not think the bill is necessary, and feel that some parts threaten the independence and even non-profit and charitable status of Universities.

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

   I think the bill will reduce accountability, and reduce inclusion. As an example, I have been elected by non-teaching staff to serve on Court in an open election of all eligible staff. If this bill is passed in its current form I would probably be removed from Court and replaced by an appointed trade union representative (Given the overall size of Court and need for a majority of non-executives). This reduces the accountability within Court. Forcing Universities to have a strict composition of their governing bodies is not good governance.

   The Chair of Court should have the confidence of Court members, and should not be elected by the wider institution, or potentially appointed by Ministers.

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

   The bill will greatly reduce the level of autonomy of the University Court, especially sections 1,8,13 and 14, which potentially allow far more political influence over Universities without full parliamentary scrutiny.

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

   The power of Scottish Ministers to change the governance structure by regulation would be extremely disappointing, and could threaten our classification as a non-profit organisation, and 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.

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

   No, Government should only currently monitor the governance performance of Universities under the Scottish Code of Higher Education Governance and not legislate. The Code can be reviewed over time with the agreement of all Universities.

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 recruitment and appointment of the Chair is already clearly laid out in the Scottish Code of Higher Education Governance, and is open and transparent. I do not understand how Scottish Ministers determining who was eligible to be appointed as chair makes this better governance. Our Rector would become purely ceremonial, when at the moment they are an important student champion elected by all students.

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

   Our Court includes representatives from all the constituent communities (and at the moment includes a trade union representative because he was elected to represent academic staff in an open process). As stated before, the likelihood of this bill is that my elected non-teaching staff assessor position would go to make way for an appointed trade union representative.
Student representation would also half on Court (from 4 to 2).
Section 8 gives Ministers worrying powers (without parliamentary scrutiny) to make changes to the make-up of Court, and increases political influence on Universities.

To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons
Our Academic Council of 45 has devolved functions from our larger Senate, and this system works well, providing good governance and academic freedom. We would have to effectively start again and completely re-form our Senate. Section 13 gives Ministers worrying powers (without parliamentary scrutiny) of political influence over our academic freedom.

Yours sincerely

David Stutchfield
Submission from Dr Paul Stollard

Dear Sir

Higher Education Governance (Scotland) Bill

Submission to the Scottish Parliament's Education & Culture Committee

I am writing in my personal capacity as a Lay Member of Court of Edinburgh Napier University to express concern about key elements of the Higher Education Governance (Scotland) Bill which is currently being considered by parliament. I have been an independent member for the past six years. I have previously served as a national trustee of the Samaritans and am currently a non-executive director of NHS Health Scotland and was recently appointed as a board member of Historic Environments Scotland.

I would like to make three main points about the proposed legislation.

First, it remains unclear to me that the government has made a coherent case for introducing this legislation in the first place, and equally unclear how if at all the measures proposed will actually improve the governance of our universities. All of our HEIs have already adopted the Scottish Code of Good University Governance that was published just two years ago in 2013, and my own university at least is fully compliant with it. University Courts already include elected members of staff and students with a majority composed of “lay members” (non-executive directors).

Secondly, the proposal that the Chairs of Court should in future be elected by a popular vote of some sort, on a basis that has yet to be detailed, seems deeply misguided. I am not aware of any other publicly-funded body in Scotland that is required to elect the Chair of its governing body in this way, and see no case for making our universities an exception. On the contrary, it is absolutely vital that those who chair University Courts have the skills and knowledge required to govern increasingly large and complex organisations effectively, and that other members of the governing body have confidence in their Chair, and ultimately retain the collective power to remove a chair that is perceived to be ineffective, or worse.

Thirdly, the proposal to grant ministers extensive new powers to decide on the process for appointing chairs, their terms of office, the remuneration that they should receive, the composition of the governing body itself, none of which proposals were mentioned in the government’s consultation document, is extremely worrying both in principle and in practice. As a matter of principle, this will clearly mitigate against the autonomy of the universities, which ministers purport to respect, as well as concentrating power in the hands of the executive rather than the parliament. From a practical perspective, these provisions significantly increase the risk of Office of National Statistics re-classification, which would be enormously damaging for a sector that currently receives less than half of its funding from the government, and is one of the largest economic clusters in the Scottish economy.

Yours faithfully
Submission from Steve Skelton

To whom it may concern:

It is important that Scottish Universities maintain their level of discovery and expertise, which may be weakened by political influence. Scientific expertise has been growing steadily at St. Andrews University. An example, is the important development of Photoporation in Genetic Research.
Submission from Dr Hamish W. Sutherland

Dear Committee Clerk  I write to register my anxiety aroused by the potentially harmful effects of the proposals in the Bill that seems challenging to justify in cost benefit assessment. The present arrangements underpin the national and international recognition of the quality, merit and success of higher education and academic research in Scotland. Extra regulation with inevitable consequent additional bureaucracy risks stifling enterprise and introducing needless delay of progress. Furthermore the Bill runs the risk of being perceived at home and abroad by political analysts and commentators as another step in the subtle pursuit of totalitarianism in Scotland by the national Party. Not a desirable prospect My conclusion is to leave well alone.

Yours faithfully  Hamish W. Sutherland
Submission from Mr Mike Taylor

Dear Sir / Madam

Higher Education Governance (Scotland) Bill

I write as a General Council Member of St Andrews University to express serious concern at the proposed Higher Education Governance (Scotland) Bill.

The case for needing such a bill is not made (and thus its fitness for purpose is not made either).

Yet significant consequences of these proposals are wholly inappropriate:

- **Loss of autonomy**
  due to an unnecessary increase in political involvement.

- **Academic reputation would be put at risk**
  Any level of perceived government control would reduce the ability to attract top quality students and academics. Recognition of Scotland’s world class HEIs would be in jeopardy.

- **Economic Risk would increase**
  Major capital flows generated from across the globe to fund research would also be put at risk by reduced independence of governance, affecting the HEIs and communities they serve.

- **Overly prescriptive standardisation would drive mediocrity**
  The rich diversity of the HEIs in Scotland drives today’s excellence. There is no need for prescriptive, micro-management standardisation of governance.

- **Additional costs and complexity would be introduced**
  The proposals would increase the cost of governance and compliance for no perceivable gain. Conflicts of interest would arise on governing bodies by including Union representatives.

I fully support the conclusions of The Royal Society of Edinburgh’s Advice Paper (15-01). **This bill is unnecessary and should be withdrawn.**

The provisions of the recently introduced HE Code of Governance appear to be working well in pursuing modernisation. Accordingly “...Scottish Government resources would be better directed at supporting HEIs to address strategically … the fundamental [challenges facing the HE sector]”.

Yours sincerely,

Mike Taylor
Higher Education Governance (Scotland) Bill: Submission from the Steve Morrison, Rector of University of Edinburgh

I am the current Rector of Edinburgh University. I was elected in February 2015 for a three-year term. I understand that the currently elected Rectors of the Ancient Scottish Universities will not be affected by the proposed legislation and we will serve out our terms. I therefore have no personal vested interest in the effect of the legislation. However the Bill as currently written poses a threat to the future of what I consider to be a historic part of Scottish Higher Education and I would like to address my evidence to ensuring the continuation of the position of elected Rectors in the Ancient Scottish Universities chairing University Courts.

As Rector of Edinburgh University I have been involved in the document which has been submitted as “Higher Education Governance (Scotland) Bill: Submission from the University of Edinburgh” from Edinburgh University.

I agree with the evidence in that document that the current system works and the University takes very seriously its obligation to provide robust corporate governance and accountability. However I would like to go further with respect to the question asked in Question 4 of the invitation to submit evidence, “Question 4 – Please provide your views on the merits of each of the specific proposals on appointment of chair; inclusion of various persons within the membership of governing bodies; and requirements that academic boards should be comprised of no more than 120 people and include various persons.”

I agree with the proposal that Chairs of governing bodies in Scottish Higher Education institutions should be publically
elected. I further think that the Edinburgh University model is a particularly good one because all members of staff, academic and non academic, and all students are entitled to vote. The whole procedure is therefore inclusive and every member of the University can participate in the election of the Chair of its governing body.

In the case of Edinburgh University and the other Ancient Scottish Universities, that person is accorded the long standing historic title of Rector and he or she chairs the University Court. I think it would be unfortunate and a mistake to lose that part of the Scottish Ancient Universities’ heritage by substituting a more modern title. It should be up to any Scottish Higher Institution to entitle their Chair in any way they wish.

The question then arises as to how the candidates who compete in the public election should be nominated. I don't agree with the current selection method as described in the Bill and would need further practical discussion about how candidates should be entered so that the process of nomination and election is genuinely democratic.

I believe that alumni of Universities will become more important as external mentors for current students and therefore I would not agree to reduce their number on the University Court. I agree with the proposal that trade union members should be elected to the governing body and would also suggest that local city and community members should be sought from a wider range of candidates including community councils so that they have a closer engagement with their local University.

Regarding the Senate, I would submit that one size does not fit all. Edinburgh University has 12,000 staff and so a
proportionate size for its senate should be found conducive to
democratic participation rather than picking an arbitrary limit
of 120 members. As I have been elected by the staff as well as
the students, I intend to consult the staff on this issue.

In order to further exchange views with the Parliamentary
Committee I would like to appear in person before the
Committee and give oral evidence.
Higher Education Governance (Scotland) Bill: Submission from the Rector of St Andrews:

Dear Sir,
The unique Scottish tradition of the Scottish Ancient universities for students to select and elect their Rector to chair University Court, the ruling body of the university, is a special and precious tradition which the Higher Education Bill before you, will remove.
Sadly, the changes proposed will see the Rector no longer have the right to chair the most important governing committee of the university.
In its current form, the Bill before you - in addition to removing the right of the Rector to chair University Court - will also take away the democratic right of students to determine who will be the candidates who stand for election as Rector.

The concept that students nominate individuals to stand for election is an excellent counter-balance to the traditional hierarchy of universities. It is an open and democratic process, accessible to all matriculated students to put forward the candidate of their choice: selected by the students, for the students.
As the proposal stands, students will for the first time no longer determine the candidates who will go forward for election. Instead this right will be replaced by a committee whose membership and remit is unclear.

The strength of the current model in place is that it allows the key stakeholder group of any university -the students - to determine the individual to chair University Court (the Rector).

This system in the ancient universities should not be dismantled to accommodate a one-size-fits-all approach, but should be considered as a model of democratic strength. To see a piece of Scottish history disappear, when the principle of electing an individual to preside over University Courts throughout Scotland already exists in the universities which by ordinance have elections for Rectors every three years, seems short-sighted.

In conclusion, flexibility is required in the proposed legislation to accommodate a system that conforms to a democratic tradition which has a historic record of success.

I would be delighted to speak to your committee. After all, it would be a tragedy that under the current proposals I would be the last Rector of St Andrews to chair University Court.

I look forward to hearing from you.

Yours sincerely
Catherine Stihler
Rector, University of St Andrews
Dear Sirs,

I was disappointed to learn that you are considering the HEGBill. I was a student at St. Andrews in the 1980’s and have closely followed its development since then. Over the years I have often reflected on how my years there formed me as a scholar and have contributed to my own academic career. During my years as a professor in the United States, time and again I have seen how over management can sap an institution of its strength and originality, and I oppose your efforts to impose that sort of regime on St. Andrews. I fear that instead of promoting better education in Scotland it will make more institutions equally mediocre.

Students have been attracted to St. Andrews, and other Scottish universities, for centuries. Why put the dead hand of bureaucracy on schools that can function more effectively when left to determine their own policies and destinies? I hope you will reconsider this bill and its tendency to over manage academic affairs that are better left to the faculties and governing bodies of the universities themselves.

Thank you.

Yours sincerely,
Submission from Ms Anne Thomson
Higher Education Governance (Scotland) Bill

For the attention of the Committee Clerk.

I am writing to express my concern at the proposals contained in the Higher Education Governance Bill. I am a graduate of the University of St Andrews and wish to bring to your attention the following which I consider to be likely outcomes of the passing of this bill as it stands:

- the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence;
- its academic reputation will suffer;
- it will lose its edge, in a global market, to attract the best students, the best academic staff and funding;
- this will be bad for St Andrews, for Scottish higher education, for the economy, for the country.

Furthermore, it is unnecessary.

I understand the Royal Society of Edinburgh's views are as follows:

- “The RSE considers that the proposals…are inappropriate, unnecessary and potentially counter to good governance…We suggest that the proposals are withdrawn.
- “Institutional autonomy and independence are fundamental principles that underpin the successful performance of Scotland’s HE sector. The proposals outline a level of governmental intervention that is entirely inappropriate for an autonomous sector.
- “The proposed intervention could only be justified by clear evidence of serious, systematic deficiencies in the governance of the sector.”

I would also like to see the post of Rector continue in its current role, upholding the interests of the student body and chairing Court.

I urge you to listen to the objectors to this bill and redraft or reject it.

Anne Thomson
My wife and I run a successful business consultancy supporting the SME business community in Scotland. Our success is in no small part due to the standard of education we both received while students at St Andrews University in the 1970's. Our University experience left us as confident, educated individuals ready to contribute to business and social society. And the University has 600 years of doing this without overt political oversight or interference.

We therefore object in the strongest possible terms to the proposed bill and it's short term meddling. The autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence; its academic reputation will suffer: it will lose its edge, in a global market, to attract the best students, the best academic staff and funding; this will be bad for St Andrews, for Scottish higher education, for the economy, for the country;

In short, this bill is unnecessary and unwelcome for the current and future students.

Malcolm & Mary Todd
Dear Sirs

I have taken considerable interest in the discussions leading up to the publication of the Higher Education Governance Bill, as I fairly recently returned from a nine-year spell in the United States where I was President and CEO of a very well-endowed private higher education institution, Princeton Theological Seminary.

In March 2013 I was appointed Pro-Chancellor of the University of Aberdeen. I had been Dean of the then Faculty of Arts & Divinity at Aberdeen prior to my move to the United States.

The years in the US were successful but demanding as I was CEO prior to and during the banking crisis of 2008-11 and there were times when our endowment dipped by 600 million dollars. This impressed on me the needs a governing body has for stability, trust and the ability to make unpopular decisions, at times rather quickly.

On this basis, I am doubtful about the Bill’s somewhat unclear proposal that the chair of a governing body might be elected. While that may give the appearance of transparency, at a time of real difficulty, the chair must have the full trust of the board of governors and that implies that the chair should be elected by them, not imposed upon them.

I learned that as institutions develop, their boards go through different ‘seasons’ and a successful and self-critical board will be aware of its own ‘skill mix’ and its needs. I believe it is deeply mistaken to legislate on the composition of boards, as you would thereby lose that flexibility and dynamism. It goes without saying that governors should be in classes and rotate and have limited terms of tenure. The impact of that crucial aspect of turnover is suppressed if the composition (skill mix) is itself set in stone. For similar reasons, I am doubtful also about the proposals to determine the composition of Senates which in my experience need to retain the flexibility to evolve to match the academic structure and character of particular institutions.

I learned that it was crucial in a difficult period that all governors were fully committed to forming a single body and reaching corporate decisions. The effectiveness of a board is much reduced if any governors are present as ‘delegates’ of an interest group. For that reason I’d seriously advise against requiring trade union membership (or any other delegated appointments).

Two further overriding issues of concern emerge from the Bill as now published that were not evident in the prior consultation exercise. The first is that the Bill proposes Ministerial control over a range of matters of internal governance. This undermines a key principle of universities in Scottish society which is that they should be free from political control. This is an issue for Scottish democracy as much as it is for Scotland’s universities.
Related to those Ministerial powers, I understand there is concern that this could result in universities being reclassified as 'government bodies' and/or losing their charitable status. As someone who is closely involved in supporting the University of Aberdeen’s fundraising activities, I know that it is extremely difficult to persuade donors to give to an organisation that they perceive as being a government body or politically controlled. Fundraising at Aberdeen has enabled the creation of wonderful new facilities like our Library and supported many, many students to benefit from a university education. It would be a tragedy for Scottish higher education if we were to find ourselves in a situation where the public good of philanthropy and charitable giving were to be cut off from our universities.

Yours sincerely,

Very Rev Professor Iain R Torrance
Submission from Janet S Tucker BSc, MPH, PhD

As a member of the General Council of the University of St Andrews I am writing in response to the current Higher Education Governance (Scotland) Bill.

I am concerned that:

1. The need for legislation to impose change on all institutions’ governance structures is not justified by evidence of existing and serious deficiencies in the Scottish HE sector;

2. The autonomy and independence of Scottish HE institutions are fundamental to their success and performance. The powers given to Ministers in the Bill to make changes to governance regulations threaten that autonomy;

3. Academic reputation will fall;

4. The long evolved diversity and individuality of Higher Education institutions in Scotland should not be threatened by direct political regulation which will have a detrimental impact on higher education, the economy and Scotland.

Janet S Tucker BSc, MPH, PhD.
UCU Scotland response to the Education and Culture Committee on the Higher Education Governance (Scotland) Bill

The University and College Union is the largest trade union in the Post-16 education sector in the UK, representing 120,000 academic and related members across the UK, and is the largest union in the higher education sector in Scotland.

We are happy for this submission to be made publicly available and shared in the usual ways.

If it was helpful to the committee we would be delighted to expand on our response and give further evidence in person.

We have answered the questions asked by the committee in order below.

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

One of the themes pushed by those arguing against governance reform in the Scottish Government’s consultation on the bill is that this is legislation in search of a problem, that there is no problem and the governance of our universities does not require improvement. In arguing this case the body that represents university principals, Universities Scotland, was joined by a number of existing members of university courts. The argument is made that the international reputation of our universities proves the competence of the current arrangements. UCU is the largest trade union in the higher education sector in Scotland and refutes this. UCU believes that the reputation of our universities is not based on their successful governance, but on the world class research and teaching carried out by staff in our higher education institutions. Unfortunately we feel that universities’ high international standing is somewhat dented by management and governance failures.

There is a problem with the way that our universities are governed which leads to a lack of robust questioning of strategic decision making of senior management. Our concern is this can lead to many institutions making demonstrably bad educational, financial and other decisions. We believe this has been the case most recently over plans to make large numbers of academic and other staff redundant (and in some instances close down whole departments) in universities including Dundee, Glasgow, Stirling, Abertay and
Aberdeen; and a lack of transparency around pay, awards and remuneration which have been widely reported; and that a move away from the university as (at its best) a collegiate learning community towards straightforward managerialism has damaged our universities. The von Prondzynski review was not set up for no reason. Rather, it was set up by the Scottish Government following a string of governance failures and a lack of transparency around soaring pay awards for principals and senior university managers. Substantial evidence was submitted to the von Prondzynski review demonstrating that there is a lack of connectivity between staff in our universities who feel disenfranchised and at times demoralised, and senior management who paint a much rosier picture divorced from the reality on campus.

There is also a question of accountability and how accountable university governing bodies are to the community of which they are a part. This is evidenced by the lack of diversity and often too uniform background of members of governing bodies. (We note the recent increase in the number of women chairs and welcome and comment on that elsewhere in this submission.)

Since the turn of the year we’ve seen universities face criticism over principals and senior managers receiving pay rises – of up to 13 per cent – while staff were being told there was no money for pay increases. In addition we see principals receiving expenses of tens of thousands of pounds. While it may be possible to make a case that senior managers are deserving of such substantial increases, it is the failure in governance in remuneration committees making these awards, that is the matter of concern. Having faced criticism in 2014 over the lack of transparency, the body which represents principals, Universities Scotland, argued that the sector had now established a ‘new normal’ of the very highest standards of transparency, accountability and effectiveness. This, it was argued, was as a result of the Code of Governance coming into effect. UCU was critical of the code when it was introduced but in any event that those standards aren’t being met under the code is demonstrably the case, when again in 2015 on being asked in an FOI to send details of the remuneration committees that set their principals’ pay, over two-thirds of Scottish institutions refused to provide full details. Of 17 institutions asked by UCU to provide remuneration committee minutes and an explanation for a principals’ pay rise, four refused to send any information and a further 8 redacted minutes, in some cases making them unintelligible.

The genesis of the call for elected chairs of governing bodies has been the gradual removal of the practice of rectors (in those ‘ancient’ universities where they did so) chairing court meetings. It is worth bearing in mind that only a minority of universities in Scotland have rectors (five), and that the majority do not have a position of a rector elected by students. This gradual removal of rectors chairing the governing body we believe has been as a result of a push from senior managers in the universities that the person chairing court should be
elected by court itself rather than the university. The guidance\(^1\) issued by the Scottish Rectors’ Group outlines the gradual push towards taking the democratic element of governance arrangements out of universities over many years, and the political counter push by senior politicians including then MPs David Steel, Donald Dewar, Brian Wilson and Menzies Campbell against this trend and to maintain the democratic tradition.

We are aware that there is a view that the proposals to elect chairs to all Scottish HEI’s governing bodies would result in the rectors in the universities which currently have rectors losing their right to chair court. We do not accept that this is the case. First, as it currently stands not all rectors chair court. Indeed, as is the case in Dundee some rectors have never had the right to chair. More importantly, even in those institutions where they have this right to chair, we have seen a gradual diminution in them fulfilling that role, with senior governors instead taking on the duty. All of the institutions which have a rector have ensured their governing body has separately appointed a chairperson to act as senior governor and chair the court. We also note that the code of governance drawn up by the Scottish Committee of Chairs of Court outlines a procedure whereby the chair is selected by a nominations committee rather than nominate the rector where one exists. It is also the case that the bill has provision for direct student representation on court as student association nominees. The idea of needing an “authority” figure to champion and represent them alone - and uniquely only in the ‘ancient’ universities - seems somewhat outdated when students are perfectly able to speak for and represent themselves.

We do not want though to lose the role of rector as a democratic voice on the governing body and in the wider university, rather, we want and believe the Bill can establish and revitalise this democratic tradition not just in the ‘ancient’ universities but across all institutions in Scotland. We are of the view that, as the von Prondzynski report suggests, in universities that currently have a rector the new elected chair of the governing body could take on that title albeit that he or she be elected by all staff as well as all students as currently happens in Edinburgh. This is our preferred option, but another possibility, if it were demanded by students in the four ‘ancient’ universities and Dundee, might be for the elected rector to sit alongside the new elected chair on court but that they be elected only by students and solely have an advocacy and representative role. In that case, then the rector would lose the ability to chair court (albeit one that was not always taken up and has changed over the last twenty years). It is important that the role of chairing would be taken on by someone with a democratic mandate from the whole university. Whichever of these possible solutions was used, the major benefit of the Bill is that rather than only having elected rectors in a small number of universities who

\(^1\) [https://www.abdn.ac.uk/documents/scottish-university-rector.pdf](https://www.abdn.ac.uk/documents/scottish-university-rector.pdf)
sometimes do but more often don’t chair the governing body, the bill will allow for an elected chair in all institutions.

(2) The extent to which the bill:

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

We believe that there is no magic bullet in regard to governance. We do, however, believe that elected chairs of governing bodies – essentially reinforcing and extending the historic role of an elected rector in chairing court but, as we and others supporting reform would want, elected by all staff and students (as happens in Edinburgh University) to represent the whole university community – would refocus the university as an institution of learning with a democratic tradition. Essentially the question in hand is whether a university should be modelled on solely a business model with annual surpluses as the definition of success, or run as an educational institution part publicly funded and accountable to the community it is based in and providing both teaching, research and knowledge exchange. In our view universities should not be regarded simply as businesses. It is well within the working life of many current academic staff that they would have as staff elected academic positions of management within the institution. As with rectors chairing court meetings, it is relatively recently that this model has disappeared. UCU is not, as some contributors to the Scottish Government’s consultation did, calling for elected principals, but we believe elected chairs would redress some of the imbalance and ensure that we can be confident that decisions made by court, often affecting the entire ethos and direction of an institution, are at least robustly questioned and considered, and we can be as assured as we can be that the decision reached is the correct one for the university and not simply railroaded through by senior managers without sufficient scrutiny.

We also support proposals for trade union and student nominees to have places on governing bodies. We note the body which represent university principals, Universities Scotland’s, view that trade unions members sitting on court would breach the Nolan principles. We disagree and note that a similar argument was not made against there being specific places for student association representatives. Trade union members would act as nominees on governing bodies and as such would be perfectly able to act in the best interests of the institution. The idea of trade unionists acting against the interests of the institution seems like a last hurrah for the old ‘enemy within’ view of unions, rather than a sensible way to conduct industrial relations in 2015. Likewise we make reference to the Scottish Government’s 2014 ‘Working Together Review’ chaired by the former Enterprise Minister Jim Mather which recommended that the “Scottish Government should legislate to ensure that there is effective worker representation (from representative trade unions) on the board of every public sector body...”. Higher Education Institutions are, as the von Prondzynski
review states, autonomous public bodies and receive over a billion pounds of public money from the Scottish Government annually, notwithstanding the other public money they draw in from publicly funded research bodies.

We note the recent Herald story\(^2\) regarding the estimated costings in the financial memorandum for the bill and the claim by Universities Scotland, that these were miscalculated to take into account only actual days chairing court and not also the associated work carried out by the chair. We agree that the cost should include the additional work above days spent chairing court meetings, and are of the view that the payment of suitable remuneration for the role would open it up beyond the narrow section of society that have traditionally taken the role on and would be money well spent.

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

The purpose of autonomy is to protect academic freedom and allow institutions to further knowledge free from any government and other external bodies intervention. Autonomy is not a cherished concept to allow principals to open another international campus or shut down departments without question or challenge. In the current debate the purpose of autonomy can be overlooked by those seeking to use the argument as a defence against reform. It is telling that the Trinity College Dublin policy on academic freedom\(^3\) which the von Prondynski report references lists changes away from collegiate model of governance toward a more hierarchical model as being a threat to academic freedom. We would not support the reform of university governance if we believed that the proposals contained in the bill threatened that autonomy. We do not wish to see any increased influence by Ministers in the running of universities and do not believe that the proposals outlined in the bill would so. The proposals do allow Ministers to ensure that the sector has improved and provides for more robust governance procedures. Given that the sector currently receives over one billion pounds annually we believe that politicians and parliament are entitled to be assured that the sector is robustly governed. The proposals do not give powers to Ministers to involve themselves in the day to day running of institutions, or in setting targets beyond the current ministerial letter of guidance to the funding council.

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

Similarly to our answer to the previous question on autonomy we do not believe that the proposed legislation would affect lines of accountability. The reforms

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\(^3\) https://www.tcd.ie/about/policies/academic-freedom.php
are about strengthening how governance works, not about Ministers having control over which courses universities teach or which areas of research are funded. Those decisions will rightly be left to funding bodies and the universities themselves.

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? Are further measures needed?

UCU has argued since before the von Prondzynski review that there is a need for legislation on governance. Universities are statutory bodies and many of their governance arrangements are also set in law. The complexity of the sector and the differing roots of the legislation applying is not a valid reason to not seek to bring in legislation. We are also clear that it is the possibility of legislation following the von Prondzynski report that has driven the positive developments the sector has seen in recent years.

In 2011/12 research carried out by NUS Scotland showed that only 25 per cent of members of university courts were women. In October 2014 it was reported that five out of the last six appointments of chairs of court were women, marking substantial progress. And we’ve seen other welcome developments since the publication of the von Prondzynski report and the promise by Ministers of legislation. Scottish Universities have signed up to the aspiration to be living wage employers. Again, very welcome. The code of governance drawn up by the Committee of Scottish Chairs (who incidentally don’t contain any rectors) was, we would argue, also an attempt to see off legislation and didn’t properly address the issues raised by the von Prondzynski report. While the promise of legislation has driven part of the progress in these issues, it is important that the Scottish Government follows through and brings forward the democratic framework for elected chairs. We support elected chairs and that they should be brought in with legislation so as not to be subject to a gradual attack on their right to chair the governing body as has been seen in the case of the rector.

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.

UCU strongly support the principle of elected chairs but need to see detail before we can comment further. Our preferred option would be for the detail to be in
the bill and to include elected chairs; elected by all staff and all students – which
we note would place the students at a numerical advantage over staff.

We would also prefer that there was no pre-election interview or shortlisting
stage meaning that any candidate is able to put themselves forward for election.
We recognise, however, that the universities may be uncomfortable with such an
open system and would seek to reach a consensual outcome on this specific
question.

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

We strongly support the proposals to have trade union and student nominee
positions. We believe that universities will be strengthened by having as diverse
and representative a governing body as it can and that that should include staff
and students. Universities rightly recognise trade unions for bargaining and we
see no reason why that should not also be the case with regard involvement in
the governing body. Trade union nominees can bring a wealth of experience and
knowledge to the boardroom table, and are capable of acting in the interests of
the institution. As indicated in response to question one we don’t accept the
arguments made thus far by university principals against trade unions being on
the governing body. We note that they don’t make the same arguments around
the Nolan principles about Student Association nominees; and that the proposal
also sits fully with the recommendations of the Working Together Review.

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

We are comfortable with proposals on the proposed size of academic boards
outlined in the bill.

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

Please provide your views on the following –

(5) The likely affects of these provisions, for example, whether there are any
areas of teaching, learning or research that will be particularly enhanced.

We believe that recent history shows a number of decisions made on
departments and academic disciplines has not been based on educational
rationale but on financial grounds and to drive ever bigger surpluses or as a
result of bad financial decisions made by unrepresentative governing bodies, and
sometimes the rationale for change has not been clear. Recent examples would
include the universities of Glasgow, Dundee, Stirling, and most recently
Aberdeen. It would be fair to say that enhanced teaching and research exists in
subjects that would otherwise have been closed were it not for campaigning and industrial action taken by UCU. It is our view that better governance arrangements would mean universities made better decisions in the first place to the enhancement of teaching, learning and research.

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

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

The constraints on academic freedom contained in the question all apply. In addition we would add the willingness to bend to outside pressure from, for example, the media or politicians by the employing institution.

The point of having academic freedom embedded in legislation is that it takes precedence other the constraints referred to and protects the members of university staff. In essence you either have academic freedom enshrined in law allowing university staff to defend themselves or don’t in which case the constraints referred to are paramount. The proposals simply seeks to widen the existing reference in the 2005 Act. Given that we as a trade union on a not infrequent basis defend members whose academic freedom is questioned, then we support the 2005 definition and its extension in the bill.

As stated in response to question 2(b) the Trinity College Dublin policy on academic freedom\(^4\) annexed in the von Prondzynski report contains a useful list of threats to academic freedom. These include strategic planning, particularly relating to research; measurement of performance in research, including allocation of resources based on meeting targets for research productivity; changes in university governance [from collegiate model to hierarchical model]; state control through funding mechanisms; and academic tenure and fixed-term contracts.

(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?

Our view is that it should go beyond simply their work in an institution. Clearly work within the university should be covered but we are also clear that academics are often seen as public figures and opinion leaders. An example of this might be the 2014 referendum on Scottish independence where institutions

\(^4\) https://www.tcd.ie/about/policies/academic-freedom.php
largely supported high profile individuals against perceived pressure but cannot guarantee that this will always happen.

We are also clear that academic freedom should apply not solely to academic staff. The development of ideas and knowledge may be led by academic staff, but the process will involve academic related and support staff too. We believe that they should also be covered.

Finally, we also note that the bill does not carry forward all the proposals contained in the von Prondzynski report or indeed the consultation. While we are happy that the proposal to rename university principals ‘chief executives’ was dropped there are other recommendations that were in the report and not carried forward which deserve proper consideration. The proposals to make the recruitment, appraisal and remuneration of both principals and senior management should be considered further along with the possible establishment of a Centre for Higher Education research within an existing institution.

For further information please contact:

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Higher Education Governance Bill

The UNISON Scotland evidence to the Scottish Parliament Education and Culture Committee

August 2015
Introduction

UNISON is Scotland’s largest public sector trade union. UNISON members deliver a wide range of services in the public, community and private sector. In education UNISON members deliver essential services including cleaning, advice, administration, libraries, technical and research support, IT, finance, learning and student support services, security, porter services and management. It is essential that the voices of all those involved in education contribute to the debate on its future. UNISON Scotland is able to collate and analyse members’ experience to provide evidence to inform the policy process. We therefore welcome the opportunity to submit evidence to the Education and Culture Committee.

Response

UNISON welcomed the outcomes of Professor Von Prondzynski’s Review of Higher Education Governance and is supportive of the aims of the Bill. We particularly welcome the opportunity for trade unions to nominate board members despite the opposition of university management. We are disappointed that the same opportunity is not available to members working in further education. Democratic structures create public bodies which are open and transparent in their dealings with the public. The Independent Commission on Good Governance in Public Services (2005) laid out 6 principles of governance. These principles are equally valid.

Those appointed to these roles should be:

- Focusing on the organisation’s purpose and outcomes for the citizens and service users
- Developing the capacity and capability of the governing body to be effective
- Performing effectively in clearly defined functions and roles
- Promoting values for the whole organization and demonstrating good governance through behavior
- Taking informed transparent decisions and managing risk
- Engaging stakeholders and making accountability real

Universities rightfully value their academic freedom. This freedom does not exempt them from the needs to be governed properly and to be run efficiently and effectively. Better governances of banks could have prevented the collapse of those banks and the ensuing financial crisis and the same is true for charities. There must be independent oversight of how senior management operates in any organisation.

In our submission to the review we called for a great deal more transparency and accountability from those who run our universities. Universities, which play such a crucial role in Scotland’s education, economy and culture and spend large amounts of public money, must have modern transparent governance structures to ensure their efficiency and effectiveness. The work of chief executives and senior staff in private companies is open to shareholder and board scrutiny, there needs to be a similar mechanism independent of senior management for universities too.
UNISON welcomes the plan to set out regulations regarding the appointment of “a chairing member for governing bodies”. Democratic structures create bodies which are open and transparent in their dealings with the communities they serve. Therefore we would prefer that the chair of the governing body was elected by staff and students. Even if this is not to be the case the appointments group which both shortlists and selects the chair/election candidates should include student and staff representatives.

UNISON is disappointed by the response of university leaders to these modest proposals to improve university governance. We have seen in both written responses to the Scottish Government proposal and newspaper stories claims that these are radical changes, that the Scottish Government is ending universities independence, that trade union members on boards would not act in the best interests of the institutions and that there is a risk to their charitable status risking millions in philanthropic giving. Government legislation covers the operation and governances of a huge range of public, private and charitable institutions in Scotland and the UK. Trades unions are subject to a range of legislation and government oversight including a Certification Officer. No one believes that the finance industry has been taken over by government because there are rules governing how it operates. There are volumes of company law on how businesses must be run. We have trading standards, environmental health, charity laws, rules surrounding the delivery of energy and telecoms, a charity regulator, utilities and telecoms regulators. Setting out rules for effective governances is not taking over.

Universities play a crucial role in our country and receive large amounts of public money. Setting out how universities should choose the people responsible for their own governance is vital. It is clearly not the same as controlling who is appointed or indeed what decisions the governing bodies then make. No one from the Scottish Government will have a role on university governing bodies.

Reclassification by Office of National Statistics (ONS) as a public body is also raised as a concern by Universities Scotland. This would have implications for universities’ charitable status and therefore on how they would deal with any gifts from philanthropists. The ONS paper regarding reclassification of further education colleges as public bodies uses universities as a contrast to demonstrate why colleges had been wrongly categorised in the past. It makes it clear why the position of universities is different from colleges and there is nothing in the Bill that relates to those issues. The Scottish Charities Regulator is equally clear about what constitutes a charity and again nothing in this Bill leaves a universities open to a challenge by the regulator.

The ONS reclassified colleges as “Central Government” bodies in 2010 and continues to classify them as such. This is because “the discovery of public sector controls over these institutions, sufficient to result in ONS concluding that the government had control over these bodies general corporate policy”.

The paper then goes on to say why universities continue to be defined as Non Profit Institutions Serving Households (NPISH).

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1 https://www.gov.uk/government/organisations/certification-officer/about
2 Reclassification of Further Education Corporations and Sixth Form Colleges in England May 2012
The main reason for the decision that the public sector controls general corporate policy is that government funding makes up such a large proportion of college funding.

“although universities receive considerable public funding, they have other sources of funding and have a high degree of autonomy, such that they are judged not to be controlled by Government.”

Universities Scotland indicated that Scottish universities only get 45% of their overall funding from government. Colleges on the other hand are much more reliant on public funding: “Scottish Government funding, provided through the SFC, makes up the majority of the income received by the college sector (70.9 per cent in 2013-14).”

Universities have a range of income sources and the proposed Bill will not impact on the balance of funding. The difference in borrowing powers was also said to be significant: colleges unlike universities require government permission to borrow. The Government also has the power to merge or close further education colleges. There is no similar power over universities. There seems therefore no risk of reclassification following the implementation of the Bill.

The Scottish Charity Regulator is also equally clear on what merits ministerial direction or control which would prevent a body being given charitable status:

“an organisation can’t be a charity if its governing document allows government ministers to control direct or stop it from carrying out its activities”

They further clarify that they will consider

- How important the parts that government can control re to the organisations’ functions
- And can ministers use their powers whenever they wish?

The Bill does not give these powers to the Scottish Government. The regulator also states that this refers to a body’s governing document not to any contracts or service level agreements.

“it is open to charities to enter into contracts or agreements with government ministers, though charity trustees must make sure that they are acting in the interest of the charity. Therefore it is clear that Single Outcome Agreements or government initiatives to, for example, improve access for people from low incomes to universities do not constitute ministerial direction or control.

As Universities Scotland and the regulator also make clear, if the regulator ruled that aspects of the Bill or other agreements between a charity and ministers meant a body no longer met the test Ministers do have the power to act “by making an order in the Scottish parliament” to ensure that universities retain charitable status and therefore all the tax and fund raising benefits attached. There seems therefore no risk to either charitable or NPISH status involved in the new Bill.

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4 http://www.oscr.org.uk/charities/guidance/meeting-the-charity-test-guidance
UNISON, alongside other trade unions, welcomed the Scottish Government's commitment to trade union representation on the boards of public sector bodies. While we are disappointed that this right was not extended to our members working in further education we are pleased that the Higher Education Governance Bill extends this right to universities.

Employee engagement in running organisations is a very effective way to improve efficiency and effectiveness. They, much more than managers, interact with users/customers and understand how systems operate in the real world. Staff have just as much invested in the success of organisations as managers. Research into partnership working in the NHS indicates just how successful employee involvement is in running large complex organisations.

UNISON is disappointed but not surprised by the reaction of University Scotland and university chairs to trades unions being able to nominate a board member.

The Universities Scotland submission states

"there are appropriate structure for close engagement with trade union sides ....where issues can be discussed frankly from the respective perspectives of management and the trade union side without either party being placed in a conflict of interest"

And that boards are therefore not the appropriate bodies for union management negotiations and discussions. We fully agree. It appears that it is Universities Scotland that misunderstands the role of board members: Board meetings are not places where unions and management negotiate or liaise. The proposal is about how universities are governed: the strategic objectives, of the organisation and ensuring those tasked with delivering the objectives are working effectively towards them.

The submissions from Universities Scotland and the chairs seem to suggest that trades unions representatives cannot be trusted to behave appropriately: that there would be a conflict of interest that they would not be able to resolve. While we dispute the statement that "This intrinsic conflict of interest was one of the fundamental difficulties with the late 1970s experiments with the appointment of trade union representatives to the boards of public corporations" Even if it were true we are also in very different times. Industrial relations now bear no relation to the 1970s. The role of the employee director in the NHS is evidence of union nominees bringing expertise to boards and fully able to understand the roles and responsibilities that come with taking up a director’s post.

Trade union members undertake a range on roles both within the union and in the wider community. Many are very experienced in holding positions on committees and boards in the public and voluntary sectors. They have skills and knowledge that boards require. Trade unions, far from preventing nominees from being effective board members, are able to support members with administrative, research/information and training required to undertake these roles.

Unions provide training to members on a range of areas enable them to bring skills to university boards for example employment law, human resources and negotiating skills. Members run trade unions: the democratic committee

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5 Working Together Review Scottish Government STUC
structures of the union allow them to gain experience and training in running large organisations. These same structures mean they are also well used to understanding the “mandates” and nature of what it means to sit on a board, to make collective decisions and to be bound by confidentiality.

Conclusion
UNISON represents a range of education staff and we have used their experience to inform this submission. UNISON welcomed the recommendations of the Review of Higher Education Governance in particular proposals for a clear line of accountability between higher education institutions and the Scottish Government and the role for trade unions on governance bodies. We are keen to ensure that those recommendations are implemented. UNISON Scotland therefore welcomes the opportunity to participate in this consultation.

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Higher Education Governance (Scotland) Bill:
Evidence from Universities Scotland to the Education and Culture Committee

Universities Scotland and its member institutions share the Scottish Government’s commitment to modern, inclusive and accountable higher education governance.

Higher education governance is already highly progressive; for example, including students and multiple staff members on every governing body and their full involvement in the appointment of Chairs and Principals. Governance standards have been very recently reviewed and reformed and are fully enforceable as conditions of SFC funding.

Universities Scotland would welcome the opportunity to provide oral evidence to the Committee during its stage one scrutiny. The sector’s diversity is of key relevance to this Bill and we believe it will be helpful if the Committee is able to hear oral evidence from witnesses that fully reflect that diversity.

Summary: Bill provisions

We have specific concerns about the provisions of the Bill. In summary:

- The Bill grants Ministers unprecedented and far-reaching powers in university governance, which could be used by future Ministers to exert significant control. These are of significant concern in themselves and, additionally, could jeopardise universities’ current ONS classification.
- The Bill gives Ministers the power to decide how the chairs of governing bodies should be appointed. We are extremely concerned that this power may be used to require institutions to introduce ‘elected’ chairs who do not have the confidence of governing bodies, and who may be elected on the basis of policies opposed by the governing body. This would create conflict at the heart of governing bodies.
- The Bill creates intrinsically conflicted roles for interest group nominees on governing bodies, contrary to normal standards of good governance.
- Legislation to standardise the size and membership of academic boards is unjustified when institutions are highly diverse, is contrary to university autonomy, and would disenfranchise academic staff.

Summary: Unintended impacts of the Bill

New Ministerial powers are proposed in the Bill which were not the subject of consultation (sections 3,8,13, 14 and 20). These new powers give rise to a fundamental business risk that higher education institutions (HEIs) may be reclassified by the Official for National Statistics (ONS) as Central Government (as has already happened to colleges). This would disable HEIs from multiplying the impact of public funding by acting entrepreneurially, would severely limit HEIs’ capacity to borrow to redevelop their infrastructure, and would put philanthropic support for higher education in jeopardy. Losing all this would severely affect the scale of universities’ capacity to contribute to Scotland’s economy and society, including in skills provision, social mobility and innovation. ONS reclassification would compromise HEIs’ status as independent voices in public life. The risks of ONS
reclassification are so critical that we urge the Committee to recommend that the Bill should not progress unless the ONS is able to give an absolute assurance that higher education institutions will not be reclassified.

We are also concerned that increased Ministerial powers may be at odds with HEIs’ status as charities, since the law states that organisations do not meet the charity test if they are directed or controlled by Ministers. The Bill as currently drafted gives Ministers extensive powers over how the chairs of governing bodies should be appointed, and wide regulation-making powers for Ministers to decide in future who should be members of governing bodies and academic boards. The Bill opens the risk that future Ministers may use these powers in ways that constitute direction or control. Universities Scotland has asked for specific assurances from Scottish Government on the ONS and charity law points (included at the end of this submission), and we await their response.

Universities Scotland
September 2015
Answers to questions from the Committee

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

Neither the Policy Memorandum, the preceding consultation nor the 2012 Review of Higher Education Governance identify any significant problems.¹ The explicit motivation for the Bill is cited as to create greater ‘consistency’, without acknowledgment of consistency in HE governance where it currently exists and with no reasons given for why further consistency would be an improvement in a diverse sector. Governance arrangements naturally vary across Scotland’s very diverse higher education institutions, but they have highly progressive core standards in common. All have:

- multiple staff members on the governing body;
- student members on the governing body;
- guaranteed involvement of student and staff governing body members in the appointment of the Chair and all new independent governing body members and the appointment and appraisal of the Principal;
- an open process for the appointment of Chairs and Principals, including public advertisement, managed by a committee or panel that includes staff and student members.

In many cases, these arrangements are longstanding. In 2013, the Scottish Code of Good Higher Education Governance further modernised standards across the sector.² The Code contains many specific requirements and compliance has become a condition of receipt of SFC funding. Some parts of the Policy Memorandum appear to misrepresent this (see below and the Annex).

The Bill is presented as a response to the 2012 Review of Higher Education Governance. The relevant recommendations of that review were not unanimously agreed by the review panel.³ Nor were they subject to consultation when the Review was published. They cannot therefore be taken as evidence of a consensus for the proposals in the Bill. This is confirmed in the responses to the Bill consultation from across civic Scotland.⁴

Universities, much like the public and private sector, have faced the challenge of inclusion in terms of achieving equality and diversity within the membership of governing bodies. This problem was particularly acute in 2012/13 when, unusually, the sector had no women amongst its 19 Chairs. The HE sector has led its own effective response to this issue which has resulted in 31.5 per cent of current Chair roles held by women in 2015. More widely, 32 per cent of independent members of university governing bodies are women which compares favourably with the public sector bodies (29 per cent of seats at UK level) and FTSE100 companies (22.8% of board positions).⁵

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¹ 2012. von Prondzynski: “The story of Scottish higher education is overwhelmingly a good one. This report is not an exercise in criticism or complaint.” Taken from page iv of the Report of the Review of HE Governance in Scotland. The Scottish Government repeatedly acknowledges the sector’s successes in public statements, including: Angela Constance, June 2015, “Scottish universities are already viewed as world leading around the globe with four institutions in the world’s top 200, more than any other country per head of population apart from Switzerland.”

² See the Annex for more detail. The Code can be accessed at http://www.scottishuniversitygovernance.ac.uk/, along with a one-year-on report detailing the sector’s consistent response.


⁴ See, among others, the consultation responses of the Royal Society of Edinburgh, the Institute of Chartered Secretaries and Administrators, the Scottish Council for Development and Industry, and Glasgow University Students Representative Council.

⁵ HE figures on gender balance among independent members correct as of November 2014. Figures for UK public bodies and FTSE100 companies taken from Women on Boards and also correct as of 2014.
2(a) The extent to which the Bill will improve higher education governance

We do not believe the Bill sets out measures that will improve governance. On the contrary, we are concerned that the creation of conflict between Chairs and governing bodies, and the creation of intrinsically conflicted new representative roles on governing bodies, will be detrimental to good governance. We believe the appropriate way in which the governance of autonomous higher education charities can be continually evolved is for the Scottish Code of Good Higher Education Governance to be reviewed regularly, in a way that includes diverse stakeholder perspectives.

2(b) The extent to which the Bill may alter the higher education sector’s current level of autonomy

The pre-legislative consultation did not include fundamental new powers granted to Ministers to change the composition of governing bodies and academic boards or to prescribe procedures for appointing and remunerating Chairs. These are radical departures from previous legislation. These provisions open the door to Ministerial influence over institutional strategy and to academic freedom being compromised by governmental control over institutions’ governance and internal academic management structures. While this may be far from current Ministers’ intentions, potential future uses of the Bill’s provisions need to be considered. These powers also contribute to the increased risk of ONS reclassification.

2(c) The extent to which the Bill may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

In 2013, the Scottish Parliament decided that the Scottish Funding Council, rather than Ministers, should be responsible for ensuring that HEIs had appropriate standards of good governance, given effect in the Scottish higher education governance code.\(^6\) This established a clear, robust and fully coherent line of accountability, with the body responsible for the public funding of higher education institutions ensuring that this funding was directed to institutions with high standards of governance.

The SFC’s role would be undermined by the creation of wide new powers for Ministers. The Bill gives Ministers power over wide areas of university governance including the appointment and remuneration of chairs of governing bodies, the composition of governing bodies, and the composition of internal academic boards. This shifts the balance of responsibility for ensuring good governance standards from a non-political body to Ministers, greatly increasing the risk of future political interference in higher education.

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

Universities Scotland does not see a need for any of the legislative provisions in the Bill. Non-legislative means, including institutional reviews of governance effectiveness and regular review of the Scottish Code of Good Higher Education Governance through an inclusive process, can ensure

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\(^6\) Section 2, 9A of the Post-16 Education Scotland Act.
continual evolution of good governance. When published in 2013, the Code committed to review progress after three years; this timetable is now less certain because the Bill creates a ‘moving target’ about what further changes to the Code may be necessary.

4. Specific proposals:

Regulations for the appointment of Chairs of governing bodies

- Unlimited powers are granted to Ministers to vary the proposed regulations. These were not subject to consultation and raise the prospect of indefinite degrees of political direction of the process.

- The Bill leaves open the possibility of election of the Chair by a constituency other than the governing body, contrary to accepted good practice across autonomous organisations of all kinds. 78 per cent of respondents to the pre-legislative consultation objected to this. 7 The line of accountability and confidence from the Chair to the governing body is an important safeguard against damaging instability. Carrying the mandate of another electorate – possibly from a low turn-out election as in some recent rectorial elections – could easily bring a Chair into conflict with the governing body. A divided governing body is less able to hold senior management to account and less able to take crucial strategic decisions, especially when the division is between the Chair and a majority of the governing body.

- The current process for appointing a Chair, as stated in the Code, obligatorily includes staff members, students and independent governors at every key stage, as members of the nominations committee that makes a skills assessment, prepares the job description and undertakes formal interview. 8 While the content of the proposed regulations is unknown, the Scottish Government has not made a proposal that US believes improves on this level of stakeholder engagement.

- Any publicly adversarial election process is likely to restrict the pool of qualified candidates for the role of Chair, with implications for attracting a diverse set of candidates. Trial elections of NHS Board members in 2010 found a lack of diversity among candidates. 9 A different NHS Board pilot scheme, which was found to attract a wider range of candidates, involved improved advertising and recruitment processes. These are already the norm in higher education and are delivering improved diversity: for example, six of the last seven appointments to Chair HEI governing bodies were women.

- The rationale for the proposal, as set out in the Policy Memorandum, is based on a flawed understanding of current governance arrangements. These are neither optional nor inconsistent: key matters such as open advertisement and interviews with full stakeholder involvement have been obligatory since the SFC adopted the Code. All institutions comply.

- The role of any elected Chair would clash with that of the elected Rector role at the Ancient universities. See the Annex for details.

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7 See the independent summary of written responses to the pre-legislative consultation (p3): http://www.gov.scot/Publications/2015/04/4961/0
8 2013 Code of Good HE Governance, Main Principle 11, p.22.
9 http://www.gov.scot/Publications/2012/12/8580
Requirements to include various persons within the membership of governing bodies

- The membership of governing bodies at all of Scotland’s higher education institutions currently includes staff, students and independent members drawn from Scotland’s public, private and third sectors. This practice of inclusion is a long-held tradition within our institutions.

- Our concern relates not to the inclusion of a broad range of stakeholders on governing bodies but to the introduction of unlimited Ministerial control over the membership of governing bodies, which raises the risk of undue future political influence on the governance of HEIs.

- It is a widely accepted principle that governing body members should not carry any external mandate but should serve only in the interests of the institution. This is recognised in the Policy Memorandum (paragraph 47) but not in the legislation itself. No explanation is given in any of the Bill’s documentation as to how appointees of a trade union could serve in this capacity without carrying a union mandate that limits their capacity to act disinterestedly – or, if they could genuinely act without a mandate, what is then gained by having union appointees, representing 27 per cent of staff in the sector, rather than simply staff governors elected by all staff.

- Adding new obligatory governing body members affects inclusivity and the balance of skills, because of guidelines limiting the size of the governing body. Again, this is recognised in the Policy Memorandum (paragraph 44), but its implications are not considered. It would affect at least 12 institutions and would be likely to result in the loss of independent expertise on governing bodies.

- The obligatory inclusion of alumni governors pays no regard to the very different traditions and structures of different institutions and their alumni organisations.

Proposals to ensure that academic boards are comprised of no more than 120 members

- This brings Ministerial influence further into institutions by allowing future Ministers to determine elements of internal academic governance.

- In the Ancient universities, all professors are automatically academic board (Senate) members, while well-developed committee structures ensure the effective and efficient operation of large Senates. Therefore, the Bill would disenfranchise several hundred members of academic staff. No rationale for this is offered.

Academic freedom

- As academics themselves, university Principals and Directors both understand and value academic freedom immensely.

- No evidence has been presented that academic freedom is currently inhibited.

- The freedom ‘to develop and advance new ideas or innovative proposals’ is already guaranteed under existing legislation, as a corollary of the freedom to “question and test established ideas and received wisdom”.  

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10 OSCR charity Trustee duties: “Trustees should put the interests of their charity before their own interests, or those of any other person or organisation.” At: [http://www.oscr.org.uk/charities/managing-your-charity/trustee-duties](http://www.oscr.org.uk/charities/managing-your-charity/trustee-duties)

• Academic freedom and university autonomy are two distinct aspects of a successful HE sector, but the autonomy of universities provides important protection against potential political infringements of academic freedom. The Bill’s provisions introduce new Ministerial controls.
Annexes:

A. Section-by-section analysis
B. Additional Background
C. Comments on financial memorandum
D. Questions put to Scottish Government on 13 August
Annex A: Section-by-section analysis

This Annex provides additional detail of Universities Scotland’s concerns on each section of the Bill. Points made in the main submission to the Committee are not repeated in detail here.

Section 1: Appointment as chairing member

Our serious concerns over this section are expressed in our response to the Committee’s questions.

The Policy Memorandum is misleading on the scope, specificity and authority of the Code, in stating that “While implementation of the Code has, to some extent, increased the level of transparency across the sector in relation to appointing a chair, there remains no guarantee of consistency across the sector and, in practice, HEIs have adopted different approaches.”

This is not the case. The Code of Governance lays down a specific set of requirements to ensure an open process including public advertisement and interview, with staff and student governors involved at all stages. These requirements are obligatory. They have been followed by every institution that has undertaken the appointment of a Chair since the Code’s introduction and are confirmed policy at every institution.

In general, the Policy Memorandum understates the specificity and binding force of the Code.

The Bill (in Consequential Modifications) removes the right of a Rector to ‘preside’ at the governing body of each Ancient university. The policy intention behind this is unclear and it was not subject to consultation. This would in effect amount to the elimination of the traditional Rector role, a significant part of which is to be a voice for students. Otherwise, it is unclear how the historic role of Rector could be maintained in the presence of a Chair elected by a different constituency, with a potentially clashing mandate.

This unclarity and incompatibility of roles contrasts with the current well-functioning arrangements. A clear and well understood distinction exists between the ‘presiding’ role of the Rector, in the terms of the Universities (Scotland) Act 1889, and the strategic leadership role of a senior governor, who is equivalent to the institutional Chair and is appointed according to the Code’s specified procedures for appointing Chairs. All of the relevant universities have clear protocols on this distinction.

Section 2: Remuneration to be payable

This provision is unnecessary, since institutions already have the power to remunerate Chairs and/or independent members at their own initiative, and it is provided for in the HE governance code.

It is inappropriate in principle for Ministers rather than governing bodies of autonomous institutions to decide on the reasonable remuneration level. Also at a practical level, institutions of highly diverse scale and mission need to be able to make diverse decisions about this.

Section 3: Consultation for section 1 and 2

The requirement for consultation is an inadequate protection against potential future misuse of the proposed wide-ranging ministerial powers to exercise undue influence on higher education institutions.

Section 4: Composition of governing body

Our principal concerns about this section are set out in our response to the Committee’s questions. Here we note some complexities and consequences of the proposed changes that should be borne in mind.

This section requires eight members on each governing body to be selected by particular interest groups and, in so doing, introduces multiple new obligatory members to many governing bodies. This has implications for the size and balance of governing bodies. The Code states that governing bodies should not normally exceed 25 members. Implementation of the Bill in its current form would leave eight of the eighteen relevant institutions with governing bodies of over 25 members and would have to seek ways to remove existing categories of member.

The Code also specifies, as a basic safeguard of good governance, that lay (external) members should make up a majority of the governing body. A further four institutions would have to remove some governing body members in order to maintain this requirement while staying within the 25 member limit. In general, institutions would be forced to accommodate the new categories of member by removing existing ‘internal’ governing body members.

The likely effect of this in most cases is that places for staff governors would have to be removed from some governing bodies. These are open to all staff (of relevant categories; e.g. academic or non-academic), whereas trade union membership comprises 27 per cent of staff in the sector. This means that any necessary removal of staff governors to accommodate union-appointed governors would amount to a loss of influence for the majority of staff.

At 4(1)(d), it appears inappropriate to call non-academics ‘support staff’, unless the specific intention is to exclude more senior non-academic professionals from being nominated to the governing body.

At 4(1)(g), it is stated that other members should be appointed ‘in accordance with the governing document of the institution’, without recognising that the membership prescribed at 4(1) is inconsistent with those ‘governing documents’. No provision is made for how institutions should resolve these conflicts.

The Bill and Policy Memorandum pay no heed to the existence of multiple trade unions representing staff at most institutions and the resulting complexities in determining which trade union should nominate governing body members. Nor does it deal with the situation at institutions where there is no recognised trade union.

Section 5: elections to governing body

We would question the need for this section. As autonomous institutions, HEIs are able to organise elections in accordance with their statutes/ordinances and already do so for certain categories of governing body member.
Section 6: nominations to governing body

This section seems redundant in ways parallel to section 5 and also fails to recognise the potential complexities of appointing via multiple recognised trade unions.

It would seem inappropriate to rule out the possibility of election for these proposed members.

Section 7: Validity of body’s proceedings

As autonomous organisations, HEIs have their own rules regarding the validity of proceedings. The provision is therefore unnecessary.

Section 8: Power to modify section 4

In answering the Committee’s questions we set out our deep concern over this section, which (a) was not subject to consultation and (b) grants an unprecedented degree of influence to current and future Ministers, a serious erosion of autonomy and a threat to the charitable status and ONS classification of HEIs, whether now or as a result of a future Minister’s actions. Parliament has not previously given Ministers the power to decide who is on an HEI’s governing body.

We note that Scottish Ministers already have a significant degree of oversight of any changes in higher education governance, including any future proposals to change governing body membership, through the system of approval by the Privy Council (or, by assumption, any successor body).

Section 9: Size of academic board

We believe that legislation about the internal organisation of autonomous charities is inappropriate in principle and contrary to the interests of many academic staff. In the larger Ancient universities, hundreds of professors would see the removal of their current right to contribute to academic governance.

Section 10: Composition of academic board

Given the various internal structures at different HEIs, the phrase ‘heads of school’ fails to map to any position at some institutions and would designate very different roles at others. Likewise, not all Scottish HEIs have a Principal.

Such technical issues reflect the broader inappropriateness of legislating on the internal academic governance of highly diverse institutions.

10(1)(e)(ii) disregards the fact that section 10 in general may be contrary to the ‘governing document of the institution’.
Section 11: Elections to academic board

See the comment on section 5. Legislation is not required for HEIs to proceed with internal elections, as they already do.

Section 12: Validity of the board’s proceedings

See the comment on section 7.

Section 13: Power to modify sections 9 and 10

See the comments on section 8.

We note that while Parliament has previously legislated about the composition of academic boards (Senates), this did not grant ministerial powers to regulate – and indeed the power to modify the composition of Senates was given back to universities through their power to make ordinances. Therefore, this provision significantly increases ministerial powers at the expense of university autonomy.

Section 14: Procedure for regulations

The affirmative procedure does not provide an adequate safeguard against the future over-extension of ministerial powers to exert undue influence on higher education. Ministers working within majority governments would be expected to succeed in introducing changes.

Section 19: Academic freedom

This section contains unexplained changes from the proposals that were subject to pre-legislative consultation. The Committee should carefully scrutinise the legal implications of the proposed change of wording “must aim to uphold”, bearing in mind the contexts in which academic freedom is most likely to be invoked and what new responsibilities this does or does not impose on governing bodies. The Committee should probe whether the Scottish Government understands this as creating a new responsibility different in substance from the current requirement to ‘have regard to’ academic freedom, and what the intended consequences of this are.

However, we would suggest that the Bill’s focus on the definition of academic freedom ignores more important dimensions to the protection of this freedom. A coherent and meaningful approach to academic freedom must secure freedom from any undue influence over research and higher education, not least political influence. In this respect, the overall coherence of the Bill is problematic, as it purports to strengthen academic freedom while introducing Ministerial powers that could in principle give Ministers substantial leverage over institutions, or even facilitate direct intervention, so that future Ministers could secure direction of the institution and its academic priorities through their effective power over who governs the university and serves on its academic board.
Section 20: Ancillary regulations

This section appears to give Ministers an unspecified extent of power to amend primary legislation. Notwithstanding the need for the affirmative procedure, this is a significant concern, for reasons raised elsewhere in this submission.
Annex B: Additional background

This Annex provides additional detail to inform the Committee’s consideration of the Bill, specifically:

- **The Code of Governance**, noting some inaccurate impressions conveyed in the Policy Memorandum;
- **the diversity of the higher education sector**, which shows the Bill’s drive for uniformity to be inappropriate;
- further detail on the basis of **ONS reclassification and its potential costs**; and
- **academic freedom**, addressing the Committee’s detailed questions.

The Scottish Code of Good Higher Education Governance

The Code was created in 2013 under the guidance of a Steering Group commissioned by the Committee of Scottish Chairs, at the invitation of the Cabinet Secretary for Education and Lifelong Learning. It was written on the basis of 80 meetings involving more than 350 university staff, students and others.

In the Post-16 Education (Scotland) Act 2013, the Scottish Parliament decided that standards of good university governance should be set and overseen by the SFC, a move that appropriately places responsibility for governance in the hands of an independent expert higher education body and also marries oversight of governance with accountability for public funding. The SFC has declared the Code to constitute the principles of good governance for Scottish higher education and therefore compliance with the Code has become a condition of SFC funding for each HEI.

The scope and force of the Code

Contrary to certain statements in the Policy Memorandum (e.g. paragraphs 14, 34 and 36), the Code places clear and binding requirements on institutions and has been effective in ensuring the adoption of consistent standards across the sector. While the Code is structured in terms of Principles and Guidelines, it makes clear that institutions are expected to comply with all of these. To quote from Lord Smith’s foreword to the Code:

“All universities in Scotland will be expected to comply with the Code’s Main Principles and to observe the guidelines. The Code has been written so that exceptions will be rare. Where universities have a material reason for being unable to comply, they must explain why; this principle of “comply or explain” is a widely-accepted governance concept. Any such exceptions to compliance with the Code will be disclosable through the process of audit.”

The SFC’s adoption of the Code gives this external force. It follows that non-compliance with any part of the Code would only be acceptable if the SFC were satisfied that the particular nature or circumstances of a given institution required such an exception. This is an appropriate recognition of the sector’s diversity and of the SFC’s role in applying independent expert judgment where required.

The Post-16 Education Act grants the SFC the power to impose other standards on the sector. It is therefore misleading for the Policy Memorandum to imply that good governance rests on a binary
choice between the Code and new legislation (e.g. paragraph 67). In adopting the Code, the SFC has made an active choice to employ a mechanism that promotes collaborative and constructive enhancement of the governance of autonomous institutions, informed by appropriate expertise on all sides.

An interim one-year assessment of the Code’s impact demonstrated intensive activity across the sector to ensure full compliance (and in many cases to go well beyond compliance, with additional measures appropriate to the institution). Over 350 changes to policy and/or practice were recorded and others were in progress, demonstrating both the sector’s commitment to modern governance and the Code’s efficacy as a regulatory mechanism.\(^\text{13}\)

**Opportunities for further review and improvement**

With the Code in place, the standards of good governance are clear and mandatory, but it is also important for a modern and progressive system that governance arrangements should be open to continuous improvement. This is the approach that is already being taken by the higher education sector.

When the Code was introduced, a commitment was made to review it after three years, with direct stakeholder involvement, giving due time to assess its impact and to ensure that it remains up to date. This review process was scheduled for 2016 but will now be delayed because of the uncertainties caused by the Bill.

**The diversity of the sector**

The Policy Memorandum repeatedly cites ‘consistency across the sector’ as the sole motivation for introducing legislation on higher education governance (e.g. paragraph 14). However, diversity is a feature and a strength of the Scottish higher education sector and it is to be expected that highly diverse institutions will require a degree of variation in their governance arrangements.

Each of the nineteen HEIs has evolved along a distinct pathway, whether established as a university 600 years ago or emerging from the development of other institutions within the last decade. Their distinct sizes and backgrounds enable them to fulfil a variety of missions, serving the needs of Scotland’s different industries and a wide variety of students and pursuing diverse and complementary research specialisms that enrich Scotland’s innovation landscape.

Given such a variety of institutions, in size, mission and constitutional foundations, there should be no presumption that uniformity in governance arrangements is always desirable. The following table gives just three illustrations of how of the 19 institutions that make up the higher education sector differ on parameters that are relevant to governance.\(^\text{14}\)

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\(^\text{13}\) The one-year progress report can be viewed at [http://www.scottishuniversitygovernance.ac.uk/thecode/](http://www.scottishuniversitygovernance.ac.uk/thecode/)

<table>
<thead>
<tr>
<th>Institution</th>
<th>Number of staff (FTE)</th>
<th>Number of students (headcount)</th>
<th>Annual income from all sources</th>
<th>Constitutional status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Royal Conservatoire of Scotland</td>
<td>234</td>
<td>925</td>
<td>£ 18,142,000</td>
<td>Company limited by guarantee, with shareholders</td>
</tr>
<tr>
<td>University of the Highlands and Islands</td>
<td>210 directly employed; many other staff employed through partner colleges</td>
<td>7,470</td>
<td>£ 62,731,000</td>
<td>Partnership of colleges, incorporated as a company limited by guarantee. Also a regional strategic body for further education.</td>
</tr>
<tr>
<td>University of Edinburgh</td>
<td>8,619</td>
<td>27,625</td>
<td>£780,630,000</td>
<td>Established by royal charter</td>
</tr>
</tbody>
</table>

**ONS classification**

Any loss of autonomy raises the risk of reclassification of HEIs as Central Government organisations by the ONS. This technical adjustment would have far-reaching negative consequences for the sector and for Scotland. The risk is real and immediate:

- The ONS has a specific intention to review the classification of higher education institutions as part of its current programme of work.
- It is a matter of public record that when the ONS reviews the designation of institutions as either Non-Profit Institutions Serving Households (NPISH) or Central Government, “The key factors in each of these decisions are public sector powers over the various institutions”. 15
- Recent years have seen serious cases of ONS reclassification to Central Government, including Scottish FE colleges and Scottish Futures Trust projects, with major consequences for those institutions and for the Scottish Government.
- The loss of autonomy may be seen cumulatively. Other recent innovations in the relationship between HEIs and the Scottish Government, such as Outcome Agreements, would count towards this, raising the risk associated with any further legislation.
- Similarly, even if reclassification were avoided now, the Bill would contribute significantly to a cumulative loss of autonomy which could trigger reclassification at a future date.

Classification by ONS as Central Government would comprehensively transform universities’ financial capabilities, through restrictions on borrowing and the creation and use of surpluses, the loss of philanthropy and an inevitable reduction of partnership with the private sector. This would profoundly affect HEIs’ ability to invest and consequently their ability to operate with success in a competitive global context.

In 2013-14, HEIs invested £371 million in educational and research and innovation infrastructure, 72.5 per cent of which came from sources other than grant funding – the very sources that are under threat from ONS reclassification. If unable to sustain such investments, the sector would rapidly become significantly disadvantaged in the international competition for the best students and researchers, putting at risk over £2 billion of non-SFC income and an £11 billion overall contribution to the Scottish economy. Even on its own, the loss of HEIs’ capital investment would be significant.

loss to the wider economy. Capital investment by higher education institutions has been shown to bring higher economic impact than overall capital investment (returns of 5.5:1 and 4:1, respectively).\textsuperscript{16}

The range of finance available to HEIs as autonomous organisations is central to their ability to lever government funds, creating much greater impact than could be achieved with public funding alone: SFC grants constitute just 35 per cent of the sector’s total income.

\textsuperscript{16} BiGGAR Economics (2015), \textit{Contribution of Universities to the Scottish Economy}. 
Annex C: Comments on Financial Memorandum

This Annex responds to the Financial Memorandum (FM). The points below have also been submitted to the Finance Committee’s separate call for evidence.

All of the provisions in the Bill that have practical consequences create additional complexity and new administrative and/or financial burdens, relative to existing governance arrangements.

We believe the costs discussed in the FM have been generally underestimated, while a number of significant costs have not been considered.

Wider costs

The FM does not consider the cost, to HEIs and the country, of the possible ONS classification of HEIs as Central Government entities, which could follow from increased ministerial influence over HEIs. As noted above, the consequent transformation of HEIs’ financial foundations would jeopardise around £300 million of infrastructure investment annually, which brings returns of £5.50 for every pound invested.

Underestimated costs notably include:

- **The cost of remuneration of the Chair**
  These costs are calculated on the erroneous premise that ‘reasonable remuneration’ would require payment only for attending meetings. We note that the motivation for the proposal to remunerate Chairs is understood to be the encouragement of diverse candidates for the role. It is highly unlikely that qualified individuals would be influenced by remuneration at six days per year for a role that demands a great deal more commitment on a regular basis. Indeed, such obviously inadequate remuneration might well be counterproductive.

  More realistic calculations of time devoted to chairing an HEI’s governing body, as evidenced by advertisements for the role at several institutions, stand at around 50 days per year. On this basis, even assuming the FM’s estimate of a daily rate, the cost would be c.£460,000, meaning that the FM underestimates this cost by around £405,000.

- **Advertising costs for recruitment of the Chair** (an existing cost, but covered in the FM)
  On the basis of institutions’ own experience, these costs are underestimated by £4,000 - £8,000 per institution, meaning that the FM underestimates the sector-level cost by at least £72,000 and up to £144,000.

- **Likely costs of running elections for Chairs**
  Contrary to the assumption of the FM, it may not be possible to run such elections using low-cost ICT solutions without disenfranchising some constituencies. Even if online solutions were possible, such elections would involve set-up costs. HEIs have often outsourced comparable elections to ensure independence, efficiency and full and fair opportunities to participate. Realistic costs are difficult to estimate, especially as the nature of the proposed election is not known, but the evidence of
comparable exercises suggests costs of £1,000 - £3,000 at some or all institutions, even if an
electronic-only system is used (hence up to £54,000 overall, where the FM expects ‘minimal’ cost)
and around £7,000 where postal ballots are also used, meaning up to £126,000 at sector level.

The following costs are not addressed in the FM:

• The cost to HEIs of administering changes to HEIs’ governing instruments
The FM makes a reasonable estimation of the cost, in staff time, to the Scottish Government of
administering changes to HEI governing instruments. However, the FM makes no corresponding
estimation of the cost, in staff time, of the administration needed with all 19 HEIs to change
governing instruments.

In making amendments for compliance with the Code and other recent changes, HEIs have often
experienced protracted processes to make such changes through the Scottish Government and Privy
Council. The precise impact is difficult to estimate; one HEI suggests the equivalent of at least one
full-time senior member of staff for one year would be required to deal with all the required
changes.

It is important to note that the cost of such changes to comply with the Bill would follow extensive
work at all institutions since July 2013 to ensure compliance with the Code of Governance. If an
alternative to the Privy Council is to be explored in the future, the sector faces the prospect of a still
further extended period of upheaval in governance. At all stages, this is a significant draw on staff
time and resources, with corresponding opportunity costs. This is a high price to pay for reform
which, according to even its strongest advocates, is a matter of enhancement rather than a reaction
to any notable problems.

• Staff time devoted to appointments processes, especially Chair appointments
Staff involvement in these processes includes a significant time commitment for several senior
managers. Since the Bill’s effect would be to complicate appointment processes in multiple ways,
the cost in terms of staff time is likely to rise significantly further.

• Legal fees incurred for necessary professional advice on changes to HEIs’ governing instruments
Again, this difficult to estimate accurately, but is likely to be a substantial five-figure sum across the
sector.

• Setting up new appointment processes for categories of governing body member that some or all
institutions currently do not have.
For some institutions, this is likely to involve the establishment of a formal graduates’ association
appropriate for the role of electing or nominating governing body members. It is difficult to give
precise costs for creating and maintaining such processes in the absence of further detail.

Meeting the costs

Higher education institutions will have no choice but to find the required resources from existing
budgets. While the sums involved are relatively modest in the context of HEIs’ broader activities,
they are big enough to have real operational impacts. It is important to note that this diversion of resources would carry opportunity costs and would come at a time of existing budgetary restriction, when HEIs are working hard to deliver efficiencies across their operations.
Annex D

Questions for the Scottish Government from Universities Scotland on the Higher Education Governance (Scotland) Bill (asked on 13 August)

This paper seeks the Scottish Government’s answers to some specific questions about particular issues of major legal and practical concern which arise from publication of the Bill. The questions focus on areas of significant concern where further information is required to enable university leaders to appraise the risks and costs arising from the Bill. They focus on:

- The risks of higher education institutions’ reclassification as public sector bodies by the Office for National Statistics
- Potential conflicts with charity law
- Conflict between the requirements proposed in the Bill and the requirements of institutions’ own governing documents.

These specific questions are asked without prejudice to university leaders’ more extensive concerns about the Bill, which will be set out in our evidence to the Scottish Parliament.

A. ONS classification

Universities Scotland members are extremely concerned that Bill may lead the Office for National Statistics to classify higher education institutions as public sector bodies. This has already happened to colleges. The risks are heightened by ONS’s specific intention to review the classification of higher education institutions as part of its current programme of work.

As well as the recent reclassification of colleges as public sector bodies, we are aware of further current ONS reclassification proposals with severe real-world impacts. The ONS reclassification of Scottish Futures Trust infrastructure projects would bring their costs within public sector borrowing and inhibit the creation of public/private partnerships: see Scotland hits snag in funding model for infrastructure projects. ONS are also looking at the reclassification of Housing Associations in England as a result of increased Ministerial direction, with similar impacts: see ONS confirms it will examine associations’ status.

The reclassification of higher education institutions as public sector bodies would have immense financial impact and immense adverse impact on institutions’ competitiveness.

ONS consider the degree of government influence and control over bodies when deciding whether to classify them as part of the public sector. In Universities Scotland’s view, the Bill significantly heightens the risk of institutions’ reclassification as public sector bodies through the additional controls it hands to Ministers: as set out above these include:

- Power to decide how people should become chairs of governing bodies
- Power to decide how long people should serve as chairs of governing bodies
- Power to determine the remuneration of chairs of governing bodies
- Power to determine the composition of institutions’ governing bodies
- Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.

ONS are likely to look at these in cumulation with the existing framework of control of institutions by government and its agencies, including the Outcome Agreements framework and the statutory
requirement to observe the governance code as a condition of grant. Reclassification would make institutions subject to the requirements of the Scottish Public Finance Manual.

Critical adverse impacts of ONS reclassification of institutions as public sector bodies would include:

- An end to institutions’ entrepreneurial activity since institutions would be unable to retain surpluses generated through these activities.
- Inhibition of universities’ ability to enter joint ventures with business to promote innovation.
- Severe restriction of institutions’ capacity to borrow money to develop new infrastructure, and inclusion of institutions’ borrowing within overall public borrowing.
- An end to philanthropic support for institutions, since donors do not typically give money to government bodies.
- An end to institutions’ status as autonomous charitable bodies separate from the State.

Specific questions

- What legal advice did Scottish Government take on the Bill’s potential impact on the ONS classification of higher education institutions?
- What advice have Scottish Government taken directly from ONS about the potential impact of the Bill?

B. Charity law: Charitable status of institutions

The Higher Education Institutions covered by this Bill are all educational charities. Charitable status is an essential part of universities’ identity and mission.

At a financial level, charitable status is essential to institutions’ solvency. Loss of charitable status would, in particular, mean that institutions lost their entitlement to 80% relief from non-domestic rates. This was estimated in 2008 as being worth £27m per year.

Loss of charitable status would also severely prejudice institutions’ capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions who are no longer charities.

As drafted, the Bill is causing Universities Scotland members some concern about potential loss of charitable status.

Section 7(1) of the Charities and Trustee Investment (Scotland) Act 2005 contains the Scottish charity test, supplemented by the definition of charitable purposes in section 7(2). However, section 7(4) provides that a body which meets the terms of the section 7(1) does not in fact 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 the Office of the Scottish Charity Regulator commented on the Scottish Government’s consultation proposals, the Bill gives Ministers significantly more power over institutions than the proposals that were consulted on. Universities Scotland members are very concerned that increased Ministerial controls may prejudice institutions’ charitable status. Particularly:

- Power to decide how people should become chairs of governing bodies
- Power to decide how long people should serve as chairs of governing bodies
- Power to determine the remuneration of chairs of governing bodies
- Power to determine the composition of institutions’ governing bodies

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• Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.

Taken together, these powers appear to represent a substantial degree of Ministerial control.

Specific questions

• Have the Scottish Government taken advice from OSCR about the implications of the Bill for institutions’ charitable status?
• If so, what advice was offered by OSCR?

C. Charity law: role of members

Universities Scotland members are concerned that the Bill appears to put members of the governing body in a situation which is in conflict with their role as charity trustees.

Section 66 of the Charity and Trustee Investment (Scotland) Act 2005 sets out the general duty of charity trustees:

(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
   (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,
   (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and
   (c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—
      (i) put the interests of the charity before those of the other person, or
      (ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.

(5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—
   (a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
   (b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.

The Scottish Code of Higher Education Governance also imposes duties on institutions which have the force of law as conditions of grant under section 9A of the Further and Higher Education (Scotland) Act 2005. The code requires that:
“The governing body should exercise its responsibilities in a corporate manner; that is to say, decisions should be taken collectively by all of the members acting as a body. Members should not act individually, or as representatives of a constituency or in informal groupings, to take decisions on governing body business on an ad hoc basis outside the constitutional framework of the meetings of the governing body and its committees.”

Main Principle Number 6 – Responsibilities of Members provides that:

“All members shall exercise their responsibilities in the interests of the Institution as a whole rather than as a representative of any constituency. The Institution shall maintain and publicly disclose a current register of interests of members of the governing body on its website.”

The supporting guidelines to Main Principle 6 provide that:

“It is central to the proper conduct of public business that chairs and members of governing bodies should act and be perceived to act impartially, and not be influenced in their role as governors by social or business relationships (see also Main Principle 3). Good practice requires that a member of a governing body who has a pecuniary, family or other personal interest in any matter under discussion at any meeting of the governing body or one of its committees at which he/she is present shall, as soon as practicable, disclose the fact of his/her interest to the meeting and, if requested by the chair, shall withdraw from that part of the meeting ... Members nominated by particular constituencies should not act as if delegated by the group they represent. No member may be bound, when speaking or voting, by mandates given to him/her by others, except when acting under approved arrangements as a proxy for another member of the governing body.”

Universities Scotland is concerned that members of governing bodies who are appointed as the nominees of particular interest groups may find themselves in a conflict of interest where they cannot exercise the mandate of the interest group that nominated them without breaching the general duty of charity trustees to the good governance of the institution and the specific requirements of the code. Nominated members of governing bodies may find that they frequently have to declare a conflict of interest and refrain from participating in the business of the governing body, or that their continued participation puts them at risk of misconduct in the administration of the charity.

The Bill also raises a separate issue about what should happen if an institution does not have a recognised trade union for academic or ‘support’ staff, or if there are multiple recognised trade unions for these categories of staff. Who, in these circumstances, would nominate the trade union members of the governing body?

Specific questions

- Have the Scottish Government taken advice from OSCR about the difficulties which nominated members may have in complying with the general duty on charity trustees and the requirements of the HE governance code?
- If so, what advice was offered by OSCR?
- What is the Scottish Government’s policy intention about the nomination of members of the governing body in the circumstances outlined above?

D. Charity law: Skills and expertise
As noted above, the Scottish Code of Higher Education Governance imposes duties on institutions which have the force of law as conditions of grant under section 9A of the Further and Higher Education (Scotland) Act 2005.

The code requires institutions to have a balance of skills and expertise on their governing bodies, to have a majority of independent members on governing bodies, and to have a governing body of a reasonable maximum size. Specifically:

Main Principle Number 9 provides that:

“There shall be a balance of skills and experience among members sufficient to enable the governing body to meet its primary responsibilities and to ensure stakeholder confidence. The governing body shall draw up and make public a full evaluation of the balance of skills, attributes and experience required for membership of the governing body, which shall inform the recruitment of independent members of the governing body. The membership of the governing body shall be regularly assessed against this evaluation.”

Main Principle Number 10 provides that:

“The governing body shall have a clear majority of independent members, defined as both external and independent of the institution. A governing body of no more than 25 members represents a benchmark of good practice.”

Universities Scotland is concerned that the greatly extended non-independent membership proposed at section 4, and its potentially indefinite extension by Ministers under section 8, will make it impossible for some institutions to comply with these requirements of the code.

Specific questions

- What analysis have Scottish Government made of the specific impact of the Bill on each institution’s ability to meet the requirements of the code set out above?
- What policy consideration did Scottish Government give to whether the provisions in the Bill were consistent with the requirements on institutions under the code?

E. How to deal with conflict between the requirements proposed in the Bill and the requirements of institutions’ own governing documents?

The governance of higher education institutions is defined in various governance instruments that have the force of law:

- Articles of association for institutions constituted as companies (including Glasgow School of Art, the Royal Conservatoire of Scotland, SRUC and the University of the Highlands and Islands)
- Royal Charters (for institutions including Dundee, Heriot-Watt, and Stirling)
- Ordinances for ancient Scottish universities made by The Queen in Council
- Institutions’ own statutes, approved by the Privy Council.

The provisions of the Bill will be in conflict with a range of these instruments, which make provision for the membership and conduct of governing bodies and academic boards/ senates which is different from that set out in the Bill.

The Bill does not make specific provision for what institutions should do if they are subject to conflicting requirements that have the force of law. This creates uncertainty.
Specific questions

- What consideration the SG gave to the extent to which:-
  - the composition of each governing body already reflected the various groups who would have a right to appoint members of that governing body under S4; and
  - The introduction of members in implementation of section 4 would put governing bodies in breach of the Code unless they removed members appointed under their existing statutes.
- More generally, what consideration has the Scottish Government given to the conflict between the provisions of the Bill and the requirements on each institution under the various governance instruments outlined above?
- How does the Scottish Government believe these conflicts can be resolved if no provision for this is made in the Bill?
- What relationship is envisaged between ‘rules’ proposed in the Bill (sections 5, 6, 11) and existing governance instruments?
- Has the Scottish Government made any estimate of the costs to institutions if existing governance instruments require change?
- Has the Scottish Government consulted the Privy Council Office about processes for changing existing governance instruments, and if so what advice was given by the Privy Council?
- What timescale does the Scottish Government envisage for any action to make existing governance instruments consistent with the requirements set out in the Bill?

F. Regulation-making powers

The Bill gives Ministers extensive regulation-making powers. Without prejudice to university leaders’ serious concerns about the extent of these powers, which will be set out in our evidence to the Scottish Parliament, it would be useful to know what the Scottish Government’s intentions are with regard to the publication of draft regulations during the course of the Bill, to enable the Scottish Parliament to consider how the powers in the Bill will be used.

Universities Scotland
1 September 2015
Higher Education Governance (Scotland) Bill

Call for Evidence from Education and Culture Committee: University Court of University of Glasgow response

This response has been developed by a Working Group of the University Court, on behalf of the Court. The University Court welcomes the opportunity to give evidence. We have responded to the first four questions individually and have grouped together our response to the questions on academic freedom.

Founded in 1451, The University of Glasgow is a large institution with over 25,000 students and 7,000 staff. The University Court is a 25-member governing body with a majority independent membership; it also includes members from the following constituencies: the University Senate, the General Council (the graduate body), the Students’ Representative Council, employees (including provision for Trades Union nomination), and the City Council, together with the Principal, the Rector (elected by the students), and a nominee of the Chancellor. These constituencies have existed for many years, including since before the approval of the last substantive Ordinance in 1979 which introduced student and employee members, albeit that numbers from the various categories have been changed over the years. The Working Group included Senate, Students’ Representative Council, employee, General Council and other independent members.

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

We do not consider that there are existing problems with Higher Education Governance. For many years (since the launch of the first Code of Good Higher Education Governance in 2004), governance arrangements have been compliant with a UK Code of Practice and, more recently, a Scottish Code has been developed introducing improvements particularly around diversity, inclusion and accountability. We believe that the Scottish Code has been effective resulting, e.g., in new measures to address gender equality, include staff and students in the appointment of Principals, Chairs of Courts and independent members as well as in the appraisal of performance of Principals and Chairs, and requiring Courts to commission externally-facilitated reviews of their effectiveness and publishing the outcomes. The Scottish Code is reviewed every three years (the next edition is due in 2016) thereby ensuring that it is readily and frequently kept up to date, and compliance with the principles which it sets out is a condition of funding from SFC.

The higher education sector in Scotland is diverse and one of the nation’s success stories. Important elements of that success have been a high degree of local autonomy and effective governance. The University of Glasgow has recently revised its governance arrangements, making changes to the membership of Court and establishing a Council of Senate to which significant powers of Senate are delegated. Throughout those changes we have sought to improve and modernise arrangements (e.g. ensuring a significantly majority of lay members of Court, filled by advertisement, and recognising that a 600+ member Senate is not a fit for purpose body to govern academic matters). We have made these changes to meet our needs – including to secure effective governance of our
ambitious estates strategy. We believe that exercising this autonomy is likely to be more effective than requiring compliance with a ‘one size fits all’ model.

2. The extent to which the Bill

   a will improve higher education, particularly in the areas above
   b may alter the higher education sector’s current level of autonomy
   c may affect lines of autonomy between the Scottish Government, relevant public bodies and the higher education sector.

It is difficult to see how the Bill will improve Higher Education. According to the Policy Memorandum, the Bill will strengthen existing governance in higher education but that is not evidenced and, indeed, the opposite may transpire depending on the detail yet to be developed concerning the regulation by Ministers. For example, were the procedure to appoint the Chair of the Court to involve an election from among the candidates deemed suitable for appointment as is exemplified in the Policy Memorandum our belief is that we would not attract the best candidates for the role and that, therefore, governance would be poorer.

The Bill proposes that Government Ministers take significant new powers to impose governance practice on universities regarding the appointment and remuneration of Chairs, and the composition of the governing body and of the academic board. These powers were not included in the Consultation. In giving these powers to Ministers, the Bill:

- will reduce the independence and diversity of the universities which has been a key plank in their contributing to a strong economy;
- may result in the Office of National Statistics determining that universities are arms of central government as with recent changes in Scotland’s FE sector. This change of status would have a dramatic and very harmful impact on relationships with business and entrepreneurial activity in universities and would remove our ability to generate surpluses to invest in our infrastructure;
- could compromise universities’ ability to attract philanthropic funds: while there is any uncertainty in universities’ status there are implications for funding from those bodies or individuals which are unable to support entities associated with central government. The University is currently progressing a £50m capital development at the Queen Elizabeth University Hospital of which £35m relates to funding of imaging facilities – in particular the Imaging Centre of Excellence (ICE), a unique facility in the UK with the ability to treat patients of all types including non-ambulant, acutely ill and ventilated patients. All of the £35m has been realised from external sources with Trust funding of over £5m leveraging the further sums from the Medical Research Council, UK Research Partnership Investment Fund and the European Regional Development Fund;
- opens the risk that future Ministers may use these powers in ways that may threaten the sector’s current ONS or charity status.
These aspects are clearly unintended as the Bill directly contradicts the Cabinet Secretary’s commitment - in the Governance consultation document - that ‘for universities to be successful ... they need to be autonomous institutions’ and that ‘The Scottish Government does not want to increase Ministerial control over universities’.

The University of Glasgow estates strategy, recently approved by Court and covering the 10 years to 2025, includes capital investment of £450m which comprises £250m in historic and future operating surpluses, £100m borrowing, £50m philanthropic support and £50m property sales. Were the University to be reclassified as an arm of central government, that would immediately have a severe adverse impact on our ability to implement our strategy because of the inability to retain surpluses, the impact on philanthropic giving and restrictions on borrowing.

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

The Bill in its current form places significant new powers in the hands of ministers with the consequent risks as set out in our response to Question 2 above. Moreover, much of the detail of how the Bill will be implemented is missing, yet to be determined.

We believe that good University governance is best promoted through the Code of Practice which requires principles of governance to be observed, and compliance with which is a condition of funding from SFC, but which recognises diversity in the sector and requires that institutions observe the principles in a manner that reflects their distinct missions, cultures and needs at any point in time. Fundamentally we believe that legislation is not required to further good University governance: we can evidence this by the improvements we have introduced over recent years.

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

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

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

Each of these proposals involves a prescriptive approach taken by a Minister which consequently reduces the independence and diversity of the Higher Education Institutions. Moreover, the proposals may compromise the status of the institutions as bodies independent of Government – with colossal financial implications – and the exercise of discretionary powers by future Ministers could affect their charity status.
In addition, in specifying the composition of the governing body and the academic board, there is a risk that this Bill undermines the principles of good governance which include acting in the best interests of the institution. Were the member to be mandated by their constituency to represent the latter’s interests this would be a backward step.

We believe that the higher education institutions themselves are best placed to decide the process for appointing the Chair of their governing body, and the memberships of both their governing body and academic board. We cite our recent experience as evidence of that: we are currently seeking to appoint a Chair of Court through a robust process of advertisement leading to appointment; we have reduced the member numbers of certain constituencies to allow us to have a clear external membership on Court, appointing members with the right skills to enable us to meet our strategic needs; and we have established a fit for purpose Council of Senate with a balance of members reflecting our academic needs and of a size that enables us to effectively conduct our business. We believe that there is no need for a legislative approach to be taken as there already exists a robust approach for promoting good governance through the Code of Good Practice with which institutions are already required to comply as a condition of SFC funding.

Role of the Rector

The final point we would draw to the Committee’s attention is that the schedule of legislative amendments accompanying the Bill involves removing the right of students at the ancient universities to elect a Rector to preside at meetings of the governing body. This is a development that was not proposed in the Consultation, and is not discussed – or even referred to in any detail – at any point in the paperwork accompanying the Bill.

For members’ information we include as an Appendix to this Call the Court’s responses under these headings to the original Consultation which elaborate on the concerns expressed here.

Academic Freedom

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.

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

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

The law currently requires all HEIs to have regard to the desirability of ensuring academic freedom. The new Bill proposes a longer definition of academic freedom than currently appears in the 2005 Act: we have no issue with the addition of developing and advancing new ideas or innovative proposals per se but this is caveated by the requirement that HEIs ‘must aim to ensure’ academic
freedom, whereas the current legislation says that they 'must have regard to the desirability of ensuring' academic freedom'.

It is difficult to see what the Government is trying to achieve through these new words. One potential consequence of the new wording would appear to be to undermine the role of the governing body in the determination of institutional strategy which we believe is not what was intended. What we mean by that is that academic freedom as newly defined could be seen to be permitting staff e.g. to pursue research in any academic area, contrary to a more focussed strategy (and efficient use of resource) approved by the governing body.

It is of concern to us that the Government’s stated intention is to strengthen an obligation on the universities when it has not explained what impact this strengthened obligation would have, and why the new obligation is more desirable than the old.
Appendix

Extracts from response to Consultation Paper on Higher Education Governance Bill

Preliminary Comments from University Court of the University of Glasgow:

The University Court (‘the Court’) welcomes the opportunity to contribute to the consultation.

The Court believes that HE-specific legislation is not necessary for the reasons set out below, and in addition questions if legislation could in practical terms cover such a richly diverse sector. The Code of Good HE Governance (‘the Code’) already covers many of the areas in question and should be used as the framework for continuous improvement, rather than new legislation being introduced in the areas proposed. The Code has the benefit of being flexible and dynamic (including being open to relatively quick change if required), but is nevertheless formulated in the appropriate spirit to achieve continuous improvement in governance. Compliance with the Code, or provision of a satisfactory explanation about non-compliance, is a condition of funding, therefore it has force.

Chairing of Governing Bodies:

The consultation paper proposes an advertising/shortlisting process followed by an election of the ‘chair’ of the governing body by a ‘balanced and representative electorate’. The composition of the electorate is not further defined. The consultation paper does not fully define ‘chair’. Given the explanatory text in the consultation paper, the implication is that ‘chair’ means the person who in practical terms undertakes ‘day to day’ duties including responsibility for the leadership of Court, its effectiveness and its conduct; liaison with the Principal and members of the senior team; and representing the University at relevant meetings with external bodies and stakeholders.

However, it is unclear whether the statutory role of Rector in the ancient Universities has been fully considered in drafting the consultation. The Rector is the ‘ordinary president’ of Court in the ancient Universities and may ‘preside’ at meetings of Court with a deliberative and a casting vote. If the Rector were to be considered the governing body’s ‘chair’, then the electorate for that position (chair of Court) is already fixed, being prescribed originally in legislation and latterly by Ordinance: in both cases it is the student body. The proposal in the paper is that there be an open advertisement and interview process, followed by an election involving various stakeholders. The role of a (student-elected) Rector as president (chair) of Court could therefore effectively be abolished.

If, by ‘chair’, the consultation paper means the role undertaken in many institutions by a senior lay member of Court (referred to in this response as ‘Convener’), then the appointment of this person is already covered by the Code, involving a transparent process including advertisement and competitive selection and interview. However, it does not involve the final aspect of the proposed legislation, which is ‘election by a balanced and representative electorate’.

There are two existing roles (Rector and Convener) that are both highly valued. The Rector is elected by the student body and provides an important channel to strengthen the student voice, which the Court would not wish to see diminished.
Within many Universities’ processes, there is already a commitment to openness in the appointment of the Convener through advertisement and recruitment. Rather than an election being needed, these processes might be further refined locally, e.g. by the Nominations Committee, which the Code already requires to include staff and students, possibly convened with more Court members present than would normally be the case and overseeing the appointment of the Convener.

An election process for Convener could politicise the position, potentially deterring some excellent candidates when what is needed is a person with the best possible skills and experience. For reasons of good governance, it is essential that governing bodies as a whole have the full confidence in the Convener: a politicised process via an election might negatively impact on this.

There is a reference in the consultation to possible remuneration of the chair. While noting the time and personal commitment required of such a role, and that subject to charity law this is already allowed, the Court is not supportive of this.

**Membership of Governing Bodies:**

In many universities, the Governing Body includes student, academic staff, support staff and alumni members, so, consistent with the consultation paper proposals, these are inclusive bodies. However, in the interests of democracy, and good governance, it is important that staff members of the governing body should be selected by all staff and not simply nominated by trade unions. Glasgow's governing body has benefited greatly over the years from the input of staff members who have also been members of a trade union. However, selection of Court members as representatives of a trade union would involve those members arguing the trade union's position, whenever relevant, in the course of Court business. This would be contrary to good governance, which requires that all members of Court act in the best interests of the University rather than of a constituency.

The Court questions the need for, and the practicality of, all governing bodies being required to be in the same format for these categories of members, given that the size of governing bodies varies across the sector. If necessary, the Code could be amended to make recommendations in these areas. On this basis, legislation is not necessary.

With respect to equality, the Court recognises the challenges involved and supports a commitment to achieving parity, while noting that with respect to many constituencies contributing to its membership, it cannot compel them to achieve gender equality.

**Composition of Academic Boards and appointment of Members:**

The proposal refers to a body that is very similar to this institution’s existing Council of Senate. Therefore, given that the University of Glasgow has been able to create such a body through its own internal processes, other institutions may also be able to act without the need for legislation. The proposal in the consultation paper also has implications for the future of the wider Senate at the older universities.

The size and diversity of the sector militates against the proposals in the consultation. If necessary, the Code - which already requires effectiveness reviews of such bodies - could be amended to make recommendations in this area. Legislation is therefore not necessary.
Higher Education Governance (Scotland) Bill – Education and Culture Committee Call for Evidence

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.
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 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.

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
Response from the University of Aberdeen Development Trust

The Trustees of the University of Aberdeen Development Trust welcome the opportunity to provide comments to the Committee on the Higher Education Governance (Scotland) Bill. It should be noted that the Trust is a separate charity, independent of the University of Aberdeen but which exists for the sole charitable purpose of raising funds to benefit the University.

It is rare that the Trust would feel obliged to comment on draft legislation. It is, therefore, a measure of our deep concern regarding the purpose, proposals and potential impact of this Bill on both the University of Aberdeen and the wider higher education sector in Scotland, that we submit this response. It is not evident what ‘problem’ in governance this Bill seeks to address and the case for many of the proposals appears more political than evidence based. It is evident, however, that the Bill risks creating a set of problems for universities which may have a detrimental effect on governance and perhaps more critically, undermine their ability to compete internationally. The documentation in support of the Bill has not outlined if it will enable Scotland’s universities to advance their competitive position. We are also aware that several of the proposals have come forward despite a majority of responses in the pre-legislative consultation expressing their opposition to them.

As a Trust which seeks to fundraise in support of the University a key concern, however, is that the Bill may result in either a loss of charitable status for the University or reclassification by the Office of National Statistics (ONS) as a public/government body. These are both consequences which would significantly inhibit the capacity of the Development Trust to raise funds through donations and philanthropic giving to the extent that we currently do. By way of context, it may be helpful to the Committee to note that the Trust raised £6.4M in donations in 2013/14 and is in the process of preparing for the launch of a major new fundraising with a multi-million pound target which will build on a previous campaign that closed in 2010, and raised over £150M. That income stream enables the University to invest in new facilities and staff, and to provide bursary support for students which simply would not be possible otherwise. Philanthropic giving and donations are a hugely important means by which the University can make public funding go further in support of students and ensuring institutions like Aberdeen can continue to provide a world class educational experience. As such, it seems self-evident that Scotland should help universities to harness philanthropy and we hope that the critical importance of this to the future of universities will be recognised and protected.

Impact of the Bill on the Autonomy and Competitiveness of Universities

We note that the Bill includes a range of proposals regarding what are quite detailed matters of the internal governance of Universities – the process of appointment of the Chair of a governing body, the composition of the governing body, and the composition of the academic board (Senate). At the general level, it is concerning that Government considers it appropriate to legislate on the internal governance of a charity. We are more concerned still that the Bill appears to give Ministers new and extensive powers over the internal governance of universities. This represents a fundamental diminution in the autonomy of universities and undermines the principle that universities should be independent from political control.
ONS Reclassification and Loss of Charitable Status

Aside from our concern about the consequences of the loss of institutional autonomy for Scottish society and the need for universities to fulfil their role as an independent voice in civic life, we are particularly concerned that the extension of Ministerial control over matters of internal governance will endanger the University’s charitable status and/or reclassification as a public/governmental body.

Such a reclassification or loss of charitable status would have far reaching financial implications for universities one of which would be with regard to fundraising. It is widely known that donors are reluctant to give to institutions who are not charities or who are government or quasi-government bodies. Over the past decade, the University of Aberdeen has been very successful in harnessing the goodwill of its alumni and wider stakeholders to help support major new projects such as the Sir Duncan Rice Library and the Suttie Centre for Teaching and Learning in Healthcare and for a range of scholarships to support students. All of that support has helped the University to deliver an improved student experience for Scottish students and to support the Scottish Government’s priorities for the economic, cultural and societal growth of Scotland. At a time when public finances are so stretched, Scotland can ill afford to cut off or significantly inhibit the option of philanthropic and charitable giving from its universities. This is a key issue which we would suggests needs to be at the fore of Parliament’s scrutiny of this Bill.

Ends

Mr Sandy Manson, Chair

On behalf of the Trustees of the University of Aberdeen Development Trust
Higher Education Governance (Scotland) Bill

University of Dundee Response to the Education & Culture Committee

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

The University of Dundee has a strong record of adhering to recognised standards of governance as set out by the CUC Code on Higher Education Governance, the Scottish Code of Good HE Governance (‘the Scottish Code’) and other guidance on best practice. For instance, the University regularly reviews the effectiveness of Court, most recently in 2014, has multiple staff members elected to the Court, has provision for two elected student members and has an open process for the appointment of the Chair of Court and Principal which mandates the inclusion of staff and student members on appointment panels.

The University accepts that challenges remain in achieving a more diverse membership of Courts but it must be recognised that this is a common challenge across many boards in the private and public sector. Importantly, the University is making progress on this issue consistent with the principles set out in the Scottish Code which has resulted in a more diverse membership after recent appointments.

More generally, the Bill seeks to impose uniformity in relation to the membership of the sector’s governing bodies. This approach does not take into account the diversity of the Scottish higher education sector and consequently fails to recognise that similarly diverse existing governance arrangements are appropriate and to be expected.

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

The University does not believe that Bill will ultimately improve higher education governance.

It is an established principle of good governance that members of the governing body act in the best interest of the institution as a whole, and therefore they do not act as if they are mandated by or representatives of other bodies but as individuals working to a common purpose in support of the strategic objectives and best interests of the institution.

In terms of embedding equality, the Scottish Code requires that institutions’ governing bodies provide a public statement setting out their strategy and aims in relation to ensuring equality and diversity in their membership. Given that as a result of powers contained in the 2013 Act, the Scottish Funding Council now requires institutions to comply with the Code, such statements must be provided and will be open to public scrutiny. The University believes that at the present time, there is no need to legislate on the matter of equality on governing bodies until such time as it is clear that the introduction of the Scottish Code has not achieved appropriate levels of progress in this area.
2(b) The extent to which the Bill may alter the higher education sector’s current level of autonomy

The University is deeply concerned that the Bill and associated powers for Ministers will adversely affect institutional autonomy.

The University is concerned that the pre-legislative consultation did not include reference to new powers for government ministers to proscribe the composition of governing bodies. As a point of principle, the use of subordinate legislation or Ministerial directions to decide what categories of person should be on governing bodies, how they should be appointed and their conditions of service raises fundamental issues about institutional autonomy.

Furthermore, the University is concerned that the use of subordinate legislation by Ministers may lead the Office for National Statistics to classify higher education institutions as public sector bodies, a situation which has already occurred in the college sector as a result of greater ministerial influence permitted under the Post 16 Education Act. The reclassification of the University as a public sector body would have a profound adverse impact by significantly restricting the financial freedom of the institution and placing at risk the University’s relationships with philanthropic organisations and our ability to have an impact, through knowledge exchange and collaboration, on innovative business growth in Scotland.

Furthermore if the University was reclassified as a public sector body the institution would not meet the Scottish charity test as defined in in the Charities and Trustee Investment (Scotland) Act 2005. At a financial level, charitable status is essential to institutions’ solvency and would further limit the University’s capacity to access philanthropic funding as donors are highly unlikely to wish to support institutions who are no longer charities.

2(c) The extent to which the Bill may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

Since 2013 there have been clear lines of accountability with regards to higher education governance, with the Scottish Funding Council responsible for ensuring that the higher education sector maintains acceptable standards of governance, as evidenced by compliance with the 2013 Scottish Code. The long-standing existence of the Financial Memorandum between institutions and the Funding Council and the more recent development of Outcome Agreements already provide clear and appropriate levels of accountability between the Scottish Government, Funding Council and institutions for the public money universities receive.

The University believes that the measures contained within the Bill will fundamentally alter these lines of accountability and will see the sector become directly accountable to the Scottish government.

As noted above, the University is concerned that the Bill will affect its position as an independent organisation and could ultimately result in the university being considered as a public body.

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

The University believes that there is no need for any of the legislative provisions of the Bill and is concerned that a number of the legislative measures will serve to weaken, rather than strengthen
current governance arrangements. Indeed, it is clear that certain of the proposals in the Bill run counter to well-established principles of what constitutes best practice in corporate governance. We would be more content to allow the sector to engage with the government on non-legislative methods of ensuring good governance across the sector. Examples of such measures would be institutional reviews of effectiveness and continued implementation of the 2013 Scottish Code.

4. Specific 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

The University is concerned that the process of appointing the Chair of Court is to be determined by Scottish Ministers, as this introduces the potential for political interference in the operation of our universities.

The University of Dundee does not support the option to open up the shortlist of candidates for the chair to an election process. The University believes that the most effective way of ensuring an appropriately skilled chair is appointed is to subject all candidates (both internal and external) to a rigorous application and selection process, involving external advertisement and interview before an appropriately balanced panel of the Court, which includes staff and student members. To append an election to this process runs the risk of undermining the rigour of that process as well as potentially turning the appointment of one of the most important roles in a University into a popularity contest or one based on personal agendas, campaigns or mandates. The University is concerned that it may very well also deter potential, highly qualified candidates from applying.

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

The University would urge caution in the use of the word ‘representative’. The Scottish Code recognises the need for governing bodies to include staff, students and graduates as well as lay members in the membership of governing bodies. The University of Dundee has provision for two student members, seven elected staff members and two graduates within the formal composition of its Court. In addition a further three graduates of the University are lay members of the Court. In terms of staff membership, the Senate elects four assessors from amongst its number, the Academic Council (which comprises all academic and administrative staff) elects two assessors, and the remaining staff member is elected by the clerical, manual and technical staff. The University considers this to be a significant and appropriate level of staff membership on Court.

The University does not support the direct nomination of members of Court by campus unions. It should be noted that two of the current members on Court are each active members of their respective unions, one academic and one non-academic, and indeed there has been a long history of candidates with union backgrounds standing for, and being elected to, the Court. Nevertheless, the University believes that staff should be able to determine for themselves who from the staff they wish to be their assessors on the governing body, rather than a ‘ring-fenced’ nomination being made by the relevant trades unions. The proposal appears to the University to give preferential treatment to particular sections of staff within the institution and it would also appear to vitiate the democratic principles that the consultation document elsewhere seeks to espouse.
To require HEIs to ensure that their academic boards are comprised of no more than 120 people, and include various persons.

The University believes this proposal further increases the level of external interference in the operations of Scotland’s universities and is unnecessary. However, the University has at no point had a Senate membership that exceeded 120 people and has recently reduced the membership of its Senate to a maximum of 50 individuals.

5. Academic freedom

It is unclear to us that the proposals in relation to academic freedom do anything to strengthen or enhance those protections within the law that are currently in operation. Since there is already a legal duty on institutions as well as one often embedded in their governing instruments, it is unclear what additionality is achieved by requiring that a statement on academic freedom should be a condition of grant. Many chartered universities have a statement on academic freedom in their statutes or ordinances, indeed the University of Dundee has even approved the text of an ordinance which sets out a procedure for investigating claims from members of staff who believe their academic freedom has been infringed. The University believes that the right to ‘explore new ideas’ is implicit in the current wording of its own provisions, but has no strong objection to introducing enhanced wording.

One aspect, however, which must be borne in mind is that institutions must be free to determine their own academic strategies, which may also include decisions on the fields of research or teaching to pursue. Any statement on academic freedom should be so worded to allow institutions to manage staff and their performance in line with the strategic objectives of the University.

Institutions should not be compelled to provide resource to support all and any research carried out by their staff; the crucial point is that institutions should not be able to curtail research or discriminate against staff merely on the basis that the institution does not like the outcomes of the research or they are controversial.
Summary

The University of Edinburgh has deep concerns about the scope and provisions of the Higher Education Governance (Scotland) Bill.

We support the aim of the Scottish Government to create an inclusive, strong and sustainable economy and we are committed to ensuring that there is transparent and inclusive participation in the governance of the University.

We are very concerned, however, that the proposed legislation opens up the real potential for a reduction in the ability of Universities to ensure academic freedom and act as a source of independent thinking.

We are dismayed that the proposed legislation could weaken the inclusiveness and effectiveness of our existing governance arrangements which ensure both a strong voice for staff and students and external, independent expertise in governing what is a large and complex organisation.

We do not think that there has been any compelling explanation of what the problem is that needs to be fixed here.

Overall there appears to have been no obvious recognition of the very different size and shape of Universities within Scotland. The proposed uniform (apparently arbitrary) upper limit on Senate membership is just one example of an apparent lack of recognition of the very different sizes of higher education institutions in Scotland.

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

The new Scottish Code of Good HE Governance has only recently been introduced (in July 2013) and we have reviewed and refined our approach to ensure full compliance.

Our system of governance is working well, providing appropriate oversight and assurance for a University which is currently 17th in the world; returns over £9 to the Scottish economy for every £1 of public funding invested; has a strong track record of widening participation (with over half of our Scottish students coming from widening participation backgrounds and offering a wide range of open, free online courses); and is a committed fair employer (we are the first University in Scotland to sign up to the Scottish Government’s Business Pledge). We pay scrupulous attention to continuing to ensure robust, open and transparent governance of our institution. We recognise our accountabilities to our wide range of stakeholders, within and beyond the University community.

We do not think that there has been any evidenced argument of the benefit to Scotland of the further changes proposed in this draft legislation. The new Scottish Code of Good HE Governance takes an appropriate principles-based approach and all
higher education institutions have an obligation to either comply or explain. This seems much more appropriate than the prescriptive ‘one-size fits all’ approach proposed in the Bill, given the wide diversity in size and shape of higher education institutions in Scotland.

**Question 2**—The extent to which the Bill (a) will improve higher education governance, particularly in the areas above; (b) may alter the higher education sector’s current level of autonomy; (c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector.

We think that the Bill would weaken higher education governance. We are particularly concerned that it would reduce Universities’ autonomy and ability to ensure academic freedom and act as a source of independent thinking.

There has been a clear and well established understanding over many years in Scotland - and more broadly in the UK - on how best to balance the need for Universities to be accountable for the public resources that they receive while ensuring that they should be able to offer analysis and comment without fear or favour regardless of the political make-up of the Government of the day. The proposed new legislation breaks that convention, giving future Governments significant potential influence and control, without the safeguard of the same level of parliamentary scrutiny and public consultation. This is not only of deep concern in itself, but also poses a threat to Universities’ classification by the Office for National Statistics which would have severe adverse consequences on our ability to contribute to Scotland’s economy and society and on our wider global mission.

The extent of the proposed powers to be exercised through secondary legislation are, in our opinion, constitutionally inappropriate and deeply concerning in this regard. Sections 1, 8, 13 and 20 give wide powers to Ministers to enable future changes through secondary legislation which could significantly shift the balance, reducing the autonomy and ability of higher education institutions to ensure academic freedom. Section 14 provides Scottish Ministers with the broad power when making regulations ‘to make different provision for different purposes’. The Bill gives Ministers potentially very open ended powers that should properly be exercised by Parliament through primary legislation.

The Robbins report (Cmnd 2154), made a thorough examination of the importance of ensuring appropriate institutional autonomy to guarantee academic autonomy and noted that: ‘a system that aims at the maximum of independence compatible with the necessary degree of public control is a good in itself, as reflecting the ultimate values of a free society...we do not regard such freedom as a privilege but rather as a necessary condition for the proper discharge of the higher academic functions’. The UK Higher Education sector is seen as a role model in this regard by its European counterparts.

The draft Bill is already being seen by Higher Education commentators as leading to reduced autonomy for Scottish Universities. This threatens our ability to attract and retain world class talent. The individual’s academic freedom depends not only upon specific recognition of his or her intellectual liberty, but also upon the collective and institutional independence of the institution within which that individual freedom is protected and nourished. This Bill threatens the ability of higher education institutions to provide that environment in Scotland. We are competing in an increasingly competitive environment internationally, where the gap is increasing between the truly
world-leading Universities and the rest. Our ability to build on our strong track record, through international partnerships and collaborations, will be hampered by the uncertainty generated by this draft legislation around academic freedom, reduction in institutional autonomy and limited parliamentary scrutiny over enhanced Ministerial powers.

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

We do not think that the case has been made for the proposed legislative measures in the Bill (or any further legislative measures) at a time when important non-legislative measures – the new Scottish Code of Good HE Governance – have only recently been developed and implemented; and our existing governance is providing good, robust and open assurance and accountability.

Examples of the way in which we account for our stewardship of resources and set out our strategic direction are included in our substantial annual report and accounts (which includes a full corporate governance statement, risk assessment and social responsibility and sustainability report); in our annual review (which highlights key impacts and achievements); and in our Court webpages which include Court papers and minutes open to all.

Question 4 – Please provide your views on the merits of each of the specific proposals on appointment of chair; inclusion of various persons within the membership of governing bodies; and requirements that academic boards should be comprised of no more than 120 people and include various persons.

We do not agree with these proposals which do not appear to reflect an understanding of the extent of transparency and inclusivity that exists within our current governance arrangements or the diversity of size and shape of higher education institutions within Scotland.

Our Court already has representatives from our staff, students, alumni and the city as well as external independent members who bring a breadth and balance of skills and are appointed through an open and transparent process.

The proposal for a single elected Chair and to strip the Rector from long established rights to preside over Court does not recognise the fact that the University of Edinburgh has a different model which ensures an effective voice for staff and students in the governance of our institution.

Our dual model of leadership combines a Rector, directly elected by the students and staff of the University, who presides over meetings of Court; and a Vice-Convener, whose role is similar to that of chair of institution, appointed by Court through an open and transparent recruitment process. This dual model works well for us, ensuring both a strong voice for staff and students and external, independent expertise in governing a large and complex organisation. The proposals would require institutions such as ours to run two parallel electoral processes for these roles – reducing our ability to be able to access (through a full, transparent appointment process) the depth of skills and experience that we need for the governance of a global university of our size and breadth.
The proposals appear to significantly underestimate the onerous nature of these roles. The University of Edinburgh’s dual leadership model requires some 8 hours/week, including weekend and evening work, for the Vice-Convener in addition to the time spent by the Rector in presiding at full Court meetings, chairing General Council and holding surgeries and public meetings for individual students. Neither the Rector nor the Vice-Convener claim remuneration for the time spent fulfilling these roles. We cannot understand the basis for the time estimate in the Financial Memorandum of 6 days/year which appears to us to display a real lack of understanding of the depth and breadth of the commitments associated with this role to ensure good and robust governance.

Our large and inclusive Senate is managed effectively through a tried and tested approach which includes committee structures focusing on key aspects of Senate’s work. This ensures our Senate can both provide a forum for wide engagement with our professorial and student body while ensuring effective decision-making. We are therefore concerned to see the proposed (apparently arbitrary) upper limit of 120 on the numbers of our colleagues who would be able to participate in future meetings of our Senate. This would strip hundreds of our professors of their existing rights as members of our Senate to no obvious benefit to our institution.

In each of the above provisions, the case has not been made that one size fits all. Our institution is a large one (with 13,000 staff and 35,000 students and includes individual Schools which are larger than some whole higher education institutions in Scotland). We have developed tried and tested mechanisms for ensuring appropriate voice and engagement for an institution of our size and history and accounting for its activities and stewardship of resources.

These proposed legislative provisions break with the understanding established in the Universities (Scotland) Acts to date that has respected the diversity of Universities in Scotland. The Bill represents an unwarranted move towards standardisation which does not properly take account of the appropriate diversity of size, shape and focus that exists within the sector.

**Question 5-7:** Academic Freedom – please provide your views on the likely practical effect of these provisions; any significant constraints; and whether the situations in which relevant persons can exercise their academic freedom are clear.

We find it perplexing that, while the Bill purports to strengthen academic freedom through making explicit the freedom to develop and advance new ideas and innovative proposals, it poses a serious potential threat to higher education institutions’ very ability to protect such freedoms. As discussed in the answer to question 2, the scope of the proposed secondary legislation is particularly troubling in this regard. The specific proposal to extend the definition of academic freedom is, in our view, unnecessary and unlikely to strengthen further what is already a core value for the University of Edinburgh.

**Conclusion**

We are committed to making a significant, sustainable and socially responsible contribution to Scotland, the UK and the world, promoting health, economic growth and cultural wellbeing. We are very concerned that the proposed provisions in the Bill would weaken rather than strengthen our ability to deliver on this in an increasingly competitive international environment.
Higher Education Governance (Scotland) Bill
Call for Evidence

Response by the University of Glasgow General Council

The Business Committee of the General Council of the University of Glasgow welcomes this opportunity to submit response to the Scottish Government Call for Evidence.

The Business Committee shares the wishes of the Scottish Government to enable a framework of higher education governance that is more modern, inclusive and accountable, and will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose. However, we are conscious that one of the reasons for the great success of the higher education sector in Scotland is the plurality of approaches which have evolved. We would not wish to see such diversity and flexibility unduly diminished.

We have some concern that the role of Court members as independent charity trustees is not fully reflected in the draft Bill. Court Assessors are not, and cannot legally be, "representatives"; once elected they function as independent members, albeit with a particular interest in and experience of the University. This should also apply to members from other groupings.

I. Preliminary issues.

This section addresses aspects of governance which are outside the limited scope of the questions to which responses are invited.

1. Nowhere, either in the earlier Consultation document or in the accompanying Policy Memorandum is any evidence cited of current deficiencies in performance of the university sector attributable to shortcomings in its governance. Similarly, no evidence is cited of inadequacies in respect of universities’ compliance with the existing Code of Governance, now a condition of grant in respect of SHEFC funding. In the absence of this evidence it is impossible to see what the purpose of the Bill is, other than a mistaken desire for uniformity in the structure and process of governance across all HEIs regardless of their significant differences (see Comment, under A3 below).

2. It is asserted that the existing Code is deficient in that it is ‘not far-reaching enough to meet desired policy objectives’ (Policy Memorandum, 67). However, these policy objectives are not specified. In their absence it is again impossible to conclude if the Bill is fit for purpose.

3. In the absence of any instrumental role for the Bill (in terms of ensuring movement toward stated objectives) it can only be concluded that the Bill has an end in itself, which appears to be the one established, without stated reasons, in Sections 1(1), 3, 8, 13 and 20(1), namely to give Scottish Ministers a determining role in the governance of universities in the widest sense, not only of control of or influence on the Governing Body, but also of the Academic Board. An extreme possibility would be to attempt to dissuade the pursuit of research in an area which was perceived to be "politically unacceptable". This represents a quantum reduction in the autonomy of the Scottish universities, which will materially hinder the proper discharge of their academic function. Even if the powers provided to Ministers were not exercised in this way, the very inclusion of legislative provisions that could allow political intervention in the governance of the universities would undermine their status and reputation, and potentially their ability to function at the highest levels as centres of research excellence.

4. We believe that the Bill as drafted is intrinsically inconsistent with the intent of the Universities (Scotland) Acts in respect of the statutory autonomy granted to the ancient universities; without significant amendment the resultant Act could not reasonably coexist on the statute book with existing legislation, even given the minor alterations which the Bill proposes to make to the Acts. The uniformity in governance structure and process sought through this Bill is directly incompatible with the 1858 Act.
5. We consider it possible that the prospect of Scottish Ministerial involvement in university governance could lead universities being categorised as ‘public bodies’, seriously constraining such financial freedom as they currently enjoy, and could undermine the confidence of many of the professional organisations which presently accredit qualifications delivered by the universities. In 2010, the ONS classified all Further Education Colleges to the public sector with very serious consequences for their financial autonomy and ability to manage flexible (the SFC has had to issue a series of communications in attempts to get around the restrictions that this classification has resulted in for FECs).

ONS, in that decision, stated that universities had remained outside of the public sector at that stage as they enjoyed wider freedoms than the Colleges that were re-classified – the significantly enhanced public and political control over university governance envisaged in this Bill would seem to threaten directly these ‘wider freedoms’ and so risk re-classification of Scottish universities into the public sector with the attendant restrictions on financial flexibility and good management. Such a move would also impact very seriously on Scottish Government financial provisions as all university spending would become part of public sector expenditure.

6. It is to be regretted that the term ‘university’ does not appear in the Bill in any substantive sense. This leaves doubt as to whether the specific functions which differentiate universities from other educational institutions have been borne in mind at all during the conception of this Bill. It is also to be regretted that even the term ‘governance’, the ostensible subject of the Bill, is not defined.

7. Most fundamental of all, it seems not to be understood that the academic staff form the originative ‘power-house’ of the university, directing the critique of received wisdom and developing new understandings of all aspects of the world. It is incomprehensible that they should be denied a substantial presence on the Governing Body, given its responsibility for academic strategy. To regard them as employees in a manufacturing company, working under top-down direction and only permitted a voice through their union, betrays this underlying deficiency of the Bill.

II The Stated Questions

Q1. What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?

A1: The principal problem is an external one, the lack of comprehension of the nature of the academic purpose of universities, which leads to inappropriate criteria being employed when assessing their performance.

Comment:

a) The consequence of this problem is the external pressure put on universities to prioritise a drive to managerial efficiency in pursuit of financial survival. This occurs within a context of, on the one hand, fierce inter-institutional competition, both national and international, and, on the other hand, insensitive political short-run priorities that seem to reveal an ignorance of the fundamental academic functions of the universities – which are much more than merely supplying credentials. This materially constrains the pursuit of good governance, i.e. the development of academic strategy and the attainment of congruence between strategy and managerial performance. This is not to suggest that efficiency and the achievement of value for money is not already a priority for universities: making the best use of limited resources in their pursuit of academic excellence is a fundamental requirement that is embedded within existing governance and management structures and processes.

b) Modernity is a vacuous, in-the-eye-of-the-beholder notion, of no obvious applicability to an activity such as governance. The date of legislation has no intrinsic significance; what matters is fitness for purpose. Some pre-1707 Scottish legislation is still fit for purpose. But purpose is relative to the function of the institution.

c) Inclusion (‘inclusiveness’ or ‘inclusivity’?) is meaningless in the absence of a statement of what or who is intended to be included and the authority of its selection as an objective.
d) Accountability is a matter of ‘to whom?’ and ‘on what terms?’ The financial probity of universities is already subject to close examination by the authorities that fund them [SFC/University of Glasgow Outcome Agreement 2015-16. Annex D: “Governing bodies and their designated officers must comply with the terms of the Financial Memorandum (FM) between the SFC and higher education institutions”; ]; the quality of educational provision and student services are similarly under constant, thorough and systematic scrutiny; the quality of research is subject to internationally recognised systems of review and scrutinised by research funding organisations. In other respects universities are presently autonomous institutions in the eye of the law, and not accountable within that.

Q2. The extent to which the Bill
(a) will improve higher education governance, particularly in the areas above

A2(a) It is not obvious that governance will be improved; indeed there are reasons to believe that it will be harmed.

Comment:

The ‘areas’ of modernity, inclusion and accountability are not operational notions so it is not possible to say. An important distinction is that between the structure of governance, the process of governance (within that structure) and the outcomes of governance (produced by that process). Improvement pertains to outcomes, while the Bill largely seeks to influence structure, so in general it is difficult to speculate about improvement.

In particular, however, the Bill generates three concerns: first, it is not clear that having an appointed and remunerated chair of the governing body will, as such, have any beneficial impact whatsoever on the process of governance – all the less so given the slight time commitment expected of the appointee (which implies that the existing commitments of Court Convenors are not fully appreciated), which itself occasions fears that in due course this role will be performed by a civil servant or, more probably, a political appointee; second, the proposed elimination of members of the Senate (Academic Board) from membership of the Governing Body constitutes a serious impediment to the formulation and execution of academic strategy; third, the inclusion of union and student representatives introduces divergent interests into Governing Bodies (which, hitherto, in the case of the ancient universities, comprised only individuals with the collective interest of the institution at heart), which will push the business of the governing body further away from its concern with governance in the direction of management (which the Code itself is careful to differentiate from governance).

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

A2(b) The Bill will seriously impair the autonomy of the individual universities and thus the sector.

Comment:

As noted already the Bill enables Scottish Ministers to have a significant role in the governance of universities; accordingly it is fundamentally destructive of autonomy. In the context of fierce UK-wide and international competition in both research and learning this elimination of autonomy could be very harmful to the standing and performance of the Scottish university sector, which is unlikely to benefit from a parochial attitude toward its universities.

Regardless of whether these powers are exercised, the very fact of their inclusion in legislation and the potential created for political interference in university governance would be damaging to the reputation of these bodies, especially in a wider academic context.

That the University of Glasgow is a member of the Russell Group of British universities is evidence of its ability as an autonomous institution to attain a high level of achievement. Moreover, accreditation of over 400 academic plans by around forty professional bodies is critical to the standing and market shares of its qualifications, but the confidence of these bodies is likely to be undermined by the apparent loss of autonomy itself and by the consequential dominance of politically inspired priorities.
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

A2(c) The Bill may bring the universities within the public sector and radically affect its lines of accountability, possibly to their disadvantage.

Comment:

A critical factor mentioned above is the possibility that the changes to the structure of governance proposed in the Bill will lead to the universities themselves becoming public bodies, a change which would materially impact on the accountability of the sector in respect of the Scottish Government, markedly diminishing their financial independence. Universities only remained outside of the public sector in 2010 (when Further Education Colleges were reclassified) due to the ‘wider freedoms’ that they enjoyed – the measures in this Bill seem to damage that concept of wider freedom and so risk reclassification with all of its very serious financial repercussions for universities and for the Scottish Government.

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.

Q3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

A3. No. The Code successfully established that progress could be made on a non-legislative basis. There is no need for legislative measures.

Comment:

The point has already been made that no evidence has been put forward of systemic inadequacies of governance among Scottish universities; in the absence of that evidence it simply cannot be said if the proposed measures are necessary or proportionate. Although the recently introduced Code of Governance does not technically have statutory force, in so far as compliance is a condition of grant and Scottish universities are wholly dependent on grant funding, to all intents and purposes the Code is a legislative measure. Accordingly it is difficult to talk in terms of a balance. The only clear ambition set out in the Bill is to impose uniformity of governance structure and process across all HEIs for its own sake with no evidence that existing governance is inadequate or that the new governance proposed would remedy any specific issues.

The problem with seeking a legislative solution to perceived problems in the sector is that a ‘one size fits all’ approach is unlikely to achieve whatever the desired results are imagined to be. It has to be recognised that the Scottish universities differ significantly from each other in terms of their legislative foundations, their functions, their scale of operations, their balance between research and learning, their financial performance – all of which has a lot to do with their differing histories. This diversity makes to difficult to frame an appropriate legislative basis for their conduct.

In general our position is that as far as the University of Glasgow is concerned (and probably the other ancients) there are no governance problems demanding an attempted legislative solution – unless, of course, its autonomy is itself regarded as a political problem. No further measures are required.

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
Q4. Please provide your views on the merit of each of these proposals.

A4. The views are as follows:

- In the absence of details about the regulations it is impossible to assess adequately the merit of the suggestion, although in general it is not immediately apparent why the appointment of a chair will in itself necessarily enhance the governance of the institution.

- It has already been noted that the inclusion of union and student representatives is undesirable as their sectional interests will introduce managerial concerns into the agenda of the governing body. The exclusion of members of the Academic Board from the governing body will materially hinder the process of governance. Union and student interests are effectively addressed in other structures. The conception of the governing body as analogous to a representative political assembly is inappropriate in relation to the academic function of the universities.

- Universities differ significantly in terms of the size of their academic staff establishments. A more appropriate limit on the size of the academic board might be a particular proportion of the relevant establishment, with weight being given to senior staff. (The Academic Board is similarly not a representative political assembly, given its academic role).

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—

Q5. The likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

A5. It is unlikely that performance in these areas will be enhanced by the intended legislative provisions.

Comment:

It would be entirely inconsistent with the concept of the ‘university’ for academic freedom to be conceived without inclusion of ‘the freedom to develop and advance new ideas and innovative proposals’ – in so far as the university’s role is to challenge and revise received wisdom it cannot but be involved in the development of new ideas and the creation of new techniques.

This does not mean that there are no inertias in the process; there is an entire corpus of knowledge concerned explicitly with the problems of the logic of scientific discovery. But resistance to new perspectives and innovative techniques cannot be legislated against; there always has to be caution as there is always ambiguity in knowledge. From the universities’ point of view it cannot be imagined that this provision will make any difference – though it might, perhaps, encourage a more litigious approach to the dissemination of research findings.

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

Q6. 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.

A6. This question concerns the substantive and complex subject area of the sociology of knowledge creation and is not a context for legislative controls.

Q7. 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?”
A7. It is inherent in academic freedom that it has no limits of expression, so there cannot be a closed list of situations in which it can be exercised.

Comment:

It would be to society’s serious disadvantage if academics were to be precluded from functioning as expert witnesses in a wide range of contexts; nor would it be desirable for individuals to be prevented from expressing opinions as persons, merely because they were also academics. Being restricted to expressing views within their institutions is a feature more characteristic of a police state. Part of the process of disseminating the new knowledge, universities’ unique contribution to society, is to challenge any deficient received view, wherever it is found. Academics are generally mindful of the force of peer review in what they write or say.

III Drafting and Other Matters

1. Specific clauses

a) Section 1 (1)

Given the evident importance of the Chair of the Governing Body, the absence from this section of the Bill of any specification whatsoever of the process by which the Chair is to be appointed is a serious gap. The Explanatory Notes do not provide any specific commitment to a particular process or to appropriate principles of selection of candidates or appointment and thus do not help fill this gap. In effect the Section merely states that there will be a Chair and, by implication, the person concerned will be from outwith the institution – in contrast to the present situation, where it can reasonably be anticipated that the Chair will already have the interest of the university at heart.

In the absence of a clarification of the process, the possibility is not excluded that the Chair will be, to all intents and purposes, a ministerial appointee. If that is the intention, perhaps it should state that. The Bill is also silent on the potential implications of establishing much greater political control over governance, especially on the classification of universities and the financial and reputational impacts that would result.

b) Section 4 (1) (g)

If the Bill is intended to repeal or amend comprehensively the existing legislation, regarding the membership of the Governing Body, then this Section is surely redundant, as there will no longer remain any other basis of membership than that specified in the Bill. If that is not the case, and pre-existing legislation remains in effect, then that surely implies the Bill is proposing to amend what already exists – in the sense that designated individuals are being added to or deleted from the original specification of the membership.

This could then mean that particular office-bearers not specified for membership in the Bill could nonetheless remain members under the pre-existing legislation – for example, Senate Assessors. The Consequential Modifications fail to clarify this matter.

c) Section 8, referring to Section 4 (1).

The force of incorporating ministerial prerogative into the Bill is surely to nullify the Section to which it refers – that Section specifies one particular composition of the Governing Body but the minister may determine another. Obviously a subsequent Act could always change the Bill, but leaving the matter to ministerial prerogative creates considerable uncertainty and militates against long-run stability and planning.

d) Section 13, referring to Sections 9 and 10.
The comments above in respect of Section 8 apply here with similar force. Indeed, in so far as the Academic Board is concerned with the fundamental purpose of the institution, the risks of exercise of ministerial prerogative are the greater.

2. Consequential Modifications

a) The Act of 1858

Section 4  The purpose of the repeal of ‘consist of the members’ is obscure, as there are other uses of the term ‘members’ (applied to Court) throughout the Act (Sections 6-11)

b) The Act of 1889

Section 5  The part explicitly repealed by the Bill — the words before ‘Seven…’ — was previously repealed by the 1966 Act. While it removes the Rector from membership of the Governing Body, there remain references to the Rector elsewhere in the Act, so the office apparently remains - but apparently not that of the Chancellor. Given the Chancellor is appointed by the General Council this represents a diminution of the role of the General Council. The Bill should be explicit on the proposed future of these roles.

c) The Act of 1966

i. Section 2 (1)

The proposed insertion apparently leaves unchanged the rest of the text of the Section. But this includes the specification of the composition of the Courts (Parts I – IV of Schedule 1) that replaced the repealed section of the Act of 1889, even although the Chapter of the Bill to which the insertion refers actually changes that composition. This would appear to be inconsistent — although it gives support to the view noted above that Section 4 (1) (g) could have substance.

ii. Section 2 (6)

The intended repeal of this sub-section is of significance both for the Senate/Academic Board and for the General Council. It presently concerns the powers of Court and the particular procedure to be followed by Court in its determination of resolutions relating to recommendations to Court from Senate. It could imply that Senate is losing its right to make recommendations to Court on a wide range of significant academic matters; in the by-going, the obligations on Court to refer these proposed resolutions to the General Council for their consideration would disappear, reducing further its involvement in governance. The fact that these recommendations with explicit academic objectives nonetheless have resource implications of concern to Court identifies the inevitable dual interest in them on the part of both bodies, which this modification — and indeed the Bill as a whole — seems not to acknowledge.

On the subject of powers of Court, Section 2 (5) of the Act relates to Ordinances. No modification is proposed to this sub-section. However, included amongst the matters in respect of which Court may propose that an Ordinance be enacted is the composition of Court itself (Schedule 2 Section 1). It seems that the Bill does not anticipate the continuation of that right, but no step has been taken to block it.

iii. Section 7

The repeal of this Section removes the specification of the proportion that elected non-professorial members should comprise within Senate. While this is consistent with the Bill’s proposals for the composition of the Academic Board, the full specification of the membership of Senate remains in Section 5 of the Act of 1858, unamended in subsequent Acts but inconsistent with the Bill.

John Marsh  
Convener, Business Committee  
University of Glasgow General Council
SUBMISSION FROM THE UNIVERSITY OF GLASGOW STUDENTS’ REPRESENTATIVE COUNCIL

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

We see there being no issues with higher education governance in the status quo and in fact see several strengths: the Code of Good Governance, the diversity of the Scottish sector, space for institutionally driven change and Rectorship.

1. The Code of Good Governance (the Code). We see the Code as a strong driver of modernity, inclusion and accountability by it being:
   - Updated every three years (with the next edition due in 2016) in consultation with key stakeholders (such as the Scottish Government and student representative organisation) which ensures it is kept fit-for-purpose.
   - A condition of SFC funding which ensures compliance with the process of the code.
   - Successful in ensuring the inclusion of students in the appointment of principals, convenors and lay members;
   - Successful in ensuring the inclusion of students in the appraisal of principals and convenors
   - The Committee of Scottish Chairs commitment in 2015 to tackle gender inequality on university courts by committing to at least 40% of co-opted lay members being female by 2018.
   - Recognising the necessary and desirable diversity in the sector whilst maintaining a base of strong principles.

2. The diversity in Scottish universities is important because:
   - It allows the university sector to best serve the broad macro and micro economic needs of Scotland.
   - Research intensive universities drive international investment and open new industrial and entrepreneurial areas which then support Scottish based investment and growth.
   - Specialist institutions drive international standing in focused areas of work, and serve local and regional skills gaps

The corollary of this is that the governance requirement of these different missions requires different systems. Diversity of mission and diversity of governance go hand in hand. The Code therefore:
   - Provides a robust common footing whilst allowing for local autonomy on how exactly those governance arrangements work
   - Allows each institution to have a unique history, culture and character reflected in its governance arrangements and mission.

3. There exists in the status quo the power to amend governance arrangements internally without need for government intervention. This is supported by the Code and underlines the benefits of a diverse sector.
   - The University of Glasgow has recently amended its governance with the aim being to make it more robust, effective and transparent whilst retaining its unique character and traditions.
   - The academic body Senate - which has no mechanism for formalised student membership and has a membership of 600+ academics – provides a strong collegial and cultural link between senior academics but devolves significant power to a new Council of Senate.
   - This is new Council of Senate has 120 members, a minimum of 10% formal student members, and is very close in constitution and remit to that proposed in the bill. All of this was achieved without the need for legislation through existing processes and with full involvement of the SRC.
4. Furthermore at the University of Glasgow the SRC sees strength in the existing model of Rectorship:
   - It ensures students are put at the heart of university governance and ensures that governance remains accessible, inclusive and transparent.
   - It also ensures balance in governance which is traditionally over representative of the experiences of staff relative to students.

2. The extent to which the Bill
   (a) will improve higher education governance, particularly in the areas above
   (b) may alter the higher education sector’s current level of autonomy
   (c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

The bill will not improve higher education in any meaningful way and instead is a threat to the world leading Scottish university sector. Three main concerns are around: autonomy and diversity; independence from government; and the conflict with consultation objectives.

1. As previously detailed in the answer to question one: the autonomy and diversity of institutions to decide their own governance arrangements (in line with the principles of the Code) which support their distinct mission is key to the success of our world leading university sector. The bill threatens the future ability of universities to do this and therefore by extension the success of Scottish universities collectively.

2. The bill threatens the independence of universities from government. The powers assumed by Scottish Ministers in the bill causes concern to the SRC on several fronts:
   - These were not in the consultation
   - They give rise to the potential for the Office of National Statistics to reclassify universities as arms of central government as has happened with the FE sector. Further clarification is needed before the bill is enacted that this would not happen. This change in status would have a very significant impact on the way universities operate
     a. by removing their ability to generate surpluses;
     b. stymie relationships with business and industry;

   In the case of the University of Glasgow this would have the impact on students of:
   a. Making the £775million investment in new buildings and campus infrastructure untenable leaving students studying, researching and learning in buildings which are aging or not fit for purpose; and the opportunity cost of not building a world-class campus.
   b. Making future investment in new facilities difficult and again leaving students studying, researching and learning in facilities which are not world-class
   c. Restrict the capacity for students to undertake postgraduate study at the University of Glasgow as many funding bodies stipulate only distributing funding to charitable organisations.
   d. Restrict the ability of the university to cultivate links with business and industry that would benefit students by providing opportunities such as research placements or work placements.

3. There is a conflict with consultation objectives and statements made by the Cabinet Secretary. Scottish Ministers in the bill would assume the power to stipulate:
   - the process for selection of convenors of court
   - remuneration for convenors of court
   - composition of governing bodies
This is directly contrary to the statement by the Cabinet Secretary in the consultation document that ‘the Scottish Government does not want to increase ministerial control over universities’.

Further to this, we wish to state categorically that we believe this Bill as it stands represents a significant overreach by central government and an unnecessary incursion into institutional autonomy which will have potentially serious and harmful consequences.

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

As has been detailed in previous answers we feel that the balance has been struck in favour of legislative measures and we think that:

- The Code is a strong and robust tool by which to ensure sufficient consistency and rigour across Scotland
- Further harmonisation of governance arrangements across the sector is not necessary through the bill given demonstrable improvements delivered by the Code since its introduction.
- Diversity in the sector is desirable and key to its success
- The Code is already a condition of SFC funding
- The bill is an overreach by central government which endangers the operation, autonomy and future plans of universities.

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

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

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

Regarding selection of the chair of governing bodies we are dismayed and astonished by the way in which such a sweeping change to the governance of ancient universities in Scotland has been handled. The bill as it stands would remove all influence from the role of Rector - a position which is uniquely Scottish in its history and character and was not subject to consultation nor is it discussed in any detail in the paperwork accompanying the bill.

We have a number of concerns about this:

1. While there is diversity across the ancients in the level of participation of Rectors what remains constant is the power of the Rector to chair meetings of Court and ensure students are put at the centre of governance
2. The role of rector is uniquely Scottish; intrinsic to the character, traditions, and governance of ancient universities; and serves an ambassadorial role greater than simply presiding at meetings of university courts.
3. There exists a nuance difference between the role of Rector and Convenor of Court which the bill does not reflect.
4. The espoused openness, transparency, and democratisation that the bill aims to achieve (whilst preserving good governance) exists in the Rector and Convenor status quo.

5. Removing the right of the Rector to preside at meetings of university courts is a retrograde step in terms of inclusion, accountability and transparency; and unnecessarily impinges on the character and traditions of the ancient universities, and a uniquely Scottish institution.

6. Changing the electorate of the Rector or chair to include staff will disrupt the balance in governance which is traditionally over representative of the experiences of staff relative to students.
Submission from the University of the Highlands and Islands

The University of the Highlands and Islands (UHI) welcomes the opportunity to respond to the call for evidence raised by the Education and Culture Committee of the Scottish Parliament in relation to the Higher Education Governance Bill.

Scottish universities introduced a voluntary Code of Good Governance in Higher Education in July 2013 which has already led to positive changes to governance across the sector including the gender balance of university courts. Each of the universities has taken the code very seriously and a great deal of effort has been expended in ensuring full implementation in a short timescale.

UHI believes that this code has not been given sufficient time to achieve its full impact and does not believe that there is a need for additional legislation in this area. An external review of the code should be carried out to assess its effectiveness before legislation is considered.

UHI believes that there has been a lack of consultation with the sector by the Scottish Government prior to introducing this Bill. The consultation carried out earlier this year prior to the Bill being published was limited in its scope; for example, no comment was invited on the financial implications of the Bill.

UHI is very uncomfortable with the powers proposed for Ministers to make changes by regulation as we believe all changes to legislation in this area should be subject to full parliamentary scrutiny. We are particularly concerned that this could lead to the inappropriate centralisation of power over our diverse sector.

Our responses to the questions raised by the Committee are as follows:

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

   UHI believes that any required changes to governance including modernity, inclusion and accountability have been addressed in the 2013 Code. UHI is unaware of any problems and we have not been made aware of any by either our staff, students or other stakeholders.

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

   UHI does not believe that the Bill will improve higher education governance. Indeed, we believe it could endanger effective governance if chairs were appointed without the support of the Court (or board) they will lead.

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

   UHI has serious concerns that the Bill poses a serious risk to the autonomy of universities, particularly if changes to the legislation can be made by regulation. UHI is most concerned that the proposals may lead to universities being reclassified by the Office for National Statistics as public bodies which would have an extremely detrimental on the sector. UHI is
acutely aware of the additional resource burden that the reclassification of incorporated colleges has placed on the college sector and, indirectly, on UHI as the Regional Strategic Body for further education in the Highlands and Islands. The charitable status of universities could also be brought into question by HMRC if the level of control that could be exercised by Government Ministers through regulation is passed. Loss of charitable status would also have a major impact on universities potentially threatening the significant sums raised from philanthropic giving.

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

UHI believes that there are already clear lines of accountability between the Scottish Government, relevant public bodies and the sector. The Code of Good Governance together with the revised Financial Memorandum for Higher Education introduced in 2014 clearly set out the accountabilities of the Court and Principal for public funding. University Courts are already accountable and transparent in their activities. The proposed legislation will add further complexity with no benefit to the sector or to accountability or transparency.

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

As 1 above. If Ministers have specific concerns relating to the governance of the sector we would want these to be aired and discussed with a view to resolution without resorting to legislation.

4. 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

UHI has concerns over the election of a chair by other than Court members. UHI is a company limited by guarantee and a charitable body and must, therefore, comply with the Companies Acts and Charities Act. It is essential that a Chair is appointed because of the skills and experience they can offer. It is already challenging to find independent members with appropriate skills and experience who are willing to fulfil the demanding role of Chair in a rural area. UHI believes that if potential candidates were subjected to an election process, even fewer people would put themselves forward and their appointment may not have the confidence of the Court.

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

UHI does not formally recognise any trade union but has staff who are members of three or more different unions. Two staff governors are represented on the Court through
elections which are open to all staff across the 14 separate employers in our partnership. UHI believes that the measures proposed in the Bill for trade union representation would significantly narrow the representation that staff currently enjoy. Similarly, our current constitution allows for two student governors, one HE and one FE. This works well and we have not been aware of any issues by staff or students.

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

UHI has significantly fewer than 120 members on its Academic Council and it functions well on this basis. However, we believe it should be for institutions to determine the size of their academic council and not be a matter for legislation.

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

5. **Academic freedom**

Please provide your views on the following—

The likely practical effect of these provisions, for example, whether there are any areas of teaching, learning or research that will be particularly enhanced.

UHI fully supports the concept of academic freedom. However, it does not support the introduction of legislation in this area. The current subtlety of academic freedom policies could be lost. For example, UHI foresees difficulties if academic staff believe that they have a legal right to pursue research in a certain field but it is not strategically aligned to the university’s plans and it cannot be supported with limited funding available. Valuable time and resource could be expended in legal battles on such situations. Legislation in this area would be particularly challenging for our two academic partners who are part of their respective local authorities. Conversely UHI does not understand why legislation in this area will be more effective than academic freedom policies already in place as academics are already encouraged to have new and innovative ideas. We feel the case for legislation in this area has not been made and could have unintended negative consequences.

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.

The freedom to express opinions is not constrained other than in the case of council employees (see 7 below). Funding for research will always be constrained and funded research activities will be prioritised in line with the university’s strategic plan. Academic freedom matters are for academic councils to consider rather than university courts. Strategic direction and funding decisions, however, are within the remit of Court.
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?”

UHI is not aware of any concerns raised by staff on the current interpretation of academic freedom. The constraints that exist are that the activity is within the law and would not bring the institution into disrepute. Staff in our two academic partners who are part of their respective local authorities are constrained by their employment contract to not criticise the council which employs them.
UCUG Response to Higher Education Governance (Scotland) Bill - Call for Evidence

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

The von Prondzynski review was established in 2011 in response to apparent failings in HE governance in a number of institutions. The panel members were drawn from all sections of the university community and the review’s remit was to:

- consider whether current institutional governance arrangements in the higher education sector in Scotland deliver an appropriate level of democratic accountability given the level of public funding institutions receive;
- identify and examine proposals for change which observe the benefits of an autonomous sector but will also consider the importance of full transparency; and
- the effectiveness of management and governance, the clarity of strategic purpose and its efficient implementation.¹

All but one of the subsequent recommendations were unanimously endorsed by panel members, with a single dissenting voice speaking against the proposal for elected chairs. Since the publication of the recommendations in 2012 very little of substance has changed within HE governance. The Code of Governance produced by the Scottish Chairs of Court codified existing practice rather than addressing the von Prondzynski recommendations. Indeed the code did nothing more than cement the Chairs of Court own submission to the von Prondzynski review.²

The majority of university students are women (56.1%)³ as are the majority of university staff (53.7%)⁴ while women account for only 22.3%⁵ of professors and 32% of governing body members. There is clearly an issue with representation which the current code has been slow to address.

2. The extent to which the Bill
(a) will improve higher education governance, particularly in the areas above
(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

UCUG believe that it is essential that institutional autonomy be maintained while addressing inclusion and accountability. Clarifying and strengthening the role of the academic board will provide a safeguard to academic freedom and institutional autonomy. However this can only be ensured by providing places on governing bodies for academic board members and trade union nominees which will improve accountability and representation, as will having a Rector empowered to chair the governing body having been elected by staff and students.

¹ http://www.gov.scot/Topics/Education/UniversitiesColleges/16640/ReviewHEGovernance/Remit
³ https://www.hesa.ac.uk/intros/stuintro1314
⁴ https://www.hesa.ac.uk/pr212
3. Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

The von Prondzynski report also included the recommendation that:

“The Government should instruct the Scottish Funding Council to establish in an appropriate academic setting a Scottish Centre for Higher Education Research, which should be available as a resource for the entire higher education sector and for government.”

The establishment of a Centre for Higher Education Research would provide much needed evidence essential for the development of good governance practice within Scotland.

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.

The diverse nature of Scotland’s University sector should be acknowledged, with ancient, red-brick, post-92, and small specialist institutions all contributing local, national and international expertise. However while the particular strategic priority may vary by institution the prevailing rational for a university to be a place of learning, teaching and research for the broader social good demands that the governance model best able to deliver this is used across the sector. To this end the proposals within the bill should be seen as a minimum standard to be followed.

Higher Education Institutions in Scotland are communities dedicated to learning, teaching and research. This requires an approach to governance which recognises this vision and does not simply replicate governance structures prevalent in big business or elsewhere. To this end it is right that governing body membership should include places for elected student, academic board and trade union nominees within their structure. Transparency would be enhanced by broadening the selection of chair of court to include the whole university community which would also democratis the process and demonstrate that a chair had the confidence of the whole university.

While it is sensible and appropriate to set a maximum size for an academic board it is critical that there must be academic involvement within the governing body, as well as trade union nominees. University of Glasgow currently has six (6) members of the academic board (Senate) elected to Court as well as two (2) trade union nominees. To this end UCUG would recommend that the provisions within section 4.1.b of the draft bill be amended to require election of members from the academic board. Concerns over staff involvement in governance are met by sections 4.1.c and 4.1.d which require reserved places for academic and non-academic trade union nominees.

5 http://www.gov.scot/resource/0038/00386780.pdf Section 7.2 p39
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.

Upholding academic freedom is essential to institutions and individuals engaged in the pursuit of learning, teaching and research. While there may be little measurable enhancement forthcoming in the short term from these provisions the potential negative impact of a watering down of the commitment to academic freedom could have a detrimental effect on the sector as a whole.

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.

Funding pressures within institutions are already seeing some research topics and grant applications prioritised over others. The balance between institutional strategy and individual academic endeavour can be difficult to identify. However by empowering academic boards and including academic staff within governing bodies and wider governance structures a balance can be reached which recognises both academic freedom and institutional priorities.

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?

Academic freedom, within the law, should be defended both inside and outside the institution. A significant number of university staff were involved with both the Yes and Better Together campaigns during the independence referendum. Institutional policy or restraint on academic freedom should not prevent similar discourse or civic engagement.

Finally, UCUG believes that the practice of electing trade union nominees to Court at the University of Glasgow is one that the Government would find useful to consider. We would be happy to provide further evidence to the consultation in writing or in person.

UCUG Officers
Higher Education Governance (Scotland) Bill: evidence to Education and Culture Committee

Summary

The University of St Andrews is deeply concerned about the scope and provisions of the Higher Education Governance (Scotland) Bill. We fully endorse the aims of having governance structures that are open, transparent, accountable and inclusive. To this effect, we embraced the Scottish Code of Higher Education Governance, introduced in 2013, and have used this to deliver a governance framework that ensures a strong voice for staff and students alike, supported by independent external expertise and scrutiny, whilst recognising the particular traditions and needs of our University.

Our concern is that these aims risk being undermined, rather than strengthened, by the measures proposed in the legislation. We do not consider that there has been any convincing explanation presented of what the problem is that this legislation is intended to remedy.

The proposals in the Bill go significantly beyond even what was envisaged in the Consultation exercise. The extent of the proposed powers to be exercised through secondary legislation risks introducing a dangerous level of political influence and control over Universities. Sections 1, 8 and 13 allow Ministers to enable future changes to the make-up of University Courts and Senates through secondary legislation, without the safeguard of full Parliamentary scrutiny. Section 14 appears to give Ministers a very broad and open ended power to “make different provision for different purposes”, which should properly be exercised by Parliament through primary legislation.

Taken together, the proposals in the Bill would significantly undermine the autonomy and independence of Scottish Higher Education institutions, and jeopardise Universities’ ability to ensure academic freedom and act as sources of independent thinking. The Royal Society of Edinburgh stated in their response to the consultation exercise, “Institutional autonomy and independence are fundamental principles that underpin the successful performance of Scotland’s HE sector. The proposals outline a level of governmental intervention that is entirely inappropriate for an autonomous sector”.

The Bill also puts at risk universities’ status as charities, and their classification by the Office for National Statistics as non-profit institutions. This would not only be damaging to our academic standing in an increasingly competitive international environment, but would also curtail the entrepreneurial activity we undertake and the value we contribute to the Scottish economy.

St Andrews receives less than one quarter of our total funding from the Scottish Government, and a recent study demonstrated that we deliver over £12 economic benefit for every £1 we are given by the Scottish Government. We make a net contribution of £485 million to the Scottish economy annually and directly support almost 9000 Scottish jobs. We are able to do this because we are autonomous, not in spite of it.
We hope that, before the Bill has passed through the Committee stage, the Scottish Government will secure concrete assurances that the Bill, and any regulations that could potentially be made under the powers given in the Bill, will not trigger a reclassification by the ONS, or threaten the charitable status of HE institutions. We would like to see on the face of the Bill a clear commitment to maintaining universities’ autonomy and freedom from political influence, and to respecting the diversity of institutions that is such a key strength of the Scottish HE sector and the student experience.

Questions

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

Higher Education governance has been subject to considerable reform in the past few years, most recently with the introduction of the Scottish Code of HE Governance in 2013. This sets out 18 key principles with comprehensive supporting guidelines, within an overall framework that recognizes the distinct and diverse nature of each Scottish HE institution. An interim progress report on its implementation published in 2014 commended the progress that has been made. Compliance with the Code is a condition of grant set by the Scottish Funding Council, and a recent internal audit report showed that the University of St Andrews was not only fully compliant but in a number of areas exceeded the requirements of the Code in terms of modernity, inclusion and accountability. The Code is due for review in 2016, and every three years thereafter.

At no time have Scottish Ministers explained the specific problems that this legislation is intended to address, or the failings they perceive in the Code or in HE Governance more generally that require primary legislation to rectify. We believe the best route for ongoing modernization of HE Governance is through the review of the Code.

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

Like other HE Institutions, the University of St Andrews has a governance structure that is open, transparent and accountable, and which ensures a strong voice for academic staff, non-academic staff and students alike, supported by independent external expertise and scrutiny. We do not believe that any of the measures in the Bill will improve Higher Education governance.

On the contrary, proposals to dictate the composition of university Courts and Senates, made without any recognition of existing statutory constraints, will have the effect of excluding or diminishing groups of people currently represented. This will be to the detriment of the academic provision and the associated student experience.
For example, to accommodate the Bill’s requirement for Trades Union nominees on Court, the University of St Andrews would have to abolish the existing Court position that is directly elected by the entire non-teaching staff of the University. This will disenfranchise the vast majority of staff who do not belong to a trade union.

Similarly, the Bill appears to reduce to a purely ceremonial function the role of the Rector - elected by the entire student body as a champion of their interests. The Policy Memorandum and Explanatory Notes are silent on this, and it did not appear anywhere in the original Consultation.

The suggestion that there should be contested elections for Chairs of Court goes against basic principles of good governance – that the chair of a board, whether of a university, a non-departmental public body, or a private company, should have the confidence of the entire board, not just the faction that got the most votes.

In the words of the Royal Society of Edinburgh’s response to the initial consultation, the proposals are “inappropriate, unnecessary and potentially counter to good governance”.

(b) may alter the higher education sector’s current level of autonomy
(c) may affect lines of accountability between the Scottish Government, relevant public bodies and the higher education sector

The proposals in the Bill, in particular sections 1, 8, 13 and 14, will fundamentally diminish the higher education sector’s autonomy. They will give Ministers unprecedented power to make further future changes to the appointment of Chairs and the composition of Courts and Senates, without the safeguard of full parliamentary scrutiny. This opens the door to greater future political influence and control, and in the words of the Royal Society of Edinburgh, represents “a level of governmental intervention that is entirely inappropriate for an autonomous sector”.

The Bill puts at risk universities’ ability to act as sources of independent thinking, and also potentially their status as charities and their classification by the Office of National Statistics as non-profit institutions. This would not only be damaging to our academic standing in an increasingly competitive international environment, but would also jeopardise the entrepreneurial activity we undertake and the value we contribute to the Scottish economy.

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? Are any further measures needed?

At no stage has the Scottish Government articulated the problems that it believes need to be tackled by legislative measures. We believe that any further reforms of Higher Education governance should be driven through the triennial reviews of the Code, not through legislation.
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

The HE Code of Governance already requires the Chair to be appointed through a transparent process, following open advertisement; and sets limits on the period of appointment. HE Institutions already have the discretion to pay Chairs (although none believe it is in the interests of the institution to do so) and to reimburse expenses incurred by Court members or applicants for posts.

It is unclear how the proposals in the bill will deliver better governance or add to existing good practice. St Andrews’ Senior Governor is appointed through open competition, following open public advertisement. Court agrees clear criteria for selection, and a transparent process for the shortlisting, interview and selection of candidates.

The suggestion that Scottish Ministers should be able to set through Regulations the criteria for selection of a Chair of Court introduces a new degree of political control and influence over HE institutions. It would allow a future Administration to determine who was and was not eligible to be appointed as Chair, and would fundamentally undermine the autonomy of the sector.

The suggestion that there should be contested elections for Chairs of Court goes against basic principles of good governance – that the chair of a board, whether of a university, a non-departmental public body, or a private company, should have the confidence of the entire board, not just the faction that got the most votes.

Although the Bill makes no direct reference to the role of the Rector, the consequence of the legislation would be to reduce this ancient tradition to a purely ceremonial function, removing an important champion of student interests who is elected by the entire student body.

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

The Court of the University of St Andrews already includes representatives from the academic, non-academic, student and graduate communities. These are elected directly by their constituencies. It is transparent, inclusive and representative.

The composition of the Court of St Andrews is defined by existing statute, which sets its size at 23 members and defines the constituencies from which they will be drawn. At least four ordinances would require significant revision to accommodate the changes required by the Bill, a complex and time consuming process that requires ultimately Privy Council approval. Even with these ordinances changed, it is difficult to see how the requirement for these eight posts could be squared with the principles
of good governance set out in the Code, which requires a majority of lay members and places an overall ceiling of 25 members.

One consequence would be to replace the elected non-academic representative with nominees from the trades unions – disenfranchising the vast majority of staff who are not members of a trade union. Another would be to reduce the level of student representation from the current four (including the Rector) to two. It is not clear how the Scottish Government believes this will improve the diversity and representative nature of Court.

Having Court representatives nominated by particular interest groups (as opposed to being elected from particular constituencies) presents a particular challenge. As charity trustees, they are required to act in the best interests of the University, but this risks presenting the individuals concerned with a conflict of interest should the best interests of the University diverge from the policies of the nominating body. In fairness to Court members who may be nominated in this way, the Bill should explicitly state that their requirement under charity law to act collectively in the best interest of the HEI overrides any policies or agendas of the individual body that is nominating them.

The power given to Ministers under section 8 to make further changes to the composition of Courts without the safeguard of full Parliamentary scrutiny introduces an additional level of potential political control over institutions that runs directly counter to the assurance given in the Consultation document that ‘The Scottish Government does not want to increase Ministerial control over universities’.

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

In St Andrews, the Senate, of roughly 230 members, has devolved its functions to the Academic Council of 45 individuals. This includes the Deans of Faculty, Heads of School, Senate Assessors on Court, Student Members and elected members from the Arts and Science faculties. It provides a balanced and effective forum for decision making on all education matters, including the semester system, marking scales and teaching regulations.

The consequence of the Bill would require the Academic Council to be disbanded and replaced by a reformed Senate that would either have to be significantly larger in number or significantly less representative in its composition. We do not believe that this would be in the interests of good governance or effective administration.

The power given to Ministers under section 13 to make further changes to the composition of University Senates without the safeguard of full Parliamentary scrutiny considerably undermines academic freedom and institutional autonomy by introducing an unacceptable level of potential political influence over matters of academic judgement.
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”.

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.

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.

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 do not object to the revised definition of academic freedom, but do not see any evidence that further definition is required and do not consider that the revised definition will strengthen academic freedom or deliver specific benefits. Academic freedom is essential to the work of a university, and we believe that the concept is already sufficiently understood to encompass the exploration of new ideas.

The Bill changes the obligation on institutions from “must have regard to the desirability of ensuring academic freedom of relevant persons” to “must aim to uphold the academic freedom of all relevant persons”. The rationale for this significant additional responsibility is not made clear – it did not appear in the consultation document and the Policy Memorandum is silent on the subject. It is unclear how this higher level of obligation (“must aim to uphold”) would accord with separate statutory duties placed on Universities. Section 26(1) of the Counter-Terrorism and Security Act 2015, for example, imposes a statutory duty on HE bodies to have due regard to the need to prevent people from being drawn into terrorism.

More generally, it is difficult to square the apparent desire of this section of the legislation to increase levels of academic freedom with the risk to academic freedom and institutional autonomy posed by the proposed increase in Ministerial control over how Universities function.

University of St Andrews
31 August 2015
To the members of the Scottish Parliament’s Education and Culture Committee,

We, students past and present of the University of St Andrews, bring to you a matter of grave concern, both for the autonomy of our institution and its ability to serve the Scottish people.

The Higher Education Governance (Scotland) Bill threatens to dismantle one of our oldest traditions by removing our strongest student advocate: The Rector.

The forthcoming legislation stands to dramatically alter the appointment of the Chair of the University Court- a role filled by The Rector in the four ancient universities since 1858.

In these four universities, The Rector is democratically elected by students and given the right to chair the Court, and is trusted by those students to ensure their voices are heard at the highest levels of university governance.

Making no reference to this ancient institution, while simultaneously proposing entirely new procedures for the appointment of the Chair, the bill offers an ambiguous future for the role of Rector. However, one thing is certain. This signals the end of the Rectorship as we know it.

Under the new legislation, if the Rector retains their power at all, their process for election would be replaced by an undefined panel which would pre-screen, interview, and shortlist candidates before even a single student vote could be cast. (HE Governance (Scotland) Bill, pg.3; Consultation Paper, pg. 13)

It is odd to invoke the autonomy of our university while committing clear ministerial interference, but stranger still to invoke democracy while destroying the democratic process.

Further still, should the Rector be sidelined on the University Court, it will impact their capacity to effect change in other areas of the University. Diminishing their stature will only diminish their ability to serve students. Our last three Rectors alone have:
• Helped to ensure academic excellence, by empowering students as school presidents and class representatives (Kevin Dunion, 2009).
• Established a widespread scholarship fund to enable students to pursue their career aspirations through summer internships. (Alastair Moffat, 2012)
• Reconnected notable alumni with the university and its current students for personal and professional development. (Catherine Stihler, 2015)

Furthermore, the committee should note it was a Rector that ensured their assessor would be a student (John Cleese 1970), enhancing the number of students serving on Court- a primary aim of this very bill.

Proponents of this bill have espoused worthy values of transparency, accountability, and inclusivity. But these are not new ideas. Our Rectors have been fighting for them for over 150 years.

We implore the committee to stand up for this uniquely Scottish tradition, to protect and promote the unencumbered right of students to select and elect their Rector as Chair of the University Court.

University of St Andrews Students’ Association

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Phone: (01334 46) 2700
The University of St Andrews Students’ Association is a registered Scottish Charity (SC019883).
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 co-operation 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 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
UNIVERSITY OF STIRLING

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

Response to Call for Evidence

This response sets out the views of the University of Stirling Students’ Union on the Higher Education Governance (Scotland) Bill.

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?

The Union feels in terms of inclusion that the University’s highest level of governance should be an inclusive environment, relatively reflecting the diverse range of the student community in which it acts in the interests of. Unfortunately, we feel that while the gender balance on Court is somewhat improving, to our knowledge, no other race, other than white, is represented, and there is an overall lack of other protected characteristics represented.

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

We believe the Bill is acting in the best interests of students and the institution as a whole; with regards to accountability, the minimum of 10% student membership on our Academic Council would increase our student representation from 2 to 3, further ensuring the student voice is heard, and that the University is accountable to the student representatives, and the student population. The Bill’s proposal for the election of the Chair of Court will improve both inclusion and accountability. Many students are not aware of the top-tier governance structures; however, if they were to be involved in the process of electing the Chair of Court (similarly to how a Rector is elected at the Ancients) students would be more engaged and aware of who they are and what they do. By the same token, the Chair of Court would be more accountable to the students and staff that elected them; although they serve Court, it cannot be forgotten that they also should serve the institution as a whole, especially the students and staff.

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

We believe it is important all HEI’s are operating at the same level of good-governance; legislation is the only way to ensure this. Although we appreciate institutions autonomy is important, it is vital that ALL universities meet a standard that is not always achievable through recommendation but only through obligation. We believe that although their autonomy may be affected by these changes, that the end result will be beneficial for students, and therefore worth a small loss of autonomy.

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

We believe the transparency and the increased level of consistency across all HEIs the Bill will ensure will only help increase accountability amongst the sector and public bodies, as well as the Government itself. We believe that if everyone is more accountable for their actions, and that if the standard the Bill expects if not met, then swift and robust action can be taken to ensure the best experience for students.
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?

We believe that the Code of Good Governance, which was developed in consultation with Scottish Universities and key stakeholders, provided a good platform for HEIs with regards to Governance. We believe many institutions follow this code and operate good governance. However, we believe the Bill will ensure every institution is compliant and that some areas would only be improved with the introduction of legislative measures; for example, the increase of student members on Council- we are unsure if this would happen without legislation.

Are any further measures needed?

N/A

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

We believe the proposal set out for the election of a chair of court makes the process more transparent. There have been concerns raised by our Institution that an election would put women off running; we rebut this by stating that in the last general election a record 1 in 4 candidates standing were women and that in our own SU elections, we had more women candidates than men in our latest two elections. If this is a real concern of the University, it is the responsibility of the university to ensure that it holds an election that is open and accessible and takes active measures to ensure all feel confident and comfortable standing.

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

We believe the changes to the way student members would be appointed, giving the power to the Students’ Union is mutually beneficial for us and the University. By giving us the choice to select which two of our sabbatical officers sit on Court, we can put forward the most appropriate Sabbatical Officers; those who have an active interest or background in governance, policy, education etc. ensuring they can effectively contribute, as well as enhancing the personal development of that Sabbatical that has a keen interest. It would also allow us the flexibility to engage in best practice in Gender Balancing and that would benefit the gender balance of court.

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

Our current size of Academic Council is 30 members; we do not see an issue with a limit of 120.
Higher Education Governance (Scotland) Bill – Response to Education and Culture Committee

The Importance of independent governance in maximising the value of public sector investment

The principle of a responsible and autonomous education sector

The University of Strathclyde fully embraces transparent and independent governance of the sector as a positive driving force behind the University’s contribution to Scotland. The existing requirement that the majority of governors be independent of both the University community and of government delivers independent scrutiny, external challenge and protects academic freedom. We view this independence from government as a fundamental part of a university’s role within a modern democracy – the existence of controls to ensure the delivery of appropriate outcomes in return for public investment is balanced with responsible autonomy which allows universities the potential to undertake areas of research and teaching which represent the views, interests and intellectual breadth of society as a whole, and not only those of the government of the day.

The benefits responsible autonomy delivers for Strathclyde and for Scotland

This defining autonomy of our governing body and the associated freedom to operate has been central to the identification, pursuit and achievement of a number of significant recent developments at Strathclyde. With the freedom to pursue opportunities, in line with our strengths in teaching and research, Strathclyde is working in partnership with others to deliver educational, economic and employment benefits to Scotland. These include:

- The development of the University’s Technology and Innovation Centre which is transforming the way academics, business, industry and the public sector work in partnership. Bringing together researchers, businesses and the public sector, the work undertaken in TIC is focused on solutions to key challenges in areas of economic importance including energy, health, future cities and manufacturing – a key part of the University’s projected total economic impact of £1.4bn over the coming decade.
- Working with companies including GSK, Rolls Royce, Boeing and their suppliers in our centres of manufacturing excellence which, as part of a wider drive to increase our engagement with business and industry, have seen private sector investment in R&D at Strathclyde grow to over £10m per annum.
- Securing a greater role for Scotland and Scotland’s businesses in the National Physical Laboratory (NPL) through our role as a Strategic Partner of NPL which include advanced plans to bring a Scottish hub of the UK’s internationally renowned laboratory for measurement science to Glasgow with direct benefits to business sectors as diverse as healthcare, aerospace, manufacturing and energy.
- The ongoing internationalisation of the University which ensures our students are educated in an environment which prepares them for participation in the global economy, brings significant inward investment to Scotland and sows the seeds of Scotland’s future connections around the world.
- Combining excellence with equity and equality through taking in the largest cohort of SIMD 0-40 students of the Scottish research intensive institutions, working in partnership with industry and colleges to deliver the Engineering Academy - which simultaneously addresses industry skills needs and delivers a dedicated learning pathway from colleges to study at Strathclyde - and working in partnership with government to improve outcomes through the Centre for Looked After Children in Scotland (CELSIS).

In line with our commitment to independent challenge and scrutiny in pursuit of excellence we have embraced the Scottish Code of Good Higher Education Governance developed under the leadership of Strathclyde Chancellor Lord Smith of Kelvin. This has deepened and extended the participation of our staff and students in both our academic
and corporate governance and further extended the transparency of decision-making by the University’s governing body.

**Protecting current freedom to operate with responsible autonomy and independent scrutiny**

In common with other universities, Strathclyde recognises the responsibilities and expectations associated with the delivery of outcomes in return for public funds. Indeed, we go beyond this and are committed as a fundamental part of our mission to contribute to the development of society and the economy. As such, the Outcome Agreement process has assisted us in articulating our aspirations and contributions to the Scottish Funding Council, but as the bulleted list above makes clear, it is partnership work that defines our contribution to Scotland and is central to leveraging third party income to maximise the value of public investment in universities. It is the Bill’s potential impact on our ability to continue to undertake partnership work that our central to our concerns with the Bill as currently drafted.

**Potential ONS reclassification as public bodies**

Of greatest concern is the possibility that the Bill may lead the Office for National Statistics (ONS) to classify higher education institutions as public sector bodies. We are aware that the ONS plans to review the classification of higher education institutions in due course. In light of this we are concerned that the increased ministerial control outlined in the draft bill may lead to Scottish universities losing their independent status, a core component of academic freedom, through the bill’s proposals to give ministers the power to:

- Determine the mechanism for the selection of chairs of governing bodies
- Decide the length of office of chairs of governing bodies
- Set the remuneration of chairs of governing bodies
- Control the composition of institutions’ governing bodies
- Dictate the detailed internal structure of institutions, most notably the Senate or ‘academic board’

Such a reclassification seems possible with these proposals adding to the existing powers exercised through funding, the Financial Memorandum and the Outcome Agreement process. This is of deep concern to the University as it would severely curtail our ability to operate in partnership with others in order to deliver benefit for Scotland and maximise the value of public investment. In particular it would severely restrict or curtail our ability to:

- Enter into partnership and joint ventures with businesses and charities in order to undertake R&D and promote innovation.
- Continue our investment in campus modernisation since we would be unable to retain surpluses generated from non-government funded activities for this purpose, would be unlikely to receive the levels of philanthropic support we enjoy as a wholly independent charity and our capacity to borrow money would be restricted.
- Compete effectively with universities based elsewhere in the UK
- Compare financial performance with universities elsewhere in the UK, with potential implications for participation in/comparability of performance in the Research Excellence Framework, due to the requirement to follow a different accounting code and financial year pattern

With such restrictions in place it is difficult to determine how the partnership work outlined at the opening of this submission or the modernisation of our campus could be taken forward effectively.

**Charitable status**

Related to the potential reclassification of universities as public bodies are a range of issues arising from the Bill’s potential impact on our status as a charitable body. Charity law makes clear that charities are bodies independent of government and will fail the charity test if their constitution expressly permits Scottish Ministers to direct or otherwise control their activities. The Bill gives Ministers significantly more power over institutions than the original proposals, including significant control over the governing body, its chair and the academic board outlined in the previous section. Whilst it is unclear whether the provision in the draft Bill would amount to sufficient control to call...
into questions universities’ charitable status, the manner in which these powers could be used by future ministers may yet call into question their charitable status. Were this status to be lost, it would lead to a range of impacts including:

- Loss of 80% relief on non-domestic rates (worth £2.6m in the most recent year)
- A requirement to pay corporation tax on any surplus at a rate of 20% thereby significantly reducing our ability to invest in our campus and infrastructure
- Loss or severe restriction of philanthropic income (currently ~£1.5M per annum) as donors are unlikely to risk their donations being recovered into central government funds at the financial year end
- Loss of R&D income from charities

Additional specific considerations

In addition to these fundamental concerns about the role independent universities play in society and the potential for the Bill to impact upon these, we have a number of more detailed concerns, which are summarised as follows:

- It is important for the preservation of academic freedom that universities’ governance arrangements retain the current balance in which universities are held to account for their delivery in return for public funds, but remain at arms-length from government with SFC providing oversight and scrutiny of public funds. In light of the significant shifts toward direct ministerial control contained in the Bill, this is put at risk.
- The Bill will change the University Court’s current position as the ultimate constituency for the selection or election of its Convenor and Members. This is central to ensuring the governing body’s confidence in the chair and to ensure both the Convenor and Members have the skills and experience and ability to provide effective and appropriate challenge to the University’s executive. This would be at risk were the chairperson to be elected by a constituency other than the governing body itself as proposed in the Bill. Mechanisms to ensure appropriate and representative appointments already exist including well established open and transparent nominations processes, with fixed terms of office and the ability for the Court to remove the Convenor and to determine any remuneration for its members.
- The impact of the proposals to define additional Court members may have on our ability to effectively manage the representation of both genders and other protected characteristics – whilst we have 50-50 female-male representation amongst our appointed lay members those posts already filled by elected nominees (senators, students) and external bodies (local council, graduates association) are overwhelmingly occupied by men.
- The Bill’s proposal of creating positions reserved for trade union representatives will have the effect of disenfranchising the majority of staff who are not trade union members, particularly administrative and operational staff. This will have the effect of reducing democratic engagement of staff with the University’s governing body rather than enhancing it. Trade unions’ participation in our existing electoral processes is welcomed, but in the most recent staff election to Court (2015) a trade union representative stood, but was not the electorate’s chosen nomination.
- Related to this, the Governing instruments of the University make clear that all members of Court members are expected to make collective decisions in the interest of the University as a whole and not act as representatives of any constituency which may elect them (the latter appears to be the assumption in the Bill). Given the specific mandates Union reps hold to act for their members it is unclear how potential conflicts of interest could be overcome.
- The Bill provides an unacceptable level of power to ministers in Sections 8 and Section 20 which empower ministers to undertake further reform of the sector or to change the process of appointment without parliamentary scrutiny, an approach which was not made plain in the government’s initial consultation.
Higher Education Governance (Scotland) Bill

Submission to the Scottish Parliament’s Education and Culture Committee by
the University of West of Scotland

Introduction

The University of the West of Scotland writes to submit answers to the Education and Culture Committee outlining our views on the relevant points. We would particularly wish to stress our view that the current governance arrangements for Higher Education governance are effective, kept under review and as we observed in our response to the January 2015 consultation stage, we are not persuaded by the need for legislation in the area of HE governance. The Scottish HEI sector has implemented the principles and guidelines in the 2013 Scottish Code of Higher Education Governance which is delivering the stated aims of the Bill “to establish a required minimum level of inclusivity, transparency and consistency across all HEIs”. We are of the view that that making further changes to the system at present is premature and that the planned review of the Code should continue as planned.

There are a number of concerns relating to the Bill which we would wish to draw out:

- Institutional arrangements for appointing Chairs are already equitable, transparent and highly accountable. Chairs are appointed through rigorous processes and, most importantly, the governing body is fully involved in the process. Introducing an appointment process directed by the Scottish Ministers and potentially involving an election, could reduce the number and quality of candidates; rather the reverse of what is suggested would be the benefit
- Universities are autonomous bodies with distinctive strategic plans and communities. They are also diverse in their mission and provision. Attempting to impose a ‘one size fits all’ approach to the composition of governing bodies and academic boards would affect autonomy and diversity, thereby damaging Scottish higher education which is a recognised asset to Scotland which is acknowledged nationally and internationally
- Introducing new legislation around academic freedom appears unnecessary
- The potential for increased Ministerial involvement in Scottish Universities’ governance in the future for which the bill provides, and the potential thereby for reclassification by the ONS could impact upon their financial position due to issues relating to retaining surpluses, limiting the ability to engage with commercial partners and entrepreneurial activity. It could also impact adversely on their charitable status and make them less attractive for philanthropic activity due to a change in taxation rules. If such changes were introduced they would severely disadvantage the Scottish HE sector compared to other UK HEIs

Our concerns are outlined in more detail in response to the Committee’s specific questions below:
The Education and Culture 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?

UWS, as part of the Scottish HE sector, has implemented the 2013 Code of Good HE Governance. This has provided institutions with a modern, clear and consistent framework for good governance whilst supporting individual autonomy and sector-wide diversity. Consequently, and as has been highlighted by the many responses to the consultation earlier in 2015, UWS does not consider that there are fundamental issues or evidence of significant concerns with HEI governance, including around modernity, inclusion and accountability. It is strongly felt that a period of settlement would be beneficial for the sector rather than introducing new legislation which incorporates principles already in place and being implemented that ensures Scottish HE governance is effectively ordered with transparent expectations of adherence to principles and guidelines. Therefore, we would argue that the Code is sufficient and that legislation and the potential for ministerial regulation are not required.

Universities and HEIs are clear that their autonomy is essential to their success as it enables them to directly respond to their students’ needs and to engage fully with the professions, industry and other parts of the national and international economy, including other universities and colleges. Institutions are fully aware that alongside this sits the need for effective governance and accountability in order that key stakeholders have confidence in higher education. Governance already has a strong focus on inclusion and accountability through the requirement to include a wide range of independent members, staff and students on governing bodies and to have in place appropriate policies regarding the equality and diversity. Evidence of this includes an increase in the number of female Chairs appointed across the sector. The Scottish Chairs have also confirmed their commitment to addressing gender equality in governing body membership. The One Year Implementation Report on the Scottish Code of Good HE Governance provides further examples of diversity and inclusion on governing bodies, including examples from UWS.¹

While we continue to keep the effectiveness of our governance arrangements under review and are not complacent about this, overall we would wish to reiterate a statement previously made by an individual respondent to the initial consultation: “….Fixing what is not broken seems a waste of precious government time.” We would be interested to understand further the evidence that there is a significant issue with the HE sector to justify such additional legislation at this time.

2. The extent to which the Bill

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

Diversity is a key aim of boards and the Code and Public Sector Equality Duty are seen as sufficient to support institutions in this objective, with no requirement for further legislation. The Committee of Scottish Chairs announced in April a commitment to a minimum of 40% of both genders amongst the independent members of governing bodies and the success of this goal will be reviewed in 2018. UWS already has 41% female membership on Court and Universities Scotland reports 32% female membership on governing bodies across the sector and an aim to continually increase this and champion equality and diversity. Three Scottish institutions are also participating in the ECU’s pilot Race Equality Charter Mark and others are exploring participation in this new initiative.

The Government claims that the Bill will assist in the creation of ‘an inclusive, strong and sustainable economy by enabling more transparent and inclusive participation in higher education governance’. We would argue that higher education governance is already transparent and inclusive and would invite the Scottish Government to clarify what evidence has led it to have concerns about this.

In terms of accountability, there is a good relationship between the chair and the board which is constructively challenging. There is real concern that potential ministerial regulation of court appointments could reduce the effectiveness of the governing body, damaging the relationship between the governors and the chair and this could have a negative impact upon HE governance.

There are currently no issues relating to efficiency regarding the engagement with the Privy Council when making any necessary constitutional changes. Certainly UWS experience has been that any amendments have been dealt with efficiently and effectively within an acceptable timescale.

We cannot therefore see that the Bill will improve matters significantly, given the comments made in 1 above. The new Code of Governance needs time to take its full effect and a review has been planned for 2016. The outcome of this review may reasonably be expected to continue to enhance and strengthen HE governance in Scotland.

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

Freedom of speech and expression, championed and demonstrated by institutions such as autonomous universities, is a hallmark of strong and confident democracies. Institutional autonomy is at the heart of universities, enabling them to develop their own mission and strategies appropriate and relevant to their particular range of students and communities as well as enabling them to provide a distinctive offer to commercial and professional organisations in terms of partnership, entrepreneurial activity and innovation.
This was acknowledged by the former Cabinet Secretary for Education and Lifelong Learning, Michael Russell MSP, less than a year ago in his ministerial foreword to the Consultation Paper on a Higher Education Governance Bill when he said “They are diverse organisations, characterised by a distinctive ethos with autonomy at the core.” This benefits the students and increases their chances of success and future employability and is particularly welcomed by the international market as it allows differentiation and specialisation. It also benefits the economy through offering a diverse range of activities and research across the country. The introduction of legislation that is designed to provide greater consistency will inevitably have an effect on institutional independence and would undoubtedly be detrimental as the benefits of autonomy referred to above would be adversely affected. It is also inconsistent with assurances given during the post-16 Bill that Scottish Government did not intend to interfere in ‘responsible autonomy’, as highlighted by Universities Scotland.

Universities and HEIs are not, nor should they be, identical. Their diversity adds great value to the HEI sector and how it is perceived internationally and therefore attempting to have a ‘one size fits all’ approach to governance could be potentially damaging to the sector.

It should also be noted that stakeholder engagement could be affected by any perceived element of political involvement in universities’ governance which may, in turn, damage the sustainability of institutions and the local, regional and national economy through reduced engagement. We would invite the Committee to consider this issue.

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

Currently lines of accountability between HE, public bodies and the Scottish Government are quite clear and there are many checks and balances to ensure that governance is handled appropriately. If a political dimension is introduced into the appointment of university chairs this could lead to divisions between sections of the board and between the chair and the board which would be damaging to institutions and the relationships between HEIs, the Scottish Government and relevant public bodies. Interfering with this structure could have a serious effect on the future of HE governance.

We would have strong concern that, following the introduction of the Post-16 Education (Scotland) Act, where there has been increasing centralisation of the Scottish FE sector, this HE Bill could result in greater control and centralisation of the HE sector which would diminish the overall strength and value in the current sector.

Given the potential for significantly increased levels of Ministerial control and direction of HE proposed in the Bill, we are concerned at the possible impact this might have in due course on the classification of Scottish HEIs as charitable bodies. Such a development would put the Scottish HEIs at a severe

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2 http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Bills/P16_Universities_Scotland.pdf
disadvantage when compared to other UK and International HEIs. We would strongly encourage the Scottish government to review this aspect of the Bill and ensure this would not be an unforeseen consequence in the future. For example, HEIs are currently able to hold surpluses – vital for development, in particular with capital projects that are critical to attracting staff and students – and engage in diversification of income and work streams as well as philanthropic activity. It could have considerable financial implications if Scottish HEIs were no longer able to engage in this kind of activity due to changes in their charitable status.

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

We have commented previously that is our view there is no compelling case for new legislation on HE governance. The bill presents a range of legislative measures, many of which are already addressed by the Scottish Code of Good HE Governance and therefore being implemented. Given that the Code was comparatively recently introduced and a report has been published on the developments it has engendered, we would be interested to hear what, if any shortcomings have been identified which require new legislation of this kind.

As we have already stressed, institutional autonomy is at the heart of universities. An attempt to impose consistency on a diverse sector made up of autonomous institutions is potentially difficult and undesirable. We would be concerned that the increase in control that the government wishes to introduce could severely affect institutional autonomy. Currently, the system works effectively and in a timely manner. It would seem to us that adding a further layer of legislative complexity and duplication is unnecessary. We would have concerns that it could also cause delays and obstructions if legislation needed to be amended or supplemented. Introducing legislation of this kind naturally makes institutions concerned that this could signal an intention to reduce autonomy further in the future – a move that universities would strongly oppose for the reasons given earlier. Autonomy is at the heart of universities and ensures that they are able to provide the best quality of provision for the students in their part of the sector.

There is significant potential for conflicting requirements of the Bill and statues/ordinances of institutions. This would require review and amendment of HEIs governing instruments thereby adding to the administrative burden on institutions and other bodies who must approve such changes. This would also bring associated financial and timescale issues in order to amend governing instruments. We believe the estimates provided in the financial memorandum for such activities underestimate the costs involved as they do not take account of HEI staff time. We do not believe that is good use of HEI or government time and resource given that the system works effectively at present.

One individual respondent to the initial consultation document indicated “good governance is not achieved through legislation, but rather through continuous examination and improvement of practices by institutions”. UWS shares this view and would endorse the comments above about planned review of the
implementation of the Code and the further enhancements and sharing of best practice this can be expected to deliver.

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**

We are concerned about the proposed power of the Scottish Ministers to engage with the process of appointment of chairs of HEI governing bodies, their terms of appointment and possible remuneration and the impact such powers could potentially have to exert an element of control over an HEI. We are also concerned about the potential powers for Ministers to revisit and change regulations in the future. This undermines institutional autonomy and independence and would be of significant concern to this institution.

We strongly believe that increasing the number of candidates, in particular from different backgrounds, is important and should be the aim of any good governance arrangement. However, there is a real concern that introducing an election element in the selection process for the appointment of chairs could result in a reduced, rather than an increased, number of applications. Many suitable potential candidates would be concerned that an election would lead to failed candidacy becoming public knowledge and consequently they may choose not to engage in the process, thus depriving the HE sector of their expertise. This is something that should be seriously considered by the committee.

We therefore have a real concern that the final appointment of a chair by an electorate rather than the governing body itself could create a tension between the two and reduce the effectiveness of decision making. The chair needs to have the full support of the governing body and this kind of change could seriously damage that level of confidence, thereby potentially damaging the governance of higher education institutions.

It should be noted that this kind of approach was previously been trialled within the health sector but NHS boards did not find that elections broadened the pool of those appointed and the scheme was abandoned in 2013. It may be that other options could be considered as part of the appointment process, for example, including other Universities in the recruitment process, developing core criteria which appointment panels could augment for their own institution etc. The planned review of the Scottish Code of Good HE Governance could consider and promote existing good practice on the appointment of chairs which might be utilised more widely in the HE sector.

We do not object to the advertisement of vacancies for chairs or court members (indeed that is already our practice), the appointment of recruitment consultants
to undertake the process and the engagement with a wide range of stakeholders on the interview panel. However, it should be stressed that, once again, the Code of Governance has already made enhancements and ensured a consistency of approach to appointment procedures which requires an open process to be held for the appointment of chairs and governing body members. The Bill does not therefore appear to add further value to this area of practice.

Currently we have calculated the involvement of the chair to be around 30 days per year. However, the financial memorandum associated with the bill suggests costs to institutions if chairs were remunerated (which is not our practice at present) would equate to 6 days. We would suggest that it is highly unlikely that any chair would only ‘work’ with their institution for this limited amount of time and therefore the cost implications would need to be significantly increased. It should also be noted that the cost to institutions of debating and responding to the potential introduction of the Bill is already into thousands of pounds and will continue to increase as the Bill makes its way through the relevant channels. As noted above, institutions will also be required to make changes to Senate and Court constitutions and associated documents and regulations which would also be costly in terms of staff and legal advice time.

With regard to the remuneration to the chair of the governing body, the Scottish Code of Good HE Governance already provides for remuneration of members subject to certain considerations. Whilst the potential remuneration for a chair may bring a wider range of candidates forward and therefore broaden the outlook of the board this is not guaranteed. Attracting candidates from less financially rewarded backgrounds is a positive feature, but there is no guarantee that providing remuneration for the post will have this effect.

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

We strongly favour social partnership and the involvement of a wide range of stakeholders in boards, but we are confident that this is currently in place and is reflected within the Code of Governance. The UWS Court includes lay members with a broad range of professional and life experience, elected academic staff, elected professional support staff and elected students. Universities Scotland has indicated in earlier responses that nearly a third of all governing body members are recruited from staff, students or the alumni and independent members are also part of the governing body structure, forming the majority.

The Scottish Code of Good HE Governance expressly reflects the existing legal requirement that charity trustees must act impartially for the institution’s good and exercise their responsibilities in the interests of the institution as a whole rather than as a representative of any constituency. It would be essential that if governing members were to be representatives of specific interest groups that they understood that their role as a governor and a charity trustee would be to act for the good governance of the institution and not as a representative of their particular group which could result in a conflict of interests. This is a real concern for institutions and it remains unclear in the bill and supporting documents how this governance tension would be addressed.
Trade union links with higher education are good and institutions have systems in place to engage with the unions in addition to the Joint Negotiating Committee for Higher Education Staff. Many trade union members stand for election to the governing body but this is in a different capacity to that of being specifically appointed as a union representative. We would have concerns that it may not be in the best interests of good governance for trade unions to be explicitly represented on the governing body as they could feel mandated to represent their union (which may be one of several representing institutional staff) position rather than that which is best for the Institution’s long term development. This could introduce conflicts of interest and would not sit comfortably when looking at the international dimension of HEIs; for example, Ireland removed compulsory union membership in governing bodies in 1997.

It should also be noted that the Scottish Code of Good HE Governance requires members ‘not to act individually, or as representatives of a constituency or in informal groupings’ and indicates that ‘… Members nominated by particular constituencies should not act as if delegated by the group they represent. No member may be bound, when speaking or voting, by mandates given to him/her by others, except when acting under approved arrangements as a proxy for another member of the governing body’. This is in direct conflict with the Bill; we would ask how the Government intends to deal with this issue. Indeed, the 7 Nolan Principles of Public Life requires office holders to act in terms of the public interest, not under obligation of other parties or conflict of interest and to be objective, impartial and make decisions without bias.3

While there may be value in seeking alumni to join the court, and indeed alumni often apply to serve on the courts of institutions where they engaged with their own higher education, it is not necessary to legislate for such membership. Equally in may not always be possible to secure the services of an alumnus who also has the requisite skills and attributes to fill a particular skills gap in any given vacancy at a given point in time which might leave a governing body inquorate under these proposals. It should be for individual universities to determine the specific membership requirements of its governing body taking into account the needs of the institution and the balance of skills and attributes across the existing court membership.

Finally we note that to include the various specific categories of membership proposed on the governing body could cause a conflict with the need to have no more than 25 members on a governing body as indicated in the Governance Code. Incorporating the proposed categories of membership as prescribed by the bill could compromise the ability of HEIs to co-opt or appoint members to address any identified gaps on the skills matrix maintained by the governing body to ensure that there is an appropriate balance of skills and experience to enable the governing body to meet its primary responsibilities.

• To require HEIs to ensure that their Academic Boards are comprised of no more than 120 people, and include various persons

Institutions are hugely diverse and vary considerably and therefore their Academic Boards (or Senates) reflect this. There is also a degree of flexibility in membership which allows institutions to include or co-opt members as appropriate and aligned to their mission. By their very role and purpose to consider the academic work of the university, academic staff are at the core of Academic Boards’ membership. Attempting to introduce consistency across the board interferes with institutional autonomy and is not considered to be acceptable and would limit the ability of boards to be responsive and adaptable for the benefit of their own institution. It would be more appropriate to ensure that institutions should be able to set their own size and board composition based on the structure and needs of the institution and perhaps to handle this through the review of the Code of HE Governance.

As noted above regarding the composition of the governing body, we are concerned by the proposed future powers for the Scottish Ministers to modify by regulations the number, categories of membership and percentage of persons to be appointed to the HEI Academic Boards.

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

Academic freedom

The Bill also proposes to 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.

Academic freedom is central to the ethos of universities. It has been a principle in Scotland for many hundreds of years and is seen as a key success factor as it enables flexibility, diversity and the ability to decide individually how to provide the high quality provision appropriate to the relevant market in terms of educating students, undertaking research, innovation and knowledge exchange. The existing rigorous academic processes that are in place within HEIs as part of their autonomy and accountability support academic freedom. As Universities Scotland indicated in its response to the earlier consultation, “There is already a statutory basis, with SFC oversight, for the requirement for institutions to ensure the protection of the academic freedom of relevant staff in compliance with relevant legislation and its own governing instruments.” their implementation of the statutory protection of academic freedom is unnecessary, There does not appear to be evidence that the current 2005 Act restricts or has left open to threat the freedom ‘to develop and advance new ideas and innovative proposals’
and we would ask for further clarification of the benefit of amending the legal definition.

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”.

Academic freedom is already covered in the law, in HEI governing instruments and in contracts of employment and therefore providing a further layer of governance will add little of benefit. We cannot identify any specific academic areas that would be particularly enhanced by the additional legislation proposed.

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.

All universities have a desire to foster academic freedom and this is built into many of their processes. The area of difficulty may be when including post-16 provision as those providing HE in an FE context are not governed in the same way as HE institutions.

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 would expect to be clear that the views being expressed were those of the individual, rather than of the institution, but this is the case currently, and therefore changing the definition should not be necessary. It may be helpful to clarify the position and make it expressly clear that individuals exercising their academic freedom are doing so on their own behalf, and not representing their institution, but this has not been an issue thus far.
Submission from Dr Elizabeth Vallance

Dear Sirs

I write as a member of the General Council of the University of St Andrews in relation to the Higher Education Governance (Scotland) Bill due to go through the Scottish Parliament this autumn.

In my view, this proposed legislation would give government a dangerous level of control over the governance of all Higher Education Institutions in Scotland, including St Andrews. Enforcing conformity among what are very diverse institutions will mean that their ability to develop their individual strategies will be inhibited, with inevitable stifling of innovation.

Any changes to the governance of the Scottish Universities and Small Specialist Institutions should be handled through the forthcoming review of the Scottish Code for Good Higher Education Governance rather than through legislation. The Code allows for the evolution of good practice; legislation would inhibit it.

The Scottish Government taking unto itself powers to order the way in which members of University Courts are appointed (whether from Trade Union or other third party sources) is an unwarranted infringement of the institutional autonomy that is essential if the Scottish Universities are to be competitive in their pursuit of excellence.

Representative democracy, in the form of the direct involvement of elected representatives of staff and students, is a more effective and less risky means of selecting Chairs of University Courts than direct election through a plebiscite of staff and students.

In short, this is a misguided Bill, an unnecessary and unwelcome state intervention and should be dropped altogether.

Yours sincerely,

Dr Elizabeth Vallance
Submission from Dan Venning

To The Clerk to the Education and Culture Committee, and Members of the Scottish Parliament:

I am writing you to urge you, in the strongest terms possible, to vote "No" on the Higher Education Governance (Scotland) Bill.

My name is Dan Venning, and I am a graduate of the esteemed University of St Andrews (M.Litt. Shakespeare Studies, 2005).

The bill, as it is currently written, is an attack on the academic independence of universities and on academic freedom, the very underpinning of today's universities, because it places the governance of universities under more political and bureaucratic influence. This will, without a doubt, lead to political influence in composition and programs and stifle controversial inquiry (the spirit of the university). As a consequence, Scottish universities will be unable to attract the most prominent faculty members, and the universities will lose their edge in a competing global market of universities. This will in turn lead to the best potential students choosing to study elsewhere (including outside of Scotland).

The bill, as written, is noble in aim. It seeks to impose uniform standards over the composition of Scottish universities. But this bill is not the way to go about obtaining that aim. It will only serve to cripple the very universities it seeks to bolster, and will be bad for institutions like St Andrews, and for the higher education and economy of Scotland on the whole.

Thank you for your consideration,

Dan Venning
M.Litt. St Andrews,
Submission from Brenda A. Waiwood

Dear Sirs,

I attended the University of St. Andrews from 1965 – 1970. I enjoyed my years there and received an excellent well rounded education. I would hate to see the University hampered in any way from continuing to provide such an education. It seems that this Bill would cause increased expenditure by the University in order to comply, and reduce its ability to attract the best academic faculty, staff and philanthropic donations. I fail to see the rationale for this legislation other than governmental interference and a desire to control the actions of the University.

Please drop this Bill from your plans,

Yours sincerely,

Brenda A. Waiwood
Submission from Dominic Waugh

Dear Committee Clerk,

I am writing to you in opposition to the proposed Higher Education Governance Bill due to pass through the Scottish Parliament in Autumn. I do not believe that new legislation should be passed enabling the Scottish Government to exercise greater control over the composition and governance of all higher education institutions in Scotland.

There is no need to enforce greater consistency among institutions and reduce their ability to adopt individual strategies. Extra regulation and bureaucracy will stifle enterprise and jeopardise the positive contribution that Universities make to the economy.

Many Scottish universities and their General Councils have strongly opposed these proposals, along with The Royal Society of Edinburgh, as well as various other bodies, have also been extremely critical.

As a graduate of St. Andrews University (and as such a member of the general council) and current student at Glasgow University I firmly believe this superfluous proposal should be dropped for the following reasons (among many):

- The autonomy of Universities will be greatly weakened and will be vulnerable to direct political influence
- The academic reputation of leading Universities will be weakened
- Universities will be less able to attract the best students, staff and funding
- It is unnecessary - at no point in my university career have I ever felt the need for Government input

Frankly, the fact that the Scottish Government is wasting money on these proposals during a state of economic austerity is ludicrous. I look forward to you dropping this bill and spending the money where it should be spent - or better yet, paying off some debt.

Should you have any questions regarding my letter, please do not hesitate to contact me via email reply.

Yours Sincerely,
SUBMISSION FROM DAVID WALLACE
HE Governance Bill: Education and Culture Committee Consultation

This submission is primarily addressed to question 2 of the Committee’s consultation. I hope that its brevity is appropriate, in the spirit of the consultation request. I write in a personal capacity, and would be willing to meet the Committee if this would be helpful to it.

1) The rational for the Bill is to improve modernity, inclusion and accountability in the HE Sector, on the grounds that the Scottish Code of Good Higher Education Governance is not a prescriptive set of rules. According to the Bill’s Policy Memorandum “This indicates that the Code will be insufficient in securing the level of consistency across the sector that is sought by the provisions in the Bill”.

2) The HE sector in Scotland is acknowledged to be strong, both in its scale and quality. Furthermore, the excellent diversity of HE institutions in Scotland is absolutely essential to meet the diversity of expectations of students, their future employers and society in general.

3) The sector faces major challenges, including continuing to increase diversity of student and academic bodies, the recruitment of staff of the highest quality, and international competition in research. All of these are vital for the well-being of the sector and its value to Scotland as a whole. It is a great strength of the sector that they are met in different ways and to different extents by the individual institutions which make up the sector.

4) It is completely unclear how the proposed legislation will help institutions to maintain and build on their individual strengths and reputations to meet these challenges.

5) Indeed, there are high risks that the Bill will have adverse effects on the sector, and threaten its overall value to the economy and society in Scotland. For example, its imposition of uniformity in Governance will not encourage the diversity of institution that Scotland needs. Also, HEIs with the highest international renown have a diverse range of funders, most outwith Scotland; one funder simply imposing its views on Governance may well be counter-productive with other funders. Adherence to the principles of good Governance is a condition of grant from the Scottish Funding Council, and this requirement could be strengthened by the SFC if it is deemed to be currently inadequate.

6) Most importantly, the Bill is a direct threat to the autonomy of institutions. This is not just a matter of principle: it will impact on the international competitiveness of institutions. Quality staff in Universities are highly mobile; indeed in recent years this mobility has been essential for the success of the HE sector in the UK, which has avoided the shortages of academics in e.g. STEM subjects through attracting significant international recruitment. The Scottish Government will be more sensitive than any to the inspirational motivation which autonomy and independence can bring, and the situation is the same in HEIs. Overall, leaders in HE, academic and non-academic alike, will not be attracted to a system where the Government can, in particular through the enabling nature of the Bill, control the composition of the Governing Body and the Academic Senate or equivalent of their HEI. The Bill will make Scottish Universities less attractive places for leading academics than e.g. institutions in England, to the detriment of the sector and its value to Scotland.

I hope that the Education and Culture Committee will exercise its responsibility in considering this Bill, and that the above will help it to do so.

David Wallace, 2 September 2015
Submission from John Wallace

29 August 2015

HE Governance Bill

I write as a former Principal of the Royal Conservatoire of Scotland, having retired from that post in September 2014. In my capacity as Principal, I was a shareholder in the Conservatoire, an *ex officio* member of the Conservatoire’s Board of Governors and Convenor of Academic Board.

The Bill is truly ill- advised, replete as it is with pernicious possibility – it is unnecessary and could well be counterproductive, particularly in the unique context of the Conservatoire. The Governance of the Conservatoire works – this Bill is an ill- conceived solution in search of a non-existent problem. If enacted, it will compromise institutional autonomy and stifle the distinctiveness that helps the Conservatoire (and the entire sector) to flourish.

Of course the Chair of the Conservatoire’s Board of Governors should be appointed on the basis of an inclusive and transparent process. However, the appointment should be made by the Board of Governors (which includes elected staff and students) rather than through some other form of election process that would inevitably lead to a very unwelcome politicisation of the role, which would be very divisive in a small and intimate artistic community, which is the Conservatoire. As a previous Principal, I understand more than most that the role of Chair 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 also have the confidence of the Board, and must maintain a position of authority with the Board and with the Conservatoire’s senior management. To be fully accountable to the Board, its Chair must be appointed by the Board.

Neither do I agree with the proposal that there should be mandated representatives of any particular interest group on the Board, particularly as the Board already includes elected staff and student Governors and a wider representative swathe of multifarious Scottish higher-level interest from the entire breadth of the country including its Highlands and Islands. Representing the evolution of Scottish cultural identity in the steaming melting pot of the twenty-first century should surely be the RCS’s Board’s job, and your proposed process consigns us to the nationalised rubbish heap that was the 1960s and 70s. You want to knock down the living, breathing ‘all human life is here’ edifice and replace it with mindless sterility. Death by committee is a well-known condition in Scotland. Why do you want to enshrine it in statute? This would be a mistake.

Please realise this and give the RCS the flexibility to evolve in the way that is best for an autonomous institution.
Dear Mr. Shevlin,

Re: Higher Education Governance (Scotland) Bill – Call for Evidence

The following are my comments in response to the Education and Culture Committee’s invitation of views on the proposed Higher Education Governance Bill:

1. The proposals being put forward immediately reduce the autonomy of HEIs, with the potential for further Ministerial influence / control through future regulations:

(a) Membership of Governing Bodies

Representative membership is a key requirement for Governing Bodies. However, specification of the numbers to be appointed under the various categories and the power of modification of categories and numbers given to The Scottish Ministers, allied to the requirement in the Scottish Code of Good Higher Education Governance that governing bodies have a majority of independent members may restrict individual institutions ability to structure their governing bodies in the way best suited to them, while still ensuring fully representative membership. The policy memorandum (SP Bill 74 – PM) states that there is a goal to “embed a level of consistency across the institutions”: while not explicitly stated, is the eventual goal to use powers of modification to fully stipulate both categories and numbers of membership leading to all institutions having the same governing body structure?

While having a governing body of no more than 25 members is considered to be a benchmark of good practice, there may be an argument that a (much) smaller governing body than one of 25 members may allow for more effective governance: the proposed measures may not allow the necessary flexibility for institutions to choose to move in that direction.

(b) Chairing member of Governing Body

The Governing Body is responsible for appointment of its chairing member; this will take into consideration the role of the Rector, if appropriate, and of a “Senior Governor” or “Vice-Convener”.

From the Scottish Code of Good HE Governance “One Year Into Implementation”: “The involvement of staff, students and independent members in the processes of university governance goes beyond membership of the governing body with the new Code expecting a role for them in the appointment of the most senior individuals in university governance including the Principal, the Chair of the governing body and its independent members.” I believe that the process for appointment of a chairing member should continue to be the responsibility of the Governing Body itself. The Bill gives Scottish Ministers the power to regulate on the term of appointment and, among other means of selection, “criteria for selection” and “holding an election from among candidates”. There is no indication given in the Policy Memorandum of the nature of any regulations which might be introduced, but the presumption must be that they would reduce the autonomy of the Governing Bodies in the appointment of chairing members.
(c) Academic Boards

The Bill provides authority to the Scottish Ministers to determine, by regulation, the size, categories of membership and category numbers for the Academic Board.

The Executive Summary to the November 2104 “Consultation Paper on a Higher Education Governance Bill stated:

“The overarching aim is to strengthen governance in the higher education sector in Scotland, ensuring that it remains fit for purpose. The Scottish Government wants modern, democratic and accountable processes to inform governance arrangements in higher education institutions in Scotland. The aim of the legislative change that is proposed is not to increase Ministerial control over institutions, but to support them to develop and refine their own governance systems by introducing a limited number of new statutory measures aimed at embedding greater consistency of approach.” (One wonders why it was actually felt necessary to deny that there was an intent to increase Ministerial control.)

In his Ministerial Foreword to the Consultation Paper, Michael Russell MSP wrote, in describing the Scottish universities, “They are diverse organisations, characterised by a distinctive ethos with autonomy at the core”, having said previously “Scotland can be proud of its higher education system”. It would appear that the proposed Bill does not “support them (institutions) to develop and refine their own governance systems” but is precisely increasing Ministerial “control” in certain ways, in order to ensure the objective of “embedding greater consistency of approach” - which seems to mean an objective of uniform approach. Should the approach to governance not take the stated diversity into consideration?

2. The correct balance may not have been struck between legislative and non-legislative measures.

Again, quoting Michael Russell, “Existing governance structures, influenced by introduction of the new Scottish Code of Good HE Governance, have served our higher education institutions well enough, but I am confident that the system is capable of further improvement.”

From Lord Smith of Kelvin’s Preface to the Governance Code “One Year Into Implementation” it is clear that the Code is already having a positive impact.

In his letter of July 9, 2015 to Angela Constance, Cabinet Secretary for Education and Lifelong Learning, Stewart Maxwell, the Convener of your Committee, asked a number of probing questions on the Bill. Perhaps the responses Mr. Maxwell receives will allow the Committee to determine if the issues involved are such that legislation is required or if they are more appropriate subjects for discussion in the review of the Code of Good HE Governance which is to take place in 2016.

Yours sincerely,

Jim Wallace
Dear Sir

I have considered the proposals contained in the above bill and am concerned about the impact these proposals could have on the University of Aberdeen, of which I am a graduate.

Aberdeen is placed in the top 200 of the World University Rankings, this implies a substantial degree of high quality governance, based upon legislation dating back to 1858. This, and subsequent, legislation has allowed the University of Aberdeen to develop a system of governance reflecting the views of a wide range of stakeholders. This system has proved time and again able to address issues of accountability, inclusion and modernity to ensure Aberdeen has maintained a place at the top table.

Aberdeen has an elected chairperson. The Rector is elected every three years by the students of the University, this has worked well in the past and continues to be fit for purpose. The Bill's proposals for an elected chairperson are unclear on the process, the constituency and the identification of suitable candidates. The real possibility exists of legal challenges to the outcome of any such election.

The Bill envisages two elected representatives of the student body in Court, Aberdeen students presently have four representatives. Likewise the proposal for graduates is two, Aberdeen graduates currently have four representatives at Court. Reducing representation of two major stakeholders is a strange way to improve the running of a university.

Aberdeen graduates have an active General Council which elects the Business Committee. This body meets regularly and has the right to be consulted on the running of the university. Senior figures from the University regularly attend General Council and Business Committee meetings and answer detailed questions on the affairs of the University as well as outlining proposals for the development of the university.
The University of Aberdeen is not perfect. Significant challenges exist which the University must find ways of addressing. There is much work to be done on improving the quality of research, raising even higher its standing in Scotland, the UK and the world, and improving the student experience, but the University of Aberdeen has identified these issues and is facing up to them.

It is right and proper that the Scottish Government and the Scottish Parliament are involved in a continual dialogue with higher education institutions in Scotland. It may be that the governance of some of these establishments is not fit for purpose but these proposals for a one size fits all system fail to recognise the many strengths of the existing system of governance at Aberdeen. They seem likely to produce a unified and centralised system which will not allow Aberdeen and other forward thinking Universities to build on their histories and traditions and create clear identities in a very competitive world market.

In short, the governance of the University of Aberdeen is not broken, why does this bill try to fix it?

Joseph Wallace
Submission from David Walker

Dear committee clerk,

I am a graduate of St Andrews University and a member of the General Council. I am writing to express my concerns regarding the proposed Higher Education Governance Bill that is due to pass through the Scottish Parliament in the autumn.

I believe the proposed legislation to be counter to current best governance practice, and it is superfluous.

In particular I am concerned that (i) the autonomy of the University will be greatly weakened and it will be vulnerable to direct political influence (ii) its academic reputation may suffer, (iii) it will lose its edge in an international market to attract the best students, the best academic staff and funding, (iv) this will be bad for St Andrews, for Scottish higher education, for the economy, for the country, and (v) it is unnecessary.

Please submit my concerns to the committee, and note my objection to the current form of proposed legislation.

Yours sincerely,
Submission from Mrs Alison Walker

Higher Education Governance (Scotland) Bill

Dear Sir or Madam

I am writing to express my opposition to The Higher Education Governance (Scotland) Bill.

As a Scottish graduate of St Andrews University, I am concerned that the University’s autonomy would be greatly weakened by this unnecessary bill and that it would be open to direct political influence.

There is also the concern that the reputation of the University would be lessened, leading to a loss in its ability to attract the best students, staff and funding.

I believe that this bill would be bad for the higher education system in Scotland, as well as the economy and country as a whole.

Yours
faithfully

(Mrs) Alison Walker
Dear Sirs and Madames

I am writing in relation to the higher education governance bill and the changes that this will bring to the leadership and management of our nation’s universities.

My reading of the proposals is that all of Scotland’s universities are to now be subject to a standardised set of regulations on the appointments of governing bodies and councils and for the selection of university leadership positions.

I strongly believe that to maintain our country’s higher education sector at the highest levels that we need to always be looking for reform and innovations not just in the content of courses and the range of subjects covered but also in the leadership and management of these institutions. The various universities in Scotland employ a range of management structures that provide potential for development and evolution to best fit their requirements. With arrangements in each institution differing dependant on their size and composition. Best practice can then be migrated to other institutions either in whole or in the parts where they are most successful.

To my mind a government bill standardising university governance will remove any room for innovation in this area as all will have to directly conform to a set profile. Therefore improving governing structures in the future will have to be done centrally and universally. Would there be room for the University of the West of Scotland to change their governing council to respond to changing requirements without the agreement of the government at the time? What if the challenges one university faced differed from those of another? Is one size fits all the answer?

A second strong concern is over the use of enabling legislation. Does this mean that whilst at an initial stage the changes might be limited whilst subject to select committee scrutiny and a public reading. But if the legislation allows for future changes to be made by the government without a further consultation. Are we not opening the door to a whole range of leadership changes? The appointment of University chancellors by government? This feels very much like the thin end of the wedge of a move to make university leadership become political appointments.
Finally on the current reading the governing councils will have a core group of representatives from the staff, union, student and alumni. I strongly believe in the benefits of dynamic unionism but question if this allocation is correct. The proposal is for 2 union representatives and two staff representatives. I presume these are drawn from the same body of workers? What if union membership is low at a particular institution? If the staff representatives are elected are the union representatives, or are they appointed centrally?

I hope these questions are of use in your considerations

David Watt
As a resident of Aberdeen and a graduate of the University of St Andrews, I would like to express my deep concerns over the forthcoming Higher Education Governance Bill.

As you are aware this bill, as currently proposed, will impose significant changes on the courts, governing bodies and academic boards of Scottish universities and on the overriding concept of Academic Freedom.

My concerns are as follows:-

1/ The autonomy of Scottish universities will be substantially reduced and they will become subject to direct political interference by ministers, without even the safeguard of parliamentary scrutiny.

2/ This potential for interference will erode the academic freedom and independence of the Scottish universities with consequent damage to their academic reputations at the national and international levels.

3/ The damage to academic reputations will impair the ability of the Scottish Universities to attract the best students, academic staff and funding, again at both the national and international levels.

4/ The practical challenges of complying with the proposed legislation will distract the academic and financial resources of the Scottish Universities away from their primary purpose as seats of learning and research.

5/ The damage inflicted on the Scottish universities will have a detrimental impact on the wider Scottish economy, because these universities are essential as suppliers of an educated workforce and theoretical research to Scottish industry. In addition, one should not forget that they fulfil an important role as a source of foreign exchange.

6/ There is no compelling explanation of the problem that the legislation is intended to resolve and that it is, therefore, unnecessary.
In short, the Scottish Parliament must keep in mind that the freedom of institutes of higher education is a vital component of a free society and it must accept that such freedom requires that these institutions be immune from ministerial and even parliamentary interference.

Richard Wass MA
Submission from Mr Derrick Watson

Dear Sirs,

I write as one who has attended the University of St Andrews and UHI (Sabhal Mòr Ostaig) and whose son has attended the University of Glasgow and Glasgow School of Art.

I do not support the proposals in this Bill and fully endorse the points made by the Royal Society of Edinburgh in their response of February 2015. I cannot see any purpose in this Bill other than to deepen political control of universities and to erode their autonomy, which I deplore. As far as St Andrews is concerned, I am particularly concerned that a consequence of this measure would be a diminution of the university's reputation internationally with consequent detrimental effects on standards and financial support.

Yours faithfully,

Derrick Watson M.A.
I urge the MSPs to consider very carefully opposition from the Universities and other significant bodies to the terms of the bill. To disregard the considered views of these bodies, MSPs would indeed be exceedingly arrogant and irresponsible.

Our universities and specialist colleges have reputations, relevancy and responsibilities well beyond Scotland: to constrain their capacity to develop their individual reputations and contribution to the diversity of need in learning, research and teaching would be excessively narrow minded and contrary to Scotland's historical contribution to intellectual thought and to educational, cultural, scientific and technical evolution.

It would be extremely damaging to pass the bill without changes that will allow institutions of higher education a more than significant degree of autonomy and self determination as to how each individually can respond to and provide for the needs of its students and wider communities within Scotland and, more importantly, worldwide.

To allow politically inclined, non-academics in government or civil service to have any powers potentially determining levels uniformity in the realms of higher education would inevitably be dangerously parochial, short-term, short-sighted and stultifying.

The Scottish Parliament must avoid all possibilities for present or future straight-jacketing Scotland's institutions of international significance.

Ian Watson
Submission from Mr Charles Warren

Dear Madam or Sir,

I am writing to express my views concerning the Higher Education Governance (Scotland) Bill. I write as a Senior Lecturer and a former Senate Assessor on the Court of the University of St Andrews.

The stated aims of the Bill - transparency, accountability and inclusivity - are unexceptionable. However, I find many of the specific proposals deeply concerning. The commitment in the consultation to respect the autonomy and diversity of institutions has been replaced in the Bill with an essentially 'one size fits all' approach which is completely inappropriate and potentially damaging for such a diverse sector. Thus far, there has been no compelling explanation of the problem that the legislation is trying to solve. Given that the HE Code of Governance has only recently been introduced, and that there is a commitment to review it in 2016, it is wholly premature to bring forward legislation at this juncture. Next year's review will provide an evidential basis for deciding what, if any, governance problems warrant a legislative solution. Taking forward the proposed legislation at this time, prior to such evidence becoming available, is misguided, flawed and unnecessary.

The Bill risks undermining Universities’ autonomy by giving future Governments significant potential influence and control without the safeguard of parliamentary scrutiny. In turn, this not only represents a threat to Universities’ ability to ensure academic freedom and to act as sources of independent thinking, but could also damage Universities’ academic standing and jeopardise the very substantial benefit that they currently deliver to the national economy.

Furthermore, the Bill has serious financial implications. I am concerned that the Government has significantly underestimated the costs of compliance, in particular in relation to proposals for remuneration of chairs and the amount of work to implement the legislative change through reviewing, consulting, amending and implementing University ordinances. There would also be significant opportunity costs to the Scottish economy.

In essence, therefore, I fear that the Bill will have a wide range of unintended but very damaging consequences, including:
- compromising the strong academic reputation of the Scottish HEI sector
- undermining the ability of Scottish universities, operating in a global market, to attract the best students, the best academic staff and funding.

These outcomes will clearly be detrimental for Scottish universities, for the economy and for the country as a whole. I therefore urge you to postpone any legislation until after next year’s review of the Code of Governance, and then to revise it thoroughly in the light of the evidence which will then be available. Only legislation which is evidence-based and clearly justified will command the support and confidence of the sector.

Yours faithfully,

Charles Warren
Submission from Peter Witham

Dear Sir or Madam

I am writing to express my deep concern regarding the proposals of the Scottish Government regarding the Higher Education sector in Scotland, proposals which, if implemented, could threaten six hundred years of accomplishments in Higher Education. Scotland has a proud recording of nurturing its universities and developments and over the last decades has created a sector notable in its diversity: from modern, technology oriented institutions, to medieval foundations steeped in a tradition of academic excellence. This diversity cannot exist in the face of greater centralised control.

In the opinion of many eminent commentators - political and entrepreneurial, as well as academic commentators - the legislation is not only harmful; it is superfluous.

The Scottish universities and their General Councils have strongly opposed these proposals. The Royal Society of Edinburgh, as well as various other bodies, has been extremely critical.

The Higher Education Governance Bill offers exactly such a threat. It is a threat to the autonomy of the Scottish universities, to their creativity, their diversity and to their originality.

The proposal for Chairs of governing bodies to be elected by people from outside, is an invitation to political and / or commercial interference in the affairs of research and education institutions. This is most inadvisable.

I urge the Education and Culture Committee to reconsider the whole issue in its September meeting, and to send the Bill back to the drafters for a profound rethink.

As somebody who worked for thirty-three years for the United Nations, I spent most of my career living and working in developing countries, with a particular focus on strengthening institutions of national and local governance. I learned that, along with other factors, an independent higher education sector is key to good national governance. Working with local universities was a vital factor for the UN's work in developing and measuring national human development progress. We could not have performed this function without the independence of such institutions - nor would we have wished to do so. It is sad to think that Scotland might now be on the verge of abandoning this principle.

I hope it is not too late for a fundamental reappraisal of these proposals.

Yours faithfully,

Peter Witham
I am a graduate of St Andrews University (MA 1969) and I wish to express my strong opposition to the above proposed legislation.

In the first place I see no need for this. Secondly, I am opposed to the creation of more bureaucracy which is bound to come at a high cost to us taxpayers. Thirdly, the proposed legislation will impinge on the autonomy of higher education establishments such as St Andrews University, by trying to impose a "one cap fits all" set of regulations. If universities are to thrive and to promote new research and innovative teaching methods they must have autonomy and freedom to act as they see fit, unhindered by Government busybodies.

A bill such as this one would no doubt be acceptable in a communist or Nazi state, where independence of thought must at all costs be stifled, but it is wholly unacceptable here in the United Kingdom.

Please record my strong opposition to this bill, which I sincerely hope will not be passed.

Jonathan Wilson
Education and Culture Committee
Higher Education Governance (Scotland) Bill
Submission from Susan Wilson

As a graduate of St Andrews University and member of its General Council, I am writing to you to express my objection to The Higher Education Governance (Scotland) Bill.

The benefit I have received from attending St Andrews University is huge. This Bill would weaken the University's independence which could lead to its academic reputation suffering. This would be a disaster, not only for the University but also for Scotland.

I hope this Bill will not be passed.

Susan Wilson
September 2015
Submission from Avril Wright

I am writing to oppose the plans in this bill to impose government control over the composition and governance of educational bodies including the University if St Andrews which I attended and graduated from in 1976.

The proposal would significantly waken the autonomy of the Scottish Universities which has served them well for hundreds of years and it would introduce a level of political influence/interference which is entirely inappropriate and unnecessary.

It is likely that the academic reputation of all Higher Education establishments would be weakened if this Bill went through and this would have a detrimental economic impact as well as impacting on a University’s (like St Andrews) ability to attract the best students and academics.

I would urge you to remove this bill and leave things as they are thus ensuring the quality of Higher Education in Scotland free of political interference and maintaining current high academic standards.

Avril Wright
Submission from Ian C Wright

THE HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

I oppose the implementation of the Higher Education Governance (Scotland) Bill as firstly, I fail to understand the need for the proposed changes particularly as the HE Code of Governance, only introduced in 2013, is to be reviewed in 2016.

Furthermore, Scotland’s HE establishments (in particular St Andrews University) depend on independence and institutional autonomy to ensure their successful performance. The new legislation will exert direct political influence over all HE institutions in Scotland and thereby reduce institutional autonomy and increase bureaucracy and regulation. Consequently, particularly in the case of St Andrews University, its global competitiveness will be jeopardised, as will its ability to attract the best academic staff and best students and to promote relationships with business and charitable funders.

Ian C Wright  BSc Hons. StAnd. Zoology

P.S. I have voted SNP for 49 years
Submission from Professor Robert A Wood

Sir/Madam

I wish to offer respectful advice to the Scottish Government that the well intentioned legislative proposals to strengthen University Governance will not have beneficial effects, and will damage the credibility of Government. In these modern times the Universities, and those who lead them, have strong sociological awareness. I urge Government Ministers to interact with the Principals Group to explore issues that concern Government and in that way get a fuller understanding of the best way to find common causes. Edinburgh, it will be clear, is a world class University in the top rank internationally in research productivity and in the attraction of UK and international research funding. Sir Timothy O’Shea, assisted notably by Sir John Savill, has overseen the continued rise of Edinburgh’s reputation; this feeds through to the enrolment of the very best undergraduates, and nearly rivals Oxford. Dundee has in a decade become internationally recognised in bio science and the imaginative step of promoting Sir Pete Downes to Principal offers a prospect of Dundee extending its areas of expertise; Dundee is very highly rated for student experience as surveys confirm. Sir Ian Diamond is getting Aberdeen in order and is eliminating opposition to change and modernisation, he also has a personal track record of working with Government at UK level. St Andrews is a magnet for international student recruitment and has a very popular student experience. I will say nothing of the others but all have positive aspects and ambitious plans.

There are certain to be better ways of creating Government /University cooperation that will be creative and productive than the rather doctrinaire legislative proposals that will simply impede and antagonise. My key proposal is for Government to work with the Principals Group and perhaps a senior civil servant might be delegated to attend that group and lead Government liaison. A second proposal is for Government to delegate a civil service representative to join each University’s management structure each with a free role to develop involvement and cooperation. Such posts, ideally held for two to three years, would be training slots for future stars to move through and would be a cost saving in ways that could be explained but may well be obvious.

I feel sure that the Chief Minister and her colleagues would be able to abandon the proposed legislation if alternative and functional influence could be secured. It would not be a case of the Government appearing weak. If the proposals go through as currently intended Government will be weakened. Parliament must be wise and entrepreneurial. It is unfortunate that things have gone so far down the wrong track and I am surprised that this is the case given the academic credibility that many MSP’s and Ministers have

With good wishes

Professor Robert A Wood
Submission from Ms Olga Wojtas
Higher Education Governance (Scotland) Bill

I have been a higher education journalist for over 30 years (I was Scottish editor of The Times Higher Education until 2009) and I have also just demitted office as a court member of Queen Margaret University after six years.

Since the universities were devolved in 1992, a key principle of academic freedom has been that Government should be at arm's-length from running them, with the Scottish Funding Council acting as a buffer body. It is deeply concerning that this Bill would increase Government control, endangering that academic freedom which enables them to operate without fear of political interference.

I am particularly dismayed by the Bill's proposals on the composition of governing bodies. I have lengthy experience of higher education institutions' governance, including practical experience at QMU, and can see absolutely no need for this. Nor has the Government provided any rationale for its proposals. This strikes me as a classic example of "If it ain't broke, don't fix it." The strength of our HE system is its diversity, and the proposals undermine that. The HEIs themselves have already adopted a Scottish Code of Good HE Governance: their public funding is dependent on compliance with this code, but unlike the Bill, it does not destabilise the distinctiveness of different institutional issues. This legislation is unnecessary. The institutions themselves are pushing not just to maintain standards but to raise them, and the code ensures that what they do is accountable, transparent and inclusive.

The proposal for trade union nominees is misconceived. Governing bodies already include elected trade union members but, like all members of the governing bodies, they serve as individuals, not as representatives. I write as a trade union member: I have been a member of the National Union of Journalists throughout my career and believe firmly in unions' importance. But in terms of serving on governing bodies, we leave any vested interests at the door and join together as a group of "critical friends" all working to do our best for the institution.

My experience of QMU is also of a proactive commitment to diversity, including gender balance. I served on both the nominations committee and equality and diversity committee for several years. The nominations committee is responsible for interviewing and
recommending court members, taking account of the balance of skills and attributes that are needed, and when seeking out new court members, the university is explicit about its commitment to diversity.

I would urge the Committee to ensure that these damaging proposals are not implemented.

Olga Wojtas
Higher Education Governance (Scotland) Bill – Voice Scotland response

Q1 – What do you consider to be the existing problems (if any) with higher education governance, particularly around modernity, inclusion and accountability?

Many of the current governance structures developed historically during times when democratic accountability was less prized as a feature of public life, so this aspect of governance tends to be underdeveloped, particularly in terms of inclusion, diversity and representativeness. Although the new Scottish Code of Good Higher Education Governance has led to some significant improvements, such improvements are patchy across the sector as they lack the force of law which the current proposals would address. As current governance structures sometimes embody outmoded conceptions (particularly as regards composition), this can lead to decisions which are more management-led rather than in the interests of the whole collegiate community. Sometimes, the over-representation of management and business interests can lead to strategic decisions being taken which emphasise commercial and administrative interests over academic and educational priorities, and the lack of democratic accountability often means that such decisions are difficult to question or influence. Recent examples would include cutting courses, closing down departments, targeting particular faculties for staffing reductions, and awarding disproportionate pay rises to higher management personnel at the expense of the wider workforce.

Q2(a) – The extent to which the Bill will improve higher education governance, particularly in the areas above.

Voice Scotland welcomes the move towards the appointment of elected chairs as a matter of principle for all HEI governing bodies and the transparency and accountability this achieves. A good balance is also achieved in ensuring an increased voice for staff and students on those bodies. In terms of the selection of chairs, we submit that this detail should have formed part of the Bill; we look forward to having sight of the draft regulations from Ministers in due course.

The Bill appears to make what may be an impractical distinction between academic and support staff (requiring one person to be appointed from a trade union representing academic staff, and another from a union representing support staff). As many of the relevant trade unions (including Voice Scotland) represent all categories of staff, such a distinction may be difficult (and irrelevant) to implement in practice. Also, some aspects of the Bill are too vague to comment on intelligently – e.g. the reference to the development of “as consensual a model for elected chairs as possible” allows for no insight into how elections would be run or even who would make up the electorate.

It is submitted that votes should reflect the individual students and staff members of the institution. It is submitted that it would be difficult to set boundaries on who externally should be entitled to vote and conflict of interest issues would potentially arise. Voice Scotland are therefore of the view that voting rights are best restricted to those internal to the institution to ensure transparency and clarity.

It is submitted that it would be appropriate for the “staff-side” of the Board to be comprised of staff representatives on a pro-rata basis to reflect trade union membership levels, to ensure that this accurately reflects the staff body represented.

Q2(b) – The extent to which the Bill may alter the higher education sector’s current level of autonomy.

As public institutions receiving funding from the public purse, it is only right that open, transparent and accountable governance processes are in place.

Whilst there is always a risk that an increase in statutory obligations may reduce organisational autonomy, autonomy is not an end in itself and there is no merit in preserving antiquated arrangements which disenfranchise large sections of the academic community in inscrutable and undemocratic ways for the sake of defending autonomy. Any kind of accountability limits autonomy, but justifiably so, especially when it is recognised that the higher education sector is funded by so much public money. If the proposed legislation succeeds in making governance more democratic,
accountable and transparent, this should help to maintain autonomy by removing the need for Ministers to intervene directly in the decision-making processes of universities.

Q2(c) – The extent to which the Bill may affect lines of accountability…

Answered in 2(b) above.

Q3 – Has the correct balance been struck between legislative and non-legislative measures? Are any further measures needed?

A combination of legislative and non-legislative measures, in order to ensure change occurs and to support that change through guidance measures, is appropriate. With regards to the Scottish Code of Good Higher Education Governance, which was introduced in 2013, care should be taken to ensure that any changes to practice within institutions under that code which are better than that demanded under the terms of the legislation are not reversed in order to meet the requirements of that legislation.

Q4 – The Bill proposes a number of specific changes…provide your views on the merit of each of these proposals.

The proposal to require chairs to be appointed according to a process yet to be set out in regulations is difficult to respond to (see response to 2a above). The detail should be part of the Bill. We agree with the proposal to require HEIs to include both student and trade union governors, but some of the detail may need amending or clarifying for the purposes of practical implementation (see response to 2a above). We agree with the general thrust of the proposals for the composition of academic boards although, whilst we are aware that currently some of the more ancient universities have up to 120 members on their academic boards, this cannot make for effective decision-making; therefore, if it is thought necessary to specify a maximum size, a more optimal number should be given – otherwise, it may be better left unspecified.

Q5 – The likely practical effect of these provisions…

Enhancing accountability and inclusion is likely to lead to more effective decision-making, which can be expected to have positive benefits for all aspects of a university’s operations, including teaching, learning and research.

Q6 – Are there likely to be any significant constraints…on academic freedom…?

There are many constraints on academic freedom. Some of these constraints may be more imaginary than real, although people will act on their perceptions, so both real and imaginary constraints may have equal influence. Constraints such as organisational ethos, hierarchical management, performance appraisal structures, media pressure and security of tenure may all have an effect, which is why it is important to strengthen academic freedom and safeguard it in law.

Q7 – Are there situations in which relevant persons can exercise their academic freedom clear…?

Academic freedom should not be limited to specific work roles, as academics often have wider public profiles and so may be called upon to express views outwith the institution.
Delegated Powers and Law Reform Committee

Higher Education Governance (Scotland) Bill at Stage 1
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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

Richard Baker
Scottish Labour

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meetings on 8 and 29 September and 6 October 2015 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Higher Education Governance (Scotland) Bill at Stage 1 (“the Bill”)\(^1\). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill\(^2\).
Overview of the Bill

3. The Bill was introduced by the Cabinet Secretary for Education and Lifelong Learning on 16 June 2015. The Bill makes provision in relation to the chairmanship of governing bodies of higher education institutions (“HEIs”) and the composition of and appointment to governing bodies and academic boards of HEIs; and on the academic freedom of persons engaged in teaching or research at post-16 education bodies.

4. Part 1 of the Bill makes provision in relation to the governance arrangements of HEIs. For the purposes of the Bill, an HEI is a university, or an institution providing higher education designated by the Secretary of State, which is also a “fundable body” (i.e. a body which may receive funding from the Scottish Further and Higher Education Funding Council). The Open University is specifically excluded from the definition of HEI in the Bill.

5. Chapter 1 of Part 1 makes provision in relation to the governing body of an HEI (i.e. the body responsible for the management and administration of the HEI). Chapter 1 provides that the chair of the governing body is to be appointed in accordance with regulations made by the Scottish Ministers, who may also by regulations make provision as to the remuneration of the chairing member; sets out the requirements as to composition of the governing body, and gives the Scottish Ministers the power to modify by regulations such requirements; provides that the process of election and nomination to the governing body is to be conducted in accordance with rules made by the governing body; and specifies that the validity of the proceedings of the governing body is not affected by any defect in appointment or vacancy in membership.

6. Chapter 2 of Part 1 makes provision in relation to the academic board (also known as the Senate) of an HEI (i.e. the body responsible for the overall planning, coordination, development and supervision of the academic work of the HEI). Chapter 2 provides that the academic board is to consist of no more than 120 members, and gives the Scottish Ministers the power to modify this number by regulations; sets out the requirements as to composition of the academic board, and gives the Scottish Ministers the power to modify by regulations such requirements; provides that the process of election to the academic board is to be conducted in accordance with rules made by the governing body; and specifies that the validity of the proceedings of the academic board is not affected by any defect in appointment or vacancy in membership.

7. Chapter 3 of Part 1 makes provision as to regulations made under, and defined terms used in, Part 1. Power is given to the Scottish Ministers, by regulations, to modify the definition of a “higher education institution” so as to include or exclude a particular institution.
8. Part 2 of the Bill makes provision in relation to academic freedom. It amends section 26 (academic freedom) of the Further and Higher Education (Scotland) Act 2005 to strengthen the protection of academic freedom for persons engaged in teaching or research at post-16 education bodies (this includes fundable HEIs and further education institutions, including the Open University). The amendment also extends the meaning of academic freedom to include the freedom to develop and advance new ideas and innovative proposals.

9. Part 3 of the Bill makes provision as to ancillary regulations, consequential modifications and commencement.

Delegated Powers and Law Reform Committee
Higher Education Governance (Scotland) Bill at Stage 1, 59th Report, 2015 (Session 4)

Delegated Powers Provisions

11. The Committee considered the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the delegated powers in the following provisions:

- Section 20 – Ancillary and consequential provisions
- Section 22 – Commencement.

12. At its meeting on 8 September, the Committee agreed to write to the Scottish Government to raise questions on the remaining delegated powers in the Bill. The correspondence is reproduced at the Annexe. The Committee’s comments and recommendations on these powers are detailed below.

Section 1 – Appointment as chairing member

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Provision

13. Section 1 provides that the chairing member of the governing body of an HEI is to be appointed in accordance with a process set out in regulations made by the Scottish Ministers. Such regulations may include (in particular) provision for: periods of appointment and whether reappointment is possible; means of selection for appointment; and reimbursement of candidates expenses.

14. Section 1 also gives examples of possible means of selection, as follows: public advertisement; criteria for selection; interview of candidates; shortlisting of candidates; and holding an election from among candidates. Before making such regulations, the Scottish Ministers are required to consult each HEI to which the regulations relate and such other persons as the Scottish Ministers consider appropriate (section 3).

Comment

15. The Delegated Powers Memorandum (“DPM”) produced by the Scottish Government explained that, while the Government considers it crucial that the Bill includes a minimum requirement for the chairing member of a governing body to be appointed in accordance with a process set out in regulations, it is not considered necessary to set out the detailed process in primary legislation. The DPM noted that the regulations could potentially include a considerable amount of detail, which it is thought could be better provided for in secondary legislation. The DPM also explained that the power to make regulations will provide flexibility to
allow for modification of the process to reflect variations in practices within the higher education sector, without resorting to primary legislation.

16. In terms of procedure, the DPM explained that the affirmative procedure is considered appropriate, since the process of appointing a chairing member will be a key process for HEIs. The DPM also noted the requirement for consultation with stakeholders before the power is exercised.

17. While generally the Committee is content that both the affirmative procedure and the requirement for consultation are appropriate in these circumstances, given the significance of the appointment of chairing members for HEIs, the Committee notes that the appointment of chairing members is a key policy in the Bill and is a matter of considerable controversy amongst HEI stakeholders.

18. The Committee therefore sought further explanation from the Scottish Government as to why it is considered appropriate for the key provisions as to the appointment of chairing members to be postponed to secondary legislation, and whether such key provisions could instead be set out on the face of the Bill and therefore be made subject to full Parliamentary consultation and debate, with the detail of the process to be set out in regulations.

19. The Scottish Government’s response reiterated that it is not considered appropriate for the detailed process for the appointment of chairing members to be set out on the face of the Bill, this being considered more appropriate for secondary legislation. The Scottish Government did however indicate that, influenced by continuing dialogue with stakeholders on this matter, it is considering whether it might be appropriate to bring forward an amendment at Stage 2 setting out a provision on the face of the Bill for a single model for the appointment of elected chairs, although the Scottish Government considers that it might still be more appropriate for some details of the process to be left to regulations.

20. While the Committee accepts in principle that the detail of the process for the appointment of chairing members could be postponed to secondary legislation, it considers, since this is a key policy in the Bill, that it could be more appropriate for the key provisions as to the appointment of chairing members to be set out on the face of the Bill and therefore be made subject to full Parliamentary scrutiny.

21. The Committee notes that the Scottish Government, influenced by continuing dialogue with stakeholders on this matter, is considering whether it might be appropriate to bring forward an amendment at Stage 2 setting out a provision on the face of the Bill for a single model for the appointment of elected chairs. The Committee will return to consider these powers after Stage 2.
Section 2 – Remuneration to be payable

Power conferred on: the Scottish Ministers  
Power exercisable by: regulations  
Parliamentary procedure: affirmative

Provision

22. Section 2 provides that the Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chairing member of the governing body of the institution. Such regulations may include (in particular) provision that: specifies or limits the circumstances in which sums must be offered; requires sums to be reasonable given the responsibilities of the chairing member; or delegates to other persons the function of determining sums in particular cases.

23. Before making such regulations, the Scottish Ministers are required to consult each HEI to which the regulations relate and such other persons as the Scottish Ministers consider appropriate (section 3).

Comment

24. The DPM explained that most, if not all, governing bodies do not pay remuneration to chairing members. The Scottish Government considers remuneration and allowances should be available to chairing members in order to increase the potential range of candidates.

25. Similarly to the power in section 1, the Scottish Government considers that it is not necessary to set out the detail in relation to remuneration and allowances in primary legislation; such detail is considered to be more appropriate for secondary legislation. The DPM also noted that this approach will allow flexibility to change the provisions on remuneration and allowances to reflect changing practices within the higher education sector, without resorting to primary legislation.

26. The DPM explained that the affirmative procedure is considered appropriate given the potential impact that the exercise of the power could have on HEIs. The DPM also noted the requirement for consultation with stakeholders before the power is exercised.

27. While generally the Committee is content that both the affirmative procedure and the requirement for stakeholder consultation are appropriate in these circumstances given the significance for HEIs of the remuneration and allowances payable to chairing members, the Committee notes that the principle of remuneration for chairing members is in general a new concept for HEIs and has met with opposition amongst stakeholders.

28. The Committee therefore sought further explanation from the Scottish Government as to why it is considered appropriate for the principle and basic
framework of remuneration for chairing members to be postponed to secondary legislation, and whether such principle and basic framework could instead be set out on the face of the Bill and therefore be made subject to full Parliamentary consultation and debate, with the detail to be set out in secondary legislation.

29. The Scottish Government’s response reiterated that it is not considered appropriate for provisions in relation to remuneration and allowances for chairing members to be set out on the face of the Bill due to the potentially considerable level of detail necessary, this being considered more appropriate for secondary legislation.

30. The response explained that, while the Scottish Government notes the Committee’s suggestion that the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill, it still considers that provisions on remuneration would be more appropriately contained in regulations.

31. The response also noted, however, that if an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it.

32. While the Committee accepts in principle that detailed provision on remuneration for chairing members could be postponed to secondary legislation, it considers, since this is generally a new concept for HEIs, that it could be more appropriate for the key provisions on remuneration for chairing members to be set out on the face of the Bill and therefore be made subject to full Parliamentary scrutiny.

33. The Committee notes that the Scottish Government has indicated that, if an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it. The Committee will return to consider the powers after Stage 2.

Section 8 – Power to modify section 4

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

Provision

34. Section 8 gives a power to the Scottish Ministers to modify section 4 of the Bill, which sets out the requirements for the composition of the governing body of an HEI. Section 4 provides that a governing body is to be composed of: the chairing member; 2 staff members, elected by the staff; 1 academic staff member, nominated by a trade union; 1 support staff member, nominated by a trade union;
2 students, nominated by a students’ association; 2 graduates, nominated by a graduates’ association; and such other persons as are appointed by virtue of an enactment or in accordance with the governing document of the HEI.

35. Section 8 provides that the Scottish Ministers may by regulations modify the categories of membership set out in section 4, and the number of persons to be appointed under a particular category in that section.

Comment

36. The DPM explained that this power is taken to allow for prompt and effective change to be made to the requirements for the composition of governing bodies. The DPM suggested that changes in future practice in the higher education sector or relevant developments in good governance principles might lead the Scottish Ministers to conclude that the provisions in section 4 require modification.

37. In terms of procedure, the DPM explained that the affirmative procedure is considered appropriate given that this is a power to amend significantly the effect of primary legislation, and also given the potential impact that the exercise of the power could have on HEIs and their governing bodies.

38. Although this power is widely drafted, the Committee is content in principle with the explanation for the need for taking this power, and that the affirmative procedure is appropriate in these circumstances, given the significance for HEIs of the requirements as to composition of governing bodies and the fact that this is a power to modify primary legislation.

39. The Committee notes, however, that unlike the powers in sections 1 and 2, there is no requirement on the face of the Bill for the Scottish Ministers to consult HEIs prior to making regulations under this section. Given the potential impact of regulations made under this section on what is a significant area, the Committee asked the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8.

40. The Scottish Government’s response noted the Committee’s suggestion and indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations, and any other persons whom the Scottish Ministers consider appropriate.

41. The Committee is content in principle with the power in section 8 of the Bill, and that it is subject to the affirmative procedure. However, given the potential impact of regulations made under this section on what is a significant area, the Committee considers that a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8.
42. The Committee notes that the Scottish Government has indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by regulations made under this section, and any other persons whom the Scottish Ministers consider appropriate. The Committee will return to consider these powers after Stage 2.

Section 13 – Power to modify sections 9 and 10

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Provision

43. Section 13 gives a power to the Scottish Ministers to modify sections 9 and 10 of the Bill, which set out the requirements for the size and composition of the academic board of an HEI.

44. Section 9 provides that the board is to consist of no more than 120 members. Section 10(1) provides that the board is to be composed of: the principal of the institution; the heads of school of the institution; academic staff members elected by the academic staff; students elected by the students; and such other persons as are appointed by virtue of an enactment, in accordance with the governing document of the HEI or in accordance with a decision of the governing body of the HEI. Section 10(2) provides that more than 50% of the board members must be elected academic staff and students, and at least 10% of the members must be elected students.

45. Section 13 provides that the Scottish Ministers may by regulations modify: the number of members of the board specified in section 9; the categories of membership set out in section 10(1); and the number or percentage of persons to be appointed under a particular category in section 10(1). Such modification as to number may be made by specifying a fixed number or percentage, or a maximum or minimum (or both).

Comment

46. The DPM explained that this power seeks to allow for a prompt and effective change to the requirements as to the size and composition of the academic board, in order to respond to any changes in future practice in the higher education sector and to relevant developments in good governance principles.

47. In terms of scrutiny, the DPM explains that the affirmative procedure is considered appropriate, given that this is a power to amend significantly the effect of primary legislation and also given the potential impact that the exercise of the power could have on HEIs and their academic boards.
48. Although this power is widely drafted, the Committee is content in principle with the explanation for the need for taking this power, and that the affirmative procedure is appropriate in these circumstances, given the significance for HEIs of the requirements as to composition of academic boards and the fact that this is a power to modify primary legislation.

49. The Committee notes, however, that there is no requirement on the face of the Bill for the Scottish Ministers to consult HEIs prior to making regulations under this section. Given the potential impact on what is a significant area, the Committee asked the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13.

50. The Scottish Government’s response noted the Committee’s suggestion and indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations, and any other persons whom the Scottish Ministers consider appropriate.

51. The Committee is content in principle with the power in section 13 of the Bill, and that it is subject to the affirmative procedure. However, given the potential impact of regulations made under this section on what is a significant area, the Committee considers that a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13.

52. The Committee notes that the Scottish Government has indicated that an amendment will be considered at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by regulations made under this section, and any other persons whom the Scottish Ministers consider appropriate. The Committee will return to consider these powers after Stage 2.

Section 15 – Meaning of higher education institution

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

Provision

53. Section 15(1) sets out the definition of an HEI for the purposes of Part 1 of the Bill. HEI has the same meaning as in the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”) – that is, a university or an institution providing higher education designated by the Secretary of State. However, such an institution falls within the definition only if it is also listed in schedule 2 (fundable bodies) to that Act. Schedule 2 lists those bodies which may receive funding from the Scottish
Further and Higher Education Funding Council ("the Funding Council"). The Open University is specifically excluded from the definition.

54. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition set out in section 15(1) so as to include or exclude a particular institution.

Comment

55. The DPM explained that the policy intention is that all publicly funded HEIs should be subject to the governance provisions in Part 1 of the Bill, but that an HEI operating in both Scotland and another jurisdiction (such as the Open University) should be excluded from the Bill's governance requirements, to avoid being made subject to conflicting governance regimes. The Open University is already specifically excluded from the definition.

56. The DPM further explained that the power to amend the definition is taken to give the Scottish Ministers the flexibility to include or exclude a particular HEI from the definition in the event of changed circumstances, for example if another cross-border HEI similar to the Open University begins operating in Scotland and receives public funding.

57. The Committee considers that, while the example given in the DPM might explain why a power to exclude an HEI from the definition is required, it does not explain why a power to include an HEI is required, since the definition will already catch all universities and designated institutions eligible to receive public funding, by virtue of being listed in schedule 2 to the 2005 Act (bodies which may receive funding from the Funding Council). The Committee therefore asked the Scottish Government for further explanation as to why a power to include an HEI in the definition is required, and for examples of when such a power might be used.

58. The Committee also asked the Scottish Government for an explanation as to why the negative procedure is thought appropriate in this case, given the potential impact of a modification of the definition so as to include a particular HEI, on the institution in question; and to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15.

59. In its response, the Scottish Government agreed that the definition in the Bill will capture all HEIs which receive public funding, by virtue of being included in schedule 2 to the 2005 Act, and that this would include any future HEIs added to that schedule. On further reflection, the Scottish Government considers that the power to include new institutions beyond fundable bodies may not be required, since the policy intention is that only fundable bodies should be covered by the requirements of the Bill. The Scottish Government will therefore consider an amendment at Stage 2 to amend the power to change the definition so that it can be used only to exclude institutions from the definition.
60. In light of this potential amendment, the Scottish Government did not consider that any response was required to the Committee’s enquiries in respect of when a power to include a specific institution in the definition might be used, and why the negative procedure is considered appropriate. Similarly, the Scottish Government did not consider that a requirement for consultation need be included on the face of the Bill, again given the potential amendment discussed above.

61. **It is not clear to the Committee why a power to include a specific institution in the definition of “higher education institution” in the Bill is required, since the definition in the Bill will already catch all universities and designated institutions eligible to receive public funding, by virtue of being listed in schedule 2 to the Further and Higher Education (Scotland) Act 2005 (bodies which may receive funding from the Scottish Further and Higher Education Funding Council).** Given the potential impact on the institution in question, the Committee considers that any regulations made under this section to include a specific institution in the definition could be made subject to the affirmative procedure and that a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any such regulations.

62. **The Committee notes that the Scottish Government has indicated that an amendment will be considered at Stage 2 to amend the power to change the definition in section 15 so that it can be used only to exclude institutions from the definition, and not to include institutions in the definition. The Committee will return to consider these powers after Stage 2.**
The Higher Education Governance (Scotland) Bill as introduced is available at the following website: 
http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd.pdf [Accessed October 2015]

The Higher Education Governance (Scotland) Bill Delegated Powers Memorandum is available at the following website: 
Correspondence with the Scottish Government—

On 8 September 2015, the Delegated Powers and Law Reform Committee wrote to the Scottish Government as follows:

1. The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 8 September and seeks an explanation of the following matters:

Section 1 – Appointment as chairing member

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

2. Section 1 provides that the chairing member of the governing body of a Higher Education Institution (“HEI”) is to be appointed in accordance with a process set out in regulations made by the Scottish Ministers. The process for appointment of chairing members of governing bodies is a key policy in the Bill and is understood to be a matter of controversy amongst HEI stakeholders.

3. The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the basic framework for the appointment of chairing members to be postponed to secondary legislation; and

(b) to consider whether the basic framework for the appointment of chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail of the process to be set out in regulations.

Section 2 – Remuneration to be payable

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

4. Section 2 provides that the Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chairing member of the governing body of the institution.

5. The principle of remuneration for chairing members of governing bodies is a new concept for HEIs and is understood to have met with opposition amongst HEI stakeholders.
6. The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the principle and basic framework of remuneration for chairing members to be postponed to secondary legislation; and

(b) to consider whether the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail to be set out in regulations.

Section 8 – Power to modify section 4

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

7. Section 8 gives a power to the Scottish Ministers to modify section 4 of the Bill, which sets out the requirements for the composition of the governing body of an HEI. The proposed requirements as to the composition of governing bodies set out in the Bill are understood to have met with opposition amongst HEIs.

8. The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

Section 13 – Power to modify sections 9 and 10

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: affirmative

9. Section 13 gives a power to the Scottish Ministers to modify sections 9 and 10 of the Bill, which set out the requirements for the size and composition of the academic board of an HEI. The proposed requirements as to the size and composition of the academic board of an HEI set out in the Bill are understood to have met with opposition amongst HEIs.

10. The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.
Section 15 – Meaning of higher education institution

Power conferred on: the Scottish Ministers
Power exercisable by: regulations
Parliamentary procedure: negative

11. Section 15(1) sets out the definition of an HEI for the purposes of Part 1 of the Bill. HEI has the same meaning as in the Further and Higher Education (Scotland) Act 2005 – that is, a university or an institution providing higher education designated by the Secretary of State. However, a university or designated institution falls within the definition only if it is also listed in schedule 2 (fundable bodies) to that Act. Schedule 2 lists those bodies which may receive funding from the Scottish Further and Higher Education Funding Council. The Open University is specifically excluded from the definition.

12. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition set out in section 15(1) so as to include or exclude a particular institution.

13. Given that the definition of HEI determines which institutions are subject to the governance requirements set out in the Bill, changes to the definition to include or exclude a particular institution could have a sizeable impact on the institution affected.

14. The Committee asks the Scottish Government:

(a) for clarification as to why a power to include a higher education institution in the definition is required, since it appears that the definition in the Bill will already catch all universities and designated institutions (other than the Open University) which may receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005;

(b) for examples of when a power to include a higher education institution in the definition might be used;

(c) why the negative procedure is considered appropriate in this case, given the potential impact of a modification of the definition so as to include a particular higher education institution, on the institution in question; and

(d) to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15, again given the potential impact on affected institutions, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.
On 22 September, the Scottish Government responded as follows:

Having considered the points in your letter, the Scottish Government would respond as follows:

Paragraph 3

The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the basic framework for the appointment of chairing members to be postponed to secondary legislation; and

(b) to consider whether the basic framework for the appointment of chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail of the process to be set out in regulations.

In respect of point (a), as set out in the Delegated Powers Memorandum, it was considered crucial that the Bill included the minimum requirement to have a chairing member of the governing body of a higher education institution (HEI) appointed in accordance with a statutory process. It was not considered necessary to set out the detailed process of appointment of the chairing member in primary legislation. The regulations could potentially include a considerable level of detail about the process that could be better provided for in secondary rather than in primary legislation. It is also considered that the power would allow the Scottish Ministers the flexibility to modify any process regarding the appointment of chairing members to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

With regard to point (b), influenced by continuing dialogue with stakeholders on this matter, Scottish Government is considering whether it might be appropriate to bring forward an amendment at Stage 2 that set out a provision on the face of the Bill for a single model for the appointment of elected chairs, although it might still be more appropriate for some details of the process to be left to regulations.

Paragraph 6

The Committee asks the Scottish Government:

(a) to explain why it is considered appropriate for the principle and basic framework of remuneration for chairing members to be postponed to secondary legislation; and

(b) to consider whether the principle and basic framework of remuneration for chairing members could be set out on the face of the Bill and therefore be made subject to full parliamentary consultation and debate, with the detail to be set out in regulations.
In respect of point (a), since this power is very closely associated with the power in section 1 of the Bill, Scottish Government considered it appropriate that the basic framework for remuneration for chairing members should be set out in regulations as it would not be appropriate to include provisions in relation to remuneration and allowances in primary legislation due to the potentially considerable level of detail necessary. It is also considered that the power would allow the Scottish Ministers the flexibility to modify any provisions on remuneration to reflect any variations in practices within the higher education sector without having to resort to primary legislation.

With regard to point (b) Scottish Government has noted the Committee’s suggestion, but still considers that the provisions on remuneration would be more appropriately contained in regulations. If an amendment were to be brought forward at Stage 2 about the process for appointment of chairing members, then the Scottish Government will reflect further on whether any reference to remuneration should be included within it.

Paragraph 8

The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 8 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

The Scottish Government notes this suggestion and will consider an amendment at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

Paragraph 10

The Committee asks the Scottish Government to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making regulations under section 13 to modify such requirements, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

The Scottish Government notes this suggestion and will consider an amendment at Stage 2 to include a requirement in the Bill to consult with any HEIs which might be affected by the regulations and any other persons whom Scottish Ministers consider to be appropriate.

Paragraph 14

The Committee asks the Scottish Government:

(a) for clarification as to why a power to include a higher education institution in the definition is required, since it appears that the definition in the Bill will already catch all universities and designated institutions (other than the Open
University) which may receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005;

The Scottish Government agrees that the definition in the Bill will capture all HEIs which receive funding from the Scottish Further and Higher Education Funding Council, by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005, and that would include any future HEIs added to the list of fundable bodies. On further reflection, it is considered that the power to include new institutions beyond fundable bodies may not be required since the policy intention is that only fundable bodies should be covered by the new requirements and the Scottish Government will therefore consider an amendment at Stage 2 to amend the power to change the definition so that it can be used only to exclude institutions from the definition.

(b) for examples of when a power to include a higher education institution in the definition might be used;

(c) why the negative procedure is considered appropriate in this case, given the potential impact of a modification of the definition so as to include a particular higher education institution, on the institution in question; and

With regard to points (b) and (c) the Scottish Government agrees that the above power at section 15 of the Bill to include an HEI may not be required, and therefore it is not considered that any response is required for these questions.

(d) to consider whether a requirement could be included on the face of the Bill for the Scottish Ministers to consult affected HEIs before making any regulations under section 15, again given the potential impact on affected institutions, in similar terms to the existing requirement for consultation before exercising the powers in sections 1 and 2 of the Bill.

With regard to point (d) and in respect of the answer to (a) above, the use of the power is expected to be limited to those circumstances where a particular HEI needs to be excluded from the definition of “higher education institution”. The regulations will give Scottish Ministers the flexibility to make changes in the event of changed circumstances of a particular institution, which result in the institution needing to be excluded. The change will not impose any new requirements on the institution and will only apply to the particular excluded institution. As such, we consider that any use of the power is likely to be uncontroversial and consequently current provisions in the Bill are appropriate in the circumstances.
Finance Committee

Report on the Higher Education Governance (Scotland) Bill’s Financial Memorandum
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Finance Committee

1. The remit of the Finance Committee is to consider and report on-
   a. any report or other document laid before the Parliament by members of the Scottish Government containing proposals for, or budgets of, public expenditure or proposals for the making of a tax-varying resolution, taking into account any report or recommendations concerning such documents made to them by any other committee with power to consider such documents or any part of them;
   b. any report made by a committee setting out proposals concerning public expenditure;
   c. Budget Bills; and
   d. any other matter relating to or affecting the expenditure of the Scottish Administration or other expenditure payable out of the Scottish Consolidated Fund.

2. The Committee may also consider and, where it sees fit, report to the Parliament on the timetable for the Stages of Budget Bills and on the handling of financial business.

3. In these Rules, “public expenditure” means expenditure of the Scottish Administration, other expenditure payable out of the Scottish Consolidated Fund and any other expenditure met out of taxes, charges and other public revenue.

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Introduction

1. The Finance Committee issued a call for evidence on the Financial Memorandum (FM) of the Higher Education Governance (Scotland) Bill in June 2015. The Committee received fifteen responses to its call for evidence, of which the majority came from higher education institutions (HEIs) and related bodies.

2. To explore further the issues raised in the responses the Committee then took oral evidence on 16 September 2015 from—
   - Universities Scotland; and
   - The Scottish Government Bill Team

The Bill

3. The FM states that the principal purpose of the Bill is to—

   “enable a framework of higher education governance that is more modern, inclusive and accountable. It will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose.”

4. Specifically, the Bill makes provision to require HEIs to appoint a chair in accordance with a process laid out by Ministers in regulations.

5. HEIs will also be required to include in their governing body—

   “the person appointed as chairing member, two directly elected staff members, one member nominated by academic and related unions, one member nominated by administrative, technical or support staff unions, two students nominated by the students’ association/union, and two graduates of the institution nominated by a graduates’ association.”

Issues raised in evidence

ONS reclassification

6. The majority of respondents to the Committee’s call for evidence expressed concerns that the Bill could lead to universities being reclassified as public sector bodies by the Office of National Statistics (ONS).

7. Universities Scotland, for example, stated—

   “ONS’s programme already includes an intention to review the classification of HEIs. Their classification decisions are informed by factors including the extent of government control and influence over an institution. In Universities
Scotland’s view, the Bill heightens the risk of institutions’ reclassification through the additional controls it hands to Ministers.”

8. Highlighting what it saw as the potential consequences of reclassification, the Committee of Scottish Chairs’ submission stated—

“The specific issue we wish to raise with the Finance Committee is the prospect that increased Ministerial control will lead to the universities being reclassified by the ONS as ‘Central Government’. Should this happen, it would have dramatic adverse consequences. It would—

- prevent universities from retaining annual operating surpluses;
- place a severe restriction on their ability to borrow funds;
- reduce their ability to enter into commercial partnerships; and
- put at risk their status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support.”

9. The University of Glasgow stated that reclassification would have—

“a dramatic and harmful effect on universities’ financial management. Specifically, it would disincentive entrepreneurial activity – a key element for the success of universities – and it would prevent universities from generating annual financial surpluses to invest in maintaining and improving their asset base investment that goes into infrastructure development plans, which rely on revenue surpluses, borrowing and philanthropic support.”

10. Should the risk materialise, the University of Glasgow stated that it could lose income of around £28.7m per annum, with an even greater impact expected for its capital investment programme.

11. Universities Scotland expanded on the potential impact of reclassification in oral evidence, pointing out that HEIs’ total level of borrowing was around £530 million which would have “concerning” consequences were that debt to be taken onto the public balance sheet. Furthermore, HEIs invested around £377 million in capital spending each year which could be put at serious risk were they to be prohibited from borrowing or only able to do so under tight Government control.

12. In addition to the potential financial consequences for HEIs themselves, a number of respondents also highlighted the potential impact on the wider economy. The University of St Andrews stated—

“Independent analysis has confirmed that the University of St Andrews delivers £12 in benefit for every £1 of Scottish Government funding invested. Our ability to excel in a competitive global market depends on our academic reputation, both in terms of excellence in research and a world class learning and teaching
experience. The uncertainty generated by this legislation, and the risk posed to the autonomy, can only damage the academic reputation of the HE sector in Scotland, and undermine our international competitiveness and our contribution to Scotland’s future economic growth.”

13. The University of St Andrews concluded by stating—

“We hope that a clear assurance will be provided that the proposed changes to be made by the Bill, and any regulations that could be potentially made under the powers given in the Bill, will not trigger a reclassification by ONS.”

14. In oral evidence, Universities Scotland stated that it had received legal advice that the Bill “when looked at cumulatively along with the existing indicators of Government control, creates a significantly increased risk of ONS reclassification.” However, it confirmed that it had not raised the issue with the ONS as it felt that “the responsibility lies with the Government to give us a really firm assurance that the issue has been dealt with through proper due diligence.” Universities Scotland also highlighted the difficulty of getting definitive advice from the ONS which had made it clear that it would “make a determination once it has seen what has happened on the ground.”

15. Given the view that the ONS was unlikely to give a definitive decision at this stage, Universities Scotland went on to query “whether what the Bill is trying to achieve is worth creating the risk.”

16. Universities Scotland confirmed that, following the Bill’s introduction, it had raised its concerns about ONS classification with the Government “both orally and in writing” in late June and again in a formal letter dated 13 August but had yet to receive a substantive response.

17. In oral evidence, the Bill Team confirmed that it had received “quite a substantial piece of correspondence that covers a number of items.” Whilst it acknowledged that “it would have been ideal if a response had been given prior to today”, a number of colleagues were working through the “complex and serious issues” raised to ensure that the correct answers are given in the response.

18. When asked why, given that it had been considering the matter in detail since the consultation closed in January, it had not been able to respond to the letter more promptly, the Bill Team stated that whilst it would have been easy to dispatch a quick answer explaining that the ONS would not give any guarantees before the Bill had been enacted, “some of the detailed questions about the legal underpinning of other parts of the Bill must be worked through with great care to ensure that our answers are correct.”

19. When asked to confirm when Universities Scotland could expect to receive a response to its letter, the Bill Team confirmed that it would reply “as quickly as possible.” When pressed further on the expected timescales for its response, the Bill Team stated “we are talking about weeks at the most, certainly not months.”
The Committee considers it unsatisfactory that the Government response was not issued prior to the oral evidence session. Given that the Government has been working on the issues raised for several months, the Committee asks that the response is issued as quickly as possible and made available to members of the lead committee before its evidence session with the Cabinet Secretary for Education and Lifelong Learning.

20. When it was pointed out that the ONS had already stated its intention to review the classification of HEI's regardless of the Bill’s provisions, Universities Scotland confirmed that this had been stimulated by questions relating to English universities. However, Universities Scotland stated that previous experience had suggested that the ONS would not approach this work narrowly and that “adding the risks that the Bill poses would put [Universities Scotland] in a position of quite substantive worry.”

21. When invited to quantify the level of risk as it saw it, with or without the Bill, Universities Scotland stated that without the Bill it assessed the risk as being “lower amber” but that were the Bill to be implemented as it stood, the risk of reclassification was “hovering on the amber to red border.” When invited to comment on this assessment, the Bill Team stated that whilst it respected the assessment, it did not agree with it.

22. When asked when it had become aware of the European System of National and Regional Accounts (ESA 2010) and its impact on classification, the Bill Team stated that the Government “would always have been aware” that it was a determinant of classification of HEIs although—

“The matter was looked at in earnest and in great detail across Government after the consultation on the bill ended in January 2015, and there was Cabinet consideration of it. Knowledge of ESA 2010’s determinant role is there all the time, but specific reference to the issue in detail came after the consultation closed, when we were looking at all the views.”

23. The Bill Team went on to confirm that the issue of reclassification of HEIs had been considered in 2011-12 when college reclassification “was initially being looked at” and was not being considered now as a result of issues relating to the recent reclassification of certain capital projects outwith the education sector.

24. When asked in oral evidence why the FM did not contain an analysis of the risk of ONS reclassification, the Bill Team stated that “it had analysed it carefully over a number of years.” When considering the recommendations of the 2012 Review of Higher Education Governance—

“The issue of reclassification was factored into all that thinking, and there was thorough analysis of the ESA 2010 guidance on the indicators of control. The summation of that work, which involved dialogue across Government, was that
the final planned content of the Bill would be compliant with those indicators of control, which is why the financial memorandum does not feature analysis of that.”

25. The Bill Team also confirmed that the reclassification issue had not been included in the Business Regulatory Impact Assessment for the same reasons.

26. The Bill Team confirmed that as the ONS “will not give categorical analysis or summation statements on the plans of this or any government” “there has been no discussion in which it has assessed and cleared any of the Bill’s content.” However, the Bill Team confirmed that “there has been thorough consideration of the risk, with the emphasis being squarely on the indicators of control” and stated that “nothing in the Bill will require HEIs to ask Ministers for permission to do anything.”

27. Expanding on this point, the Bill Team stated—

“It is not about Ministerial control; there have been assertions that Ministers may find themselves on governing bodies. There is absolutely no intention on the Government’s part to do that or to have any direct involvement in or control over appointments. It is about the process.”

28. The Bill Team further stated that it would be “completely undesirable” for Ministers to make appointments to boards and the Bill was not intended to give them such powers—

“The Government would never want to directly put anyone on any governing structure in a university, and that includes Ministers. I know that concerns or views have been expressed about that, but that is not the intention.”

29. Therefore “the Scottish Government’s conclusion is that the risk that is posed by the Bill does not advance beyond any risk that existed prior to it.” When pressed on this point by the Committee, the Bill Team confirmed its view that whilst “a modicum of risk exists”—

“Our assessment is that any current level of risk is not advanced by the provisions in the Bill, set against an analysis of the ESA 2010.”

30. Whilst it had not raised the specific issue directly with the ONS, the Bill Team confirmed that the Government had been developing “close relations” with it which had been “extremely helpful” as a result of capital discussions. Government officials had also participated in workshops with ONS where related issues had been discussed in general terms. This had led the Government to conclude that “there is low risk [of reclassification] and it is around factors that were already present in universities. In our belief, nothing that is being done will increase that risk.”
31. When asked to expand on its own internal assessments and the discussions it had held with ONS, the Bill Team stated—

“We used our skills and experience and the knowledge that is within the Scottish Government to assess the risks. Then, as I have said, we used our wider understanding, based on discussions with the ONS around other reclassifications, to build into that assessment.”

32. In response to a direct request to share its detailed analysis and risk assessment with the Committee, the Bill Team replied—

“We would need to provide Ministers with advice on that, and it would depend on what form the work takes. We can certainly consider that direct request. We will sort through the constituent parts of that collection of work and reply to the committee.”

33. The Cabinet Secretary for Education and Lifelong Learning responded to the request in a letter dated 5 October. The letter “runs through some of the key features of the analysis conducted by the Scottish Government” in relation to each of the ESA 2010 indicators of government control and reiterates the Government’s view “that the Bill presents no additional risk of reclassification.”

The Committee recommends that the full analysis is published in advance of the Parliament being asked to vote on the Bill at Stage 1.

34. In response to questioning from the Committee the Bill Team also confirmed that it had not sought external legal advice on the issue or the opinions of experts in the field—

“There has been no external liaison on the matter. It is a sensitive issue and we would not have a wide consultation on that point alone when the issues were being unpacked in great detail internally. We did not conduct external discussions or take expert advice from outwith Government.”

35. However, the Bill Team confirmed that it would “happily consider” Universities Scotland’s legal advice suggesting a significantly increased risk of reclassification, if Universities Scotland was prepared to share it.

36. Universities Scotland wrote to the Committee on 1 October 2015 attaching a note of advice from its lawyers that it had commissioned after the oral evidence session. The note of advice suggested that “the challenges posed to HEIs by such an [ONS] assessment exercise should appear at the level of ‘significant risk’ on their risk registers.” Universities Scotland confirmed that it was content for the note to be published.
37. When the Committee expressed “surprise” that the Government had not written to the ONS, given recent developments with regard to the classification of certain capital projects, the Bill Team pointed out that “The view of heightened risk in relation to the Bill, in its coverage in the media, is relatively recent.” The Bill Team further noted that when asked to comment by the press, the ONS confirmed that it was not prepared to give an opinion without looking in detail at the Bill’s provisions and their outcomes—

“At the start of a process, things can change. After a consultation, two of the proposals can go and four can be left. It is a moveable picture. The ONS likes to see the settled picture—as the convener said, it likes to see the end point.”

38. Later in the session, the Bill Team stated “We cannot be complacent, but nobody has raised the existing risk in this debate until perhaps the past four to six weeks. There was no mention of the ONS risk in the dialogue when the consultation was open.”

39. In response to further questioning from the Committee, the Bill Team agreed that there was actually a “slight risk” that writing to the ONS might, in fact, “increase the risk of its undertaking investigation or even reclassifying” and would “certainly delay matters.”

40. When asked by the Committee whether its risk assessment had included consideration of the potential opportunity costs that would arise from reclassification, the Bill Team confirmed that it had not but undertook to “examine thoroughly” the figures submitted by stakeholders. However, the Bill Team went on to state that this did not mean it was giving the figures credence and reiterated its view that the Bill would not “advance any current risk substantively.” Nevertheless, it confirmed that it had been working closely with HEIs on capital planning and was “very aware of the extent of the financial implications of reclassification.”

41. For the avoidance of doubt, the Bill Team confirmed that “that there is absolutely no intention on the Government’s part that reclassification would be an outcome; it is something that we would seek actively to avoid.”

42. Whilst it considered the risk of reclassification to be low, the Bill Team went on to confirm that “if, as a result of a wider ONS review of universities, there were any risk of reclassification—Ministers have made it clear that that is not a policy goal—we would take what measures were required to ensure that universities were not reclassified.”

43. When pressed to clarify whether this meant that the Government would act to change the Bill’s provisions in what it considered to be the unlikely event that reclassification did happen, the Bill Team stated—

“We do not think that reclassification will happen. Even if it did, it would not happen during the bill’s passage. For that to happen, the bill would need to
become an act and the ONS would have to go through a long process of poring over every element of it, but that is entirely theoretical.”

44. Expanding further, the Bill Team explained that—

“If reclassification is triggered it does not come into immediate effect. The colleges in England and Wales were given a period in which to review their control mechanisms and make changes that would keep them outside the boundary. That is what we were saying.

There is a very low risk of reclassification and we do not believe that the bill will change that. That is a key point. The risk already exists because of the nature of universities and their interaction with the Scottish Government. If a reclassification decision was triggered by an ONS review, which could well be triggered by a review of universities down south—that is the most likely scenario—we would ask for a period in which to review the entire structure around universities, which could lead to changes that would keep them outwith the boundary.”

45. In response to questioning from the Committee about whether HEIs might not actually want democracy and transparency and were using their concerns about finances as a “smokescreen”, Universities Scotland acknowledged that stakeholders held different positions, but assured the Committee that it did have “genuine financial concerns” about the Bill. Were these financial concerns not a factor in its thinking, Universities Scotland was of the view that it “would be able to work with Government and have a good discussion about the issues that are being addressed in the bill in relation to transparency and representation on university governing bodies.”

46. Universities Scotland went on to confirm that whilst it did have very real concerns about the potential financial implications of the Bill, they were “real concerns that are capable of creative resolution. If the powers in the bill that are given to Ministers are looked at again and alternative ways of doing things found, the ONS risk could be managed downwards. I would like to be confident that that would be the case.”

47. When asked whether it would be more comfortable if the powers being granted to Ministers regarding the membership and structures of a governing body could only be exercised through further primary legislation instead of by statutory instrument, Universities Scotland replied “That would be a different matter, yes.”

48. When asked by the Committee what parts of the Bill should be amended in order to reduce the risk of reclassification, Universities Scotland drew attention to sections 8, 13 and 20 which it considered were “the provisions that raise the critical risk factors.” In Universities Scotland’s view “There is creative scope for a rethink about how to do things in those sections in order to take Ministers out of the equation.”
49. Universities Scotland also highlighted the experience of college reclassification in Wales which “introduced elements that allowed greater student and staff representation on the governing bodies while allowing the colleges to be reclassified as non-profit independent organisations.” This model, it was suggested, “could be considered to avoid the level of control that we are talking about while addressing the concerns that stakeholders have about how governing bodies should be composed.”

50. The Bill Team expressed the view that “there is some ground for profitable dialogue between the Government and partners on the content of the secondary legislative provisions. That point has been reinforced again and again. Colleagues have said that the bill would benefit from such dialogue and that it would address issues of risk.”

51. Expanding on this point later in the session, the Bill Team stated—

“if the secondary legislative powers could be modified in a way that did not harm the bill’s overall policy intention, the Scottish Government would be open to a conversation on that. If such modification minimised risk or the perception of risk, that could be beneficial.”

52. The Bill Team further stated—

“from what has been said today, it seems that the content of those secondary powers would be looked at in the light of the evidence that was submitted to both committees. I cannot predict exactly what that would mean but, given that concerns have been raised, we will look thoroughly at the content, the impact and the intent of the secondary legislation. I restate that the intent was to future proof the legislation in some way. I am not being dismissive of people’s views of risk, but it is about good housekeeping; there is no intent to advance Ministerial control through those secondary powers. However, given that those issues have been raised, I am sure that the Government will consider them.”

The Committee welcomes the Bill Team’s commitment to working with stakeholders to minimise their financial concerns, particularly those concerns relating to the possibility of ONS reclassification and the impact it might have. This commitment is particularly welcome in light of the Bill Team’s assurance that Ministers do not wish to see reclassification happen and would take measures to prevent it should it arise.

The lead committee may wish to invite the Cabinet Secretary to outline the steps that the Government would take in such a scenario, whether as a result of the Bill or of the pre-existing risk described in evidence.
The Committee further welcomes the Bill Team’s undertaking to “look thoroughly at the content, the impact and the intent of the secondary legislation” in light of the financial concerns expressed in evidence. The lead committee may wish to seek further information from the Cabinet Secretary about the scope of this work, how it is progressing and the amendments the Government intends to bring forward as a result at Stage 2.

The Committee believes that clarification of these issues and the nature of any amendments that the Government intends to bring forward should be provided before the Parliament is asked to vote on the Bill at Stage 1.

Charitable Status

53. On a related point, several respondents expressed concerns that the Bill could result in HEI's having their charitable status rescinded by OSCR as a result of increased levels of Ministerial control.

54. For example, the University of Aberdeen expressed concerns 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 sustainability of the University.”

55. Universities Scotland also stated—

“At a financial level, charitable status is essential to institutions’ solvency. Loss of charitable status would, in particular, mean that institutions lost their entitlement to 80% relief from non-domestic rates. This was estimated in 2008 as being worth £27m per year. Loss of charitable status would also severely prejudice institutions’ capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions who are no longer charities.”

56. Whilst the University of Glasgow stated—

“while there is any uncertainty in universities charitable status, there are implications for funding from those bodies which are required to fund only charitable entities.”

57. Queen Margaret University suggested—

“As part of its deliberations, we would ask the Finance Committee to consider what further advice the Scottish Government has taken from OSCR on this
matter i.e. beyond the original consultation, and what opinion has been offered by OSCR?"

58. OSCR submitted written evidence to the Education and Culture Committee setting out the criteria by which an HEI’s charitable status is assessed. It concluded—

“Our view is that the provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4) (b) of the 2005 Act.

Section 8 of the Act gives Ministers the power to make regulations to modify the categories of membership set out in section 4 and the numbers in each category. Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions these amounted to ministerial control. Similarly, Section 20 of the Act gives Scottish Ministers wide power to make such further regulations ‘as they consider necessary or expedient for the purposes of or in connection with this Act’. Should such regulations be made in respect of Part 1 of the Bill when enacted we would have to consider the impact of these measures with respect to ministerial control.”

59. OSCR’s written evidence also confirmed that it had considered “the requirements for the composition of the governing body set out in section 4 of the Bill, and whether these would be likely to prevent the charity trustees of HEIs from fulfilling their trustee duties.” In respect of this point, OSCR concluded—

“Given the overall size and composition of the governing bodies provided for in the Bill, we do not see anything to prevent any conflicts of interest arising for charity trustees nominated under the provisions in the Bill being dealt with in a way that enables the trustees to meet their duties.”

60. When invited to comment on OSCR’s submission in oral evidence, Universities Scotland stated—

“We have reflected on OSCR’s advice. A brief summary of OSCR’s position would be that although the bill in itself probably does not lead to a risk of reclassification for charitable purposes, if ministers used their powers to amend the membership of governing bodies, to amend the membership of academic boards or to make the very general changes to legislation that section 20 allows them to make, that could lead to a situation in which OSCR had to re-examine whether universities were meeting the charity test in relation to ministerial directions. I am taking that at face value. One thing that OSCR recognises—this is pertinent to the ONS reclassification point—is that the bill gives ministers
power to alter the constitution of universities, and that is one of the risk factors in relation to ONS reclassification."

61. When it was pointed out that in reaching its conclusions, OSCR had considered each of the points which the ONS would also have considered, Universities Scotland stated that the ONS would “look at the legislation through a different lens: that of the European system for accounts” and its associated guidance.

62. When asked whether there might be ways round the proposed legislation such as through arms-length foundations holding charitable funds, Universities Scotland responded “There might well be, but they would not be as safe, as secure and as clear cut. My argument would be: why would you increase the risk if it is not essential to achieve the purposes of the bill?” Furthermore, Universities Scotland considered that the creation of such an arms-length foundation would contradict the declared intent of the legislation which was to create transparency and accountability.

The Committee notes that a number of concerns were raised in written evidence in relation to HEIs’ charitable status but is satisfied that these were addressed in OSCR’s submission to the lead committee.

Amendment of HEI governing instruments

63. A further issue which a number of respondents considered had not been addressed in the FM was that of the amendment of HEI governing instruments to align with the changes to primary legislation. Whilst the FM acknowledged that the Government could expect to incur “negligible additional staffing costs”, in making the adjustments, it did not refer to any related costs for HEIs themselves.

64. The University of the Highlands and Islands pointed out that it had made changes to its constitution in 2013/14 and “on the basis of this experience, the Bill significantly underestimates both the cost and the time required to make these changes.”

65. Similarly, Scotland’s Rural College explained that any changes to its Articles of Association cannot be made without the consent of the Scottish Ministers and OSCR. After being created through the merger of a number of separate colleges in 2012, Scotland’s Rural College stated that it had taken almost three years from the date of the request to the consent of Ministers being granted. Therefore, it considered that its experience—

“in relation to changing Articles of Association indicates that the assumption in the FM of the time and cost required to amend HEIs governing instruments is not accurate and that it significantly understates the resource requirement both for the Scottish Government and for the institutions involved.”
66. Queen Margaret University stated—

“We would ask the Committee to note that the process of securing Privy Council and Scottish Government approval for a relatively straightforward amendment to the University’s Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. This process commenced in June 2014, and the amendment is due to commence in late September 2015. Securing the necessary approval involved commissioning of legal advice, the equivalent of 5-6 days of university administrative time to oversee the process, as well as consideration of draft amendments by senior staff and the University Court at various stages of the approval process. The changes required by the Bill would be more substantial for the University than the amendments currently being progressed, and as such, would likely incur higher administrative and staff time costs than the current amendment.

As stated above, it is likely that several, if not most, governing bodies will require to seek similar amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days...We consider that none of these costs have been factored into the Financial Memorandum that accompanies the Bill.”

67. Whilst the University of Edinburgh stated—

“Implementing legislative change would require a significant amount of work to review, consult, amend and implement at least eight University ordinances. This includes engagement with the Privy Council, consultation with staff and stakeholders, legal and policy work. We estimate one-off costs of £79,500 for these processes and the legislative changes.”

68. In oral evidence Universities Scotland pointed out that HEIs were required to undertake significant consultation when making changes to their Articles of Association and would also incur legal fees. “That is a huge complication. It is the opportunity cost, rather than the real cost, that is significant.”

69. In response to questioning from the Committee on why the costs of HEIs amending their governing instruments had not been included in the FM, the Bill Team stated that the updating of governing instruments was required to comply with the code of conduct and was part of mainstream business for HEIs. The Bill Team further stated that given the variation from one HEI to another, it had found it “very challenging to identify and package up any standard costs in that regard, given the staggered nature of the time that it would take to change ordinances and governing instruments after the Bill becomes an Act.”
The Committee reminds the Government that FMs are required by Standing Orders to set out “the best estimates of the administrative, compliance and other costs to which the provisions of the Bill would give rise”, including for other bodies, individuals and businesses over and above the Scottish administration and local authorities. The lead committee may wish to invite the Cabinet Secretary to explain why the estimated costs to HEIs of amending their governing instruments were not included in the FM.

70. The Bill Team also confirmed that the Government had considered and consulted on reforming the Privy Council process. However—

“Ministers decided not to pursue that in the bill, for many reasons, but I would cite the deep complexity of the historical arrangements through which we have arrived at the current system. There are some features that are regrettable, including the time taken, the detailed legal matters and the going back and forth between legal advisers. However, as part of the announcement about the bill, Ministers mentioned a separate piece of work involving the Privy Council and a modernisation conversation, which would commence before any new legislation was thought of in the future.”

Governance arrangements – recruitment of chair

71. The FM states that individual HEIs could be expected to incur costs in relation to the recruitment of chairs (eg, advertising, administrative and interview expenses). This was estimated to total £8,000 every four years with advertising costs amounting to a quarter of that total.

72. The FM therefore states that—

“Assuming the maximum estimated advertising cost for each of the 18 HEIs affected, over the course of a four year cycle of chairing member replacements for the higher education sector in Scotland, the cost of advertising the vacancies might total a maximum of £36,000.”

73. However, a number of respondents suggested that this was an underestimate. Scotland’s Rural College for example, stated that it had recently incurred advertising costs of £16,000 when recruiting new Board members.

74. Both Queen Margaret and Napier Universities also pointed out that they had spent around £5,000 on advertising when recruiting chairs, whilst the University of Dundee stated that it had spent around £12,500 for external publicity during its last recruitment exercise for the University Court.

75. Universities Scotland suggested that on the basis of HEIs’ own experience, the FM underestimated advertising costs by £4,000 to £8,000 per HEI meaning a sector-wide underestimate of up to £144,000.
76. The University of Dundee also pointed out that whilst the FM included a maximum expenses allowance of £500 each for candidates attending interview, it did not include any expenses costs for “those members of the governing body acting as members at both the shortlisting and interview stages.”

77. The FM states that the Bill will require HEI’s “to run an election to appoint the successful candidate” and assumes that “any additional costs will be minimal and able to be absorbed within existing institutional budgets” (on the basis that low cost ICT solutions are available).

78. However, the University of Dundee stated that it had recently spent £21,000 on an election for the post of Graduates’ Assessor on Court. Scotland’s Rural College also stated that it would not be possible for it to conduct elections using an electronic solution whilst Universities Scotland suggested that online elections would cost between £1,000 and £3,000 with postal ballots costing around £7,000.

79. In oral evidence, Universities Scotland stated—

“...My real concern with the FM is about the quality of thinking that has gone into this work. For instance, a cost of £1,000 is being projected for the electoral process for a chair of court. I have looked at the evidence that has been submitted by universities—and I have run electoral processes for alumni members of governing bodies—and the universities are saying that, to run a proper electoral process costs £21,000 to £30,000.”

80. When asked whether election costs for chairs could realistically be expected to cost as much as alumni elections, Universities Scotland confirmed that in its view, set-up costs “would probably involve a ballpark five-figure sum” but it should be possible to run the system quite effectively in the future.”

81. When invited to respond to these points in oral evidence, the Bill Team explained that the £1,000 figure related to expenses for two candidates participating in an election. It went on to explain that it had encountered difficulties in quantifying the cost of recruiting chairs because the franchise for the elections had yet to be defined. Costs would also be dependent on the method by which an election was held. The Bill Team explained that the estimates in the FM—

“are about compliance with the bill. Extending a practice beyond legal compliance could result in many different costs. For example, one institution might use one newspaper and comply with the legal obligation in the bill, but another institution might decide to use four or five newspapers. The costs will be different depending on the approach that is taken.”

82. However, the Bill Team did confirm that it intended to undertake additional work on the FM which would be informed by the evidence gathered by both the Finance Committee and the Education and Culture Committee.
The Committee welcomes the commitment of the Bill Team to undertake further work in respect of the potential costs of recruiting a chair and, in so doing, to draw on the evidence submitted to it and to the lead committee. The lead committee may wish to invite the Cabinet Secretary to provide an update on this work.

Remuneration of chair

83. The FM estimates that remuneration of the chair will cost each HEI around £3,000 per annum. This estimate is based on an assumed daily rate of £512 (based on the Public Sector Pay Policy for Senior Appointments Technical Guide 2013/14) for attendance at six meetings per year. However, the majority of respondents cast doubt on the veracity of this estimate.

84. The Committee of Scottish Chairs, for example, stated—

“as every member of this committee can confirm, university chairs have much more demanding portfolios than can be addressed in 6 days per annum. The time commitment is at least one day per week, and in recent years has been greater than this….Regrettably, it appears from the FM that the Scottish Government does not understand the significance of this role and the time required to fulfil it.”

85. Similarly, the Royal Conservatoire of Scotland stated—

“The FM significantly underestimates the commitment required of the Chair of the Conservatoire’s Board of Governors. We would estimate that commitment to be one day per week so, assuming a 45 week year, remuneration for our Chair would incur an additional cost of £23k, not the £3k cited in the FM. As an aside, it is of concern that the FM should so significantly underestimate the commitment required of a Board Chair – it could be reasonably inferred from that that Scottish Government is not as well-informed about HE governance as it should be.”

86. Whilst the University of the Highlands and Islands stated—

“The Bill underestimates the time spent by a Chair of Court on university business. We currently pay the Chair for the equivalent of 1.5 days per week (reduced from 2 days in 2014/15 whilst new arrangements were being embedded).”

87. Universities Scotland expanded on the theme in oral evidence stating that it would cost the sector around £368,000 per annum to remunerate chairs for what it considered the typical number of days on which they would be working on university business (40 days) at the Government rate.
88. However, Universities Scotland went on to explain that the level of expenditure was not necessarily its main concern, stating—

“It is really about due diligence. If the developers of the bill conceive the chair’s role as simply being to chair a meeting six times a year, they have failed to understand what the role of a chair of a governing body is.”

89. When asked to respond to this suggestion in oral evidence, the Bill Team noted the variation in the number of days cited in written evidence and the difference in the role of chair in different HEIs. It explained that its intention had been to examine “the core of the job so as not to overstretch the coverage of what would be statutory remuneration” but conceded “it is fair to say that the focus was pared back a little too much” and undertook to “consider all the evidence and to revisit some of the assumptions, particularly in respect of the number of days that a chair spends doing their job.”

The Committee is disappointed about the disparity between the Government’s estimate of the time commitment required of a chair and the evidence provided by HEIs and questions the robustness of the consultation exercise in this regard. The Committee therefore welcomes the Bill Team’s commitment to undertake further work and “revisit assumptions” of the time commitment and related costs. The lead committee may wish to invite the Cabinet Secretary to provide an update on this work.

Consultation

90. A number of respondents to the Committee’s call for evidence stated that whilst they had participated in the consultation, what they considered to be key issues had not been included in it. The Committee of Scottish Chairs, for example, stated—

“The universities have had no opportunity to date to comment on important matters that were not included in the consultation but which now form part of the Bill. The detailed assumptions contained in the financial memorandum were not the subject of consultation. More significantly, the Bill proposes that government Ministers take new powers on themselves covering fundamental aspects of university governance. These could have a serious detrimental impact on University finances. They did not form part of the consultation: indeed the proposals are in direct contradiction to statements made in the Ministerial Foreword to the consultation paper.”

91. Napier University also stated “there are potential financial implications for Edinburgh Napier University which are not reflected in the FM and which were not evident from the proposals which Scottish Ministers consulted upon.”
92. In oral evidence, Universities Scotland stated that it had had no discussions whatsoever with the Government on the FM. Whilst the consultation had asked about costs and savings “in very general terms”, “the specific figures that were presented in the financial memorandum were not subject to consultation. We could have helped to refine those, so I regret that.”

93. Universities Scotland further stated that “the Ministerial powers in the Bill that are causing us concern were not the subject of consultation...We are very anxious to find a way forward that takes the Ministerial powers out and reframes the way in which those issues can be dealt with. We do not think that due diligence has been done on managing that risk.”

94. Responding to these concerns in oral evidence, the Bill Team stated--

“The point was made that there was no consultation on the financial aspects. I think that I said earlier that the views of colleagues were slightly surprising in the sense that those aspects [relating to secondary legislation] were largely intended as future proofing. Maybe in another bill such sections would have passed off without as much comment, but I acknowledge the clear concerns and views of many who have submitted evidence.”

95. The Committee considers that certain elements of the Bill which have contributed to stakeholder concerns about the potential financial impact of the Bill should have been included as part of the consultation exercise. The lead committee may wish to invite the Cabinet Secretary to set out the reasons for this omission.

Conclusion

The Education and Culture Committee is invited to consider the above in its scrutiny of the Bill at Stage 1.
FINANCE COMMITTEE

EXTRACT FROM THE MINUTES

22nd Meeting, 2015 (Session 4)

Wednesday 16 September 2015

Present:

Jackie Baillie
Gavin Brown
John Mason (Deputy Convener)
Jean Urquhart

Richard Baker
Kenneth Gibson (Convener)
Mark McDonald

Jackie Baillie stated that she had no relevant interests to declare.

Higher Education Governance (Scotland) Bill: The Committee took evidence on the Bill from—

Alastair Sim, Director, Universities Scotland;

Prof. Anton Muscatelli, Principal and Vice-Chancellor, University of Glasgow;

Garry Coutts, Chair of Court, University of the Highlands and Islands;

Higher Education Governance (Scotland) Bill: Financial Memorandum

The Convener: Our next item of business is evidence taking from Universities Scotland on the financial memorandum to the Higher Education Governance (Scotland) Bill. This session will be followed by a session with the Scottish Government’s bill team.

I welcome to the meeting Alastair Sim, Professor Anton Muscatelli and Garry Coutts. Members have received copies of all the written evidence that has been submitted, along with a briefing note from the clerks, but before we move to questions, I ask Mr Sim to make a brief opening statement.

Alastair Sim (Universities Scotland): Thank you very much, convener.

We have substantive and evidenced reasons for being concerned about the prospect of Office for National Statistics reclassification of universities as a result of the bill. Our concerns arise from our consideration of the relevant ONS guidance on reclassification, and consideration of the bill alongside the cumulation of other controls on universities. We have reflected on the European system of accounts 2010 and ONS and Treasury guidance on its application.

In brief summary, our reasons for concern are as follows. Government powers over an institution’s constitution are an indicator of control that the European system of accounts regards as defining whether an institution should be classified as being in the public sector. The bill expressly gives ministers the power to amend universities’ constitutions by altering the composition of their governing bodies. It changes universities’ constitutions by giving ministers the power to determine the selection method and term of office of the chair of the governing body. It also expressly gives ministers the power to change universities’ constitutions by changing the membership of their internal academic regulatory body, the academic board or senate. Treasury guidance on sector classification makes it clear that that is a risk, even if ministers do not themselves appoint the members of a governing body.

The very wide powers that section 20 of the bill gives ministers to amend primary legislation affecting universities’ governance, and therefore their constitutions, are also a risk factor. Treasury guidance says explicitly that, even if powers to control an institution’s strategy or constitution are
not exercised, the fact of the existence of the controls is what will be taken into account in a reclassification decision.

Governmental control of pay rates is regarded as an indicator of public sector status. The bill expressly provides for that in relation to the chairs of universities’ governing bodies.

In applying the European standards, the ONS will take a view on the overall level of control that is exerted by Government on universities. As well as applying the European system of accounts test of whether Government is able to determine the general policy of institutions, it will look at the specific indicators of control. The new powers that are proposed in the bill would have to be looked at alongside significant existing Government controls and influence on universities’ strategy and operations. Cumulatively, those factors create a very significant risk of ONS reclassification.

Controls other than those in the bill that would be taken into account include the detailed ministerial guidance on the priorities for use of public funding by the university sector; the detailed outcome agreements between the Scottish Further and Higher Education Funding Council and individual institutions to give effect to that, which effectively determine institutions’ strategy in relation to recruitment and teaching of publicly funded students, publicly funded engagement with industry and public funding of research; and adherence to the higher education governance code as a condition of public funding. In addition, there are financial controls that are exercised through the Scottish funding council, which include influence on pay through requiring institutions to have regard to public sector pay policy; the requirement for institutions to seek permission to borrow money above thresholds established by the funding council; and the requirement for institutions to receive permission from the funding council before they can grant security over land or property, or offer guarantees or indemnities above certain thresholds.

Professor Muscatelli and Mr Coutts can set out the impact that ONS reclassification would have on their institutions. All universities are concerned about the issue and its impact on entrepreneurial activities, business relationships, capacity to invest and capacity to attract philanthropic support.

We have had some discussion with the Scottish Government but, given the uncertainties, we have not been put in a position that gives us confidence that the issue has been properly investigated. Given the risks to the sector, we feel that university leaders need to have absolute certainty that the bill will not lead to universities being reclassified by ONS.

The Convener: Thank you very much for that opening statement. Our evidence session with the bill team will follow this one, so a lot of the concerns that you have expressed will be put directly to the bill team. I hope that, by the end of this morning, we will have some answers one way or the other.

Obviously, we want to put some questions to you. It seems that your overwhelming concern is about the issues that you have just raised with regard to the potential for reclassification. What legal advice have you received on that? Have you been in direct contact with the Office for National Statistics?

Alastair Sim: We have sought our own legal advice on that. Our legal advisers have also worked with colleges on ONS reclassification issues, so they are really closed engaged with the issues. The advice that we have had from our legal advisers is that the bill, when looked at cumulatively along with the existing indicators of Government control, creates a significantly increased risk of ONS reclassification.

The Convener: Okay. The second part of my question was whether you have been in touch with the ONS directly to speak to it.

Alastair Sim: We have not been in touch with the ONS directly, not least because we are trying to manage a risk here. If we were in touch with the ONS directly, I have some concern that we would catalyse the risk that we are trying to avoid.

The Convener: The very fact that we are discussing the matter in the public domain means that it will not be a secret to the ONS that it is a concern. The concerns that you have raised have been raised with us by a number of education institutions, as you would imagine. I find it a little bit odd that you have not contacted the ONS, because I do not think that it would come as a bolt out of the blue—it is not as if it would say, “We weren’t actually thinking of reclassifying them, but now that the universities have contacted us directly maybe we will just do that.” To me, your response seems rather weak.

Alastair Sim: I can see your point. I have to say that I think that the responsibility lies with the Government to give us a really firm assurance that the issue has been dealt with through proper due diligence. At the moment, we simply do not have that assurance. I really feel strongly that that is where the responsibility lies.

The Convener: I can categorically assure you that these questions will be put directly to the Scottish Government bill team and we will not demit our responsibilities in that regard.

Garry Coutts (University of the Highlands and Islands): In practice, the Office for National
Statistics has made it clear over a wide range of issues that it makes a determination once it has seen what has happened on the ground. Getting advice from it in advance is not something that has happened before. I think that that was the case with the Aberdeen relief road and other proposals that have come about. It has proved very difficult to get definitive advice from the ONS and, because it is completely independent, its analysis can change. The advice that might be available today might not be the advice that is given in the future. It is not an organisation from which people have had much success in getting clarity of advice on the approach that it will take until the decision has been made.

The Convener: If that is the case, what categoric assurances could the Scottish Government give you that its proposals would not impact on reclassification, given that you are saying that you cannot find out whether an organisation will be reclassified until after legislation has been passed?

Garry Coutts: That is exactly the risk that I am highlighting. I am not sure that we would be able to get that sort of guarantee, so the question that remains is whether what the bill is trying to achieve is worth creating that risk.

The Convener: Okay. Our job is obviously to look at the financial aspects, not necessarily the policy objectives.

Professor Muscatelli, did you want to add something?

Professor Anton Muscatelli (University of Glasgow): Yes. I just wanted to follow up on that point, which I think is very important.

As Mr Sim highlighted, the sections that perhaps bring the greatest risks, which are sections 8, 20 and 13, are not central to the review of higher education, which was seen as being implemented as part of Government policy, so to my mind it is a question of minimising the risk and seeing whether we can improve the bill through this dialogue. Mr Coutts is absolutely right that there are no guarantees here, but the issue is whether we can ensure that we do not crystallise that risk.

The Convener: You talk about improving the bill. Do you want it to be improved or would you prefer it not to proceed full stop?

Professor Muscatelli: Are you asking me, convener?

The Convener: Yes, I am asking you as a witness.

Professor Muscatelli: My view is that there is a clear mandate for the bill, because not only the Government but other stakeholders in Parliament have said that there are issues that the bill should confront. There are different views among my stakeholders in the university. We have to recognise that. There are things that can be improved. That is my personal position.

The Convener: Okay. Let us move on a wee bit. You say:

“The Government has provided no explanation of why it considers that additional Ministerial powers are desirable.”

You go on to say:

“The detailed assumptions contained in the financial memorandum were not the subject of consultation.”

What kind of discussions did you have with the Scottish Government specifically on the financial memorandum?

Alastair Sim: On the financial memorandum, we had none whatsoever. The consultation on the legislative proposals asked in very general terms what costs and savings there might be, but the specific figures that were presented in the financial memorandum were not subject to consultation. We could have helped to refine those, so I regret that.

If I may pick up on Anton Muscatelli’s point about ways forward, the ministerial powers in the bill that are causing us concern were not the subject of consultation, either; they were not included in the consultation. The discussions that we have had with Scottish Government officials lead us to think that they were trying to solve the technical problem of how to enable continual evolution of the membership of governing bodies in ways that do not require constant primary legislation, but I think that what has happened is that they have, to some extent inadvertently, come into territory where a risk has been created of ONS reclassification. We are very anxious to find a way forward that takes the ministerial powers out and reframes the way in which those issues can be dealt with. We do not think that due diligence has been done on managing that risk.

The Convener: Since the financial memorandum was published, have you had any discussions with the Scottish Government or its bill team?

Alastair Sim: Yes, we have. In particular, we have raised our concerns—both orally and in writing—about the ONS reclassification issue. At the moment, we are waiting for a substantive response.

The Convener: Right—that is fine. I will not press that further. I was going to but, if you have not yet had a substantive response, I will not.

Committee members might want to ask questions that arise from other submissions, because you are the umbrella organisation. An issue that has been raised by a number of
organisations, including Universities Scotland, is the possible loss of charitable status, but you did not mention that in your submission. Is that because you now accept that there would not be a loss of charitable status? In its evidence to the lead committee, the Office of the Scottish Charity Regulator seems to have made it clear that, in its view, that would not be an issue.

Alastair Sim: We have reflected on OSCR’s advice. A brief summary of OSCR’s position would be that although the bill in itself probably does not lead to a risk of reclassification for charitable purposes, if ministers used their powers to amend the membership of governing bodies, to amend the membership of academic boards or to make the very general changes to legislation that section 20 allows them to make, that could lead to a situation in which OSCR had to re-examine whether universities were meeting the charity test in relation to ministerial directions. I am taking that at face value.

One thing that OSCR recognises—this is pertinent to the ONS reclassification point—is that the bill gives ministers power to alter the constitution of universities, and that is one of the risk factors in relation to ONS reclassification.

The Convener: That is an important point, but OSCR said:

“we do not see anything to prevent any conflicts of interest arising for charity trustees nominated under the provisions in the Bill being dealt with in a way that enables the trustees to meet their duties.”

It also said:

“we do not see that the provision for charity trustees to be nominated in terms of the Bill will be incompatible with good practice”.

Alastair Sim: In a sense, I am taking that at face value. That is OSCR’s view.

There are issues that will arise for people who have been nominated by interest groups to serve on governing bodies about how to reconcile their mandate from the interest group with their overall duty in relation to the good governance of the institution. There might be situations in which they will have to absent themselves from the business, because the mandate from the interest group might be different from the duty to the overall institution. I am not saying that that is unmanageable, but it will create difficulties for individuals in certain situations.

The Convener: I do not want to delve much deeper into that, as several colleagues want to ask questions. I will just touch on one further point. You said:

“as every member of this committee can confirm, university chairs have much more demanding portfolios than can be addressed in 6 days per annum. The time commitment is at least one day per week, and in recent years has been greater than this ... Regrettably, it appears from the Financial Memorandum that the Scottish Government does not understand the significance of this role and the time required to fulfil it.”

You obviously have significant concerns about the financial memorandum, leaving the ONS issue to one side. What kind of financial impact do you think that underestimation, as you put it, will have on the universities?

10:15

Alastair Sim: The Scottish Government’s modelling figure for remuneration for chairs is a rate of £512 per day, I think. If you apply that to a kind of median number of days for which a chair would typically be working on university business, which is about 40 days, you end up with a figure of about £368,000 of expenditure on remunerating chairs across the sector.

Our concern, first and foremost, is not necessarily with that amount of expenditure across the sector; it is really about due diligence. If the developers of the bill conceive the chair’s role as simply being to chair a meeting six times a year, they have failed to understand what the role of a chair of a governing body is. Mr Coutts makes a significantly greater contribution than that through his role.

The Convener: It raises concerns about other aspects of the bill if that point is not understood, as you suggest.

Garry Coutts: There is also an issue around the roles that other people on courts would be playing, too. People who chair finance and general purposes or audit committees also have a significant responsibility. As soon as we start paying or remunerating certain members at a daily rate for the work that they do, that brings into question why other people who also contribute a lot of their skill and time for what are very important functions of the institutions are not also being remunerated. It looks very much like the non-departmental public body model of remuneration, which would be a big change for the sector. Of course, that would also increase costs.

The Convener: Leaving aside the ONS issue for the moment, do you feel that the financial memorandum in any way effectively represents the financial impact of the proposed legislation? Are you happy with some but not all of it, or are you not happy with any of it?

Professor Muscatelli: Without a doubt, the biggest risk financially is the ONS issue. The rest is of an order of magnitude that is more to do with how the proposed measures are designed to ensure that the governing body is effective, as has been pointed out, and—that relates to Mr Coutts’s point—the costs of membership are more in line
with what we would find on a health board or an NDPB. That would probably give us a closer estimate of what the amount would be. Financially, the biggest risk comes from the ONS reclassification issue, without a doubt. As I am happy to outline, that is how universities operate: they do so substantially by using their operating surpluses to make substantial capital commitments. That is the key area of concern.

Alastair Sim: My real concern with the financial memorandum is about the quality of thinking that has gone into this work. For instance, a cost of £1,000 is being projected for the electoral process for a chair of court. I have looked at the evidence that has been submitted by universities—and I have run electoral processes for alumni members of governing bodies—and the universities are saying that, to run a proper electoral process costs £21,000 to £30,000.

As Anton Muscatelli says, it is not the big money that is the concern, in a sense. If the assumptions in the financial memorandum are so at variance with what institutions are saying the actual costs would be, that gives me concern about the quality of thinking that has gone into the issues behind the bill, including the ONS reclassification issue.

Garry Coutts: There would also be a requirement for us to change our articles of association to meet the new terms. The last time we did that, we had to consult about 17 different organisations, all of which had a view on our articles. There are also the legal fees. That is a huge complication. It is the opportunity cost, rather than the real cost, that is significant.

The Convener: That has been suggested in a number of pieces of evidence, but I have not asked you a question about that, as I am trying to leave some questions for colleagues, who may wish to explore some of these areas.

The first member to ask questions will be Gavin Brown.

Gavin Brown: Good morning. Mr Sim, you said that Universities Scotland has taken legal advice. I presume that the lawyers have examined Treasury guidance, ONS publications and so on. If I heard you right, the legal view is that the bill would significantly increase the risk of reclassification by the ONS.

Alastair Sim: That is correct.

Gavin Brown: Obviously, we can put questions to the Scottish Government, but you said that you have had no substantive response from it. When, to your knowledge, was the ONS issue first formally raised with the Scottish Government either in a meeting or in correspondence?

Alastair Sim: I raised the matter very shortly after the bill was published. I think that it was in email correspondence with officials on 17 June that I said that it was a significant issue and that we needed to be assured that the Government had bottomed it out. Having not had such assurances, I wrote to officials on 13 August setting out a series of questions about the bill generally and the advice that we had taken on the bill, and asking for a range of assurances. I know that they are working on it, but we have still to see a written response to that.

Gavin Brown: So, when I put questions to the officials, I can say without doubt that you raised the matter with them in late June at a meeting—

Alastair Sim: I wrote about it in correspondence in late June. I also discussed it with officials at a meeting in late June.

Gavin Brown: You then wrote formally to officials on 13 August and that letter has not had a formal reply.

Alastair Sim: Not yet.

Gavin Brown: I have not been able to find anything in writing about the Scottish Government’s official view. I will ask the Government, of course, but is the official line on the issue clear to you? Is the Government saying that there is something to review, or nothing to review? Is there any indication of what the broad line might be?

Alastair Sim: In the conversations that we have had with Scottish Government officials, their initial line has been that they do not think that there is a problem because there is no plan for direct ministerial control over appointments to governing body membership or for new controls over borrowing. The latter was one of the factors that the ONS considered in deciding on the classification of further education colleges.

As I tried to set out at the beginning of the session, the guidance and the practice of the ONS show that it looks much more widely at indicators of Government control over strategy and the constitution of organisations. My view is that the due diligence has not been fully carried out. The Government has looked very narrowly at the issue, but if it was to step back and consider the guidance and the practice of the ONS, it would realise that it needed to take a wider view of managing the risk.

Gavin Brown: For the sake of argument, let us assume that the legal advice that you have been given turns out to be correct, the bill passes with no amendments and the reclassification by the ONS occurs. What are the main consequences for the sector and for the individual universities that are represented here today? I am interested in the views of all panel witnesses.
Alastair Sim: In aggregate, we are concerned that institutions would not be able to borrow money to invest or to hold over reserves from one year to another so that they could invest in teaching and research. We are also concerned that we would lose philanthropic support, because people do not want to give their charitable donations to central Government bodies. Professor Muscatelli and Mr Coutts have probably been considering the impact for their individual institutions and can exemplify that in concrete detail.

Professor Muscatelli: I am happy to say that my university is about to embark on a major capital programme, partly because we have recently acquired land, as some of you will know, and we have grown by about 20 per cent in the past couple of years.

Our governing body has approved a plan that will involve an investment of about £775 million over the next 10 years. It is a significant capital programme in terms of its positive economic impact on Glasgow and, indeed, Scotland. The programme has to be financed from our operating surpluses. This year, we will run a surplus of the order of £20 million. We have built up cash reserves that will be of the order of £145 million by the end of this financial year. All those reserves could not be used if reclassification occurred; they could not be carried over, as Mr Sim has pointed out.

The other important area is philanthropic income, because we will need to fundraise. We have plans to raise about £110 million over a period of time to help to fund the capital programme. Again, it is difficult to do that without being able to carry over money.

Those are the financial dimensions of the impact of the proposals on an institution such as the University of Glasgow, but you can multiply it many times if you look at other similarly sized institutions.

Garry Coutts: We already have some practical experience of the impact. Our academic partners that deliver HE for us are further education colleges, which experienced reclassification more than a year ago. That has already had a significant impact on them. They cannot retain reserves from one year to the next, and any reserve that is created has to go into an arm's-length foundation, which is beyond their control. Although there is as yet no direct experience of those arm's-length foundations doing other than returning resources when required—for building projects or whatever else—to the institutions that generated them, there is no guarantee at all that they will do that.

We are in the middle of looking at procurement process for student residences, and the finance companies that are looking into it are wanting to see the strength of our covenant. If our reserves are put into arm's-length covenants that are off our balance sheet, the cost of our borrowing will be significantly higher, if we can borrow at all.

If we want to develop new courses and partnerships with our communities and with industry to develop what is required for the area that we serve, we need to be able to take risks. If we do not have some reserves, our ability to take risks when working on annualised funding is much reduced.

There would be very significant issues if we were not able to operate in the way in which universities have traditionally operated. We have not had the same luxury of several hundred years' worth of history as Anton Muscatelli’s organisation, but we want to be able to develop a relationship with our alumni and with businesses in the Highlands and Islands, and to develop the sorts of reserves that will allow us to become a powerhouse that will develop and support change in our region. We are very concerned that, if we are classified as a public body, we will lose the opportunity to do that.

Gavin Brown: Mr Sim, is that something that Universities Scotland could do? I would be very interested to see the potential aggregate impact. We have heard about the University of Glasgow, and we have heard from Mr Coutts, too, but it would be quite interesting to know what the likely cumulative impact would be across the board if this were to happen—obviously, there are two issues there. Is that something that Universities Scotland could provide?

Alastair Sim: Yes. I can give you a sense of that at the headline level. At the moment, from the latest available figures, universities' overall level of borrowing is about £530 million. The consequences of taking that on to the public balance sheet are quite concerning.

I will not go into tax relief, as that is more linked to the charities issue, but the overall level of capital investment by universities each year is about £377 million. If that is put at serious risk by our inability to borrow or because of borrowing coming within tight Government public spending controls, our capacity to make that investment so as to provide the best possible facilities for students and research will be severely hampered.

Gavin Brown: I will move on to the subject of charitable status. The convener has asked a number of questions on this subject, and this question is sparked by his questions—I am grateful to him for that. If I have read the OSCR advice correctly, it did not refer at all to the ONS issue; it was considering charitable status entirely
in its own right. That is just my reading of it—obviously, OSCR could respond to that.

You may not know the answer, but my question is this. OSCR considered charitable status in its own right but, for the sake of argument, let us assume that the ONS reclassification does occur. Presumably, charitable status falls overnight, as a central Government organisation could not have charitable status. I have not considered the matter legally, but I am wondering whether you have looked into that question.

Alastair Sim: I think that separate legislation would be required. Essentially, the colleges became classified as central Government bodies, with the impacts that Mr Coutts has described. However, the Government legislated to create a specific legislative exception for the colleges, so that they can retain charitable status, even though they do not meet the normal charities test because they are under substantial ministerial direction. In my view, if ONS reclassified universities—with the grave impacts that we have described—the Government would need to legislate for us to retain charitable status.

Gavin Brown: Again, this question was raised slightly earlier. One witness wrote to us and basically said, “Kill the bill.” Assuming that that does not happen—there are negotiations and discussions to happen, and so on—are there obvious things that could immediately be removed from the bill that would, if not eliminate the risk, turn it into a minor risk instead of a significantly increased risk? Are there specific sections that could come out quite easily?

10:30

Alastair Sim: Yes. Section 8 gives ministers the power to change who is on the governing body of an institution. Section 13 gives ministers the power to change the internal structure of universities, by changing who is on the academic board or senate. Section 20 gives ministers an extraordinarily wide power to amend primary legislation. Those are the provisions that raise the critical risk factors. There are also new ones, which were not in the provisions that raise the critical risk factors. There are also new ones, which were not in the consultation on the legislative proposals. There is creative scope for a rethink about how to do things in those sections in order to take ministers out of the equation.

Gavin Brown: I am grateful.

Jackie Baillie: I think that you are right to be cautious about the application of ESA 2010, given that the Government’s infrastructure projects have also been caught up in these issues.

I wish to tease out some of the financial aspects. Mr Sim has spoken in general terms about universities borrowing £530 million a year. What kind of projects is that for, typically? What would a delay in that money being available do to those projects?

Alastair Sim: I will let my colleagues talk about the impact on specific institutions, which will illustrate that in a more concrete way. What is typically being done with that borrowing by universities? We have a great deal of estate that is not fit for purpose. Just under half our estate is in what is called conditions C and D and either is in need of immediate replacement or is falling apart at the seams and will need replacement very soon. Often, that applies to 1960s and 1970s estate, which is also hideously carbon inefficient. A lot of work is going on to renew the estate and make it fit for purpose for students and fit for purpose in carbon reduction terms.

On the research side, as innovation progresses, we endlessly need to ensure that we have the facilities and equipment to keep Scotland right at the cutting edge of research. When we start falling back on the competition, it is hard work to make up lost ground.

Looking more widely at our economic impact, if we are going to be competitive and ensure that Scotland is a place that attracts international talent at both student and academic levels, we need to be able to say that we have facilities that can compete with those of countries that have much higher levels of investment. That is hard work.

Professor Muscatelli: One of the important things is the economic leverage effect. Ten or 15 years ago, many more capital grants were being given through the funding council and other agencies. Because of spending cuts, those grants have had to be reduced. In many respects, we have been able to do things that have helped to offset that. As has been pointed out, universities are major economic engines in the economy. We are able to invest for the long term in a way that is very difficult to do with public money, because of the constraints on public budgets. The impact is huge.

I will give an example of the sort of project to which Alastair Sim alluded. In preparation for our major infrastructure development, we are installing a combined heat and power system across our campus in Glasgow. That is a £14 million to £16 million project. It will probably reduce our energy running costs by about £2 million to £3 million per year, and it will reduce our carbon footprint by 20 per cent. That has had a huge positive impact, and it has been well received.

Those are the sorts of things that are important, apart from the cutting-edge research, which is of course hugely important. We have a major quantum technology hub, at £29 million, which has required several million pounds of investment to
set up. It is one of the four quantum tech hubs in the UK. Such projects can be done only over the long term; they cannot be done on a short-term basis year by year.

Garry Coutts: We are a very different sort of institution, and the vast majority of our estate is owned by our academic partners rather than by us directly. We are in a very different position from other institutions. The issue is about being able to make investment. We want to provide state-of-the-art research facilities, as we need to increase the amount of research that takes place in the Highlands and Islands. We are in the process of developing a lot of those facilities but we are reliant on people at Highlands and Islands Enterprise and direct grants to be able to do that.

In the future, when the public settlement will be tight and we want to be more self-sustaining, we want to develop such partnerships, develop capital reserves and be able to make such investments ourselves. We want to have exactly the same sorts of opportunities as the University of Glasgow and the University of Edinburgh have had because of their history. If we do not have the opportunity to maintain reserves, that will be gone from us.

Jackie Baillie: I am picking up from you a direct impact on capital and an indirect impact on revenue, which is equally concerning.

In an earlier answer, Mr Coutts said that the ONS does not give advice in advance, but I understand that the Scottish Government is currently in dialogue with it about new models for infrastructure projects. Therefore, perhaps we should seek assurances that the Scottish Government is in dialogue about the implications of the bill for ESA 2010.

In seeking legal opinion, are you aware of any other European universities or colleges that have similar governance arrangements with their countries that might point a way through the difficulties of ESA 2010?

Alastair Sim: Not in detail. To answer that question at an aggregate level, one of the reasons why universities throughout Europe tend not to do as well as UK universities in international league tables, for instance, is that they are often subject to a narrow range of controls by their national or regional Governments. Often, those include controls over whether they can acquire and dispose of property and controls over senior appointments.

Anton Muscatelli might know more about this than I do, but it is not untypical for delegations to come to Universities Scotland to learn about how we manage a system that is respectful of universities’ contribution to the public good while also creating the space of autonomy in which we can act entrepreneurially in the public interest. We are in a happier space than many European partners and competitors. They have certainly looked to the UK as an example of how we carve out a space of responsible autonomy in which universities have the entrepreneurial capacity to act in the public good.

Professor Muscatelli: I certainly know that from Europe. In some European countries, universities are firmly in the public sector and capital investments have to be carved out from public spending. In a country such as Italy, if a campus has to be renovated, central Government has to budget for that in its public spend.

I will answer a different aspect of the question. When colleges were reclassified, it happened not only in Scotland but in England and Wales. I gather that the Welsh legislation is interesting, because it introduced elements that allowed greater student and staff representation on the governing bodies while allowing the colleges to be reclassified as non-profit independent organisations. There are models that could be considered to avoid the level of control that we are talking about while addressing the concerns that stakeholders have about how governing bodies should be composed.

Jackie Baillie: It strikes me that nobody has asked the ONS for its view on the matter, unless the Government has. Would you regard that as helpful?

Alastair Sim: If we are looking for assurances from the Government, we need to be sure that they are reasoned assurances and, given that the Government cannot control the ONS, that would mean assurances that it had agreed with the ONS.

John Mason: The Universities Scotland submission says:

“ONS’s programme already includes an intention to review the classification of higher education institutions.”

Leaving aside the bill, is there already a question on that point?

Alastair Sim: That comes back to what I said in the beginning about the accumulation of the risk. Under the existing control regime, there are some controls over borrowing, we work to quite a tight financial memorandum from the funding council and we have an outcome agreements framework in which what universities deliver is clearly a negotiation with a Government agency. We are already in territory where we are starting to look at the ONS over our shoulders. Adding the risks that the bill poses would put us in a position of quite substantive worry.

The ONS exercise was stimulated by something different. It was stimulated by questions about how universities are classified in England, given that they are increasingly reliant on fee income.
Nonetheless, if we look at what has happened before, we see that the ONS’s exercise on further education colleges was catalysed by its look at sixth-form colleges; we cannot be confident that the ONS will approach the exercise narrowly. Previous experience indicates that it will not.

**John Mason:** Can you put figures on the risk? As an accountant, I like numbers. Is the risk already 75 per cent and the bill will take it up to 76 per cent, or is the risk 50 per cent and this will take it up to 75 per cent? Can you give us any indication?

**Alastair Sim:** Intuitively, I find it easier to put the risk in terms of red, amber and green. I would say that the impact of ONS reclassification would be at the top end of red, while its likelihood is hovering on the amber to red border.

**John Mason:** Is that the position already?

**Alastair Sim:** No. That is the position with the bill.

**John Mason:** What would be the risk without the bill?

**Alastair Sim:** Without the bill, I would probably put the risk at lower amber.

**John Mason:** So you think that at the moment we are moving around within amber, but the impact would be up in red. I am with you.

We have already touched on the financial concerns, but I want to ask about a number of issues that arise, especially in the submission from the Committee of Scottish Chairs. First of all, on operating surpluses, it appears that the colleges have found a way round that matter. I am on a charity that is actually a pair of charities; one holds funds and feeds into the main charity once in a while. That sort of model is quite normal, so this should not be a serious problem, should it?

**Garry Coutts:** I think that it would be a serious problem. It is not necessarily a problem today, if there are trustees on the charitable body who are completely in tune with the way it was set up. However, the bodies that we are talking about will end up exercising control and consolidating that trust, which is a separate charity, but because there is control, it is consolidated into our accounts. Anything that is created will have to be arm’s-length in order to get around the ONS problem.

From my point of view—and this comes back to the point that I made about improving the legislation—the declared intent of the legislation is to create transparency and accountability. I do not think that taking reserves out of an organisation and putting them into one that does not have the same transparency and accountability is a solution to that problem—if that is the problem that we are trying to solve.

One could argue that if we put lots of staff and student representatives on to the ALF, we could end up exercising control and consolidating that back into the organisation. Those are the complex issues that are generated by trying to create different structures. There might be a solution, but none of us has the full picture. The issue is about managing that risk.

10:45

**John Mason:** The committee is looking at the financial aspects, but with regard to democratic accountability and transparency, which you have just have just highlighted, I was going to ask whether your concerns about finances are real or whether they are a smokescreen, because the universities do not actually want democracy and transparency.

That argument seems to have been made in a letter in today's *Herald* from Dr Iain Banks,
president of the University and College Union in Glasgow, who refers to

“the difficulty faced by staff and students wishing to influence a governance structure that is too often focused on business rather than education or research”.

That is the counter-argument to all of this. The Education and Culture Committee will be looking at the substance of that, but I need to be convinced that you have financial concerns and that the issues that you are raising are not just a smokescreen.

Professor Muscatelli: I assure you that I have financial concerns. I recognise that stakeholders have different positions; indeed, that is why the bill has been introduced.

On the issue of the finances and ONS reclassification, many stakeholders who have expressed concerns about transparency and accountability would agree with the point that we are making. For example, an institution might end up running a deficit because of unexpected circumstances—say, a cut in its research take. Clearly, staff and students would like a smooth glide path in that respect, and that is what we can provide with the ability to carry deficits forward and use cash reserves. I cannot guarantee this, as I cannot read the minds of other stakeholders, but I suspect that, on that issue, there would be quite a lot of agreement across the sector.

To reiterate, our concerns relate to sections of the bill that were not in the original review of higher education governance. They are additional parts that, to be quite honest, I do not think any of us expected.

Garry Coutts: This is a very important question. I believe that, if the financial consequences of the bill were not there, we would be able to work with Government and have a good discussion about the issues that are being addressed in the bill in relation to transparency and representation on university governing bodies. Indeed, we have moved a very long way with the introduction of the code of good governance for university courts, which is already having a significant impact on their make-up. The code has not yet had its first formal review, but we agreed with Government that it would be reviewed to see what its impact was. There is a lot that we can do to make sure that we meet demands for transparency and representation and that our institutions evolve and are fit for purpose today.

My question is whether the bill addresses the sorts of concerns that Dr Banks and others have raised. We are putting a huge amount of risk into our institutions as a result of the bill's financial consequences, but I do not believe that its other provisions address the concerns that people have raised sufficiently to ensure that they achieve what is wanted. What we need is a better dialogue with Government to try to make sure that we can get institutions and governance arrangements fit for the future.

Alastair Sim: Very briefly, I would say that the problems that we have raised with this committee are very real concerns, but they are real concerns that are capable of creative resolution. If the powers in the bill that are given to ministers are looked at again and alternative ways of doing things found, the ONS risk could be managed downwards. I would like to be confident that that would be the case.

John Mason: I take the point. The committee has had issues with the ONS in totally separate spheres, and that might be a whole question that we need to look at separately.

Do I take it, then, that you are not arguing that ministers control the universities by putting in a structure for electing the governing bodies? That sort of thing happens in the commercial sector—indeed, it happens all over the place. Theoretically, Government can interfere in anything. There is never total freedom from the risk of Government control, is there?

Alastair Sim: What I tried to argue at the beginning is that one must consider this in the round with regard to the accumulation of Government controls. We have quite an intense relationship with Government in terms of specifying what our outputs should be and being accountable for those. However, when we look at the ONS risk factors relating to a cumulative pattern of influence or control and the specific risk factors in relation to whether the Government has the capacity to amend the constitution of an institution, we find ourselves in territory where there might be cause for serious concern that the risk of ONS reclassification has been heightened. That is simply a result of taking an objective look at the guidance and considering ONS’s behaviour in relation to other sectors.

John Mason: Okay. I will leave it at that.

Richard Baker (North East Scotland) (Lab): Mr Coutts has spoken about the experience of restructuring in the college sector and its impact on financial arrangements. Is it fair to say that not all the college sector’s issues of concern have been resolved yet? I have certainly been made aware of some quite technical issues that have raised fundamental problems for colleges. For example, if a college runs its own training company—as some colleges do, and they are often multimillion-pound businesses—there is a question whether it can use its own insurance scheme or whether it has to use the Government insurance scheme, which can have severe repercussions. I understand that some of those
issues have not yet been resolved. Is that your experience, Mr Coutts, or do you think that most of those questions have been settled?

**Garry Coutts:** A number of workarounds are being used, but a huge amount of time and effort has been invested in looking at how we manage that part of our business rather than in looking at our primary purpose of ensuring that we make good-quality education available to as wide a group as possible.

The University of the Highlands and Islands is the regional strategic body for the colleges that operate in our area. We now find ourselves in the position that in order to help an institution that happened to run into financial difficulty in-year, we would have to keep a top slice from all the institutions to cover that during the year—which would mean that we would have a surplus that would be immediately taken away from the colleges’ main purpose and put into an ALF—or, if we did not take that top slice, the college in financial difficulty could end up running a deficit, which it would not be allowed to do.

There are significant risks in the college sector that we have not yet fully experienced, because it is still the very early days of the new regime. It would be crazy to introduce the risk that we are discussing into the university sector if the legislation does not add some overwhelming value to counteract it.

**Richard Baker:** From what you are describing, it seems that there has been an opportunity cost to the sector.

**Garry Coutts:** Absolutely—a huge opportunity cost.

**Richard Baker:** The opportunity cost is a result of having to undertake that work and create the new structures, which does not sound particularly efficient. Are you also saying that there are future risks—or potential problems—that have not yet transpired?

**Garry Coutts:** I can assure you that when we and the chairs and principals of the individual colleges meet together, as happens regularly, we spend about 80 per cent of our time considering governance and management issues instead of education, which is a real tragedy. Much of that discussion is created by the complexity that has been introduced by the ONS issue and other aspects.

**Richard Baker:** Mr Sim, the convener has referred to what happened with the review of the ONS. Some members have already—negotiations and discussions—or lack of them—with the ONS. Some members have already referred to what happened with the review of the capital programme and the reclassification by the ONS as a result of European system of accounts rules. For me, that shows that neither the ONS nor Europe is taking a laissez-faire approach to these matters. Given the Scottish Government’s problematic experience, which has had real impacts on capital funding arrangements, are you aware of any work that it has undertaken on the issue? Has there been any reconsideration of the issue or has there been a lack of dialogue from the Scottish Government on that?

**Alastair Sim:** I am not aware of any reconsideration of the issue. In our minds, what happened with the Aberdeen western peripheral route has heightened the risk. As you have suggested, we are now seeing quite an activist ONS, which is taking a really close look at whether things are tipping over from private to public sector classification. At roughly the same time, it has taken a very close interest in housing associations in England, not on the basis of ministers taking direct power to appoint members of housing association boards but on the basis of their exerting influence over housing associations by making disposal of their stock a policy priority.

In my mind, the risks around ONS issues have been heightened by its recent decisions. Personally, I do not feel confident that the bill has been properly considered in the context of such heightened risks.

**Richard Baker:** So you would hope or expect that that heightened risk would be taken into consideration, but you have had no reassurance from the Scottish Government that it has done so.

**Alastair Sim:** To be fair, the people in the Scottish Government to whom I speak say that they have reached their view on the ONS issues. However, although they necessarily take a wide view of the guidance and ONS practice, I think that they have not opened it up widely enough to take a holistic view of the risks that it poses.

**Richard Baker:** Finally, why were those issues not foreseen in the review process? Were those issues not anticipated because they were not expected to be problematic, or did the review believe that its views and objectives could be achieved without creating such problems?

**Alastair Sim:** I would say the latter. Whether one is fully in accord with what was recommended in Ferdinand von Prondzynski’s review, one has to admit that it did not conceive of Government taking extensive new powers over universities. It was much more about an internal reform of university governance. The idea that ministers would take powers that could enable them, by regulation, to alter the composition of governing bodies or academic boards does not sit comfortably with the findings of that review. If members read Ferdinand von Prondzynski’s
evidence to the Education and Culture Committee, they will see that, although he is clearly supportive of the broad principles of what the bill seeks to achieve, even he expresses concern about the means by which the bill sets out to achieve its aims, particularly with regard to the new powers given to ministers.

**Richard Baker:** So even the chair of the review has concerns about the bill’s impact and how its objectives are being pursued.

**Alastair Sim:** Yes.

**Richard Baker:** That is very helpful to know.

**Mark McDonald:** I want to cover a number of areas. First of all, Mr Sim, you said that the costs of appointing a chair have been significantly underestimated, and you then used the comparison of the election of alumni members to the court. The financial memorandum says:

> “Although costs will depend upon the nature and size of the electorate which features in the regulations, it is considered that the maximum cost of this election would be broadly equivalent to the cost of electing a rector within the ancient universities.”

I do not get to vote for the rector of the University of Aberdeen, but I do get to vote for the alumni members of the court, because the vote is carried out across all the alumni. Surely you are not suggesting that the electorate for appointing the chair will be thrown open to the university’s alumni. After all, they will not have that much interest in who chairs the university court; I certainly would not be that interested, given that I graduated from the university more than a decade ago.

**Alastair Sim:** I will let Anton Muscatelli talk about the costs of electing the rector, but all we are referring to is the evidenced experience of institutions that have run a proper due process, which is managed through the Electoral Reform Society and which we would need if the election were to involve the wide constituency of students and staff. I also note that section 4 of the bill specifies other categories of elected members—

**Mark McDonald:** But this is not going to touch the cost of an alumni election, is it?

**Alastair Sim:** It depends on how it is organised. If you are going to do it properly, it has to be professionally organised, and that has a cost. I am just citing what institutions have said. Those costs of £21,000 to £34,000 give you at least a ballpark figure, and it is far removed from the projection of £1,000 in table 1 of the financial memorandum.

**Professor Muscatelli:** I am afraid that I do not have estimates to hand. Electronic voting methods with a constituency of staff and students would require higher set-up costs, but I do not imagine that running costs would be particularly high.

Most of us have effective human resources systems that tell us exactly who is on the electoral roll. The setup costs would probably involve a ballpark five-figure sum, but after that it should be possible to run the system quite effectively. I do not think that that element is the significant cost.

**Mark McDonald:** A point was raised regarding the difficulties that are faced by those members from a nominating body and the potential for them to represent that body as members of the court or the board. However, that issue arises for many people who are appointed to charitable trusts and boards. I served as an appointed member from Aberdeen City Council on a number of charity boards. There are explicit rules about which hat you wear when you sit around the table, and that situation is presumably not going to change as a result of this legislation.

**Alastair Sim:** Your comment about explicit rules about which hat someone is wearing is important, and we certainly want that to be clarified during the bill process. Many institutions will have a trade unionist who is elected by staff and who serves on the governing body in the understanding that their role there is as a governing body member with corporate responsibility for the good governance of the institution. However, there is a difference between that position, which is quite proper, and the possibility that someone is there—as they might have been in a 1970s public corporation—because they have a mandate to pursue matters for their interest group and that is their only role on the board.

As the bill goes through Parliament, I want to see absolute clarity that, if someone is on the governing body because they have been nominated by an interest group, their responsibility should be—as you have described it—to the good governance and strategy of the institution and not to the constituency that nominated them.

**Mark McDonald:** I want to interrogate the point about reclassification a little further with your forbearance; it might take a bit of time for me to quote the relevant passages.

Universities Scotland states in its submission that the heightened risk comes from

> “Power to decide how people should become chairs ... Power to decide how long people should serve as chairs ... Power to determine the remuneration of chairs ... Power to determine the composition of institutions’ governing bodies”

and
“Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.”

Although the OSCR submission does not reference ONS reclassification, it nonetheless interrogates each of those areas in turn. It states:

“Appointment of the chairing member ... does not give Ministers the power of appointment or removal of a chairing member”.

It goes on to note:

“Moreover, regulations cannot be made without consultation with the older university involved.”

On remuneration payable, it states:

“Our view is that this would not in itself amount to an ability for Ministers to exert control in a way that is central to the activities of the HEI. Again, Ministers must consult with the older university involved before making regulations.”

On composition of the governing body, it states:

“These sections do not give ... Ministers the power to appoint or nominate members to the governing body: this power lies with the various nominating bodies. Nor do they give Scottish Ministers the power to remove members of the governing body. In our view therefore they do not give Ministers any power to control the HEI’s activities.”

On composition of the academic board, it states:

“These sections do not give ... Ministers the power to appoint members to the academic board. Nor do they give Scottish Ministers the power to remove members of the academic board ... In our view therefore they do not give Ministers any power to control the HEI’s activities.”

OSCR has given cognisance to each of the points to which the ONS will give cognisance and has concluded that the provisions do not amount to ministerial control. Presumably, therefore, the ONS will look at the legislation through the same lens.

Alastair Sim: The ONS will look at the legislation through a different lens: that of the European system for accounts and the various pieces of guidance on the interpretation of that system.

The Treasury’s guidance on the interpretation of the European system of accounts explicitly states that power to change the constitution of a body is an indicator of ministerial control. As I set out at the beginning of the session, ministers are expressly taking the power to change the constitution of bodies, so we are definitely at heightened risk of ONS reclassification, especially in the context of the accumulation of existing controls that could be taken into account by the ONS as indicators of government control.

Mark McDonald: Were the current regulations and rules on the composition, constitution and so on of universities a result of statute?

Alastair Sim: There is a difference between rules that are made as a result of statute and rules that are made as a result of ministerial decision. At various stages over the centuries, Parliament has taken powers to make legislation about the composition of university governing bodies.

The ability of Parliament to do that would not lead to ONS reclassification, but the bill does something that has not been done before in Scotland: it gives ministers the power directly to change who is on a university’s governing body or the balance of membership of its internal structures, particularly the academic board. That is a marked departure from what Parliament has previously thought it appropriate for ministers to do.

Mark McDonald: Speaking hypothetically, if that could happen only through further primary legislation, that would give you comfort, and the bill could remain as it was drafted.

Alastair Sim: That would be a different matter, yes.

Jean Urquhart (Highlands and Islands) (Ind): Thank you for all the information so far; it has been interesting. I have one simple question. Why do you think that the bill has been introduced? What do you think the Government wants to see changed as a result of it?

Alastair Sim: We can debate the merits of the bill, but the Government has, at various stages, said that it does not intend certain elements of the von Prondzynski review’s recommendations to be taken forward simply by the sector’s own action; they will require legislation to make them happen. The merits of that will be debated as the bill moves through the parliamentary process.

I understand the intention, but the issues that we are discussing with this committee are, in a sense, unintended impacts of that intention, and we think that those unintended impacts need to be intelligently managed.

Professor Muscatelli: I agree with that. The central intent of the bill would not be modified. If the Government’s intention is to apply the recommendations in the von Prondzynski review of higher education, that would not be modified by addressing the issues with section 8 and section 20, because those sections go beyond the original review and are about potential future changes.

Coming back to an earlier question, if that were to be done through primary legislation and did not introduce control, there would be less of a risk than there would be if it was done through regulation.

Garry Coutts: There has, for understandable reasons, been an awful lot of pressure from staff and students regarding representation on the
courts. In order to ensure that staff and students are properly engaged, we are looking at institutions that have been going for hundreds of years and need to evolve.

There has been a lot of pressure for a commitment to ensure that those constituencies have a voice on the governing bodies. I think that a commitment was made to legislate for that, when there is no requirement to do so. The bill is designed to meet pressure from particular constituents rather than to address the purposes that have been stated. We can achieve the aims in relation to the concerns of trade unions, staff members and students in other ways, and by continuing to evolve the code of good practice. That is where we should go.

Jean Urquhart: Is it a matter of trust? Has the Government been pushed to introduce the legislation? Students and trade unions have demonstrated outside Parliament but the universities did not seem to react. Is it fair that they should try to react to that?

Garry Coutts: I think that universities have reacted to it. The code of governance has gone an awful long way. Looking at the representation on our courts and the expansion of their membership, it is clear that things have changed a lot.

I would welcome a full review of the way in which the code has impacted on the effectiveness of our courts. Such a review is scheduled but, unfortunately, the bill is preventing us from progressing with it. In my view, it would be sensible to hold that review and take full account of it before we make a judgment about whether legislation is required to make it go further. I believe that we can achieve the Government’s intentions as regards representation on courts without the need for legislation, which carries a huge amount of risk and could be very detrimental to the sector.

Professor Muscatelli: It is also a diverse sector, as you will appreciate if you look at the different structures of the governing bodies across the piece. On the governing body of my institution, we have six representatives of the academic staff, two staff representatives who are elected—who are invariably trade union members put forward by their trade unions because they have an electorate who can get them elected—as well as two student representatives and a rector, who is currently not attending meetings but who may attend meetings if he or she wishes. It is a different structure from that of other institutions, and the issue is how that diversity can be managed sensibly to meet the aspirations of other stakeholders such as staff, students and trade unions and to allow good governance to be exercised. That is the problem that the bill is trying to solve, and if we can do that we will be in a good place, but in the context of the Finance Committee’s interests, I am more worried about the financial consequences.

Mark McDonald: Mr Coutts appeared to indicate that the bill’s proposal to amend the governing structures, in and of itself, gave him concern, but Mr Sim’s response to my earlier question seemed to say that the power of regulation, or the ability for secondary legislation to make amendments following that legislation, was the more pressing point of concern. I want to get to the nub of the matter. Is it the panel’s view that there should be no legislation in relation to the composition of the bodies, or is it the fact that the legislation could be amended by secondary legislation that is the problem?

Alastair Sim: There are two different levels of concern. One is the concern about financial impact, which is the one that we have described. If the Scottish Government were to look again at the ministerial powers and take out the ministers’ power to amend the constitution of governing bodies and the ministers’ power by regulation to amend the composition of academic boards, that is likely to manage the ONS risk factor—the specific issue that we have been describing to the committee.

The wider issue for genuine debate is whether the bill is necessary, given that the sector has already introduced a higher education governance code and that every institution already has robust representation of students and staff on their governing bodies. That is a moot point that will be debated as the bill goes through the Parliament.

The Convener: That concludes the questions from committee members. I thank the witnesses for responding to all our questions.

11:13

Meeting suspended.

11:20

On resuming—

The Convener: We will continue our consideration of the financial memorandum to the Higher Education Governance (Scotland) Bill by taking evidence from the Scottish Government’s bill team. I welcome to the committee Laura Duffy, Kerry Twyman and Stephen White. I have offered the bill team the courtesy of their making a brief statement, as our previous witnesses asked to make such a statement, but that has been declined so we will go straight to questions from the committee. I will ask the opening questions and will then open up the session to colleagues around the table.
As the convener of this committee, I have seen dozens of financial memoranda over the years, but this is the first time that 90 per cent of the discussion has been about what is not in the financial memorandum—you will be aware of that from this morning’s deliberations. Let us get straight to the point. In putting together the financial memorandum, what due diligence was undertaken to take into account the concern—which took up most of the evidence that we heard this morning—about the potential impact of the bill in respect of the Office for National Statistics?

**Stephen White (Scottish Government):** Consideration of the risk attached to the reclassification of Scottish universities by the ONS was not something that we thought would be in the financial memorandum. However, I will work back to where it was first considered as a substantial risk. It is not a risk that appears in the financial memorandum because we had analysed it carefully for a number of years.

Going back 18 months, to the genesis of the bill, we looked at what had come out of the 2012 review of higher education governance, which was chaired by Professor von Prondzynski. We looked at what the code of conduct had achieved and the recommendations in that report, which we thought might form the basis of the bill. The issue of reclassification was factored into all that thinking, and there was thorough analysis of the “European system of accounts: ESA 2010” guidance on the indicators of control. The summation of that work, which involved dialogue across Government, was that the final planned content of the bill would be compliant with those indicators of control, which is why the financial memorandum does not feature analysis of that.

**The Convener:** Okay. Can you pull your microphone forward a wee bit? You are speaking quite quietly, and we want to make sure that we can all hear you.

One of the things to come out of this morning’s evidence from Universities Scotland is also in the written evidence that we have received, so you will be aware of it. The committee of Scottish chairs has stated that

"it would be very ill-advised for the Government to press ahead with the proposed legislation without having first obtained a categorical assurance from the ONS that the new Ministerial powers will not lead to universities being reclassified as ‘Central Government.’"  

Has that taken place, and have you taken legal advice on that?

**Stephen White:** It is my interpretation that the ONS will not give categorical analysis or summation statements on the plans of this or any Government. It will look at what a Government has legislated and provided for when that is in front of it, and it will make a judgment. It is an active organisation that takes an interest in many areas of public policy and finance, but there has been no discussion in which it has assessed and cleared any of the bill’s content. That is not how the ONS works. However, the Treasury will often encourage Governments across the UK to have prior dialogue with it.

**The Convener:** To be fair, what you have just said is what came out of the evidence session this morning. It is almost as though you have to wait until the dust has settled before you can see whether there will be an impact for the ONS. In evidence this morning, Mr Coutts, who is sitting behind you, said that it would be crazy to take the risk of going ahead with the financial aspects of the bill under these circumstances. What is your response to that?

**Stephen White:** There has been thorough consideration of the risk, with the emphasis being squarely on the indicators of control. I have removed the indicators from my folder, but I will not read them all. Eight principal indicators of control are set out in the European guidance. For example, the guidance talks about the first indicator of control being the “rights to appoint, veto or remove key personnel”.

The bill is about the how, not the who; it is about process, not people. Nothing in the bill will require higher education institutions to ask ministers for permission to do anything.

There has been a lot of discussion of the secondary legislative powers. We have heard loud and clear what people have said today and there is also a lot of compelling written evidence. We will look at all that. In essence, the secondary legislative powers were an attempt to futureproof the bill so that primary legislation is not required to do something when modification would be a good alternative.

It is not about ministerial control; there have been assertions that ministers may find themselves on governing bodies. There is absolutely no intention on the Government’s part to do that or to have any direct involvement in or control over appointments. It is about the process. That type of direct appointment, veto, removal of personnel and so on runs through most of the first two or three indicators of control. The indicators also mention ownership of voting interests, rights to control through contractual agreements and so on, and control in other areas.

There has been a thorough examination of the indicators of control, of the Treasury extrapolation of the European guidance and of the European guidance itself. The Scottish Government’s conclusion is that the risk that is posed by the bill does not advance beyond any risk that existed
prior to it. That also came out in the previous evidence session.

**Kerry Twyman (Scottish Government):** We have not been able to approach the ONS directly on the issue, because that is not how it works, but I will say a little bit more about the finance directorate’s relationship with the ONS over the last nine, 10 or 11 months in the light of the ongoing capital issues that have been raised. We are cognisant of reclassification issues across the board; we are very aware of them and the risk was highlighted very early in the process. We have been developing close relationships with the ONS because of the capital discussions and, more widely, because there is recognition that the Scottish Government needs to have wider skills and knowledge around ONS classification.

On the back of that, we did a workshop a few weeks ago with the ONS, at which we went through all the indicators and the various scenarios that would lead to an indicator being triggered. We did not talk specifically about universities, but Stephen White and I both attended that workshop and asked questions that were specifically about the bill, although we did not ask about specific elements, because the ONS does not want to answer questions about specifics.

We probed the matter further and the ONS is coming back tomorrow for another series of meetings with finance professionals in various policy areas. We will again tease out those very issues, so that we have greater understanding. Although we cannot go to the ONS with a scenario and get a direct answer, it has been extremely helpful in this more roundabout way. It has given us a lot of time and has given us the assurances that allow us to make risk assessments.

We are, in effect, being asked to do a risk assessment of there being an ONS reclassification trigger. I guess that the question is this: are we to stop a wider potential benefit because of a risk, or are we to do the assessment, define the risk as low and proceed with something that we think provides greater benefit? In this case, we have decided that there is low risk and it is around factors that were already present in universities. In our belief, nothing that is being done will increase that risk.

**Stephen White:** I add—if it even needs to be said—that there is absolutely no intention on the Government’s part that reclassification would be an outcome; it is something that we would seek actively to avoid. That is probably understood, but I say it in case it needs to be said.

**The Convener:** To be fair, I think that everyone understood that, but it helps for you to say it in any case—that is positive.

In your view, is reclassification a red herring?

**Stephen White:** It is not for officials to agree or not with that proposition. We have assessed risk very carefully—not just recently but over a long period—and have also had dialogue in this realm previously with the ONS and universities. It is an active issue—it is not something that has shot up recently. We always take seriously anything that any stakeholder or partner says and we look at the evidence to this committee and to the Education and Culture Committee, but on balance the Scottish Government’s view is that no additional risk is posed by the bill and that its provisions are compliant with the ESA indicators of control.

**11:30**

**The Convener:** You have talked about a number of discussions, but the feeling that stakeholders—the universities—were not actively consulted on the financial aspects has come out of a lot of the evidence. Numerous submissions say the same thing. The submission from the Committee of Scottish Chairs says:

“*The detailed assumptions contained in the financial memorandum were not the subject of consultation.*"

Universities Scotland said that the “consultation document contained no detail on financial assumptions.”

Further to that, we have heard this morning that there was a meeting with the chairs in June, and the Scottish Government was written to on 13 August, but a response has not been received, despite over a month having elapsed. Will you talk about that? Would it not have been a positive thing to have responded in writing to that letter prior to this meeting—not least to have advised the committee?

**Stephen White:** We have noted that we got that letter, and we said that we would assemble a response as quickly as possible. It is quite a substantial piece of correspondence that covers a number of items. Complex and serious issues were posed to the Government, so a variety of colleagues are ensuring that we give the correct answers. I can guarantee that a response will be returned to Universities Scotland. I think that colleagues from Universities Scotland would concur that the memo to us was substantial, but of course we will respond to it. It would have been ideal if a response had been given prior to today, but we are still working through the range of issues.

On the financial memorandum, there has been quite a lot of emphasis on the secondary legislation elements and their financial impact linked to the overall reclassification risk. The opinions and views that have been shared in
evidence will be considered when we look at how they are currently framed. It is open to the Government to do that. I had the benefit of sitting at the back of the room and hearing the evidence from colleagues earlier, when things were probably expressed in a new way compared with how they were expressed in prior dialogue. We will take particular note of the idea that risk could be addressed by looking at the content of those opinions.

The point was made that there was no consultation on the financial aspects. I think that I said earlier that the views of colleagues were slightly surprising in the sense that those aspects were largely intended as future proofing. Maybe in another bill such sections would have passed off without as much comment, but I acknowledge the clear concerns and views of many who have submitted evidence. There has been some commentary about ministerial control: I think that I said before that ministers, or direct appointees of ministers, sitting on any university governance structure is not the objective at all.

**The Convener:** Okay. Let us look at issues relating to the financial memorandum. It talks about “Discussions with partners and stakeholders for whom there may be modest financial implications, to be absorbed within existing budgets”.

We should take on board the view that has been expressed that there have not been as many discussions as there could have been.

The financial memorandum goes on to say that “There is no information readily available to calculate staff costs associated with the recruitment of a chair” and “It is also anticipated that governing bodies will meet on average between four and six times per academic year.”

You will be aware that those issues have been hotly disputed. In particular, there appear to be concerns that the bill does not take into account what the true costs would be. For example, the University of Edinburgh said:

“The Bill as drafted would involve significant compliance costs for our University which we estimate at £79,500 in one-off costs and up to £125,000/year in annual recurring costs.”

This morning, witnesses have said that the financial memorandum does not seem to express any real understanding of what the role of a governing chair would be and that the role is much more substantive than appears to be understood. Will you comment on those issues?

**Stephen White:** I will start with the central criticism. We are examining the core of the job in looking at remuneration for would-be elected chairs, if the bill is enacted. The jobs are different in different higher education institutions, and many variations on the number of days required—25, 30 and 50 for example—have been cited. We are examining the core of the job so as not to overstretch the coverage of what would be statutory remuneration. I should say that by “remuneration” we mean allowances; it is not salary, wages or pay. However, given what the evidence has presented and what colleagues said earlier, it is fair to say that the focus was pared back a little too much. We concede that it is our job to consider all the evidence and to revisit some of the assumptions, particularly in respect of the number of days that a chair spends doing their job.

**The Convener:** On elections, the University of Dundee said that “A recent election at the University of Dundee for the post of Graduates’ Assessor on Court which was outsourced to the Electoral Reform Society cost £21,000,” but you suggest that the election of a chair with a minimum of two candidates would cost only £1,000.

**Stephen White:** That is only a partial estimate. Laura Duffy will be able to confirm whether this is right, but I think that it relates to expenses for the candidates. I think that the financial referendum concedes that, because the franchise for the election is not yet clarified, it is difficult to estimate exactly how much it would cost. There are also many different ways to hold an election with a range of costs. To make a general point, institutions already incur many of those expenses. Therefore, in compiling the financial memorandum, it was particularly difficult to estimate the net additional cost over and above what is already spent on such items.

**Laura Duffy (Scottish Government):** The cost of the election would be dependent on the franchise. If the franchise was simply the governing body, the cost would be almost negligible. If it went beyond the institution and included alumni, as was discussed earlier, the electorate would be vastly greater than if it was kept to staff and students. Therefore, as Stephen White indicated, it was difficult to quantify in the financial memorandum what the cost would be, with the bill including a regulation-making power. It is also difficult to separate out the additional costs for different institutions.

There are electronic systems that can be purchased for limited cost that cover numbers that sit around staff and students. That would not incur excessive costs.

**Stephen White:** The estimations of cost are about compliance with the bill. Extending a practice beyond legal compliance could result in many different costs. For example, one institution might use one newspaper and comply with the
legal obligation in the bill, but another institution might decide to use four or five newspapers. The costs will be different depending on the approach that is taken. A smaller scope could comply with the bill. It is not that there is a tariff of different approaches.

The financial memorandum’s estimates are not about underestimating anything or giving the impression that there are no costs. There was a central challenge in identifying the additional costs, and the evidence that has been gathered by the committee and the submissions to the Education and Culture Committee will inform additional work on the financial memorandum.

The Convener: You might not have considered the ONS classification to be as big an issue as it has become. However, given the concerns that have been raised about the lack of consultation on the financial memorandum, is there anything else that is not in it that you would include if you were to redraft it?

Stephen White: My opinion, based on all the work to date, is that the financial memorandum would not require the inclusion of a treatment of the hypothetical cost of a risk. It is not an exact science, but that is my summation.

Jackie Baillie: When did you become aware of ESA 2010 and its impact on classification?

Stephen White: I and my predecessors in the higher education division would always have been aware that ESA 2010 was a determinant of classification of universities, but in the context of the project that we are talking about, I suppose that we can start with 2012, when Professor von Prondzynski’s review was published. After that there was consideration of whether there would be legislation, and then there was a code of conduct for a period, so there was always knowledge that reclassification was an issue.

The matter was looked at in earnest and in great detail across Government after the consultation on the bill ended in January 2015, and there was Cabinet consideration of it. Knowledge of ESA 2010’s determinant role is there all the time, but specific reference to the issue in detail came after the consultation closed, when we were looking at all the views.

Jackie Baillie: That is helpful clarification, because the Scottish Government certainly did not think that there was a problem until it came up against reclassification in relation to its infrastructure project. It is interesting that you had some inside knowledge that other people did not have.

In January 2015, who did you talk to? Who have you taken advice from about reclassification?

Kerry Twyman: You mentioned capital projects classification. To be honest, our thoughts about reclassification in this context would have come before January, on the back of the college reclassification. When the college reclassification was initially being looked at, back in 2011-12, universities were considered in the round in those discussions—we alluded to that earlier. In many respects, the issue of college and university reclassification was on the table long before the Aberdeen bypass problems were being looked at, so I would not say that consideration followed the bypass project classification; we were always aware of the issue following the discussions around colleges.

Stephen White: That is what I wanted to impress on the committee. The issue is an evident part of how we work and has always been there for universities; however, specifically in relation to the bill, the point at which we went through the Cabinet process and looked at the matter in detail was after the consultation on the bill.

The items in the consultation are not exactly the same as the items in the bill, so the matter had to be looked at specifically in that context. Two of the items in the consultation were not taken forward at all. Once we had the final shortlist, if you like, the analysis was conducted in detail—within Government, to answer Jackie Baillie’s second question. The analysis was conducted in the context of the full range of interests across Government—finance, legal, policy and so on.

Jackie Baillie: Do you mean that you have received only internal advice and have not sought external advice? Has all the advice come from within Government?

Stephen White: Yes, on the bill and its compliance with ESA 2010. As I said, it is not the convention that Governments approach the ONS regularly to sense-check things at their inception.

You referred to dialogue on infrastructure issues, which comes later down the line, but in the bill that we are talking about—in relation to which things were looked at on a case-by-case basis—the period of intense examination of compliance was the first half of this year, after the consultation ended in January.

Jackie Baillie: Okay. We heard today about an exchange of letters, and I think that Universities Scotland is awaiting a response. If you have been looking at the matter in detail since January, surely you are in a position to respond to the detailed letter that you received from Universities Scotland.

Stephen White: I think that in that letter, which runs to half a dozen pages, Universities Scotland is looking for a categorical guarantee that the ONS will not seek to reclassify—I might have paraphrased that wrongly; only the ONS can give
that guarantee. Although it would be easy to dispatch a quick answer on that point, some of the detailed questions about the legal underpinning of other parts of the bill must be worked through with great care to ensure that our answers are correct. Only the ONS can reclassify, and it will not give a categorical, binary answer on the provisions in any bill until it sees how the bill is enacted.

Jackie Baillie: Will the Scottish Government consult the ONS not for a definitive view, because the ONS will not give you that, but for advice as you have been consulting it through the workshops, which seem to have taken place only recently?

Kerry Twyman: It took a long time to schedule the workshop that took place in the middle of August. The person who led it is the key ONS individual who provides advice to the committee that makes the decisions, so his time is extremely limited. We began talking to the ONS in May or June about setting up the workshop and decided to leave it until after the summer holidays, which is why we chose mid-August.

The point is that reclassification risk is on our radar. When we look at all policy decisions regarding legislative policy or things of that nature and when we look at risks in the round—financial, policy or stakeholder risks—reclassification is very firmly on our radar. Looking at it has become part of our normal course of business over the past few years.

11:45

Stephen White: There has been no specific tailored dialogue with the ONS on the Higher Education Governance (Scotland) Bill. In the case-by-case approach that we took, our deep analysis of the indicators of control suggested that the bill did not present a risk that would warrant such dialogue. I am not involved in the work on infrastructure, but, whatever that dialogue consists of, I expect that it is the result of a process that has gone on to reach that point. All risk assessment in this area is different; it is not all the same assessment.

Jackie Baillie: With due respect, given that you are talking about a risk assessment that is based on how ESA 2010 is applied and given that the bill flows from that, I would have thought that there would be a heightened risk or at least a heightened awareness in the Scottish Government of the potential risk in ESA 2010. I would have thought, therefore, that you would have had early engagement with the ONS for advice as a matter of good practice.

Kerry Twyman: I think that we are not making ourselves clear. The way that the ONS works does not include a facility for us to go to it for advice early on. In the workshop, it came out that the ONS is extremely busy. The formal channels do not work in that way. Hypothetically speaking, if we were to go to the ONS with a request about a bill of this nature, I think I know what the answer would be. We used our skills and experience and the knowledge that is within the Scottish Government to assess the risks. Then, as I have said, we used our wider understanding, based on discussions with the ONS around other reclassifications, to build into that assessment.

Stephen White: I am keen to answer your questions as fully as possible. There are two different assessments of risk involved. I am not involved in the infrastructure side, but I imagine that there are specific points at which the answer will be yes or no—that we can or cannot do things. What stakeholders who take a different view from that of the Government are assessing is a less direct risk to do with a process being set in train for putting a chair of court in place in a certain way or for determining the composition of a governing body. That is not the same as a very detailed point about a financial instrument, structure or model—those things are different.

I reinforce the point that we take a thorough look at risk. The Government takes the risk issues that are raised by stakeholders very seriously; there is not a blasé approach to risk. We have looked at the risk of reclassification in detail and it is our considered opinion that the risk is in compliance with the indicators of Government control. That is our summation at the current time.

Kerry Twyman: As we have also tried to make clear, we deem reclassification to be a low risk. However, if, as a result of a wider ONS review of universities, there were any risk of reclassification—ministers have made it clear that that is not a policy goal—we would take what measures were required to ensure that universities were not reclassified. There is a precedent in what happened with the college reclassification in England and Wales, where the ONS permitted a review of the control mechanisms to ensure that colleges remained outside the boundary.

We need to make the position very clear. We carried out a full risk assessment in which we looked at ESA 2010, using our knowledge and in discussions with the ONS, and deemed there to be a very low risk that what was contained in the bill would lead the ONS to look at the universities and reclassify them. We were also very clear that, if that were to happen—I stress that we deemed that to be an extremely low risk—we would do whatever it took to ensure that the universities remained outside the boundary.

Stephen White: In the middle of that strategic take on it, there is some ground for profitable dialogue between the Government and partners
on the content of the secondary legislative provisions. That point has been reinforced again and again. Colleagues have said that the bill would benefit from such dialogue and that it would address issues of risk. That would be better than a call for the bill not to be progressed at all. I would take particular note of what colleagues have said on that point.

Jackie Baillie: That is helpful. I appreciate the reassurance that ministers do not intend reclassification. I do not think that anybody around this table has called for the bill to be scrapped, but I would certainly encourage that listening mode around what amendments could be made.

You have proceeded on the basis of an internal risk assessment without having taken any external advice, but, if universities were reclassified, there would be an opportunity cost that I do not think would be appreciated by the Government or by universities. In the thorough risk assessment that you have talked about, did you also assess the opportunity cost that there would be if capital were counted against public borrowing? That might happen if the classification goes against you.

Stephen White: The short answer to that question is no, because the risk assessment led us not to do that work in the financial memorandum. However, we have all the figures that were put before us by colleagues in the higher education sector who shared in evidence their view of those opportunity costs, and we will examine those thoroughly.

Jackie Baillie: Thank you.

The Convener: Are you saying that, although reclassification is extremely unlikely, if it happened you would look again at the bill’s provisions to reverse that reclassification?

Stephen White: No. I am saying that I cannot fail to have taken note of what colleagues have said today and that a dialogue on the modification of some of the provisions might help to address the risk rather than withdrawal of the bill, which is what has been suggested in some of the media.

All that I am saying is that we will look at the evidence that has been given and advise ministers on what it might mean and how it links to risks. I am not giving the figures credence by saying that, but we have them at our disposal and we can review them. Whether or not they are accurate, we have the figures to look at, but that does not change our essential summation not that the risk is just very low but that we do not think that there is a risk of a problem with compliance with the indicators of control. The bill does not advance any current risk substantively.

Kerry Twyman: Going back to your original question, we are aware of what the reclassification of universities would mean. I work closely with colleges and I am on the phone almost every day with financial directors and the SFC. We are aware of the long process that colleges have gone through, which has been difficult and is by no means at an end. We are aware of the size of universities’ reserves, the amount of their borrowing and their capital projects. We have been doing a lot of work with them on their 10-year capital planning. I cannot give you the figures right now, but we are very aware of the extent of the financial implications of reclassification. It is something that we absolutely want to avoid.

The Convener: That is why I was a bit confused by Stephen White’s answer to Jackie Baillie. I understand you to be saying that you do not think that reclassification will happen but that, if it did, you would be willing to look at the provisions again and take them out of the bill. When I asked Stephen White whether that was what he meant, he said no, so I want you to clarify that key point. You are saying that there is a low risk of reclassification and that you do not think that it is likely. However, if it does happen, will the Scottish Government act to change the bill’s provisions to ensure that reclassification is not subsequently implemented?

Stephen White: My opinion is that the Scottish Government will not want to do anything that will hasten reclassification, but we do not think that there is any risk of that. Kerry Twyman is trying to make everyone aware that we take the issue seriously and that such an outcome would not be desired. Colleagues have said that a discussion about potential modification of the bill might lower the risk, but the Government does not think that the risk needs to be lowered. Nevertheless, if it will help to build consensus and improve dialogue and relationships, the Government will look at that.

As I say, we do not think that reclassification will happen. Even if it did, it would not happen during the bill’s passage. For that to happen, the bill would need to become an act and the ONS would have to go through a long process of poring over every element of it, but that is entirely theoretical.

The Convener: Yes, indeed.

Gavin Brown: You have said that the ONS is pretty busy, that it does not work in the way that has been suggested and that it does not have the facility to make a binding decision. Has the Scottish Government written to the ONS and asked for some guidance, advice or thoughts on the bill?

Kerry Twyman: No, because there is no process for asking for the ONS’s advice on work that we are undertaking. The way that the process works is that the ONS decides whether to review a body for reclassification. If a new body comes into
existence or results from a merger, we will write to the ONS and the Treasury to let them know that the new body is being formed and give our view on what its public status will be. That is what happens when a new body comes into existence.

However, in a situation such as this, when we have created a piece of legislation, there is no trigger activity of a new body being formed that requires reclassification, so there is no mechanism for going to the ONS; it is down to the ONS’s decision. The ONS would write to us and say that it had decided, because of the new piece of legislation, to undertake a review of the status of universities. At that point, the ONS would come to the Scottish Government to discuss the issue.

**Gavin Brown:** I accept that there is a convention and that there might not be a trigger mechanism and so on, but why have you not written to the ONS, given that we got burned over capital projects and are keen to avoid that experience? The ONS may write back and say that it is not going to tell you anything, but I find it surprising that you have not written to the ONS and asked the question.

**Stephen White:** That is tied up with our analysis of risk. There was no requirement to write to the ONS. The view of heightened risk in relation to the bill, in its coverage in the media, is relatively recent. The provisions in the bill are all informed and inspired by what was in the 2012 review as refined by the consultation that ran from late 2014 to 2015. Much of what was in that consultation is intact and in the bill. It is only in recent weeks that the risk of reclassification by the ONS has been heavily covered in the media and in dialogue. I am not diminishing the importance of that risk. However, the bill’s content was not devised in the recent past; the concepts have been around for years, during which time the ONS was not cited.

My understanding is that, if we wrote to the ONS, it would not say yes or no. The ONS gave a response to *The Scotsman* at the end of August for its article about the financial impact of reclassification. Its opinion was sought and—I am paraphrasing roughly—it said that it took note of the development but would not give an opinion until it had looked in detail at the provisions and their outcome. It was thus drawn on the issue in the press, but only in a very limited way. I understand that the ONS will, perhaps through the Treasury, have a policy dialogue on request, but that would never lead to any determination that would create the authorising environment in which to proceed.

At the start of a process, things can change. After a consultation, two of the proposals can go and four can be left. It is a moveable picture. The ONS likes to see the settled picture—as the convener said, it likes to see the end point.

**Gavin Brown:** I will not dwell on that issue other than to say that, in my opinion, it would be worth the Scottish Government writing to the ONS formally and asking whether it could tell us something—we understand that it cannot provide a full opinion—so that we do not get burned. That is just my opinion.

In your evidence today, you have told us that you have undertaken a full risk assessment, a thorough consideration of the risk over the long term and a thorough analysis of the European system of accounts and so on over a period of years and specifically since January 2015. That sounds like a phenomenal amount of work. In the interests of transparency, can the committee please see some of that work?

**Stephen White:** We would need to provide ministers with advice on that, and it would depend on what form the work takes. We can certainly consider that direct request. We will sort through the constituent parts of that collection of work and reply to the committee.

**Gavin Brown:** I will not ask you to go further than you are able, but can you ask the cabinet secretary formally whether the committee can have access to the very detailed analysis? That would furnish the debate and it would help.

**Stephen White:** You have made the request and it has been recorded.

**Gavin Brown:** Thank you. The reclassification issue is not in the financial memorandum and also does not appear in the business and regulatory impact assessment. Can you explain why it does not appear in that document?

**Stephen White:** It does not appear there roughly for the same reasons that it does not appear in the financial memorandum. The summation of our assessment of risk was that it did not warrant inclusion in that document either.

**Gavin Brown:** You did all that analysis. Jackie Baillie put the question to you about what external advice you had taken, and you said that you had not taken formal advice from the ONS.

Have you taken any other external advice? Have you taken legal advice, for example? Have you spoken to experts in the field, or have you only had internal discussions?

**Stephen White:** There has been no external liaison on the matter. It is a sensitive issue and we would not have a wide consultation on that point alone when the issues were being unpacked in great detail internally. We did not conduct external discussions or take expert advice from outwith Government.

**Gavin Brown:** Of course it is a sensitive issue. I accept that, but I want to clarify the point. Your
decision, which you stated categorically with some strength, is that there is no risk at all, but just to be clear—

12:00

Kerry Twyman: We said that there is a low risk. We have never said that there is no risk.

Gavin Brown: You said that there was no additional risk beyond the current risk.

Stephen White: There is no additional risk beyond the risk that is already identified. It is accepted in the field that a modicum of risk exists in certain facets of the structure of university governance—financial and legal arrangements, and so on. "Modicum" is the word that I would choose. However, the bill's provisions do not advance that existing risk base.

Gavin Brown: It is not that there is no risk—I did not mean to suggest that—but that there is no additional risk, so you were quite right to say that there was a low risk overall. You have reached that view and expressed it with some strength, but, just to be clear, have you taken advice from any external source on the matter?

Stephen White: No.

Gavin Brown: I hope that I am not misquoting you, then, by saying that your view is that what the bill proposes does not go beyond the current risk at all—not by a millimetre or a fraction.

Stephen White: Our assessment is that any current level of risk is not advanced by the provisions in the bill, set against an analysis of the ESA 2010.

Gavin Brown: All right. I will ask one final question, which I think that you have already answered in part. Let us assume that, as it did with the AWPR, the Scottish Government has got it wrong. Perhaps I should say not that you have got it wrong, but that the Government has taken a different view from the ONS, which could have consequences. The Scottish Government did not seem to think that there was a risk in advance of the AWPR project. We have been bitten before and that is why the committee takes the matter so seriously.

Have you done any work on the financial consequences of reclassification, should it occur? You have heard what university representatives had to say today. Has the Scottish Government done any of its own work on what the financial consequences could be if you get it wrong?

Stephen White: No. In our assessment reclassification remains a hypothetical event, so no work has been done on it. In fact, that would be very complex. That is why earlier I respectfully referred to what has been offered in the evidence.

We might not agree that there are any costs, but at least we will do stakeholders the service of looking at what they have said and at the opportunity costs that they have identified. As I said, we might not agree on what is the reality, but we will look at what they have said. There has been no specific, tailored work on costs of that sort.

Kerry Twyman: As we stated, we have a full understanding of reclassification's financial implications, which were mentioned earlier, because we have been through college reclassification. In almost every instance the financial implications are the same, although they may be magnified for the universities. Although we have not looked at the specific numbers, I would say that we have a clear understanding of what the financial implications would be across the sector, because of our experience of college reclassification.

Stephen White: The Government is well versed in such work, but in case it sounds as if we are being dismissive, I should stress that the reason that we have not done work on university reclassification is that we have had the detailed risk assessment—it hangs on that point. If we had thought that there was a need to do that work, we would have done it, but the risk assessment suggested otherwise.

Gavin Brown: I have a final question, purely on a matter of detail. Universities Scotland wrote to you on 13 August and you have not responded yet. Although the letter is six pages long, you have done all the work and a huge amount of analysis, so when should Universities Scotland expect a reply?

Stephen White: We will reply as soon as possible. We are working on that now and I do not expect that Universities Scotland will have to wait too much longer. On the specific ONS point, as I said in response to an earlier question, the answer will be quite short because, as I recall, the letter asks for an absolute guarantee that reclassification will not happen, and the answer will be compiled out of the points about risk analysis and assessment that I have made today.

An overall response to the letter will be sent as soon as possible. I suspect that we are more than halfway through working on it, but there is no purposeful delay.

Gavin Brown: Forgive me for pressing you on this point, but are we talking about days, weeks or months?

Stephen White: We are talking about weeks at the most, certainly not months.

Gavin Brown: Thank you.
Richard Baker: You have made clear your view that the ONS will not give you a categorical opinion on whether the provisions in the bill would lead to reclassification. I understand that, although, as Mr Brown said, it is worth asking the ONS for its advice anyway. However, given the fact that the ONS’s job will be to provide an interpretation in relation to the European system of accounts, could you have dialogue at a European level or approach those who are responsible for running that system for their view on whether the provisions risk reclassification?

Stephen White: In my view, we have at our disposal all that we need through the ESA guidance, the Treasury’s guidance and the chance to engage with the Treasury, which has experts whose full-time job is to advise on such issues. There is no practical need to invite a European conversation about the issue.

Richard Baker: However, could you do so, theoretically?

Stephen White: Theoretically, we could open up a dialogue with any interested party, but we have what we need at our disposal. We have already used what we have at our disposal in written form. In fact, I have it here with me: the ESA indicators of control.

Richard Baker: I am puzzled that you have not sought any external advice, given the fact that you have acknowledged that there is a risk, even if it is low, and the fact that Universities Scotland makes it clear that its legal advice says that there is a significantly increased risk of reclassification. To me, that makes it clear that it would be sensible to take external advice.

Stephen White: If Universities Scotland wants to share that advice, we would happily consider it. However, we felt that our internal assessment of risk was adequate. I wonder what external advice would offer that would be different. Risk assessment is not an exact science and external advice might be open to opinion. We might find external advice that has a negative opinion, but what would be the worth of external advice that seemed to lack objectivity regarding a pro opinion? We have examined the matter in great detail and our opinion is that the risk is not advanced.

Richard Baker: After the experience of the Aberdeen western peripheral route, to which Mr Brown referred, the Scottish Government would be wise to take a belt-and-braces approach to the matter and seek external advice, to minimise any potential for risk.

I understand from earlier evidence that the chair of the 2012 review has said that the intentions of his review can be achieved without entertaining the risk of reclassification and without proceeding with the provisions in the bill as it stands. You have talked about the potential to review the bill at the point when the risk is realised, if that happens. If the bill and the intentions of the review can be progressed without the risk, why not take that action now, prior to any problem arising, rather than having to address events through a potentially difficult and troublesome process once legislation is in place?

Stephen White: There are quite a few layers in your question and I will try to answer the whole of it.

I have not yet read Professor von Prondzynski’s submission to the Education and Culture Committee, so I do not know what he has said in it. Having been in his company at a recent meeting, I know that he remains very supportive of the bill. He might be making a technical point. Obviously I am an official, not a minister, but if the secondary legislative powers could be modified in a way that did not harm the bill’s overall policy intention, the Scottish Government would be open to a conversation on that. If such modification minimised risk or the perception of risk, that could be beneficial.

The time to think about doing that would be when the bill progresses through Parliament. I take it from your question, perhaps wrongly, that you think that it might be left until after the bill becomes an act. However, the Scottish Government will consider the scope of the secondary powers during Parliament’s consideration of the bill.

Richard Baker: It was suggested earlier that, if reclassification took place, legislative changes would be considered at that point. However, I am heartened to hear you say that those matters will be considered during the progress of the bill and that you are open to that dialogue. That is certainly helpful.

Stephen White: It is not in my gift to say what will happen but, given what has been said in evidence and the emphasis that has been placed on the sections on secondary powers—section 8 and so on—it is entirely legitimate that everyone should have a joined-up dialogue on the matter.

Richard Baker: Kerry Twyman said that it has been a difficult process for colleges to organise workarounds after reclassification. If the worst happens and the bill goes through as currently proposed and leads to reclassification of universities, would universities be compensated for the undoubted extra burden that would be placed on them by having to create similar workarounds?

Kerry Twyman: If reclassification is triggered it does not come into immediate effect. The colleges in England and Wales were given a period in
which to review their control mechanisms and make changes that would keep them outside the boundary. That is what we were saying.

There is a very low risk of reclassification and we do not believe that the bill will change that. That is a key point. The risk already exists because of the nature of universities and their interaction with the Scottish Government. If a reclassification decision was triggered by an ONS review, which could well be triggered by a review of universities down south—that is the most likely scenario—we would ask for a period in which to review the entire structure around universities, which could lead to changes that would keep them out with the boundary.

Stephen White: That is a helpful procedural explanation. I want to reinforce our view that the risk is very low. Obviously, after having a detailed conversation about the matter today, we know that there is an existing risk base, but we know that it is low. Some of the issues about reclassification were raised in meetings in 2012—even in 2011—but no work has been taken forward on that. It is not as if we are already dealing with a high risk base; the risks are marginal and low. My assessment is not off the cuff; it is based on my experience of the last four to six years. In the realm of higher education governance I have heard questions that refer to a bigger world of reclassification issues. They are not necessarily all the same, but they should all be looked at with reference to each other.

Your question was about recompense, which is a few too many hypotheticals ahead. We do not think that the bill spurs the risk of reclassification. I take on board the issue when I am asked a question on it, but I do not think that reclassification is a likely outcome, given where we are today.

John Mason: Carrying on with the present theme, Stephen White has said that he feels that there is a very low risk of reclassification at the moment, leaving aside the bill. The universities told us earlier that they thought we were in the amber area of risk. They said that the bill would take us from low amber to high amber—or bright amber or something. I would have preferred numbers, but we will go with the colours. Do you agree with their assessment?

Stephen White: No. I respect their assessment, but I do not agree with it. I agree with the colour that they used first; the impact would obviously be red and no one wants to see that happen. If we must use colours, I would put the risk as more of a green one, but I would not be dismissive of other views. We have to take seriously what people feel strongly about. The universities have expressed that both today and in written evidence.

John Mason: If there is a risk around reclassification—and if we accept that it is quite low—would you say that the greater risk lies in the current position rather than in what the bill is doing? If arrangements had to be undone, redone or reorganised, it would not be about this bill but would arise from the existing situation.

Stephen White: That is a fair point. I do not want to talk in absolutes about risk, but the bill in itself does not add any risk, or adds very negligible risk.

As for the substance of the risk, I would not want to overemphasize that either. We cannot be complacent, but nobody has raised the existing risk in this debate until perhaps the past four to six weeks. There was no mention of the ONS risk in the dialogue when the consultation was open. Professor von Prondzynski’s report and very thorough review was conducted and a lot of the ideas were posited in that report, but talk of the risk has been heightened only very recently.

12:15

John Mason: It has been suggested that we might go to some theoretical outside body to get a more definite ruling on reclassification and so on. I am interested in whether such an organisation, body or individual exists, whether in Scotland or in the UK. Leaving aside the ONS, is there anybody that we could go to? We could go to six lawyers and get six opinions.

Kerry Twyman: I agree completely with that assessment. Over the past year or two, the Scottish Government has spent a lot of time working on reclassification issues. Indeed, off-the-cuff remarks have been made to the effect that the ONS now considers the Scottish Government to be a leading expert on reclassification because of the time that senior finance colleagues and ministers have spent on the issue. I do not know of anyone that one would go to, other than the Scottish Government finance directorate or the Scottish Futures Trust, which we have spoken to, who would potentially be more experienced in the matter than the ONS, Eurostat and the Treasury.

John Mason: That is helpful. Another suggestion is that we write to the ONS. However, given that it is a sensitive issue, would writing to the ONS increase the risk of its undertaking investigation or even reclassifying? If I think that I might have driven over the speed limit last night, it might not be the best thing for me to write to the police saying, “I might have done 31mph. Do you want to check that?”

Stephen White: That is a fair comment, and that has probably informed the work on this going right back. I have answered questions about internal versus external advice. If Governments
anywhere were to consult such a body every time that a policy was taken forward, the answer might be, “We will need to think about it for a good while before we get back to you, and a determination will not be forthcoming until you show us exactly what you want to do.” Conventions are made to be broken, but I do not think that we thought it necessary to write to the ONS as part of the policy development, particularly given the risk analysis.

**John Mason:** Is there a slight risk that doing that would damage our case?

**Kerry Twyman:** Yes.

**Stephen White:** Yes, and it would certainly delay matters. The ONS looks at things in excruciating detail.

**Kerry Twyman:** Because of how the process works, if we had written to the ONS we would not have received a response one way or the other, or we would have received a stock response saying, “We will not consider this until the legislation has gone through and the changes have been enacted.” However, as you say, a flag would have been raised.

**John Mason:** That is helpful. Thank you.

I have one or two points on a different subject. The Delegated Powers and Law Reform Committee has been mentioned. I happen to be a member of that committee. Given that the universities have raised the issue, might the Government consider increasing the level of parliamentary input so that, for example, where negative procedure has been used in the past, affirmative procedure might be used in the future?

**Stephen White:** Yes. More fundamentally, from what has been said today, it seems that the content of those secondary powers would be looked at in the light of the evidence that was submitted to both committees. I cannot predict exactly what that would mean but, given that concerns have been raised, we will look thoroughly at the content, the impact and the intent of the secondary legislation. I restate that the intent was to future proof the legislation in some way. I am not being dismissive of people’s views of risk, but it is about good housekeeping; there is no intent to advance ministerial control through those secondary powers. However, given that those issues have been raised, I am sure that the Government will consider them.

**John Mason:** It could be perceived that using negative procedure to confer some secondary powers would give ministers slightly more leeway than using affirmative procedure.

**Stephen White:** Yes. I think that I am right in saying that most, if not all, of the secondary powers that would give ministers the ability to change the legislation are subject to affirmative procedure.

**John Mason:** We heard earlier that it was not the Government’s objective to appoint an individual to a university’s governing body, for example. Can you clarify that? Would it be possible for the Government to appoint somebody in that way?

**Stephen White:** I do not know whether that would be possible as a point of law, but it would be completely undesirable. The word “objective” might have suggested that there is some ambiguity, but there is no ambiguity. The Government would never want to directly put anyone on any governing structure in a university, and that includes ministers. I know that concerns or views have been expressed about that, but that is not the intention.

**John Mason:** So it is a matter of putting a process in place.

**Stephen White:** It is just a process. It is the how, never the who.

**John Mason:** It does not involve giving the Government the power to appoint an individual.

**Stephen White:** No—no way does the bill do that. In fact, nothing in the bill requires an HEI to ask the Government permission for anything.

**John Mason:** OSCR made the point in its letter that there is a slight distinction between the four older universities and the more recent ones, in that part 1 of the bill might become part of their constitution. Is that a concern, or is it just a technicality?

**Stephen White:** OSCR develops its argument to say that, although the constitutions would be altered by certain provisions in the bill, that would not jeopardise—that is my word, not OSCR’s—their charitable status. That is its conclusion.

**John Mason:** On the question whether the Government gets involved in the process of governing bodies being appointed, does that happen in other fields? Does the Government get involved in the process of people being appointed?

**Stephen White:** I could not speak authoritatively on that, but it might do with public sector bodies. However, universities are autonomous bodies so the Government would never have any notion of being directly involved in the process for the appointment of individuals to govern the structures.

**John Mason:** I am talking about putting the actual process in place—I am referring to charities and outside organisations. Perhaps it is unfair to ask you about that.
Kerry Twyman: We have said before that there was a precedent, in the sense that the Government can call for a proportion of a board to be of a certain nature, even in private companies. There are definitely precedents, although we are not experts on the subject, so we could not give you examples.

The Convener: Does Mark McDonald have a question?

Mark McDonald: I had only one question, and the deputy convener has asked it. It was not about speeding.

The Convener: That concludes questions from committee members. I have one or two wee points that I wish to raise before we finish. We have not really touched on them, but they are specific to the financial memorandum.

I refer to a couple of pieces of evidence that have been received. The first is from Scotland's Rural College. When asked whether the “estimated costs and savings set out in the FM are reasonable and accurate”, the college responded:

“The experience of SRUC in relation to changing Articles of Association indicates that the assumption in the FM of the time and cost required to amend HEIs governing instruments is not accurate and that it significantly understates the resource requirement both for the Scottish Government and for the institutions involved.”

How did you come to your assessment regarding the costs of that?

Stephen White: Laura Duffy might have a perspective on that. I hope that I have understood the question correctly. I am not sure that the financial memorandum specifies an analysis of the costs of updating governing instruments in light of the bill's provisions. Updating governance as part of the compliance with the code of conduct, as well as many other decisions that HEIs want to make, is part of mainstream business, and any provisions that the bill would bring forward, should it be enacted, would be staggered in their implementation.

All institutions are different. They all have different numbers of staff and legal advisers. It is difficult to grasp on to any standard estimation of cost. Forgive me if I have misunderstood the question but, if that is the item that SRUC is homing in on, it might involve a long-term activity. There might be a spike, if a new bill becomes an act. We take what SRUC says about costs, but we found it very challenging to identify and package up any standard costs in that regard, given the staggered nature of the time that it would take to change ordinances and governing instruments after the bill became an act.

If SRUC is homing in on a slightly different issue, I apologise for giving the wrong answer.

The Convener: No—I think that your answer is fine.

Another organisation, Queen Margaret University, said:

“We would ask the Committee to note that the process of securing Privy Council and Scottish Government approval for a relatively straightforward amendment to the University's Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. This process commenced in June 2014, and the amendment is due to commence in late September 2015.”

Basically, it is saying that the changes that the bill would bring in would have all sorts of legal consequences, advice would have to be sought, administrative time would be required and so on. It is saying that that has not been accounted for in the financial memorandum.

Stephen White: No. I refer to my previous answer, about the difficulty of isolating costs for different organisations given their different needs and the different adjustments that are required to get standard costs.

Reform to the Privy Council process was an item in the consultation. Ministers decided not to pursue that in the bill, for many reasons, but I would cite the deep complexity of the historical arrangements through which we have arrived at the current system. There are some features that are regrettable, including the time taken, the detailed legal matters and the going back and forth between legal advisers. However, as part of the announcement about the bill, ministers mentioned a separate piece of work involving the Privy Council and a modernisation conversation, which would commence before any new legislation was thought of in the future. Although that does not relate directly to the issue of cost and time, such activity will try to truncate the processes and save institutions money in the long run.

The Convener: Thanks very much—that is helpful.

Thank you all for your responses to our questions. Would you like to make any further points before we wind up this evidence session?

Stephen White: No.

Kerry Twyman: No.

The Convener: Thank you. That ends the public part of the meeting.
Written evidence to the Finance Committee

Christian Daviron
Committee of Scottish Chairs
Edinburgh Napier University
Queen Margaret University
Royal Conservatoire of Scotland
Robert Gordon University
Scotland’s Rural College
University of St Andrews
Universities Scotland
University of Aberdeen
University of Dundee
University of Edinburgh
University of Glasgow
University of Strathclyde
University of the Highlands and Islands

Correspondence

Letter from the Cabinet Secretary for Education and Lifelong Learning, dated 5 October 2015
Letter from the Director of Universities Scotland, dated 1 October 2015 and Note of Advice by Anderson Strathern LLP, dated 30 September 2015
Response

Dear members of the Committee:

I am writing to you to express my profound concern at the proposed Higher Education Governance (Scotland) Bill.

I am a graduate of St Andrews and also have an MBA from Columbia University in New York. I have served as a trustee of the American Foundation of the University of St Andrews. I have a great affection for Scotland and own a flat in St Andrews where I spend several months a year though I am still a resident of the United States. My great great grandfather was Principal of St Andrews from 1859 to 1868. My daughter, an American, is a 2005 graduate of St Andrews. Several young American friends have attended or are attending the University of Glasgow, the University of Aberdeen, the University of Edinburgh and, of course, St Andrews. I take great interest, therefore, in Scottish universities in general.

I am particularly concerned that the proposed legislation reduces academic freedom and independent thinking. While the current parliament may have every intention of keeping the universities free of interference, a future parliament might be more interfering. You will all know how much faculty and students want and need academic freedom. Many of the world’s most important discoveries and advances came about from free thinkers who thought outside the box and were often unpopular for it. Most of us tend to gravitate to the familiar, the comprehensible. Where would we be if Darwin had not been allowed to find backers and publish? Many of the most innovative biotechnology advances at this time are coming from Leuven University in Belgium because of its connections with Paul Janssen and his researchers, students and followers: small countries can have a global impact.

While I do not doubt that the proposed legislation is done with good intention, in the United States we say, “If it ain’t broke, don’t fix it.” At this time Scottish universities are attracting some of the best global academic talent, both outstanding faculty members and the most promising students. If there is political interference in governance and academic freedom, I can assure you that that talent pool will dry up very quickly.
At St Andrews we are particularly worried because we have to find a successor to a remarkable Vice Chancellor, Louise Richardson, who came to us with the highest academic and administrative credentials from Harvard. If there is political involvement in the University, and infringement of academic freedom, we will not see her like again. Top academics will not want to be considered for the post, and the Principal who starts in January 2016 will be the start of a sad downward path for the University. I have degrees from two countries and work in the international investment industry, and I have seen, many times, how quickly strategic missteps can ruin a company, an industry, and an academic institution.

In answer to your specific questions, I have not been involved in any consultation on this bill.

If this bill becomes law, there will be significant constraints on university funding that I believe to be underestimated in the FM. Much funding at present comes from research funds, they have many universities from which to choose, and they will avoid Scotland if there is political involvement in the universities. Additionally, many of them are based in England, and very few in Scotland. One third of St Andrews’ undergraduate body is international, paying international fees to the University. The proportion, and the earnings, would drop – how much, and how quickly, cannot be known. I do not know much about the Asian student body, but do know that most American applicants have a number of choices to weigh and could quickly turn away from Scotland. My own daughter had ten acceptances and one wait list from her twelve applications, all but one in the United States, and she was fairly typical. As her mother, I would have discouraged her from coming to Scotland if the higher education establishments had been in decline.

Many of the costs are unquantifiable. If Scotland’s institutions of higher education lose their standing over time, as they become more parochial and of less interest to other countries, how can the opportunity costs be calculated? Top Scottish faculty will increasingly go to other countries so that Scotland is left with the dregs, and the dregs do not attract the best funding. Over what period of time? That is unknowable. It could be very quick: I would expect top talent to leave within a year.

The proposed changes to the governance are all for the worse. You will know that appointees with special interests (representatives of students, or faculty, or unions, for example) will want to represent their constituency first, and take the university forward as a lesser consideration. That would have given power to librarians to resist the advent of computers and on line texts. Universities will inevitably tend towards
mediocrity if they are run by unwieldy collections of special interests. Mediocrity does not attract funding.

No other major university, anywhere in the world, has its politicians interfering with its governance in this way. You will find interference in some countries, generally totalitarian ones. None of these countries has a university of international standing, and none of them attracts research funds from other countries.

Please, for the sake of your country – the country of Adam Smith, James Watt, and Alexander Graham Bell – do not commit your universities to slow decline in international standing and funding. Kill this bill.

Sincerely,

Christian Daviron, MA, MBA

August 12, 2015
Introductory Comments

We are writing as the Chairs of the governing bodies of Scotland's universities. We think it essential that the Finance Committee is made aware of significant concerns we have regarding aspects of the Higher Education Governance Bill.

The Governance Bill proposes an increase in the level of control Scottish Ministers will exercise over Scotland's universities. As a general approach, we think this is unwise, and that it will constrain the dynamism and ambition that have made Scotland's universities one of the nation's great successes. However, the specific issue we wish to raise with the Finance Committee is the prospect that increased Ministerial control will lead to the universities being reclassified by the Office of National Statistics (ONS) as 'Central Government'. Should this happen, it would have dramatic adverse consequences. It would:

- prevent universities from retaining annual operating surpluses;
- place a severe restriction on their ability to borrow funds;
- reduce their ability to enter into commercial partnerships; and
- put at risk their status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support.

Taken together, these developments would:

- remove the incentive for universities to engage in entrepreneurial activity;
- put Scotland's universities at a competitive disadvantage when compared with those in the Rest of the UK; and
- have a catastrophic impact on universities' infrastructure development plans, which are principally funded by annual revenue surpluses, and which rely also on borrowing and on philanthropic support.

The Government has provided no explanation of why it considers that additional Ministerial powers are desirable. Nor have these proposals been the subject of any public discussion. They were not included in the Consultation on this Bill and indeed they contradict the statement made in that consultation by the Cabinet Secretary for Education, that ‘for universities to be successful ... they need to be autonomous institutions', and that 'The Scottish Government does not want to increase Ministerial control over universities.'
We have set out our concerns in more detail below, responding to the questions asked in the Committee's Call for Evidence.

Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

3. Did you have sufficient time to contribute to the consultation exercise?

All Scottish universities took part in the consultation exercise, responding to the issues the Government raised through its consultation paper. However, the universities have had no opportunity to date to comment on important matters that were not included in the consultation but which now form part of the Bill.

The detailed assumptions contained in the financial memorandum were not the subject of consultation.

More significantly, the Bill proposes that government Ministers take new powers on themselves covering fundamental aspects of university governance. These could have a serious detrimental impact on University finances. They did not form part of the consultation: indeed the proposals are in direct contradiction to statements made in the Ministerial Foreword to the consultation paper.

The areas in which increased Ministerial powers are proposed are:

- deciding on the process for appointing Chairs of University governing bodies, on the remuneration to be paid to Chairs and on their terms of office;
- deciding on the composition of universities' governing bodies; and
- deciding on the composition of the internal academic boards that have responsibilities relating to universities' curriculum and academic standards.

The significance of the proposed new Ministerial powers is that they may lead to the Office of National Statistics reclassifying Scotland's universities from 'Non-profit Institutions Serving Households' to 'Central Government', a move that would have a very severe detrimental impact on the financial health of the universities, and on their contribution to the nation's economic and social wellbeing.

Costs

4. If the Bill has any financial implications for your organisation, do you believe they have been accurately reflected in the FM. If not, please provide details?

As stated above, the most significant financial implication will arise if the Office of National Statistics (ONS) determines that the changes proposed by the Bill - when added to the requirements placed on Scottish universities by Outcome Agreements and
by the Post-16 Education Act - should result in their being reclassified as 'Central Government'. ONS recently reclassified Scotland's Further Education Colleges as a result of high levels of Ministerial influence. Just recently, it has made a similar decision in relation to the Aberdeen By-pass, and it is possible it will now reclassify Housing Associations in England as a result of increased Ministerial direction. A review of universities' classification is planned by the ONS, which will undoubtedly consider closely the terms of the Higher Education Governance Bill.

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

- prevent universities from retaining the annual operating surpluses which are essential to fund investment in the renewal and improvement of their estates;
- place a severe restriction on the universities' ability to borrow funds, bringing these within the constraints of public sector borrowing, and thus reducing investment in new and improved infrastructure;
- reduce universities' ability to enter into productive partnerships with commercial bodies because of the constraints associated with state aid; and
- put at risk the universities' status as independent charitable bodies. This could remove tax benefits they currently receive in areas such as rates relief and the funding of medical facilities. It could also have a severe impact on their philanthropic income, which currently stands at over £50M per annum. Philanthropic giving supports a range of infrastructure initiatives, and also scholarship opportunities, including for students from disadvantaged backgrounds.

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

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

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?
The Financial Memorandum does not address at all the possible impact of ONS reclassification. Its estimates of costs and savings focus therefore on implications of the Bill that, in financial terms, are relatively minor. Information received from several universities suggests that costs have been underestimated, and that there are no savings.

Universities may comment on the cost estimates in their individual returns. As Chairs, we can comment knowledgeably on the suggested cost of remunerating the Chair of a governing body. The Financial Memorandum estimates that this would be £3,072, based on 6 days' work per year.

In fact, as every member of this committee can confirm, university chairs have much more demanding portfolios than can be addressed in 6 days per annum. The time commitment is at least one day per week, and in recent years has been greater than this.

A key proposal in the Higher Education Governance Bill is that Ministers will specify the method for appointing University Chairs. Regrettably, it appears from the Financial Memorandum that the Scottish Government does not understand the significance of this role and the time required to fulfil it.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

This is a question for each university to answer. It is likely that they can meet the administrative costs associated with this new legislation, but that their financial health would be seriously undermined by the consequences of ONS reclassification.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?

No. The consequences of possible ONS reclassification and possible loss of charitable status are not considered in the FM.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these points?

As discussed above, the FM does not address the costs associated with possible ONS reclassification. Reclassification could arise as a consequence of the Bill, coming as it does on top of the additional Ministerial requirements made of universities through Outcome Agreements, and through the Post-16 Education Act. Alternatively,
reclassification might be a consequence of the secondary legislation for which the Bill makes provision.
Response

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

The Court of Edinburgh Napier University responded to the consultation on a higher education governance bill published by the Scottish Government in November 2014. That response did not specifically comment on the financial assumptions made as these were not explicit in the proposals and to the extent that the proposals had implicit financial implications these appeared to be minor relative to the scale of the University’s operations.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

Not applicable.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

There are potential financial implications for Edinburgh Napier University which are not reflected in the FM and which were not evident from the proposals which Scottish Ministers consulted upon.

These arise from proposals for delegated powers in relation to the process for appointing chairing members of governing bodies and their remuneration; and in relation to determining the membership of governing bodies and academic boards. These provisions in sections 1, 2, 8 and 13 of the Bill, supplemented by section 20 would increase the level of control which Scottish Ministers can exercise over higher education institutions and provide for the level of control to be further increased without recourse to primary legislation in future.
The question therefore arises as to whether increased control of the sector by Scottish Ministers following enactment of the Bill as introduced or through the subsequent use of delegated powers would cause the Office of National Statistics (ONS) to reclassify higher education institutions as central government bodies or cause institutions to fail the Scottish charity test under the terms of section 7(4)(b) of the Charities and Trustee Investment (Scotland) Act 2005.

Reclassification as a central government body by ONS would have a profound financial impact on Edinburgh Napier University, on our ability to develop an optimum investment strategy and on the nature of the business we could undertake. For example, our recent £75m investment in the renewal and upgrading of our estate at the Sighthill and Merchiston campuses was funded 60% through commercial borrowing, 13% by disposal of property and 27% from accumulated reserves. ONS reclassification would all but rule out an investment strategy of this kind, reducing our ability to use our resources efficiently to provide an excellent and modern experience for our students and make a positive impact on our local economy.

ONS reclassification would also restrict the commercial activity the University could engage in because of inflexible budgetary controls and would make us less attractive to philanthropic donors who tend not to give to government bodies. These are examples of activities through which the University leverages the public funding we receive to add value and economic impact at home and overseas.

I note that there is no indication in the FM that the risk to ONS classification has been considered or reassurances sought on the question.

I note the steps which have been taken to moderate the impact on Scottish colleges of reclassification with effect from April 2014. These have been limited in scope, primarily providing some partial and transitional protection of reserves accumulated prior to the change.

Loss of charitable status would result in a cost to Edinburgh Napier University from lost tax exemptions. I recognise that Scottish Ministers have the power to dis-apply section 7(4)(b) of the Charities and Trustee Investment (Scotland) Act 2005.

The reasons for taking the delegated powers in sections 1, 2, 8 and 13 of the Bill set out in the Delegated Powers Memorandum appear weak. They refer to a level of detail which might be required, to a hypothetical need to make prompt changes and to respond to changes in future practice. However, there is an existing legislative framework under the Further and Higher Education (Scotland) Act 1992 through which the governance arrangements of Edinburgh Napier University can be changed. The Post-16 Education (Scotland) Act 2013 already requires institutions to comply with any principles of governance which appear to the Scottish Funding Council to constitute good practice in relation to higher education institutions. I am
unaware of any historic precedent of a circumstance requiring sudden change of higher education governance arrangements. The notion that regulations to be brought forward in due course might include a “considerable level of detail” simply highlights the risk that such regulations could lead to a change in status which would damage higher education institutions financially.

I also note that the Policy Memorandum suggests at paragraph 33 that the framework nature of section 1 of the Bill arises at least in part from an absence of consensus at the time the Bill was introduced.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

In addition to the financial risk identified under question 4, I note that where costs are identified in the FM they sometimes appear to be under-estimated. For example, on the last occasion on which Edinburgh Napier University recruited a new Chair, advertising costs amounted to around £5,000 with total recruitment costs including staff time about double that. The position was advertised indicating a time commitment of forty days per annum rather than the six days used as the basis for estimating the cost of remunerating chairing members. The indicative time commitment for chairing members in the FM is unrealistic.

There will be some additional costs to Edinburgh Napier of establishing and providing ongoing support for a graduates’ association to comply with section 4(1)(f). There may also be costs associated with seeking amendments to the University’s founding Order of Council in order to comply with both legislation and good practice, particularly in relation to maintaining a clear lay majority on the governing body.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

I agree that Edinburgh Napier University should be able to meet the direct costs of provisions which are on the face of the Bill. The financial risks identified under question 4 are our main concern.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

No, for the reasons set out above.
Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

And

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

There may be costs associated with subordinate legislation, as the delegated powers proposals within the Bill are wide ranging, in addition to potential costs associated with changes in status arising from the creation of those powers as set out above.
PREFACE

Queen Margaret University welcomes the opportunity to respond to the Call for Evidence issued by the Scottish Parliament’s Finance Committee on the Higher Education Governance (Scotland) Bill, introduced in the Scottish Parliament by the Scottish Government on 16 June 2015.

We note that the Committee has invited organisations and individuals to submit written evidence setting out their views on the financial implications of the Higher Education Governance (Scotland) Bill. The estimated financial implications of the Bill are set out in its accompanying Financial Memorandum (FM).

As the Financial Memorandum sets out the principal purpose of the Bill is to: “enable a framework of higher education governance that is more modern, inclusive and accountable’, we consider it appropriate to preface our response to the specific questions posed in the consultation with broader views on the overall purpose of the Bill. These views are set out in detail in our submission to the Call for Evidence issued by the Education and Culture Committee of the Scottish Parliament.

Our primary concern, set out clearly in our response to the draft Bill, remains that Scottish Ministers consider it appropriate to legislate on the internal organisation of autonomous charities. We remain concerned about the underlying presumption that there needs to be consistency of approach within the sector and that further change requires to be driven by statutory measures. We consider that the Bill, as drafted currently, represents a fundamental shift in the relationship between Ministers and autonomous higher education institutions, with Ministers exercising considerable power through secondary legislation to decide the categories of composition of governing bodies, the manner of appointment and conditions of service. These are not matters on which the Scottish Government sought views during the Bill consultation.

Having considered in detail the Higher Education Bill as introduced, we remain concerned about the assumptions concerning existing governance arrangements within the sector, and about the impact and cost of the proposals. We consider that, while the Financial Memorandum attempts to calculate the direct costs to Universities of the proposals, it does not address the wider financial implications of the Bill. This includes the implications of any threat to HEI’s charitable status, and the costs of arising from action required under any secondary legislation.

These concerns are addressed directly below in our responses to the Committee’s specific questions.
Response

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

Queen Margaret University provided a detailed response to the Consultation on a Higher Education Governance Bill. The consultation exercise did not set out any financial assumptions, but rather, invited respondents to comment, within Annex D, on ‘the potential costs or savings that may occur as a result of the proposals for the Bill’, and on ‘any increase or reduction in the burden of regulation for any sector’. The University did not provide comments at Annex D.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

Not applicable.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes, the University had sufficient time to contribute to the consultation exercise.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

We do not believe that the financial implications for Queen Margaret University, and for the Higher Education sector within Scotland generally, have been reflected accurately in the FM. For details, please see our response set out below under ‘Consolidated Response – supporting information’.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

We do not consider that the estimated costs and savings set out in the FM are reasonable and accurate. For details, please see our response set out below under ‘Consolidated Response – supporting information’.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

For details, please see our response set out below under ‘Consolidated Response – supporting information’.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

For details, please see our response set out below under ‘Consolidated Response – supporting information’.
For details, please see our response set out below under ‘Consolidated Response – supporting information’.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

We do not believe that the FM reasonably captures any costs associated with the Bill, and that there are other costs that will be incurred. For details, please see our response set out below under ‘Consolidated Response – supporting information’.

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these?

We do believe that there will be future costs associated with the Bill. For details, please see our response set out below under ‘Consolidated Response – supporting information’.

CONSOLIDATED RESPONSE – SUPPORTING INFORMATION

Having considered in detail the Higher Education Bill as introduced, we are concerned about the impact and cost of the proposals. We consider that, while the Financial Memorandum attempts to calculate the direct costs to Universities of the proposals, it does not address the wider financial implications of the Bill. This includes the implications of any threat to HEI’s charitable status arising from increased Ministerial powers, and the additional costs arising from action required under secondary legislation.

We share the concern of others in the sector that increased Ministerial control will lead to universities being reclassified by the Office of National Statistics (ONS) as ‘Central Government’. We consider too that there is significant opportunity costs involved in individual universities across the sector engaging in what is likely to be a complicated and lengthy process for amending their governing instruments.

Impact of new powers for Ministers

We consider that, in determining the composition of governing bodies, academic boards and senates, which are part of universities’ autonomous self-regulation, the Bill affords to Ministers substantial new powers that fundamentally change institutions’ constitutional status. Such powers have the potential to change institutions’ charitable status as explained below, and the potential for Universities to be reclassified as ‘central government’ by the Office of National Statistics.

The Office of the Scottish Charity Regulator (OSCR) sets out a number of indicators that organisations must meet to pass its ‘charity test’. One of the indicators that may disqualify an organisation from charity status is the extent of Ministerial control. Such control may include:

• Power to add to or amend the powers given to boards of management;

• Consent/ approval required in relation to making a material change in the constitution;
• Consent/ approval required to make a change to the constitution.

In our original response, we stated that this would appear to have implications for any legislation that provides for Scottish Ministers prescribing changes to an institution’s constitutions, including appointments. While we note that the Office of the Scottish Charity Regulator (OSCR) commented on the Scottish Government’s consultation proposals, we consider that the Bill as published provides Ministers with significantly more power over institutions than was suggested in the consultation.

The loss of charitable status would result in HIEs losing their entitlement to 80% relief from non-domestic rates. We consider that loss of charitable status would also severely prejudice institutions’ capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions which do not have charitable status.

Equally, reclassification by the ONS, would jeopardise Universities’ status as independent charitable bodies, with negative tax consequences and the likelihood of reduced philanthropic support. Such re-designation would prevent universities from retaining annual operating surpluses, place restrictions on their ability to borrow funds and reduce their ability to enter into commercial partnerships.

As part of its deliberations, we would ask the Finance Committee to consider what further advice the Scottish Government has taken from OSCR on this matter ie beyond the original consultation, and what opinion has been offered by OSCR?

Recruitment of the Chair

On the matter of Recruitment of the Chair, we note the estimated costs attributed to this exercise as set out in the Financial Memorandum that supports the Bill. We do not recognise the basis on which such costs for other bodies and individuals have been calculated. We consider that the costs attributed are a significant under-estimate.

The Financial Memorandum suggests that the ‘potential selection of candidates for chair might involve open advertisement and selection of candidates based on suitability for the role of chair’ (emphasis added). Such transparency is a requirement under the Scottish Code.

While we accept the approximate costs attributed to reimbursement of candidates’ reasonable interview expenses, we do not accept the costs attributed to external advertisement and to the management of the appointment process.

The Financial Memorandum states that the cost of recruitment is approximately £3000 in staff costs and £2000 in external publicity costs for recruitment of a Chair on a four year recruitment cycle for the Chair.

The recruitment cycle for the Chair at QMU is three years, rather than the four suggested in the Financial Memorandum, with equivalent costs being incurred within that 3 year cycle depending on whether or not an incumbent Chair’s term is extended by the Court.

Our experience is that the cost of placing a modest advertisement within a national Scottish newspaper is of the order of at least £5000. In addition to the costs of paid advertisement, there are costs attributable to staff time in managing the recruitment and appointment process.
By way of illustration, the current process for appointing the Chair of Queen Margaret University is overseen by the Nominations Committee under powers delegated by the University Court. The Nominations Committee, which includes Court lay members, staff and student members, shortlists and interviews candidates, before selecting a preferred candidate and making recommendation for approval by the Court. As far as is practicable, this process is managed so as to dovetail with the ordinary schedule of Court and Committee meetings. This minimizes the cost in terms of members’ time and other expenses.

We anticipate that, were the University required to conduct a wider election for the position of Chair, depending on the composition and size of the electorate, and the process for nomination and election, then this would represent significant additional cost in terms of staff resource. In particular, the staff time required to publicise the election, obtain nominations, arrange ballot papers, verify and count votes and address any issues arising from process would be significantly greater than that currently involved in such recruitment. Without knowing the specific detail of the proposals, it is difficult to quantify the full extent of the additional cost to the University.

**Remuneration of Chairs**

On the matter of remuneration of Chairs, we would reiterate the view that we set out in our response to the consultation, which is that governing body membership carries a strong public service ethos which is an important motivating factor for those who participate. Remunerating Chairs risks the erosion of this ethos. Remuneration of the Chair alone would also create a significant symbolic imbalance between the chair and other governing body members, which could adversely affect the unity of the governing body.

The unpaid nature of governing body membership is an important facet of the distinction between governors and the executive. Under existing arrangements, financial considerations should not be a bar to any potential candidates for the position of chair, because expenses available to governing body member can include any lost earnings and childcare costs incurred as a result of governing body membership.

Importantly however, we consider that remuneration of the Chair is problematic in relation to charities law.

Governing body members of HEIs are charity trustees. The Charities and Trustee Investment (Scotland) Act 2005 makes clear that trustees should be remunerated only in exceptional circumstances, usually for providing some service other than serving on the governing body. We note too that, in relation to remuneration of the Chair, the 2005 Charities Act under Section 67 states that a charity trustee must not be remunerated from charity assets unless certain conditions are met.

We do not consider that this important aspect has been addressed in the published draft Bill or in the supporting guidance. Again, while we note that the Office of the Scottish Charity Regulator commented on the Scottish Government’s consultation proposals, we would ask that the Finance Committee consider what further advice the Scottish Government has taken from OSCR on this matter beyond the original consultation, and what opinion has been offered by OSCR.

Importantly, we reject completely the basis on which the remuneration of the Chair has been calculated, and in particular the number of days attributed to undertaking the role.
We are currently in the process of recruiting for a new Chair. In setting out for applicants the requirements of the role, we have stated that the time commitment will vary from week to week, but the likely overall time commitment required is approximately 50 days per year. In breaking down those 50 days, we have provided for the full Court meeting on at least 6 occasions per academic year, including a two-day Away Day on campus in the Spring.

The Chair is required to Chair or attend meetings of Committees of Court throughout the year, and to meet occasionally with Court members on an individual basis. Currently, the Chair of Court convenes the Nominations Committee, and is in membership of the Finance and Estates Committee and the Senior Management Remuneration Committee. There is background reading associated with each of these meetings. The Chair of Court is also expected to be available to provide informal support to the Principal and Vice-Chancellor, the University Secretary and members of Court. In addition to the requirements set out above, the Chair is expected to attend events held by the University, including the annual graduation ceremony in early July, professorial lectures, social and celebratory events.

In summary, were the costs to Queen University calculated on the basis of the daily rate set out in the consultation, the remuneration of the Chair would be of the order of some £26k, not including reimbursement of reasonable expenses.

*Future costs eg arising through secondary legislation*

We have concerns around the costs arising from the practical implications of the proposals as they impact of current governance arrangements of HEIs in Scotland.

The governance of higher education institutions is defined in various governance instruments that have the force of law. For Queen Margaret University, that includes the Queen Margaret University Order of Council, approved by the Privy Council, and the University’s Articles of Association governing its activities as a company limited by guarantee.

We consider that the provisions of the Bill are in conflict with these instruments, such instruments having made provision for the membership and conduct of governing bodies and academic boards/ senates which is different from that set out in the Bill.

In the case of Queen Margaret University, it would be arithmetically impossible for it to comply with the requirements proposed by the legislation while adhering to the requirements contained within the University’s statutory instrument and within the Scottish Code ie that governing bodies should have no more than 25 members, with an independent majority. The Bill sets out specific requirements in terms of representatives of particular constituencies (Section 4 refers). A number of those requirements are already accommodated within the University’s current Order of Council, including 2 persons elected by staff and 2 persons appointed by nomination of the Students’ Union.

The University is in the final stages of securing Privy Council and parliamentary approval for a proposed amendment to its Order of Council which would accommodate whatever regulation is introduced concerning the process for appointing the Chair. However, other stated requirements would not be accommodated, including provision for two persons appointed by Trade Unions and two persons appointed by being nominated by a graduates’ association. Importantly, the requirement for four additional specific constituencies within the composition of the Court would impact on the balance of lay and ex officio membership and on the maximum permissible members on the Court. Were the Bill to pass into legislation in its current form, the University Court would need to consider
either increasing its total membership (in breach of the Scottish Code), or reviewing the other current categories of staff membership.

Any such change is likely to involve the University in seeking the approval of the Privy Council for further revision and amendment to its governing instrument.

We would ask the Committee to note that the process of securing Privy Council and Scottish Government approval for a relatively straightforward amendment to the University’s Order of Council, to bring it in line with the Scottish Code, has taken some 16 months. This process commenced in June 2014, and the amendment is due to commence in late September 2015. Securing the necessary approval involved commissioning of legal advice, the equivalent of 5-6 days of university administrative time to oversee the process, as well as consideration of draft amendments by senior staff and the University Court at various stages of the approval process. The changes required by the Bill would be more substantial for the University than the amendments currently being progressed, and as such, would likely incur higher administrative and staff time costs than the current amendment.

As stated above, it is likely that several, if not most, governing bodies will require to seek similar amendment to their governing instruments, which has implications for the cost of the Bill in terms of secondary legislation, those costs being borne in part by the Scottish Government and by the Universities in terms of legal costs and costs of administrative and senior officer days. There are implications also for time allocated for Parliamentary scrutiny. We consider that none of these costs have been factored into the Financial Memorandum that accompanies the Bill.

Beyond the requirement to amend the University Order of Council, there will a requirement for amendments to the Court Standing Orders which will require additional staff time to review, draft and implement.

Finally, the Bill makes provision for a revised statement of Academic Freedom. Before the proposed changes to the definition of academic freedom were suggested, the University, in order to comply with the Scottish Code of Good Higher Education Governance, established an academic freedom working group to develop a statement of academic freedom. This group consisted of 7 academic and professional services staff members. While the same level of work would not be required to update the statement of academic freedom to take account of the proposed definition, we would expect that the University Senate would reconvene the group, with the resulting implications for staff time.

None of the above includes the opportunity costs of engaging in a complicated and lengthy process of revision to the University’s governance arrangements.

Irene Hynd
University Secretary
21 August 2015
Response

1. **Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?**

   The Conservatoire did make a submission to the consultation exercise preceding the Bill. However, we addressed the questions posed, which did not invite comment on financial assumptions.

2. **If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?**

   N/A.

3. **Did you have sufficient time to contribute to the consultation exercise?**

   Yes.

Costs

4. **If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.**

   No. The FM significantly underestimates the commitment required of the Chair of the Conservatoire’s Board of Governors. We would estimate that commitment to be one day per week so, assuming a 45 week year, remuneration for our Chair would incur an additional cost of £23k, not the £3k cited in the FM. As an aside, it is of concern that the FM should so significantly underestimate the commitment required of a Board Chair – it could be reasonably inferred from that that Scottish Government is not as well-informed about HE governance as it should be.

   There will also be additional costs associated with an increase in the number of Governors as proposed in the Bill, which would add to claims for expenses and increase the costs of events such as strategy away-days.

   The FM does not consider the cost of setting up and maintaining an appointments process for new categories of Governors. For example, the Conservatoire’s graduate association as currently constituted would not be in a position to facilitate such a process and would require significant investment to be able to do so.
The Conservatoire is by far the smallest HEI in the sector, so these additional costs will have a disproportionate impact on our finances.

5. **Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?**

On the basis of recent experience of making amendments to the Conservatoire’s Order of Council, we believe that the FM significantly underestimates the time and effort that will be required of individual HEIs, and of Scottish Government, in making amendments to existing governing documents. Significant legal fees will be incurred in that process.

6. **If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?**

If required to do so then, yes, the Conservatoire could meet the financial costs associated with this Bill. However, given that we believe that the Bill’s provisions will diminish the quality of governance rather than enhance it, that additional expenditure would not be money well spent. Incidentally, we estimate that the additional costs associated with the remuneration of a Chair alone will consume the equivalent of the contribution to the general overhead made by the tuition fee income generated by around 20 international students.

7. **Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?**

No. The FM underestimates the costs associated with the implementation of the proposals included in the Bill. Part of that is due to an underestimation of the complexities involved in making amendments to existing governing documents – the burden of which will fall on both individual HEIs and Scottish Government.

**Wider Issues**

8. **Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?**

As well as costs identified above, there will be opportunity costs to Government, Parliament and to individual HEIs in considering and implementing these proposals. Again, given that we believe that the Bill’s provisions will diminish the quality of governance rather than enhance it, it follows that we believe that the resources that it will consume could and should be better deployed.
The Conservatoire shares the sector’s concerns in respect of the risk of ONS reclassification of HEIs as Central Government bodies and the loss of charitable status. The provisions in the Bill that create that risk are set out in Universities Scotland’s submission to the Committee. We would concur with US’s assessment and would emphasise the catastrophic impact on the Conservatoire’s ability to manage our finances and to ensure financial sustainability if those risks are 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.

9. **Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?**

Given the extent to which Scottish Ministers are given broad powers by regulation to make different provision for different purposes, it is impossible to quantify future costs. However, and because of the extent to which it is proposed that powers should be delegated to Scottish Ministers, it is safe to assume that there will be additional costs. The extent of delegation to Scottish Ministers also increases the risk of ONS reclassification and further jeopardises the Conservatoire’s charitable status.
Finance Committee
Higher Education (Governance) Scotland Bill
Submission from Robert Gordon University

Response

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The detailed financial assumptions contained in the Financial Memorandum were not the subject of consultation. Therefore we have not had the opportunity to comment on critical financial issues that were not included in the consultation but which now form part of the Bill.

Several aspects of the Bill provide for the Scottish Ministers to exercise new legislative and executive powers in relation to key elements of university governance; the appointment and remuneration of Chairs, the composition of the university governing body and the composition of the academic boards. We are concerned that any extension of effective Ministerial control may lead the Office of National Statistics (ONS) to reclassify Scottish universities to the general government sector under the European System of Accounts (ESA2010). Were such a threat to the university’s autonomy to materialise, it would impact on the university’s financial management and impact on its ability to retain annual operating surpluses, borrow funds for investment and increase income through commercialisation activities at a time of increasing financial constraint in the public sector.

A further concern to the Board is the unintended consequences of the new powers, which could potentially jeopardise the university’s charitable status. Were this to occur, it would have negative implications for tax and the ability to raise philanthropic funding to support investment and student academic scholarships.
4. If the Bill has any financial implications for your organisation, do you believe they have been accurately reflected in the FM. If not, please provide details?

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

The financial memorandum grossly underestimates the time commitment of the Chair (6 days per annum at an estimate of £3,072). The minimum estimate of time for the role would be 35 days per annum, in reality it can extend to the equivalent of one day per week. There are no identified savings.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

It is likely that the University could meet the additional cost of remuneration for the Chair, however more significantly and of serious concern is the cost of reclassification by the ONS.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

The costs and risks relating to the potential loss of charitable status and ONS reclassification have not been considered.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

9. Do you believe that there may be future costs associated with the Bill? For example through subordinate legislation? If so, is it possible to quantify these points?

The risks to universities charitable status and potential reclassification as public sector bodies are fundamental issues which have not been properly considered and could be extremely damaging for the university sector.
Finance Committee
Higher Education (Governance) Scotland Bill
Submission from Scotland’s Rural College

Response

Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

SRUC did submit a response to the consultation exercise which preceded the publication of the Bill. The consultation did not specifically address any financial implications of the proposals and did not set out in detail any financial assumptions which had been made by the Scottish Government in preparing the consultation document.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

Not applicable.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

A thorough assessment of the financial implications for SRUC cannot be carried out until the Regulations to be made section 1 of the published Bill are set out by the Scottish Ministers.

Whilst SRUC will make provision for the appointment of a new Chair, in accordance with the requirements of the Scottish Code of Good HE Governance, it cannot make financial or resource provision in relation to any future Regulations until such time as these are made public.

The FM sets out assumptions on the cost of advertising vacancies, both for the Chair and for new board members. These make the assumption that advertising will primarily be through free public appointments websites. SRUC does not believe that advertising solely on such sites is sufficient to meet the requirement to promote
gender equality and diversity on Boards. SRUC has recently completed an advertising campaign for the recruitment of new Board members and whilst we used as many free and relevant online resources as we could there was a need to use other advertising sites. The FM assumes that the cost of using external print and media services would be likely to cost an HEI in the range of £750 to £2,000 per recruitment exercise. In order to access such external services SRUC had to incur advertising costs of approximately £16,000.

The FM makes certain assumptions in relation to the cost of running an election for the appointment of a Chair although these cannot be fully assessed until the Regulations for the election process are published. The same assumptions are made in relation to the elections for the appointment of staff members to the Board. The FM does however assume that the costs of an election will be minimal. This assumption is based on an election being run electronically as an HEI is likely to have email addresses for all potential voters.

SRUC does not have any budgetary provision for paying candidates expenses in conducting an election campaign and such additional costs could not easily be absorbed into existing budgets.

Until the Regulations for the election of a Chair are known, SRUC cannot assess whether it would be able to conduct an election electronically.

SRUC knows that it cannot conduct an election for staff members of the Board solely by electronic means. Given the type of work some employees undertake, for example as stockmen/women or dairy workers, there is no need for them to have access to the SRUC computer systems.

The FM assumes that the management of elections could be resourced internally by the HEI. This is not necessarily the case and SRUC has required in the past to engage external support to facilitate staff elections.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

SRUC believes that the assumptions made in the FM underestimate the costs, both in financial terms and in time, to Institutions and to the Scottish Government in implementing the provisions of the Bill if enacted as published.

SRUC is a private company limited by guarantee and has charitable status. If the Bill is enacted as published then SRUC would require to make changes to its Articles of Association to ensure it was compliant with the new Act. In terms of SRUC’s current Articles of Association changes cannot be made without the consent of the Scottish
Ministers. Consent would also be required from the Office of the Scottish Charity Regulator (OSCR).

SRUC was formed by a merger of three land-based FE colleges with SAC (the Scottish Agricultural College) in October 2012. The Articles of Association of SAC required to be changed to facilitate the operation of the new, merged institution and consent was requested from the Scottish Ministers and prior to the merger. The consent of the Scottish Ministers was not given until July 2015, almost three years after application was made, despite repeated attempts by the solicitors acting for SRUC to make progress.

The experience of SRUC in relation to changing Articles of Association indicates that the assumption in the FM of the time and cost required to amend HEIs governing instruments is not accurate and that it significantly understates the resource requirement both for the Scottish Government and for the institutions involved.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

SRUC has no provision to meet the additional costs which will arise as a result of the enactment of the Bill as published and would be looking to the Scottish Government to provide the resource required to amend the Articles of Association and to meet the costs incurred in running elections for the Chair and staff board members (including the campaign costs).

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

The FM does not accurately reflect the costs which will be incurred but it is reasonable to assume that the timeframe in which the costs will arise are as set out in the FM.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

If there is a requirement to have two Board members nominated by a graduates’ association then SRUC will require assistance in creating such an organisation and would again be looking for the Scottish Government to provide the necessary resource to create such an organisation.
9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

We are unable to assess at this stage whether SRUC would be affected by any subordinate legislation and so unable to quantify any costs associated with such legislation.

Helen Howden
Solicitor and Deputy Company Secretary
Higher Education Governance (Scotland) Bill: Submission from the University of St Andrews to the Scottish Parliament’s Finance Committee

Summary

The University of St Andrews is deeply concerned about the scope and provisions of the Higher Education Governance (Scotland) Bill. We support the Scottish Government’s aims of transparent and inclusive participation in higher education governance, but we do not believe that these will be furthered by the measures proposed in the Bill. On the contrary, the legislative proposals presented to Parliament would weaken the inclusiveness and effectiveness of existing governance arrangements.

The University of St Andrews has supported the implementation of the Scottish Code of Higher Education Governance, and believes that our governance arrangements are transparent and inclusive, ensuring a strong voice for staff and students, supported by independent external expertise and scrutiny. We do not believe that there has been any convincing explanation presented of what the problem is that this legislation is intended to address.

The proposals in the Bill would significantly undermine the autonomy and independence of Higher Education institutions, reducing Universities’ ability to act as sources of independent thinking, and putting at risk their international reputation for excellence and substantial contribution they make to Scotland’s economy. The Royal Society stated in their response to the consultation exercise that preceded the Bill, “Institutional autonomy and independence are fundamental principles that underpin the successful performance of Scotland’s HE sector. The proposals outline a level of governmental intervention that is entirely inappropriate for an autonomous sector”.

Specific Questions

Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

3. Did you have sufficient time to contribute to the consultation exercise?

The University of St Andrews submitted a response in January 20151 to the Consultation Paper on a Higher Education Governance Bill. On the issue of remuneration of the Chair we stated, “The concept of public service for no reward enables university governance to be free of any conflicting loyalties. It may be necessary to put in place appropriate support, short of remuneration, for anyone who

wishes to take on the role. This may include appropriate care expenses for a family member and appropriate travel and accommodation expenses.”

It is already open to Universities to determine any arrangements to remunerate Chairs and/or reimburse expenses incurred. We are not aware of any pressure to introduce a standard approach, or any convincing evidence that this will deliver greater diversity.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

We do not believe that the costs to our organization have been accurately reflected in the Financial Memorandum.

In particular, the estimated remuneration of the Chair severely underestimates the time that is required for this role. The Financial Memorandum assumes that the call on Chair’s time will be restricted to attending six meetings in the course of a year. This completely overlooks the substantial responsibilities of the Chair of the Court of a University outwith the formal meetings of Courts, and displays a real lack of understanding of the responsibilities of this role in ensuring robust, competent governance. The role of a Senior Governor involves work on a daily basis, including evenings and weekends. An overall time commitment totalling some 60 days would be a more realistic, but still conservative, estimate.

If remunerated at the Scottish Government’s maximum daily fee rate for non-executive chairs of £528, set out in the Public Sector Pay Policy for Senior Appointments 2014-15\(^2\), this would cost the University a minimum of £31,680 per year. Using commercial day rates for non-executive chairs of organisations of similar scale, the cost to the University of St Andrews could easily be in excess of £140,000 a year - equivalent to the places of 16 home students per year, or almost 70 over the course of the standard Scottish degree cycle.

There are also significant costs associated with the wide range of constitutional and regulatory changes that would have to be taken to implement this legislative change. The Bill appears to take no account of the impact of the legislation on the existing legal framework within which Higher Education Institutions operate, assuming that this will be addressed by the individual institutions. The University of St Andrews has identified at least four ordinances that would have to be revised as a consequence. This would require significant work including formal consultation with staff and stakeholders, engagement of legal experts, and seeking agreement of the Privy Council. We estimate one-off costs of at least £50,000 associated with this.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

The extent of the proposed powers to be exercised through secondary legislation risks introducing a dangerous level of political influence and control over Universities. Sections 1, 8 and 13 allow Ministers to enable future changes to the make up of University Courts and Senates through secondary legislation which could significantly institutional autonomy and jeopardise Universities’ ability to ensure academic freedom and act as sources of independent thinking. Section 14 appears to give Ministers a very broad and open ended power to “make different provision for different purposes”, which should properly be exercised by Parliament through primary legislation.

The risk of future costs resulting from this are threefold.

Firstly, there are real opportunity costs to the Scottish economy. Independent analysis has confirmed that the University of St Andrews delivers £12 in benefit for every £1 of Scottish Government funding invested\(^3\). Our ability to excel in a competitive global market depends on our academic reputation, both in terms of excellence in research and a world class learning and teaching experience. The uncertainty generated by this legislation, and the risk posed to the autonomy, can only damage the academic reputation of the HE sector in Scotland, and undermine our international competitiveness and our contribution to Scotland’s future economic growth.

Secondly, there is a risk that the legislative proposals in the Bill could put at risk the Charitable status of Universities. Although OSCR made general statements during the consultation exercise prior to the bill to the effect that the proposals at consultation stage did not give Ministers a power to direct or control HEIs, the Bill as introduced contains more sweeping powers, in particular the broad nature of powers

\(^3\) Economic Impact of the University of St Andrews 2011-12, BIGGAR economics, http://www.st-andrews.ac.uk/news/archive/2013/title,198915,en.php
to make regulations. We hope that OSCR’s firm assurances will be sought that the Bill, and any regulations that could potentially be made under the powers given in the Bill, will not threaten the charitable status of Scottish HEIs.

Quite apart from the direct financial consequences of losing of charitable status, this could severely impact on our Development opportunities. As an independent charity, St Andrews brought in £3.2m in 2013/14 through this route, most of which was used directly to support the professorships and scholarships which are the lifeblood of the sector.

Thirdly, there is a risk that the Bill could jeopardise Scottish HEIs' ONS classification as non-profit institutions serving households, and trigger a reclassification as a “central government entity” (as has now been given to Scottish FE colleges). This would have a severe impact on Universities’ ability to undertake entrepreneurial activities and access research funding. In 2013/14, for example, St Andrews recorded income of £12.4m relating to knowledge transfer, tied to SMEs, large businesses and other organisations excluding research councils.

Our ability to raise external funding, particularly from public sector sources, would also be put at risk since it may be deemed anti-competitive or State Aid – one example would be the recent Amber Infrastructure loan of £11m for our biomass plant, a central element of our strategic ambition to be carbon neutral for our energy supply.

In the recent successful move by Welsh FE colleges to move away from their recent reclassification as central government entities, two key areas that they addressed were the level of autonomy for colleges, including powers to make changes to their own instruments and articles of government; and the level of operational intervention by central government. We hope that a clear assurance will be provided that the proposed changes to be made by the Bill, and any regulations that could be potentially made under the powers given in the Bill, will not trigger a reclassification by ONS.

University of St Andrews
19 August 2015
Universities Scotland welcomes the opportunity to contribute evidence on the potential financial implications of the HE Governance Bill. We would welcome the opportunity to supplement this with oral evidence.

Summary

Universities Scotland has concerns that the Financial Memorandum contains underestimates of costs facing higher education institutions (HEIs) as a result of the Bill’s provisions.

However, our more fundamental financial concerns are that the Bill:

- Substantially increases the risk that the Office for National Statistics may reclassify higher education institutions as part of the public sector, and
- May create a risk to institutions’ charitable status.

The realisation of either of these risks would have far-reaching financial implications for HEIs and their contribution to Scotland.

ONS classification

The Bill significantly raises the risk of reclassification of universities by the Office of National Statistics (ONS), from ‘Non-profit Institutions Serving Households’ to Central Government entities.

ONS’s programme already includes an intention to review the classification of higher education institutions. Their classification decisions are informed by factors including the extent of government control and influence over an institution. In Universities Scotland’s view, the Bill heightens the risk of institutions’ reclassification through the additional controls it hands to Ministers. These include:

- Power to decide how people should become chairs of governing bodies
- Power to decide how long people should serve as chairs of governing bodies
- Power to determine the remuneration of chairs of governing bodies
- Power to determine the composition of institutions’ governing bodies
- Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.

1 Universities Scotland is the representative body for Scotland’s 19 higher education institutions (HEIs). In this document, we use the term ‘universities’ as shorthand for all of our members, which include three specialist institutions (the Glasgow School of Art, the Royal Conservatoire of Scotland and SRUC) as well as 16 universities.
ONS are likely to look at these in cumulation 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, the Outcome Agreements framework to give effect to that, and the statutory requirement to observe the higher education governance code as a condition of grant.

ONS reclassification that would mean universities “will be treated as part of central Government for financial purposes”. These are the Auditor General’s words, used in connection with the parallel reclassification of Scotland’s further education colleges.\(^2\) Other recent examples of adverse ONS reclassification include Scottish Futures Trust funding for the Aberdeen western peripheral route, and ONS’s current consideration of whether to reclassify housing associations in England as a result of increased Ministerial control.

In practical terms, ONS reclassification would leave universities facing:
- The loss of incentive to earn entrepreneurial income;
- restrictions on borrowing;
- the inability to create surpluses and invest them in improved facilities;
- the loss of philanthropic income, currently worth c.£53m a year; and
- a major reduction of partnership with the private sector.

These sources of funding currently support the great majority of the university sector’s c.£370m per year infrastructural investments, which are crucial to the sector’s success in a highly competitive global context; for example, producing best-in-UK results in the 2014 Research Excellence Framework for both the quality and impact of research and generating £1.3 billion export earnings annually. 65 per cent of the sector’s income (c.£2 billion) and over three quarters of its capital investments derive from sources other than Scottish Funding Council grants. Without the financial tools and the autonomy to invest strategically in this way, universities would inevitably have to reduce their levels of activity and investment, with significant implications for their ability to deliver on Scottish Government priorities, such as skills provision, innovation, and social mobility.

**Charitable status**

Universities Scotland is also concerned that the increased levels of Ministerial control may put institutions’ charitable status at risk.

Section 7(1) of the Charities and Trustee Investment (Scotland) Act 2005 contains the Scottish charity test, supplemented by the definition of charitable purposes in section 7(2). However, section 7(4) provides that a body which meets the terms of the section 7(1) does not in fact 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.

At a financial level, charitable status is essential to institutions’ solvency. Loss of charitable status would, in particular, mean that institutions lost their entitlement to 80% relief from non-domestic rates. This was estimated in 2008 as being worth £27m per year.

Loss of charitable status would also severely prejudice institutions’ capacity to access philanthropic funding, currently worth around £53 million a year. Donors are highly unlikely to wish to support institutions who are no longer charities.

Charitable status is also an essential part of HEIs’ identity and mission.

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

We took part in the pre-legislative consultation exercise. This consultation document contained no detail on financial assumptions. We limited our comments in this area to the notion of improved efficiency in the section on the Privy Council (which was dropped from the Bill).

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

N/A

3. Did you have sufficient time to contribute to the consultation exercise?

Yes. However, we note that some highly significant elements of the Bill, concerning new ministerial powers, were not included in the consultation. There was therefore no opportunity to respond to these proposals.

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

The Bill has financial implications for Universities Scotland’s member institutions. Most types of additional expenditure are identified in the FM, but not all. We believe the costs have been underestimated in almost all cases. For details, see below.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

No savings are identified in the FM and we do not expect there to be any. All of the provisions in the Bill that have practical consequences create additional complexity
and new administrative and/or financial burdens, relative to existing governance arrangements.

**Underestimated costs notably include:**

- **The cost of remuneration of the Chair**
  These costs are calculated on the erroneous premise that ‘reasonable remuneration’ would require payment only for attending meetings. We note that the motivation for the proposal to remunerate Chairs is understood to be the encouragement of diverse candidates for the role. It is highly unlikely that qualified individuals would be influenced by remuneration at six days per year for a role that demands a great deal more commitment on a regular basis (especially given that expenses for childcare, etc., are already paid).

  More realistic calculations of time devoted to chairing an HEI’s governing body, as evidenced by advertisements for the role at several institutions, stand at around 50 days per year (and in some cases more). The most conservative estimate would be 30 days a year. On this basis, even assuming the FM’s conservative estimate of a daily rate, the cost would be in a range of £276,480 - £460,800, meaning that the FM underestimates this cost by at least £220,000 and realistically around £400,000.

- **Advertising costs for recruitment of the Chair** (an existing cost covered in the FM)
  On the basis of institutions’ own experience, these costs are underestimated by £4,000 - £8,000 per institution, meaning that the FM underestimates the sector-level cost by at least £72,000 and up to £144,000.

- **Likely costs of running elections for Chairs**
  Contrary to the assumption of the FM, it may not be possible to run such elections using low-cost ICT solutions without disenfranchising some constituencies. Even if online solutions were possible, such elections would involve set-up costs. HEIs have often outsourced comparable elections to ensure independence, efficiency and full and fair opportunities to participate. Realistic costs are difficult to estimate, especially as the nature of the proposed election is not known, but the evidence of comparable exercises suggests costs of £1,000 - £3,000 at some or all institutions, even if an electronic-only system is used (hence up to £54,000 overall, where the FM expects ‘minimal’ cost) and around £7,000 where postal ballots are also used, meaning up to £126,000 at sector level.

The following costs are not addressed in the FM:

- **The cost to HEIs of administering changes to HEIs’ governing instruments**
  The FM makes a reasonable estimation of the cost, in staff time, to the Scottish Government of administering changes to HEI governing instruments. However, the FM makes no corresponding estimation of the cost, in staff time, of the administration needed with all 19 HEIs to change governing instruments.
In making amendments for compliance with the Code and other recent changes, HEIs have often experienced protracted processes to make such changes through the Scottish Government and Privy Council. The precise impact is difficult to estimate; one HEI suggests **the equivalent of at least one full-time senior member of staff for one year would be required** to deal with all the required changes.

It is important to note that the cost of such changes to comply with the Bill would follow extensive work at all institutions since July 2013 to ensure compliance with the Code of Governance. If an alternative to the Privy Council is to be explored in the future, the sector faces the prospect of a still further extended period of upheaval in governance. At all stages, this is a significant draw on staff time and resources, with corresponding opportunity costs. This is a high price to pay, given that even the strongest advocacy for reform has not been presented as a reaction to any notable problem.

- **Staff time devoted to appointments processes, especially Chair appointments**
  Staff involvement in these processes includes a significant time commitment for several senior managers. Since the Bill’s effect would be to complicate appointment processes in multiple ways, the cost in terms of staff time is likely to rise significantly further.

- **Legal fees incurred for necessary professional advice on changes to HEIs’ governing instruments**
  Again, this is difficult to estimate accurately, but it is likely to be a substantial five-figure sum.

- **Setting up new appointment processes for categories of governing body member that some or all institutions currently do not have.**
  For some institutions, this is likely to involve the establishment of a formal graduates’ association appropriate for the role of electing or nominating governing body members. It is difficult to give precise costs for creating and maintaining such processes in the absence of further detail.

6. **If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?**

If ONS reclassification results, some of universities’ most important sources of finance will be cut off. This would no longer be simply a question of ‘meeting costs’ but a critical change to operational capabilities. Regarding other costs, higher education institutions will have no choice but to find the required resources from existing budgets. While the sums involved are relatively modest in the context of HEIs’ broader activities, they are big enough to have real operational impacts. It is important to note that this diversion of resources would carry opportunity costs and
would come at a time of existing budgetary restriction, when HEIs are working hard to deliver efficiencies across their operations.

7. **Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?**

Given that the tendency to underestimate costs is in some cases based on erroneous underlying assumptions and some costs are not included, we believe that the margins of uncertainty have not been understood or stated accurately.

**Wider Issues**

8. **Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?**

9. **Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?**

Given the powers that the Bill would grant to ministers to vary significant areas of HEIs’ governance, it is certainly possible that the Bill could generate future costs, as a result of further ministerial intervention and any consequent changes to HEIs’ governing instruments and/or processes.

Consideration should also be given to the potentially costly effects of ineffective governance due to conflicts within the governing body if Ministers choose to use section 1 of the Bill to introduce a model where the chairs of governing body were not chosen by the governing body itself and did not have the governing body’s confidence. This could cause strategic opportunities to be missed, as well as loss of revenue via reputational damage. The Scottish Government’s news release on publication of the Bill held this out as a possible policy intention, despite the objections of over three quarters of respondents to the pre-legislative consultation.

**Universities Scotland**

21 August 2015
The University of Aberdeen welcomes the opportunity to submit to the Finance Committee its comments on the Higher Education Governance (Scotland) Bill. Our responses to the Committee’s questions are provided below, however, the issues we would highlight as being of particular importance are, as follows:

1) **Loss of Charitable Status and/or ONS Reclassification**

The University is concerned that the Bill proposes Ministers taking significant new powers over the governance of institutions which will fundamentally reduce the current level of institutional autonomy. The University intends to make a separate submission to the Education and Culture Committee to outline its specific concerns regarding the implications of the Bill in terms of the principle of the autonomy of universities and the specific changes to internal governance that are proposed. The University wishes, however, to highlight to the Finance Committee its significant concern that should the Bill progress in its current form, the addition of significant new Ministerial powers over the governance of Universities could result in the loss of charitable status and/or Office of National Statistics (ONS) reclassification as a public sector body.

1.1 **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 sustainability of the University.

1.2 **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.

2) **Remuneration of Chairs: Underestimation of Time Commitment**

The Financial Memorandum significantly underestimates the amount of time that is required of the Chair of a University governing body. The University estimates the time commitment required to be approximately 50 days a year rather than 6 days.
Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

Yes. The Consultation did not, however, outline in detail the potential costs of proposals.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

Not applicable.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

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 would be the minimum estimate of cost of such external advertising in the media rather than the maximum.

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 are confined to staff or students of an institution. We would emphasise, however, that the cost of running 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.

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.

5. **Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?**

See response to Q4.

6. **If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?**

This depends on the detail of the Bill. However, the University would argue that any additional costs of compliance with the Bill should be met through public funds as part of recurrent funding provided by the Scottish Funding Council. This does not include any further financial implications arising from the Bill with regard to loss of charitable status or ONS reclassification which go significantly beyond the cost of compliance with the provisions of the Bill.

7. **Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?**

The Financial Memorandum does not provide us with assurance regarding the business critical issues of charitable status and ONS reclassification.

**Wider Issues**

8. **Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?**

As referred to above, the University is concerned that due to the extension of Ministerial powers over the governance of the University, the Bill will result in the loss of charitable status.

For the same reasons, the University is also concerned that the Bill will result in the reclassification of universities as public sector bodies by the ONS.

Either would have far reaching, fundamental and potentially hugely damaging consequences for the financial sustainability of the University. We consider these two questions should be key concerns for the Finance Committee in its scrutiny of the Bill.
9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

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 much 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.
The University of Dundee submitted a response to the Consultation Paper on a Higher Education Governance Bill in January 2015. In that response the University commented on the proposed introduction of remuneration for chairs. In the institution’s view there was insufficient evidence to support the suggestion that financial incentives were helpful in attracting a more diverse range of appointable candidates. The University was, however, supportive of governing bodies considering compensation to a chair’s employer for time spent carrying out the role, in addition to the current commitment to reimburse all reasonable expenses to allow governing body members in general to attend meetings.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

No, the FM provides for remuneration of chairs up to a suggested limit of £3072 per year.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

The University’s view is the FM significantly underestimates the financial implications of the Bill in a number of areas: advertising and recruitment costs; election costs and expenses; effecting process change and changing governing instruments. Firstly, with regards to the assumed costs relating to advertising and recruitment: During the last round of recruitment for Lay Members of Court the University placed advertisements in a number of major newspapers and online resources at a total cost of approximately £12,500. The FM assumes a cost to each HEI of between £750 and £2000 for external publicity. In our experience such a low estimate would be woefully inadequate in meeting the costs associated with taking a professional
approach to the advertising of such an important position. The FM assumes the reimbursement of interview expenses to be £2000 based on four candidates with a maximum allowance of £500 per candidate. Recent recruitment rounds have involved more than four candidates, but more importantly these expenses do not include those of members of the governing body acting as members at both the shortlisting and interview stages.

Secondly, the FM assumes the cost of an election process for chair to be £500 per candidate in election expenses, based on the University of Aberdeen’s guidance on Rectorial elections. In its rectorial elections, the University of Dundee permits expenses up to a limit of £1000, although these have rarely been spent in their entirety. It is, however, arguable that given the importance of the role of Chair, the costs may be greater. It should not be forgotten, depending on the size and composition of an electorate for such an election, costs will be incurred in managing the list of electors as well as administering the election itself. A recent election at the University of Dundee for the post of Graduates’ Assessor on Court which was outsourced to the Electoral Reform Society cost £21,000. Of course, the University remains unconvinced of the benefits of an election for the role of Chair, and indeed believes that this could undermine principles of good governance and accountability by politicising a process which fundamentally must be about identifying the best candidate for the role, and which should not risk building expectations between the successful candidate and the electorate. All members of governing bodies should act for the good of the institution as a whole, this is especially important for the Chair.

Thirdly, the proposals within the Bill will require institutions to make amendments to their governing instruments. This is not without its own expense in terms of staff time and effort in drafting and preparing submissions to the Privy Council and responding to the comments received from advisers, as well as the time associated with discussing and transacting the appropriate business through the Senate and Court.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

No please see answer to question 4. On the basis of the Bill and FM, the University does not believe that there would be any financial savings to the institution; moreover the University believes the FM underestimates the costs that will be incurred in introducing and maintaining the Bill’s proposals.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

As stated, the University believes the costs associated with the Bill would be in excess of those in the FM and therefore would seek greater clarity before committing to meet any additional costs to the institution. The University would suggest that the
Scottish Government gives further consideration as to how the costs of the Bill should be met and consults with the SFC and HE sector.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

The University is of the opinion that the Bill contains a number of uncertainties and as explained above we have significant reservations over the estimated costs relating to the recruitment and potential election of a chair.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

Aside from the issues with the costs mentioned above the University would suggest there are significant resource implications to other organisations such as the Scottish Government and Privy Council.

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

The University is of the opinion that the use of subordinate legislation, or regulations as provided for in the Bill, could lead to additional costs not referenced in the Bill. As a point of principle, the use of subordinate legislation to decide what categories of person should be on governing bodies, how they should be appointed and their conditions of service raises fundamental issues about institutional autonomy.

The University is concerned that the use of subordinate legislation by Ministers may lead the Office for National Statistics to classify higher education institutions as public sector bodies, a situation which has already occurred in the college sector as a result of greater ministerial influence permitted under the Post 16 Education Act. The reclassification of the University as a public sector body would have a profound adverse impact by significantly restricting the financial freedom of the institution and placing at risk the University’s relationships with philanthropic organisations and our ability to have an impact, through knowledge exchange and collaboration, on innovative business growth in Scotland.

Furthermore if the University was reclassified as a public sector body the institution would not meet the Scottish charity test as defined in in the Charities and Trustee Investment (Scotland) Act 2005. At a financial level, charitable status is essential to institutions’ solvency and would further limit the University’s capacity to access philanthropic funding as donors are highly unlikely to wish to support institutions who are no longer charities.
It is not possible at this stage to accurately quantify the costs to the institution if the use of subordinate legislation leads to ONS reclassification or the loss of charitable status, but they are likely to be significant and potentially damaging.
Summary
The University of Edinburgh has deep concerns about the scope and provisions of the Higher Education Governance (Scotland) Bill.

The Bill as drafted would involve significant compliance costs for our University which we estimate at £79,500 in one-off costs and up to £125,000/year in annual recurring costs.

In addition, while we support the aim of the Scottish Government to create an inclusive, strong and sustainable economy, we do not think that there has been any compelling explanation of the problem that this particular Bill is seeking to address.

We are fully committed to ensuring that there is transparent and inclusive participation in the governance of the University. We are, however, extremely concerned that the proposed legislation opens up the real potential for a reduction in the ability of Universities to ensure academic freedom and act as a source of independent thinking.

We are dismayed that the proposed legislation could weaken the inclusiveness and effectiveness of our existing governance arrangements which ensure both a strong voice for staff and students and external, independent expertise in governing what is a large and complex organisation.

Response
Consultation
1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?
2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?
3. Did you have sufficient time to contribute to the consultation exercise?

We submitted a response on the 30 January 2015 to The Scottish Government’s Consultation Paper on a Higher Education Governance Bill. We stated the following:
We think that the matter of a Chair’s remuneration is probably best left to individual institutions to determine – certainly our own lay members are very clear that they would not want to be recompensed over and above expenses incurred as they see their contribution as a pro bono one; and we have had significant success in securing a good gender balance under the current arrangements. The detailed financial assumptions which now appear in the Financial Memorandum were not included in the consultation document and consequently this is our first opportunity to comment.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

We do not believe that the costs to our organisation have been accurately reflected in the Financial Memorandum.

The estimated remuneration of the Chair severely underestimates the time that is required for this role. In the University of Edinburgh the Vice-Convenor role requires around 8 hours/week (taking account of weekend and evening work) which, if remunerated, could cost from £27,144 to £125,000. £27,144 is based on the Scottish Government’s proposed day rate for NDPB Chairs (£522 per day), and £125,000 is based on KPMG’s proposed day rate for non-executive chairs of an organisation with our size of turnover. We cannot understand the basis for the time estimate in the Financial Memorandum of 6 days/year which appears to us to display a real lack of understanding of the depth and breadth of the commitments associated with this role to ensure good and robust governance.

In addition to the time commitment of our Vice-Convenor, the University’s dual leadership structure also benefits from the contribution of the Rector. Elected by a constituency of all students and staff, the Rector presides at full Court meetings, chairs General Council and holds surgeries and public meetings for individual students. Neither the Rector nor the Vice-Convenor claim remuneration for the time spent fulfilling these roles.
There are also significant costs associated with the wide array of constitutional and regulatory changes that would have to be taken to comply with the provisions of the Bill.

Implementing legislative change would require a significant amount of work to review, consult, amend and implement at least eight University ordinances. This includes engagement with the Privy Council, consultation with staff and stakeholders, legal and policy work. We estimate one-off costs of £79,500 for these processes and the legislative changes.

The costs associated with the Bill will have a direct opportunity cost, if met by the Higher Education sector, by diverting funds which have been provided for investment in education, research and innovation. While we have provided a best estimate of the immediate costs, this is likely to be a minimum impact and presumes that Scottish Government addresses significant delays in the approval processes for ordinances and other instruments.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

In addition to the above one-off and recurring costs, the Bill also poses real opportunity costs to us and to the Scottish economy by threatening our international academic standing.

Our University, currently 17th in the world in the QS ranking and 4th in the UK for research power, returns over £9 to the Scottish economy for every £1 of public funding invested. We recruit and develop the world’s most promising students and most outstanding staff and aim to be a truly global university benefiting society as a whole. We, however, are competing in an increasingly competitive environment internationally, where the gap is increasing between the truly world-leading Universities and the rest. Our ability to build on our strong track record, through international partnerships and collaborations, will be hampered by the uncertainty generated by this draft legislation around academic freedom, reduction in institutional autonomy and limited parliamentary scrutiny over enhanced Ministerial powers. The changes proposed will have real long-term financial consequences for the University and the Scottish economy in addition to immediate implementation costs.
A recent League of European Research Universities report directly relates the success of the UK Higher Education sector to the autonomy of its institutions. The UK Higher Education sector is seen as a role model in this regard by its European counterparts. The draft Bill is already being seen by Higher Education commentators as leading to reduced autonomy for Scottish Universities.

The Bill's wide ranging secondary powers are of significant and particular concern to us in this regard as they risk weakening rather than improving higher education governance. There has been a clear and well established understanding over many years in Scotland - and more broadly in the UK - on how best to balance the need for Universities to be accountable for the public resources that they receive while ensuring that they should be able to offer analysis and comment without fear or favour regardless of the political make-up of the Government of the day. The proposed new legislation breaks that convention, giving future Governments significant potential influence and control, without the safeguard of the same level of parliamentary scrutiny and public consultation.

The extent of the proposed powers to be exercised through secondary legislation are, in our opinion, constitutionally inappropriate and deeply concerning in this regard. Section 20 of the Bill proposes to give very broad powers to Scottish Ministers to amend (and indeed repeal) the whole or parts of the existing Universities (Scotland) Acts through secondary legislation. Sections 1, 8 and 13 also give wide powers to Ministers to enable future changes through secondary legislation which could significantly shift the balance of the relationship with the sector from one of accountability with autonomy to political direction; reducing autonomy and the ability of higher education institutions to ensure academic freedom. Section 14 contains a very broad power which provides Scottish Ministers with the power when making regulations ‘to make different provision for different purposes’. Overall, The Bill gives Ministers potentially very open ended powers that should properly be exercised by Parliament through primary legislation.
Finance Committee
Higher Education (Governance) Scotland Bill
Submission from University of Glasgow

Response

This response has been developed by a Working Group of the University Court, on behalf of the Court. The University Court welcomes the opportunity to give evidence. Rather than respond to individual questions, we have structured our response under the broad headings in the Call of Consultation, Costs and Wider Issues.

Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

3. Did you have sufficient time to contribute to the consultation exercise?

The University Court responded to the consultation exercise preceding the development of the Bill and we are of the view that sufficient time was available. However, the detailed financial assumptions set out in the Financial Memorandum were not the subject of consultation. Significantly, the Bill proposes that government ministers take significant new powers on themselves, covering fundamental aspects such as the appointment and remuneration of Chairs and the composition of governing bodies and academic boards. These powers were not included in the consultation exercise. They are of significance to the Finance Committee because:

1) as with recent changes to the FE sector in Scotland, they involve a risk that universities may be reclassified by the Office of National Statistics as an arm of central government. Should this happen, it would have a dramatic and harmful effect on universities' financial management. Specifically, it would disincentivise entrepreneurial activity – a key element for the success of universities – and it would prevent universities from generating annual financial surpluses to invest in maintaining and improving their asset base.

The University of Glasgow has significant relationships with businesses and these would be put at risk if the University was to be reclassified as an arm of central government due to constraints associated with state aid. These associations are many and varied. For example, we have a partnership with AstraZeneca to understand immunological disease processes, we have a long term collaboration with Shell which has delivered efficient gas surveying, we
design tools for global semi-conductor manufacturers and we have developed anti-bacterial sterilization methods now used for surgical instruments and packaging of perishable foods.

2 they may compromise the universities' charitable status, which would have significant tax implications, including damaging their ability to raise charitable funding. In addition, while there is any uncertainty in universities charitable status, there are implications for funding from those bodies which are required to fund only charitable entities.

These aspects are clearly unintended as they run counter to the statement in the consultation that autonomy was at the core of our successful universities and that ‘the Government did not want to increase Ministerial control over universities’.

Costs

4. If the Bill has any financial implications for your organisation, do you believe they have been accurately reflected in the FM. If not, please provide details?

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

Our response under Consultation above highlights the risk of government ministers assuming new powers with significant financial implications. Were the risks set out above to materialise, based on the University’s average surplus over the last 3 years of £16.5m and average funding received from major charities over the same period of £12.2m, we would suffer a loss of income of around £28.7m per annum. The largest impact, however, would be on capital funding. Our estates strategy includes capital investment of £450m which comprises £250m in historic and future operating surpluses, £100m borrowing, £50m philanthropic support and £50m property sales. Were the University to be reclassified as an arm of central government, which would immediately have a severe adverse impact on our ability to implement our strategy because of the inability to retain surpluses, the impact on philanthropic giving and restrictions on borrowing.

The estimate of costs in respect of those issues included in the Financial Memorandum is generally fairly reflected, with one exception: that of the estimated cost of remunerating a Chair. It is suggested that the remuneration of the Chair would be just over £3,072, based on an estimated six days' work per annum. In fact,
University Chairs have much more demanding portfolios than can be addressed in six days. The University is currently advertising the post of Chair, through its process of public advertisement, and it has estimated the time commitment as at least one day per week. In practice, in recent years when there has been much discussion of governance sector-wide, the time commitment has been greater than this. Should the Bill be introduced in its current form and the risks identified above were realised, the University of Glasgow would not be able to meet the financial costs (including reduced income) that would result.

**Wider Issues**

8. *Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?*

9. *Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these points?*

As we state above, the Financial Memorandum does not address the risk to the universities' existing classification by the Office of National Statistics as bodies independent of central government nor the risk to their charitable status that may be posed by this Bill. These two issues have the potential to cause great harm to the financial health of this University and all of Scotland's universities and we believe that it is vital that they are considered fully and openly.
Finance Committee
Higher Education (Governance) Scotland Bill
Submission from University of Strathclyde

Response

Please see below for the University of Strathclyde's response to the nine questions raised by the Finance Committee as part of the scrutiny process for the Higher Education Governance (Scotland) Bill.

Consultation

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

The University of Strathclyde submitted a response to the Scottish Government’s consultation of January 2015. The sole financial-related question asked in the consultation was:

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

To which the University replied:

Remuneration of chairs is not unreasonable as this happens already in a wide range of other publicly and privately funded organisations. If this is taken forward, it would be necessary for the Scottish Government to make an appropriate adjustment to charities law to ensure that universities’ charitable status is not called into question (Scottish Government legislation makes clear that governors of charitable organisations are not to be remunerated).

In addition, the University’s response to question 25 touched on some financial aspects:

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

The University’s response depends on the precise definition of ‘academic matters’, which is not set out in the consultation document. The University’s Royal Charter states that the Senate is responsible for the ‘academic work’ of the University and it should be borne in mind that decisions which some may understand to be ‘academic’, for example the overall shape of the institution’s academic provision, may also require decision by Court about the institution’s strategy and resource allocation. The Court and the Principal as accountable officer are responsible for ensuring compliance with Government Policy and Scottish Funding Council conditions of grant which may also have academic objectives or implications. In some cases these will limit the Senate’s power to take decisions what some may regard as wholly academic matters (for example admission criteria and their differing application to individual social groups). Therefore, if the proposal intends a broad definition of ‘academic matters’ which would include resource allocation then the University would not support the proposal but if the proposal is clarified to a tighter definition akin to ‘academic work’ then the University is supportive.
2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

No reference has been made to any possible conflict with charity legislation in the Financial Memorandum (see the response to question 4 below for more detail on this).

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

Costs

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not, please provide details.

The Financial Memorandum makes no mention of two areas of potentially major financial concerns:

i) Classification by the Office of National Statistics

We are extremely concerned that Bill may lead the Office for National Statistics to classify higher education institutions as public sector bodies, as has already happened to colleges. The reclassification of the University of Strathclyde as a public sector body would have a serious negative financial impact and a long-term impact on competitiveness with institutions in the rest of the UK and other countries.

The Bill’s proposals to increase Ministerial control over Scottish higher education institutions highlighted above and repeated here:

- Power to decide how people should become chairs of governing bodies
- Power to decide how long people should serve as chairs of governing bodies
- Power to determine the remuneration of chairs of governing bodies
- Power to determine the composition of institutions’ governing bodies
- Power to determine the internal structure of institutions, with particular regard to the composition of the academic board will be considered by the ONS together with the existing framework of control of institutions by government and its agencies, including the Outcome Agreements framework and the statutory requirement to observe the governance code as a condition of grant.

Adverse impacts of ONS reclassification would include:

- An end to the University’s entrepreneurial activity as it would be unable to retain surpluses generated through these activities – this is particularly important to the University of Strathclyde (awarded UK Entrepreneurial University of the Year 2013/14);
- Inhibition of the University of Strathclyde’s ability to enter joint ventures with business to promote innovation and to attract investment for research, KE, education and student employability;
- Severe restriction of the University’s capacity to borrow money to develop new infrastructure;
- An severe reduction in philanthropic support for the University, since donors do not typically give money to government bodies (our annual donor support has grown in recent years to approximately £3m p.a.)
• An end to the University’s status as an autonomous charitable body separate from the State.

ii) Possible conflicts with charity legislation and related taxation issues

As currently drafted, the Bill gives cause for concern about potential loss of charitable status for Scottish higher education institutions.

Section 7(1) of the Charities and Trustee Investment (Scotland) Act 2005 contains the Scottish charity test, supplemented by the definition of charitable purposes in section 7(2). However, section 7(4) provides that a body which meets the terms of the section 7(1) does not in fact 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.

The Bill’s proposals to increase Ministerial control over Scottish higher education institutions include:

• Power to decide how people should become chairs of governing bodies
• Power to decide how long people should serve as chairs of governing bodies
• Power to determine the remuneration of chairs of governing bodies
• Power to determine the composition of institutions’ governing bodies
• Power to determine the internal structure of institutions, with particular regard to the composition of the academic board.

Charitable status is an essential part of the University of Strathclyde’s identity and mission – loss of this status would also lead to serious adverse financial impact for the University as it provides entitlement to 80% relief from non-domestic rates (worth £2.6m in the most recent year) and exemption from corporation tax (which would become payable on surplus (used for investment in our Estate and infrastructure) at a rate of 20%). The following explicit reference to the taxation benefits from our charitable status is made within our financial statements:

‘The University has charitable status and is recorded on the index of charities maintained by the Office of the Scottish Charity Regulator (Charity No. SC015263). The University is an exempt charity within the meaning of Part 1, Chapter 2, Section 7 of the Charities and Trustee Investment (Scotland) Act 2005, and is considered to pass the tests set out in Paragraph 1 of Schedule 6 to the Finance Act 2010 and therefore it meets the definition of a charitable company for UK Corporation tax purposes.

Accordingly, the University is potentially exempt from taxation in respect of income or capital gains received within categories covered by Section 287 of the Corporation Tax Act 2009 and Sections 471 and 478 – 488 of the Corporation Tax Act 2010 (formerly enacted in Section 505 of the Taxes Act 1988) or Section 256 of the Taxation of Chargeable Gains Act 1992 to the extent that such income or gains are applied to exclusively charitable purposes.’
5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

No, given the potential conflicts with charity legislation and potential reclassification by the Office of National Status we have set out above.

6. If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?

Not if the University is reclassified as a public sector and no longer holds charitable status.

7. Does the FM accurately reflect the margins of uncertainty associated with the Bill’s estimated costs and with the timescales over which they would be expected to arise?

No, given the lack of analysis of potential conflicts with charity legislation and potential reclassification by the Office of National Status set out above.

Wider Issues

8. Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?

No, see answers above and if Scottish higher education institutions are classed as public sector bodies then any borrowing by the sector will be added to public borrowing.

9. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?

Yes, but the extent and scope of subordinate legislation has not been sufficiently detailed to allow an estimate to be made.
Finance Committee
Higher Education (Governance) Scotland Bill
Submission from the University of the Highlands and Islands

Response

The University of the Highlands and Islands (UHI) welcomes the opportunity to respond to the call for evidence raised by the Finance Committee of the Scottish Parliament in relation to the Higher Education Governance Bill.

Our responses to the questions raised by the Committee are as follows:

1. Did you take part in any consultation exercise preceding the Bill and, if so, did you comment on the financial assumptions made?

UHI made a submission to the Government as part of the consultation exercise preceding the Bill. We did not comment on the financial assumptions as no comment was invited in the questions posed.

2. If applicable, do you believe your comments on the financial assumptions have been accurately reflected in the FM?

N/A.

3. Did you have sufficient time to contribute to the consultation exercise?

Yes.

4. If the Bill has any financial implications for your organisation, do you believe that they have been accurately reflected in the FM? If not please provide details.

UHI currently remunerates the Chair of Court and the Chair of its Further Education Regional Board. The Bill underestimates the time spent by a Chair of Court on university business. We currently pay the Chair for the equivalent of 1.5 days per week (reduced from 2 days in 2014/15 whilst new arrangements were being embedded). UHI is a complex organisation and the Chair has a much wider responsibility both internally and externally than simply chairing Court meetings, not least engaging with our 13 academic partners who are widely dispersed across our region.

5. Do you consider that the estimated costs and savings set out in the FM are reasonable and accurate?

UHI changed its constitution significantly in 2013/14 in preparation for its additional responsibilities as a regional strategic body. On the basis of this experience, the Bill significantly underestimates both the cost and the time required to make these
changes. In addition to the University Court, the Scottish Government and the Privy Council, UHI has a wide range of both internal and external stakeholders who would require to be consulted and in several cases give approval to any constitutional changes. The proposed changes will lead to avoidable, unnecessary expense together with the significant opportunity cost of considerable senior staff time.

6. **If applicable, are you content that your organisation can meet any financial costs that it might incur as a result of the Bill? If not, how do you think these costs should be met?**

As a new university with very limited reserves, we are anxious not to take on additional costs unless absolutely necessary. If the Bill is enacted, we would meet any additional costs by reducing spend on other activities.

7. **Does the FM accurately reflect the margins of uncertainty associated with the Bill's estimated costs and with the timescales over which they would be expected to arise?**

We do not believe that the FM accurately reflects the margins of uncertainty as both the time and cost of implementing the proposals have been significantly underestimated as detailed above.

8. **Do you believe that the FM reasonably captures any costs associated with the Bill? If not, which other costs might be incurred and by whom?**

UHI is concerned about the potential for legal challenge by academic staff who are refused funding for research projects because of limited resources being prioritised on an institutional basis if academic freedom is enshrined in legislation as proposed. This again, could be extremely costly in both time and resources.

9. **Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation? If so, is it possible to quantify these costs?**

The Bill proposes that Scottish Ministers are given broad powers by regulation to change provisions. This makes future costs impossible to quantify and gives UHI real cause for concern that future changes will not be subjected to appropriate parliamentary scrutiny.

In summary, UHI believes that the Scottish HE Governance Code which was put in place two years ago has not been given enough time to bed in and has not yet been evaluated in terms of effectiveness. The Code has clearly had an impact; for example, gender balance on university courts has improved since its introduction. Legislation in this area is, at best, premature until an external evaluation of the code has taken place.
UHI is very uncomfortable with the powers proposed for Ministers to make changes by regulation as we believe all changes to legislation in this area should be subject to full parliamentary scrutiny.
05 October 2015

Dear Convenor

HIGHER EDUCATION GOVERNANCE BILL: CLASSIFICATION OF SCOTTISH HIGHER EDUCATION INSTITUTIONS

I understand that at the evidence session on 16 September on the Financial Memorandum attached to this Bill, one of the Members of the Committee asked to see some of the work involved in the assessment of risk that this Bill could result in re-classification of Scottish higher education institutions as public sector bodies.

Assessment of this risk was conducted prior to introduction of the Bill in June. I understand the Committee would like some information in the short term to help finalise your report on the Bill, and its Financial Memorandum in particular. This letter runs through some of the key features of analysis conducted by the Scottish Government, specifically related to the provisions in the Bill. I hope that it helps clarify the thoughts of the Committee on this important issue.

Key to this determination is the level of government control over their activities. Should universities be re-classified, it would impinge on their ability to borrow private finance. Overall, the Scottish Government considers that the Bill presents no additional risk of re-classification of our institutions as public bodies.
In classifying bodies as either public or private, the fundamental question for ONS is “does government exercise significant control over the general corporate policy of the unit?” The ‘Eurostat’ European System of Accounts (ESA 2010) guidance defines control as the ability to determine general corporate policy. This can be exercised, for example, through the appointment of directors, control of over half of the shareholders’ voting power, through special legislation, decree, or regulation. The difference between the public and private sectors is determined by where control over the organisation lies, rather than by “ownership”.

Whether or not such government control exists is assessed by considering a number of “indicators of government control” set out in the ESA10 published guidance.

The Scottish Government considered each of the ESA10 indicators in turn and how they relate, or not, to the provisions in the Higher Education Governance Bill.

a) **government rights to appoint, remove or approve a majority of officers, board of directors, etc.** (including where government has rights to veto the above) – if the government appoints a majority of directors or other key personnel, the unit would be classified to the public sector.

The Bill’s provisions will require higher education institutions to follow an identified process in appointing a new chair and to ensure that membership of the governing body and academic board or senate is representative. The provisions in this new Bill will not give the government any new rights (or powers) to appoint, remove or approve the chair or any other members of the governing body.

b) **government rights to appoint, remove or approve a majority of appointments for key committees** having a decisive role in determining key factors of the unit’s general policy, board of directors, etc. (including where government has rights to veto the above) – if the government has the right to appoint or remove most members of the finance or investment committees (for example), the unit would be classified to the public sector.

As above, the Bill’s provisions do not provide the government with any additional rights (or powers) to appoint, remove or approve committee appointments.

c) **government ownership of the majority of the voting interest** – for example, if a majority of shares in a unit are owned by government, it would be classified to the public sector.

Government ownership of voting is not included in any of the Bill’s provisions.

d) **government rights to appoint or remove key personnel** (or veto appointments/removals) – if government appointments of key positions (for example, chairperson, executive directors) effectively give it a “decisive say” in key aspects of corporate policy, the unit will be classified as public.

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The Bill’s provisions will require HEIs to follow an identified process to selecting a chair, to ensure that membership of the governing body and academic board or senate is representative, but do not introduce any new rights (or powers) for the government to appoint or remove key personnel.

**e) government rights under special shares and options** – if government has special entitlements, for example, in relation to a “golden share”, this may lead the unit to be classified as public.

Government rights under special shares or options are not included in the Bill’s provisions.

**f) government rights to control via contractual agreements** – if government imposes restrictions on the operation of the unit, for example, through its position as a dominant customer, this may lead to classification in the public sector.

Government rights to control via contractual agreements are not included in the Bill’s provisions. The Bill’s provisions in relation to academic freedom may be expected to result in less government control by making explicit the freedom to encourage exploration of new ideas or innovative concepts.

**g) government rights related to borrowing/financing** – if government has a predominant role in setting the conditions of borrowing by the unit, including the terms of borrowing and/or use of funds borrowed, or is the predominant source of financing for the unit (either directly or by providing guarantees on borrowing by the unit), this may lead to classification in the public sector.

Government rights related to borrowing or financing are not covered in the Bill’s provisions.

**h) government control via regulation** – if the government restricts a unit from ceasing activities (that is, exiting markets) or from diversifying its activities, this may lead to classification in the public sector.

The Bill’s provisions do not provide for government control via regulation to cease activities, from diversifying activities or anything similar.

**i) other relevant aspects** – ONS is also required to consider other ways in which the government might exercise control over a unit.

The Bill’s provisions do not give the government direct control in any other ways. The Scottish Government, through provisions in the 2005 Act, already has powers to impose terms and conditions on the funding provided to higher education institutions via the Scottish Higher and Further Education Funding Council, for example in relation to good governance practices of institutions.
Scottish Government analysis suggests that the HE Governance Bill does not increase the level of government control or influence over the higher education sector. However, we have taken note of all evidence shared with both the Finance Committee and the Education and Culture Committee. As the Bill progresses through Parliament, I, or my officials, would be happy to meet with the Finance Committee if that would be helpful. I want to listen to all ideas and constructive suggestions in order to make this legislation as impactful as possible in improving the governance of our higher education institutions.

ANGELA CONSTANCE
Thursday 1 October 2015

Finance Committee of the Scottish Parliament
Scottish Parliament
Edinburgh
EH99 1SP

Dear Mr Gibson,

Higher Education Governance (Scotland) Bill

I was grateful for the opportunity to give oral evidence to the Finance Committee on 16 September.

There were a couple of points where Committee members asked for information which I thought it would be useful to set out in writing.

Risk of ONS reclassification

Universities Scotland has taken further legal advice in response to the assertions made to the Committee by Scottish Government officials that they had given due consideration to the risks of ONS reclassification arising from the Bill.

I attach this advice which clearly identifies that the Bill, in cumulation with the existing pattern of government control and influence on universities, heightens the risk of reclassification of higher education institutions by the ONS. In the concluding words of the advice note:

'It is considered that, if the ONS carried out an assessment in the near future to ascertain whether HEIs are still correctly classified as Non Profit Institutions Serving Households, or whether they should now be classified within the public sector, the challenges posed to HEIs by such an assessment exercise should appear at the level of ‘significant risk’ on their risk registers.'

In the light of that advice, Universities Scotland remains highly concerned that the Bill in its current form presents a level of risk that is unacceptable and has not been fully evaluated by the Scottish Government.

Impact of ONS reclassification

Gavin Brown MSP asked whether there was further information that Universities Scotland could provide about the potential impact of ONS reclassification on higher education institutions.

Cont/...
Universities Scotland’s submission to the Finance Committee represented the serious impact that ONS reclassification would have on higher education institutions, saying:

‘In practical terms, ONS reclassification would leave universities facing:

- The loss of incentive to earn entrepreneurial income;
- restrictions on borrowing;
- the inability to create surpluses and invest them in improved facilities;
- the loss of philanthropic income; and
- a major reduction of partnership with the private sector.’

In financial terms, these impacts could include:

- severe reduction in over £1bn of income won entrepreneurially by universities in 2013/14, including:
  - £142m from the provision of consultancy, CPD and facilities to businesses and other organisations;
  - £61m of contract research for business;
  - £403m in tuition fees from non-EU students;
  - £194m from residential, catering and conference operations;
  - £135m in research grants competitively won from charities,
  - £41m in research contracts and grants from industry and public corporations in the UK and £25m from outside of UK;
- Severe reduction of a capital programme funded principally from universities’ own resources and borrowings, worth c£370m p.a.
- Universities’ existing borrowings of c£530m coming onto the Scottish Government’s balance sheet.
- Universities unable carry forward a surplus from year to year to enable investment and to provide a margin against in-year shocks: this represented a minimum prudent level of 3% of income in 2013-14, of £125m.
- Severe reduction in the c£53m attracted each year from philanthropic sources.

For information, Universities Scotland is still waiting for a reply to our letter of 13 August to Scottish Government, which raised our reasoned concerns about the Bill’s potential impact on universities’ ONS classification and asked what advice the Scottish Government had taken.

Yours sincerely,

Alastair Sim
Director

Enc/ Note of advice by Anderson Strathern LLP.
Note of Advice by Anderson Strathern LLP for Universities Scotland on the potential impact of the Higher Education Governance (Scotland) Bill on the current classification of Scottish higher education institutions by the Office of National Statistics as Non-Profit Institutions Serving Households

30 September 2015

Introduction

We have been instructed by Universities Scotland (“US”), in light of evidence given to the Finance Committee of the Scottish Parliament on 16 September 2015 on the Financial Memorandum to the Higher Education Governance (Scotland) Bill (“the Bill”), to provide further advice on whether the measures in the Bill, when considered cumulatively with other recent changes in legislation and policy, would, if implemented, increase the risk of Scottish higher education institutions (“HEIs”) being reclassified by the Office of National Statistics (“ONS”) as falling within the General Government category (S.13) of the public sector for the purposes of the National Accounts (thus losing their current classification as Non-Profit Institutions Serving Households (NPISHs) within the private sector (S.15)).

In evidence to the Finance Committee, Scottish Government officials accepted that, in the context of a the level of risk of ONS reclassification of HEIs into the public sector, a “modicum of risk” already exists in “certain facets of the structure of university governance – financial and legal arrangements and so on”. However, they also considered that there was no additional risk presented by the Bill to the current ONS classification of HEIs as NPISHs, stating that the Bill’s provisions did not advance the existing risk base. Detailed reasons for this view and the full range of factors that ONS would consider as part of any assessment of the classification of HEIs, were not presented in oral evidence given to the Finance Committee on 16 September.

Summary of advice

Our advice is that the Bill, based on an assessment of the range of factors that ONS would consider as part of an assessment of the classification of HEIs, heightens the risk of HEIs being reclassified by the ONS as being within the General Government category. We think that, when considered cumulatively with other existing government controls over HEIs, the provisions in the Bill would take HEIs into “borderline” territory in terms of their current ONS classification, for the reasons set out in this note of advice.

Context and background

The ONS is the UK’s national statistics institution. It is the executive office of the UK Statistics Authority, which is a non-ministerial department reporting directly to the UK Parliament and the Governments of Scotland, Wales and Northern Ireland. One of ONS’s responsibilities is the collection, compilation, analysis and dissemination of a range of key economic, social and demographic statistics about the UK.
In relation to classifications, ONS will review current sector classifications in various circumstances, including where:

- new legislation, policy decisions or machinery of government changes impact on the operation of an organisation or on the flows of money to, from or within government;
- there are other changes to the operation of a body which impact on the classification decision;
- changes to Eurostat guidance mean that large or specific classification decisions must be reviewed immediately to ensure that they are still compliant;
- decisions which have sizeable impacts (more than £1bn impact on deficit or £10bn impact on debt), but where their cases that have not been reviewed for other reasons, will be reviewed after 5 years;
- for any other reason, there is a need for reassurance that nothing has changed which may impact on the classification decision.

**Forward Workplan of ONS**

ONS’s ‘Classification Update and Forward Workplan’ (September 2015) indicates that ONS will be assessing the current classification of HEIs between January and June 2016. The Workplan makes reference to an assessment to be undertaken of universities between January and June 2016. The reason for the assessment is stated in the Workplan as being a change in policy (significant increases in tuition fee maxima that can be charged by universities in England and Wales), requiring an assessment as to whether universities are ‘market’ or ‘non-market’ producers.

We understand that, although there is no specific reference to Scottish HEIs being included in the overall assessment exercise, nor have they been specifically excluded. We understand that, unless ONS is specifically instructed not to consider Scottish HEIs as part of this exercise, it is possible that Scottish HEIs could form part of the assessment, for example, in relation to rUK tuition fees. If this happens, it is possible that ONS could consider other issues relating to government controls in order to assess what their correct classification should be, or propose a separate review of Scottish HEIs for this purpose. Even if Scottish HEIs are excluded from the 2016 assessment, they could still become the focus of a future ONS assessment, e.g. as a result of how new legislation or policy affects them.


In light of the recent experience of FE colleges having been reclassified into the General Government category *en bloc*, the additional powers that the Scottish Government now seeks through the Bill to control the composition and other factors relating to HEI governing bodies (when taken together
with the existing level of government control over Scottish HEIs and the introduction of a new Eurostat framework for classification of sectors), have caused Scottish HEIs to be apprehensive about the risk of possible reclassification by ONS into the public sector and its consequences.

Recent experience of FE Colleges

In 2010, incorporated further education colleges in Scotland were re-classified, *en bloc*, as falling within the General Government category by ONS, having previously been classified since 1993 within the private sector, in the category of NPISHs. We understand that the requirement in section 12(7) of the 1992 Act for an incorporated college’s board of management to obtain prior written consent from the Scottish Ministers to borrow money, give any guarantee or indemnity or create any trust or security over or in respect of any of the college’s property, was a key factor in the reclassification of incorporated colleges to the public sector. We understand that control over borrowing powers was a “show-stopper” for ONS, as far as any claim for retained NPISH status was concerned in relation to FE colleges.

Other factors resulting in the re-classification of incorporated FE colleges in Scotland included the level of general control that can be exercised by government over the colleges. The re-classification did not turn simply on whether a college was publicly funded. ONS looked mainly at the issue of control, applying the criteria it had developed based on ESA 95. Examples of such control included: the power of Scottish Ministers to merge or close colleges, the power to wind-up and dissolve the board of management of colleges and Ministers’ powers in respect of composition and membership of boards of management.

The Scottish Government took a fundamentally different approach to ONS reclassification of FE colleges, following the reclassification decision in 2010, compared to the approach taken in England and Wales by the respective Governments. The Scottish Government introduced the Post-16 Education (Scotland) Bill, which was enacted in 2013. The 2013 Act increased the level of government control over Scottish FE colleges, as well as Scottish Universities. In contrast, the UK Government passed the Education Act 2011, which changed the relationship between central government and English FE colleges, for example, in relation to borrowing powers. The 2011 Act resulted in English FE colleges being restored to their former classification as NPISHs by ONS. In restoring the classification of NPISH to English FE colleges, the ONS stated:

“Following the decision to classify Further Education Colleges in the general government sector in 2010, the UK Government has passed new legislation removing public sector controls over the Further Education Colleges in England. The Education Act 2011 received Royal Assent on 15 November 2011. Schedule 12 to the Act entitled ‘Further Education Institutions – Amendments’, is the key section of the legislation. It amends both the Further and Higher Education Act 1992 and the Apprentice, Skills, Children and Learning Act 2009 in respect of the powers held by the public sector in England over Further Education Corporations and Sixth Form College Corporations.

One of the main changes removes the requirement for Further Education Corporations in England and Sixth Form College Corporations to gain the consent of the relevant government body for any borrowing they wish to undertake. The Act also removed a number of other public sector controls over further education institutions. The Secretary of State’s right to modify, revoke or replace the instruments and articles of Further Education Corporations in England has been removed and the
power to do so given to the colleges themselves. The right of the Secretary of State to dissolve a Further education college has been removed.

The power of the Chief Executive of Skills Funding to appoint up to two additional members of the governing body of a FE corporation has been removed, as have the corresponding powers for the relevant local authority in respect of Sixth Form College Corporations. ... 

Having carefully considered the changes in the Act, ONS has concluded that the changes are sufficient to remove the public sector control of general corporate policy of FECs and SFCCs in England, resulting in their reclassification outside of the public sector.”

In light of the ONS reclassification of Welsh FE colleges, the Welsh Assembly Government issued a White Paper in 2012 on a Further and Higher Education Bill to change the relationship between Welsh FE colleges and central government. Four key areas were considered to be indicative of central government control and therefore highlighted as needing to be amended:

- the level of autonomy for colleges, including powers to make changes to their own Instruments and Articles of Government;
- the ability of a college to dissolve itself;
- the requirement for colleges to obtain Government consent to borrow funds;
- the level of operational intervention by central government.

Other issues to be addressed were the composition of governing bodies and areas where Ministerial consent was required in respect of governance.

Following the passage of the Further and Higher Education (Governance and Information) (Wales) Act 2014, which removed a wide range of restrictions and controls on FE colleges, the ONS decided to reclassify Welsh FE colleges as NPISHs within the private sector, with effect from 27 January 2015.

**Current ONS classification framework**

The ONS moved to the new European System of Accounts 2010 in September 2014 and this has now become the basis for the UK’s National Accounts, replacing ESA 95. ESA 2010 provides a framework for the classification of sectors by ONS, by allocating ‘institutional units’ to different sectors. The main sectors are: households, government, corporations (financial and non-financial), non-profit institutions serving households and the “rest of the world”. ESA 2010 is based largely on the concepts set out in SNA 2008, which provides guidelines for national accounts worldwide.

Classifications by ONS are made by assessing “institutional units” against a range of criteria set out in ESA 2010, as supplemented by the ‘Manual on Government Deficit and Debt: Implementation of ESA 2010’ ("MGDD"), (Eurostat, 2014 Edition). HEIs are institutional units for the purposes of ESA 2010 and the public sector consists of all the institutional units that are resident within that economy and controlled by government; whereas the private sector consists of all other resident units (para 1.35, ESA 2010).

ESA 2010 (para 1.36) defines control over an entity as “the ability to determine the general policy or programme of an institutional unit”. MGDD, section I.2.2, page 12, para 7, states that: “It must be stressed that the ESA 2010 classification criteria are not based on the legal form of an entity. For some entities it may be concluded that they do not have the required autonomy of decision, which is
not automatically evidenced by their legal status”. MGDD I.2.3, page 13, provides that: “10. The degree of control on an institutional unit by government...would determine whether this institutional unit is part of the public sector.”

It is considered that the level of government control of Scottish HEIs should be assessed not only in relation to control by Scottish Ministers, but also control by other government bodies such the Scottish Funding Council, given the status of SFC and its range of statutory functions. ESA 2010 20.309 provides that “Control of a resident public sector unit .... can be through the direct rights of a single public sector unit or the collective rights of many”.

ESA 2010 and MGDD contain specific criteria for the assessment of whether a non-profit institution, such as a University, falls to be classified within the public sector. If ONS assessed the current classification of Scottish HEIs and whether they should be classified to the public sector, it is understood that ONS would consider the five indicators of control listed in para. 2.39 of ESA 2010 (for NPIs recognised as independent legal entities – see extract below), together with the relevant parts of section I.2 of the MGDD (‘Criteria for classifying units to the general government sector’).

“2.39 For non-profit institutions recognised as independent legal entities, the five indicators of control are:

(a) the appointment of officers;
(b) the provisions of enabling instruments
(c) contractual agreements;
(d) the degree of financing;
(e) the degree of government risk exposure.”

MGDD, section I.2.3, (page 16) contains the following guidance:

“15. The notion of control is also applicable to non-profit institutions which might have different features and different importance (in terms of size, effect on net lending/borrowing (B.9) and debt, etc.) among EU Member States and may have an activity to the benefit of different kinds of agents.

16. Similarly to the case of corporates (and equivalent entities), control of an NPI covers the ability to determine the general policy or programme of the NPI. However, here, there is a significant difference between market and non-market NPIs, determined according to the criteria below in subjection I.2.4.3 on the quantitative market/non-market test.

17. NPIs controlled by government, and considered market producers (for instance because they sell services to corporations or to households, at economically significant prices) are classified in the sector non-financial corporations S.11. On the contrary, ESA 2010 20.13 states that “NPIs that are non-market producers, and are controlled by government units, are units of the general government sector”. “
Concerning control of NPIs, ESA 2010 20.15 also states that “Control of a NPI is defined as the ability to determine the general policy or programme of the NPI”. It restates the five criteria of control that should be considered in determining whether an NPI is controlled by government:

“(a) the appointment of officers;
(b) other provisions of the enabling instrument, such as the obligations in the statute of the NPI;
(c) contractual agreements;
(d) degree of financing;
(e) risk exposure.”

It states that: “A single indicator can be sufficient to establish control. However, if a NPI that is mainly financed by government remains able to determine its policy or programme to a significant extent along the lines mentioned in other indicators, then it would not be considered as being controlled by government. In most cases, a number of indicators will collectively indicate control. A decision based on these indicators will be judgmental in nature”.

MGDD (2014), pages 16 – 17, provides further commentary on each of these five criteria, as follows:

“a. The appointment of officers

The government may have the right to appoint the officers managing the NPI either under the NPI’s constitution, its articles of association or other enabling instrument.

b. Other provisions of the enabling instrument

On this point, 2008 SNA 4.92 is more explicit than ESA 2010. Notably, if statutorily the functions, objectives and operating provisions are already determined by government, the appointment of officers would become of secondary importance. But control by government would result if government would have the right to revoke staff and to approve budget or financial arrangements. An NPI would be considered to be controlled by government if approval of government would be required to change the statute of the entity (or the type of activity carried out by the entity), or if the entity could not dissolve itself or terminate any relation with government without such approval.

c. Contractual agreements

Some NPIs may enter into contracts with government units in order to perform tasks defined by government, acting as a specialised operator, notably in social areas. When such contracts are the main, if not total, part of the activity of the NPI, it is clear that government would be able to influence the general policy of the NPI. However, control should be assessed if the approval of government would be required for exiting from contracts with government.

d. Degree of financing

Although ESA 2010 20.15 does not specify exactly which should be the degree of financing, 2008 SNA (4.92) indicates that an NPI that is mainly financed by government may be controlled by
government. “Mainly” must be as at least over 50%. The control would be assessed if such financing would be permanent (and not on a temporary basis) and/or it would result in a narrow monitoring of the use of the funds and a strong influence from government on the general policy of the entity.

e. Risk exposure

This indicator is not developed in ESA 2010 but 2008 SNA (4.92) evokes government “exposed to all, or a large proportion of, the financial risks associated with an NPI’s activities”. In this case, the arrangement would constitute government control. Financial risks refers to ex-ante commitments taken by government on some liabilities incurred by the NPI, on possible disruptions of other sources of revenue apart from those received from government, etc.

18. ESA 2010 specifies that, in some cases, one indicator can be sufficient to establish control, but also that it is most frequently necessary to consider collectively a number of indicators and a case-by-case analysis may be frequently needed. In any case, a decisive point is the ability of the NPI to determine by itself or not its general policy."

MGDD, I.2.3, makes special mention in paragraph 19 on page 17 of control of educational units:

“Control of educational units

“19. Many educational units (schools, colleges, vocational training, universities, etc.) are non-profit institutions and are generally largely funded by government. They represent a practical example for applying the ESA 2010 control criteria mentioned in the paragraph above. Most of them are financed by government funds above 50%, since other sources, such as fees paid by parents or students or gifts, appear frequently as a minority source of funding. In some countries, government (at different levels) may take over directly some expenditure, such as teachers’ salaries or building maintenance.

20. As a matter of principle, the mere financing of the educational unit should not be, as such, a determining criterion in classifying government-supported educational units. It is likely that government exerts some influence on the use of its funds. However, if government influence only takes the form of the respect of standards (concerning teaching programmes, the quality of education, material conditions, teachers’ competences, etc.) which are imposed on any educational unit independent of its statute, then it is not control. It is also frequent that different kinds of schools (government units, private NPIs, etc.) are part of the education system. Thus the application of similar standards or norms, to a large number of units, seems to be an important feature in the case of such NPIs.

21. This must be distinguished from direct involvement of government in significant decisions relating to the school. By application of the general rule, if government appoints the managers (or approves their appointment or holds a revocation right) or gives instructions related to the everyday management of the school, thus leaving restricted decision-making capacity to educational unit’s officers, the unit should be classified in the general government sector. Under these conditions, government is deemed to control such a unit if its approval is needed to create new classes or to specialise in some teaching areas, make significant expenditure in gross fixed capital formation
(which could be mainly financed by government), borrow, recruit teachers, or if it can prevent the educational unit from ending its relationship with government.”

The guidance produced by HM Treasury in 2013 entitled ‘Class (2013) 1: Sector Classification’ ("HMT Guidance"), although referring to classifications that were made under ESA 95, still contains useful explanatory material in relation to the concept of control by government. The HMT Guidance at Annex B (ONS sector classification criteria), provides a list 14 key areas of secondary controls that were used in previous ONS assessments under ESA 95. These include, amongst other things, a power to determine aspects of how a body delivers its outputs, a power to change the constitution of the body, or veto changes to it, deciding or limiting what financial transactions a body can undertake, exerting numerous minor controls over how a body is run and setting pay rates. Although ESA 2010 will be applied to any assessment of HEIs, it is understood that the concept of control in ESA 2010, compared with ESA 95, has not been substantively redefined. A full list of the 14 criteria referred to in the HMT Guidance is provided in Annex B to this note of advice, for information.

**Main areas of risk to current ONS classification of HEIs as NPISHs**

The following sections of this note of advice identify key areas of risk in terms of HEIs moving in the direction of meeting criteria contained in ESA 2010 for classification within the General Government sector, although they are not the only mechanisms for government control over HEIs.

**Higher Education Governance (Scotland) Bill ("the Bill")**

The current Bill, as introduced in Parliament on 16 June 2015, seeks to give Scottish Ministers a number of additional powers over the governance of HEIs:

Section 1 provides a power for the Scottish Ministers to make regulations to govern the process for appointment of a chairing member of a governing body of an HEI, including making provision for periods of appointment and re-appointment, means of selection for appointment, e.g. public advertisement, criteria for selection, interview of candidates, shortlisting of candidates, the holding of an election for candidates and the reimbursement of candidates’ expenses incurred in the process.

Section 2 contains a power for the Scottish Ministers to make regulations for the remuneration and payment of allowances by HEIs to the chairing members of their governing bodies, including specifying or limiting the circumstances in which sums may be offered, requiring “reasonable” sums to be given to the chairing member and delegating to other persons the function of determining sums in particular cases.

Although section 3 requires the Scottish Ministers to consult with HEIs and “such other persons” as Ministers think appropriate before making such regulations under sections 1 and 2, this is merely a duty to consult and there is no requirement on Ministers to follow any particular option put forward in response to such consultations. Although the regulations are to be made under the affirmative procedure in Parliament, this is not necessarily going to act as a particularly strong check on Ministers’ powers, in circumstances where the Scottish Government has an absolute majority in Parliament and can use its ‘whipping’ power to obtain positive approval for secondary legislation.
Section 4 of the Bill prescribes the composition of the governing bodies of all Scottish HEIs, by reference to categories of membership (including numerical representation). Section 8 of the Bill gives the Scottish Ministers a power to use regulations to modify the number of persons in a particular category to be appointed to a governing body. It also gives the Ministers a power to use regulations to modify the actual categories of membership. It would appear possible for Ministers to use this power to delete the current categories specified in section 4(1)(g)(i) or (ii), for example, to exclude existing categories of member from future governing bodies, including those provided for in each HEI’s own Instrument of Government, e.g Order of Council, an Ordinance, an Act of Parliament or a Charter.

It would also appear possible for regulations made under section 8 to express categories in very narrow terms. A category with very few people falling within it could, in theory, be added to the section 4 list, to the point of effectively specifying certain persons as members of a governing body. Although it is understood that the current Scottish Government does not intend to use the power in this way, this does not in any way restrict the possible use of this broad power by a future Government, who might not feel bound by a previous Government’s policy commitment in relation to the use of this clearly worded statutory power.

There are no restrictions in the Bill on how these powers to prescribe composition and modify section 4 are to be used, other than making them subject to the affirmative resolution procedure, which is not considered to be a particularly strong check. These are therefore significant powers for Ministers in relation to the control of the composition and membership of the governing bodies of HEIs.

Section 9 of the Bill places a numerical limit on the overall composition of the academic boards of HEIs and section 10 prescribes the composition of the academic board, placing percentage restrictions on certain categories of members. Section 13 gives the Scottish Ministers powers to modify sections 9 and 10, which are to be exercised by regulations. The same issues arise in relation to government control through the exercise of these powers and the lack of effective checks on the powers, as arise in connection with the powers of Ministers under sections 4 and 8.

The Bill makes direct amendments to the constitutional documents of the ancient Universities (see schedule 2 as introduced by section 21 of the Bill). It also gives Scottish Ministers regulation-making powers (sections 1, 2, 8, 13) to impose requirements in relation to appointments, remuneration and composition of governing bodies and composition of academic boards/senates.

The regulation making power in section 8 of the Bill would allow Ministers to remove the current provision in section 4(1)(g)(ii) of the Bill which currently retains as members of the governing body those persons who are appointed in accordance with the governing document of each HEI. Use of the power in this way could result in a governing body being appointed entirely in accordance with the composition set out in section 4(1) of the Bill, with no reference to the constitutional document of each HEI. This would force each HEI to amend their own constitutional documents to reflect this change. The same issue arises in relation to the power in section 13 of the Bill to modify the categories in section 10(1) of the Bill in relation to the academic council/senate.

At paragraph 3.31 of the HMT Guidance of 2013, it is noted that control is evidenced by the ability to control, not just by the action of controlling (with the exception perhaps of ‘step in’ powers in the
event of a failing institution). The HMT Guidance provides that, where a department has a continuing right to exercise overall control but chooses not to do so, that still amounts to control. The power of government to change the constitution of a body, or veto changes to it, is considered to be an indicator of secondary control. In this context, the provisions contained within the HMT Guidance suggest that these regulation-making powers would be considered as indicators of control by ONS.

Although Ministers are currently involved in the Privy Council process for HEIs to change their constitutions in relation to a range of matters and have an existing power to legislate directly to change the constitutional documents of some HEIs, the regulation-making powers in the Bill will mean that, each time they are used, HEIs will be required to consider the contents of their own constitutional documents and amend them to ensure that they are consistent with the Bill and other requirements placed upon them by government. For example, if regulations are made to change numerical requirements for categories on a governing body, in a way that increases the number of prescribed members on a governing body, HEIs may require to revised their own documents to avoid being in breach of the Scottish Code of Good HE Governance’s stipulated maximum membership of 25 persons on a governing body, which is a condition of grant funding.

Existing areas of government control over Scottish HEIs

The following paragraphs consider the extent to which HEIs are subject to a range of existing controls by government by reference to a number of sources of control, although not every single power of government over HEIs in considered.

Further and Higher Education (Scotland) Act 1992

Section 47 of the 1992 Act gives the Scottish Ministers a power from them to make an order to close any designated institution, to wind-up the governing body of an institution and to dissolve the governing body of the institution. However, if section 47 forms part of the “constitution” of a designated institution (in terms of section 106 of the Charities and Trustee Investment (Scotland) Act 2005), such an order requires the consent of the institution’s governing body. Nonetheless, the power to make the relevant order in relation to the closure, winding up and dissolution, even if some delegation of functions is included in the order, still rests with the Scottish Ministers. Such a power appears to coincide with one of the secondary indicators of control included in the HMT Guidance of 2013 (“power to close a body”).

Scottish Funding Council (“SFC”) Financial Memorandum

The SFC is a Non-Departmental Public Body of the Scottish Government performing statutory functions under the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”). The SFC allocates and pays grant to HEIs in accordance with published policies and procedures.

Under the 2005 Act, the SFC has a power to attach terms and conditions to the payment of grant to HEIs and it is a term and condition of grant payment from the SFC that all HEIs must comply with the requirements set out in the ‘Financial Memorandum with Higher Education Institutions’ (“FM”). If there is any disagreement between any HEI and the SFC about the interpretation of the FM, the decision of the SFC is final. Some examples of the requirements with which HEIs must comply under the FM are given below, although this is not an exhaustive list.
The FM requires HEIs to comply with the principles of good governance set out in the Scottish Code of Good HE Governance and to ensure that public funds are used in accordance with relevant legislation. This is a term and condition of grant payment.

The FM requires HEIs to keep under review and make statutory provision for the list of matters specified in section 7(2) of the 2005 Act which relate to the governance, management and operation of HEIs. There are currently 11 items listed under section 7(2), with some further sub-divisions within each item. The Scottish Ministers have a power under section 7 to modify the list of items in section 7(2) and to issue guidance in relation to listed items. That power is exercisable by way of the annulment procedure for secondary legislation in the Scottish Parliament. It is therefore a term and condition of grant for HEIs to keep under review and make statutory provision for the matters listed in section 7(2), as amended by the Scottish Ministers from time to time.

When making payments to an HEI for strategic, capital or other grant, the SFC can attach additional requirements to the grant and it is a term and condition of grant for the HEI to comply with those additional requirements, as well as complying with the FM.

HEIs must have regard to public sector pay policy set by the Scottish Government. This is a term and condition of grant.

SFC has its own Framework Document with the Scottish Government, which includes requirements placed on SFC by SG in relation to monitoring and control of borrowing by HEIs. To enable it to meet this requirement, the SFC’s FM has placed a threshold for capital finance by HEIs, above which an HEI requires specific SFC consent to undertake any new borrowing. ‘Capital finance’ in this context includes borrowing, finance and operating leases, PFI projects, non-profit distribution projects, loan support projects and revolving credit facilities where borrowing is the substance of the transaction, and other such schemes.

In addition to complying with all the requirements in relation to capital finance in the Scottish Code, each HEI must obtain prior written consent from SFC before it undertakes a level of capital finance where the annualised costs of all capital finance would exceed 4% of either the total income (as per the latest audited financial statements of the HEI) or the estimated amount of total income for the current year, if that is a lower figure. Each HEI must also seek consent from SFC before raising capital finance on the security of assets in which the Scottish Ministers have “an interest”, as defined in the FM.

HEIs must seek the prior written consent of SFC if they intend to offer as security for a loan, any land or property which has been provided, improved or maintained with the aid of SFC grant. HEIs must also seek SFC’s prior written consent if they intend to lend or give a guarantee, indemnity or letter of comfort.

If HEIs do not comply with the FM’s requirements, and with other specific terms and conditions of grant from SFC, they may be required to repay sums to the SFC, with interest. The SFC’s FM is therefore considered to be a secondary indicator of strong government control in some key areas of HEI governance, management and operations. In this context, it is noted that ESA 2010 20.309 (‘Public sector control’) provides that: “(g)... If an entity requires permission from the public sector to borrow, then this is an indicator of control” and “(i) ...An entity that is fully, or close to fully,
financed by the public sector is considered to be controlled if the controls on that funding stream are restrictive enough to dictate the general policy in that area”.

**The Scottish Code of Good HE Governance**

Section 2 of the Post-16 Education (Scotland) Act 2013 (“the 2013 Act”) inserted a new section 9A into the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”), in the following terms:

“9A Higher education institutions: good governance

The Scottish Ministers may, under section 9(2), impose a condition that the Council must, when making a payment to a higher education institution under section 12(1), require the institution to comply with any principles of governance which appear to the Council to constitute good practice in relation to higher education institutions”.

In this context and, as already noted, the SFC’s FM requires HEIs to comply with the main principles of the Scottish Code of Good HE Governance and to observe the guidelines contained within the Code. The Code itself from July 2013 notes that it has been written so that “exemptions will be rare”. The Code states that “Where universities have a material reason for being unable to comply, they must explain why”.

The 18 main principles of the Code cover requirements in relation to: the discharge of functions and compliance with legal obligations by each HEI’s governing body, the conduct of members of a governing body, the frequency of meetings of the governing body and attendance and active participation at those meetings, the adoption and publication of a Statement of Primary Responsibilities covering a range of duties, a duty on members to exercise their responsibilities in the interests of the HEI as a whole rather than a particular constituency, the responsibilities of the Chair of the governing body of the HEI, the responsibilities of the University Principal, the need for a balance of skills amongst governing body members, a requirement for a lay majority of governing body members, principles in relation to the appointment of the Chair of the governing body including the role of a nominations committee, induction of the Chair and governing body members, the responsibilities of the Secretary of the University, the conduct of meetings, remuneration and review of salaries, effectiveness of governing bodies and their committees, the annual review of long-term strategic objectives and the use of short-term Key Performance Indicators.

The Supporting Guidelines in the Code contain more detailed information about how the 18 main principles can be adhered to and contain some prescriptive measures, including specific provisions relating to the composition of governing bodies. On its own, the Code might not appear to be a particularly strong form of government control, particularly given that it was produced by a Steering Group drawn from the HE sector itself. However, when combined with the FM and the condition of grant provisions under section 9A of the 2005 Act, it enables an enhanced level of control to be applied to HEIs in relation to compliance with the adopted Code. It also leaves scope for a significant degree of operational intervention in the affairs of HEIs, beyond the level of current intervention.

**Outcome Agreements and Strategic Plans**

The HMT Guidance of 2013, referred to above, notes that, when providing funding to a body, for example, in the form of a grant, it is good practice for a department to include enough conditions on
The use of the funding to ensure that it is spent as intended. However, the Guidance also notes that, if the conditions on the funding stream are restrictive, to allow the public sector control over the wider policy of the body, then this would form control. The Guidance gives a common example of control as being a requirement for public sector sign off over the grant recipient’s business plan. It considers that ONS would see this as a powerful control, as it allows the public sector to influence the course of the general policy of the body, or potentially how the entity decides to deliver its services or outputs.

Although neither the Scottish Ministers nor the SFC require HEIs to submit their business plans or strategic plans to them for approval, recent changes now require each HEI to agree, and to deliver on, an individual Outcome Agreement with the SFC. Under the SFC’s FM, the requirements placed on HEIs in relation to Outcome Agreements are a term and condition of grant.

Outcome Agreements are understood to have been introduced by the SFC for HEIs in AY 2012-13. The most recent SFC Guidance on Outcome Agreements (‘University Outcome Agreement Guidance for AY 2014-15 to 2016-17: Refresh’, 11 September 2015), issued to HEI Principals, states that Outcome Agreements: “are intended to help Scottish higher education institutions demonstrate their contribution to the Scottish Government’s priorities as set out in the Scottish Economic Strategy and annual Programme for Government. Outcome Agreements have become a powerful tool in demonstrating what universities deliver in return for public investment. They can help:

- Individual universities to show how they are fulfilling Scottish Government priorities.
- The overall university sector to improve its contribution towards Scottish Government priorities.
- SFC to fund the university sector in ways that support the different missions of diverse, autonomous institutions.”

The SFC Guidance on Outcome Agreements also notes that the Guidance will be substantially revised at the end of the current 3 year Outcome Agreement cycle, to: “reflect the SFC’s new Strategic Plan, recommendations from the Commission on Widening Access and any other modifications in Scottish Government and SFC priorities.” This suggests that the Guidance draws heavily on government priorities in terms of its overall content.

Section 3 of the 2013 Act inserted a new section 9C (Widening access to fundable higher education) into the 2005 Act, giving the Scottish Ministers a power to impose terms and conditions for the purposes of enabling, encouraging or increasing participation in fundable higher education. This includes a power to impose a condition that the SFC, when making a payment to a HEI under section 12(1) of the 2005 Act, would require the HEI to comply with a widening access agreement dealing with representation of particular socio-economic groups in fundable higher education.

Although Outcome Agreements (and Widening Access Agreements) are not business plans or strategic plans, they appear to be closely related to these, by linking in to each HEI’s own vision, mission and strategic objectives. Outcome Agreements are to be negotiated between HEIs and the SFC. The recent SFC Guidance of September 2015 notes that an Outcome Agreement “should align with an institution’s strategy so that it enables the institution to negotiate its contribution toward sector level impacts according to its priorities and strengths”. So, just as an HEI’s strategic plan will
inform some of the content of an Outcome Agreement, so consideration of what is to be included in an Outcome Agreement with the SFC could be expected to inform some of the content of an HEI’s strategic plan. This suggests that the public sector influences the course of the general policy of an HEI, as expressed in its Outcome Agreement and Strategic Plan; and also in relation to how each HEI decides to deliver its services or outputs.

Existing government control over changes to Instruments of Government

As already stated earlier in this note of advice, ESA 2015 at 20.15 sets out 5 particular criteria to be considered in relation to the classification of NPIs. These criteria include: “(b) other provisions of the enabling instrument, such as the obligations in the statute of the NPI”. MGDD (2014) develops this further, noting that, according to 2008 SNA (4.92), “an NPI would be considered to be controlled by government if approval of government would be required to change the statute of the entity (or the type of activity carried out by the entity)…”.


These Instruments of Government set out the main functions of the governing body of an institution in pursuit of its objects, in setting the overall strategic direction of the institution, managing its finances, setting its estates strategy, managing its human resources (including staff remuneration levels) and ensuring that robust and appropriate management structures and audit processes are in place.

Without going into detail here about the different procedures for amending Instruments of Government, which has been the subject of previous advice, each of the different procedures for changing the Instruments of Government for the Ancient, Chartered and Post-92 universities/HEIs entail some element of approval by government, with government in some form (e.g. the Privy Council, Her Majesty in Council, the Scottish Ministers and, for ancient universities, the Scottish Universities Committee) having a key “say”. It is understood that, when the Privy Council is considering proposed changes to the Instruments of Government of Scottish HEIs, it will not do anything that its advisers do not agree with and its “advisers” in this context are the Scottish Ministers and/or their officials.

On some occasions, the changes being made are actually a direct or indirect result of a requirement by government for HEIs to change their Instruments of Government. For example, in the last couple of years, some HEIs have been required to go through the Privy Council process to amend governance documents to meet the requirements of the Scottish Code concerning the recruitment of governing body chairs. They may need to go back to the Privy Council shortly to change their governing documents again, if the Bill is enacted. The current arrangements appear to correspond with the terms of category (b) of ESA 2015 at 20.15 as an indicator of government control.
Conclusion

Having considered the impact of the increased government control that the Bill will bring in relation to Scottish HEIs, and in the context of the other sources of government control that currently exist in relation to Scottish HEIs, we consider that the Bill brings HEIs closer to a possible reclassification by ONS into the public sector as NPIs.

We note that the HMT Guidance from 2013 states that, when considering the classification of a body, ONS will look at all controls, major and minor, and decide whether they add up to control.

The cumulative effect in relation to the elements of government control over Scottish HEIs includes the effect of a proposed increase in government control over HEIs’ Instruments of Government and the composition of their governing bodies through the current Bill, control through existing legislation governing HEIs and the processes for changing their Instruments of Government, regulation and control through the SFC’s Financial Memorandum, control through Outcome Agreements and the level of operational control through the Scottish Code of Good HE Governance.

As a result of this cumulative effect, Scottish HEIs appear to be moving into “borderline” territory in terms of whether they can retain their private sector categorisation as NPISHs for the purposes of the National Accounts. It is understood that this “borderline” territory is an uncomfortable place for HEIs, because of the major ramifications that would follow any ONS reclassification of HEIs to the public sector.

It is considered that, if the ONS carried out an assessment in the near future to ascertain whether HEIs are still correctly classified as NPISHs, or whether they should now to be classified as NPIs within the public sector, the challenges posed to HEIs by such an assessment exercise should appear at the level of ‘significant risk’ on their risk registers.

Anderson Strathern LLP
30 September 2015
Annex A

MGDD I.2 – Current criteria to determine public sector control (not specific to NPIs)

For information, the MGDD at section I.2, in addition to specifying criteria for classification of NPIs with the public sector, highlights the following criteria as being sufficient, individually, to determine government control of an institutional unit:

1. Rights to appoint, remove, approve or veto a majority of officers, board of directors, etc.
2. Rights to appoint, veto or remove a majority of appointments for key committees (or sub-committees) of the entity having a decisive role on key factors of its general policy
3. Ownership of the majority of the voting interest.

Where the criteria of control listed above are inconclusive, further criteria are to be considered, on a case-by-case basis. ESA 2010 (para. 20.310) specifies that a “number of separate indicators may collectively indicate control” and that each classification case needs to be judged on its own merits by the ONS.

MGDD I.2.3 (page 14 at para. 14) notes that: “there may be cases where one single and important criterion is sufficient in this regard. As a result, a unit which does not meet the above-mentioned criteria of control (even if in majority privately-owned) could still be included in the public sector”.

The “separate indicators” cited in ESA 2010 are:

4. Rights to appoint, veto or remove key personnel
5. Rights under special shares and options
6. Rights to control via contractual agreements
7. Rights to control from agreements/permission to borrow
8. Control via excessive regulation
9. Others, e.g. approval for some important decisions, e.g. mergers, dissolution, changing statute.
Annex B

ONS sector classification criteria (extracted from HMT Guidance of 2013, Annex B)

The following criteria were previously used by the ONS to decide whether or not an entity should be classified to the public sector.

Governance controls – primary indicators of control

Does the public sector:

- have the right to appoint the majority of the board or has veto rights; or
- own the majority of the voting shares of the organisation?

14 key areas indicating secondary control

Can the public sector:

1. determine aspects of how the body delivers its outputs;
2. have a final say in sale/acquisition of fixed assets;
3. take a share of proceeds of asset disposals that goes beyond the repayment of previous government support for capital formation;
4. close the body;
5. prevent the body from ending its relationship with the public sector;
6. veto any takeover (except in the case of a conventional share);
7. change the constitution of the body, or veto changes to it;
8. decide what sort of financial transactions the body can undertake, or limit them;
9. prevent the body from receiving certain types of income from other sources;
10. exert numerous minor controls over how the body is run;
11. exert financial control (N.B. this is different from funding) as part of a general system of controlling public expenditure;
12. control dividend policy;
13. set pay rates; or
14. approve acquisitions.
Background

1. The Committee reported on the delegated powers\(^1\) in the Higher Education Governance (Scotland) Bill\(^2\) ("the Bill") on 7 October 2015, in its 59\(^{th}\) report of 2015. In its report, the Committee made recommendations on five delegated powers provisions.

2. The response from the Scottish Government to the report is reproduced at the Annex.

3. This paper summarises the delegated powers provisions which the Committee made recommendations on, the Committee's consideration of the provisions and the Government's response.

Scottish Government response

*Delegated Powers: Section 1 – Appointment as chairing member*

**Provision**

4. Section 1 provides that the chairing member of the governing body of a Higher Education Institution ("HEI") is to be appointed in accordance with a process set out in regulations made by the Scottish Ministers. Such regulations may include (in particular) provision for: periods of appointment and whether reappointment is possible; means of selection for appointment; and reimbursement of candidates expenses.

5. Section 1 also gives examples of possible means of selection, as follows: public advertisement; criteria for selection; interview of candidates; shortlisting of candidates; and holding an election from among candidates. Before making such regulations, the Scottish Ministers are required to consult each HEI to which the regulations relate and such other persons as the Scottish Ministers consider appropriate (section 3).

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\(^1\) The Higher Education Governance (Scotland) Bill Delegated Powers Memorandum is available at the following website:


\(^2\) The Higher Education Governance (Scotland) Bill [as introduced] is available at the following website:

[http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd.pdf](http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd.pdf)
Committee consideration

6. The Committee identified that the appointment of chairing members was a key policy in the Bill and therefore wrote to the Scottish Government to ask whether the basic framework for the appointment of chairing members could be included on the face of the Bill.

7. The Scottish Government, in response to the Committee’s questions, commented that the appointment process would be more appropriately set out in secondary legislation rather than in primary legislation. The Scottish Government also highlighted that, subject to ongoing dialogue, it was considering whether to bring forward an amendment at Stage 2 setting out a single model for appointing elected chairs.

8. The Committee in its report highlighted that key provisions of the appointment process could be set out on the face of the Bill and noted that the Scottish Government was considering bringing forward an amendment.

Scottish Government response

9. The Scottish Government responded noting that the Committee’s comments are helping to inform their ongoing discussions with stakeholders. The Scottish Government re-iterated that the matters highlighted in the Committee’s Report are being reviewed and amendments are being considered for Stage 2. The Scottish Government has committed to updating the Committee once they have a firm view on Stage 2 amendments.

Delegated Powers: Section 2 – Remuneration to be payable

Provision

10. Section 2 provides that the Scottish Ministers may by regulations make provision for remuneration and allowances to be payable by an HEI to the chairing member of the governing body of the institution. Such regulations may include (in particular) provision that: specifies or limits the circumstances in which sums must be offered; requires sums to be reasonable given the responsibilities of the chairing member; or delegates to other persons the function of determining sums in particular cases.

11. Before making such regulations, the Scottish Ministers are required to consult each HEI to which the regulations relate and such other persons as the Scottish Ministers consider appropriate (section 3).

Committee consideration

12. When the Committee first considered the Bill, the Committee drew attention to the fact that the principle of remunerating chairing members was a new concept for HEIs. The Committee wrote to the Scottish Government to identify whether the correct balance between secondary and primary legislation had been struck and for explanation on why the principle and basic framework of remuneration had not been set out in the Bill.

13. In response to the Committee’s questions, the Scottish Government stated that due to the potential amount of detail required, it was more appropriate for the
framework on remunerating chairing members to be set out on the face of the Bill. The Scottish Government detailed that if an amendment were to be brought forward at Stage 2 on the appointment of chairing members, then they would reflect further on bringing forward an amendment in this area.

14. The Committee accepted in principle that the detailed provision on remuneration for chairing members could be covered by secondary legislation. However, given the fact that the principle of remunerating chairing members was a new concept for HEIs the Committee recommended it would be more appropriate for the key provisions on remuneration to be set out on the face of the Bill. The Committee also noted the Scottish Government’s intentions to re-consider their approach in light of any amendments on chairing members.

Scottish Government response
15. The Scottish Government responded noting that the Committee’s comments are helping to inform their ongoing discussions with stakeholders. The Scottish Government re-iterated that the matters highlighted in the Committee’s Report are being reviewed and amendments are being considered for Stage 2. The Scottish Government has committed to updating the Committee once they have a firm view on Stage 2 amendments.

Delegated Powers: Section 8 – Power to modify section 4

Provision
16. Section 8 gives a power to the Scottish Ministers to modify section 4 of the Bill, which sets out the requirements for the composition of the governing body of an HEI. Section 4 provides that a governing body is to be composed of: the chairing member; 2 staff members, elected by the staff; 1 academic staff member, nominated by a trade union; 1 support staff member, nominated by a trade union; 2 students, nominated by a students’ association; 2 graduates, nominated by a graduates’ association; and such other persons as are appointed by virtue of an enactment or in accordance with the governing document of the HEI.

17. Section 8 provides that the Scottish Ministers may by regulations modify the categories of membership set out in section 4, and the number of persons to be appointed under a particular category in that section.

Committee consideration
18. The Committee noted that the exercise of this power could have a sizeable impact on HEIs and that there was no requirement to consult HEIs in advance, unlike the powers in sections 1 and 2 of the Bill. The Committee therefore wrote to the Scottish Government to ask whether a requirement to consult with affected HEIs before making regulations could be set out in the Bill.

19. The Scottish Government responded to the Committee’s questions, noting the suggestion and detailing that the Scottish Government may consider a Stage 2 amendment putting a consultation requirement onto the face of the Bill.

20. The Committee was content in principle with the power and the affirmative procedure. However the Committee considered that a requirement could be included
in the Bill, requiring Scottish Ministers to consult affected HEIs prior to making any regulations, given the regulations’ potential impact. The Committee also noted the Scottish Government’s plans to consider a possible amendment.

*Scottish Government response*

21. The Scottish Government responded noting that the Committee’s comments are helping to inform their ongoing discussions with stakeholders. The Scottish Government re-iterated that the matters highlighted in the Committee’s Report are being reviewed and amendments are being considered for Stage 2. The Scottish Government has committed to updating the Committee once they have a firm view on Stage 2 amendments.

*Delegated Powers: Section 13 – Power to modify sections 9 and 10*

*Provision*

22. Section 13 gives a power to the Scottish Ministers to modify sections 9 and 10 of the Bill, which set out the requirements for the size and composition of the academic board of an HEI.

23. Section 9 provides that the board is to consist of no more than 120 members. Section 10(1) provides that the board is to be composed of: the principal of the institution; the heads of school of the institution; academic staff members elected by the academic staff; students elected by the students; and such other persons as are appointed by virtue of an enactment, in accordance with the governing document of the HEI or in accordance with a decision of the governing body of the HEI. Section 10(2) provides that more than 50% of the board members must be elected academic staff and students, and at least 10% of the members must be elected students.

24. Section 13 provides that the Scottish Ministers may by regulations modify: the number of members of the board specified in section 9; the categories of membership set out in section 10(1); and the number or percentage of persons to be appointed under a particular category in section 10(1). Such modification as to number may be made by specifying a fixed number or percentage, or a maximum or minimum (or both).

*Committee consideration*

25. The Committee remarked upon the potential significance of this power, as it would amend primary legislation and impact on HEIs’ governance arrangements. In a similar vein to the Committee’s consideration of the power in section 8, the Committee asked the Scottish Government whether it would consider including in the Bill a requirement to consult with affected HEIs before making regulations.

26. The Scottish Government replied to the Committee, noting the suggestion and outlined that it will consider a possible amendment at Stage 2 to introduce a consultation requirement.

27. The Committee was content with the power in principle. The Committee recommended that a requirement to consult with affected HEIs before making regulations could be included on the face of the Bill. The Committee also noted the Scottish Government’s consideration of a possible amendment at Stage 2.
Scottish Government response

28. The Scottish Government responded noting that the Committee’s comments are helping to inform their ongoing discussions with stakeholders. The Scottish Government re-iterated that the matters highlighted in the Committee’s Report are being reviewed and amendments are being considered for Stage 2. The Scottish Government has committed to updating the Committee once they have a firm view on Stage 2 amendments.

Delegated Powers: Section 15 – Meaning of higher education institution

Provision

29. Section 15(1) sets out the definition of an HEI for the purposes of Part 1 of the Bill. HEI has the same meaning as in the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”) – that is, a university or an institution providing higher education designated by the Secretary of State. However, such an institution falls within the definition only if it is also listed in schedule 2 (fundable bodies) to that Act. Schedule 2 lists those bodies which may receive funding from the Scottish Further and Higher Education Funding Council (“the Funding Council”). The Open University is specifically excluded from the definition.

30. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition set out in section 15(1) so as to include or exclude a particular institution.

Committee consideration

31. When the Committee first considered the Bill, the Committee questioned whether a power to include HEIs was required, given that the provision appears to capture all HEIs which are eligible for public funding from the Scottish Further and Higher Education Council. The Committee noted that this provision could have a sizeable impact on institutions affected by any regulations. The Committee also queried whether a requirement to consult with affected HEIs should be included within the Bill and whether the negative procedure was appropriate in light of this impact. The Committee therefore wrote to the Scottish Government for further information on these points.

32. The Scottish Government responded that a power to include HEIs in the definition may not be required, since new HEIs will be captured as fundable bodies. The Scottish Government confirmed that it would consider an amendment at Stage 2 for the provision to be only able to exclude institutions. The Scottish Government did not accept the need for a consultation requirement, identifying that the power was likely to be uncontroversial as it would not impose any new requirements on the excluded institution.

33. The Committee reinforced its earlier observation that a power to include a specific institution within the definition of HEIs was not required. Given the potential impact on an institution brought within the definition, the Committee recommended that the affirmative procedure be used and also that a requirement to consult affected HEIs prior to making such regulations be included on the face of the Bill.
**Scottish Government response**

34. The Scottish Government responded noting that the Committee’s comments are helping to inform their ongoing discussions with stakeholders. The Scottish Government re-iterated that the matters highlighted in the Committee’s Report are being reviewed and amendments are being considered for Stage 2. The Scottish Government has committed to updating the Committee once they have a firm view on Stage 2 amendments.

**Conclusion**

35. Members are invited to make any comments. If at Stage 2 new powers are proposed, or substantial amendments to the powers are proposed, the Committee will have a further opportunity to consider the Bill after Stage 2.

**Recommendation**

36. **Members are invited to note the Scottish Government’s response on the Bill, and to make any comments.**
ANNEX

Correspondence from the Scottish Government, dated 3 November 2015

The Scottish Government welcomes the Delegated Powers and Law Reform Committee’s Stage 1 report on the delegated powers contained in the Higher Education Governance (Scotland) Bill (“the Bill”). The Government would like to thank the Committee’s members for their thorough scrutiny of the delegated powers contained within the Bill.

The Scottish Government notes the comments made by the Committee in the report and further notes that the Committee will return to consider these powers after Stage 2. As the Committee is aware, the matters highlighted in the Report have been being reviewed and amendments are being considered for Stage 2. Detailed consideration and discussions with stakeholders continue, and the comments made by the Committee are helping to inform those discussions.

We will update members as soon as the Scottish Government has formed a concluded view on amendments for Stage 2.
Our ref: A12935320
11th January 2016

Dear Stewart,

HIGHERS EDUCATION GOVERNANCE (SCOTLAND) BILL

I would like to thank the Education and Culture Committee, Finance Committee and Delegated Powers and Law Reform Committee for their consideration of this Bill at Stage 1. I note the entire Stage 1 report and, in particular, the Education and Culture Committee’s support for the general principles of the Higher Education Governance (Scotland) Bill.

The principal objective of the Bill is to enable a high level framework of higher education governance in Scotland that is more modern, inclusive and transparent, and in line with our commitment to a fairer Scotland.

During the Stage 1 evidence session I attended on 10 November, I made it clear that we will continue to consider all views on this Bill, and I note Committee’s comments and requests for further information in some areas. I am keen to clarify as many of these issues as I can and the attached Scottish Government response seeks to address all of the key points raised in the Stage 1 report.

I look forward to the on-going consideration of the Bill by the Committee and by the Parliament as a whole.

ANGELA CONSTANCE
Higher Education Governance (Scotland) Bill

Scottish Government Response to the
Education and Culture Committee Stage 1 Report
January 2016
INTRODUCTION

The Scottish Government notes the key points and requests for further information made in the Committee’s Stage 1 Report. The following response aims to address the key issues and recommendations set out by the Committee.

For ease of reference, the response includes the text from relevant paragraphs in the Stage 1 Report, and also uses the same paragraph numbering as the Report.
SCOTTISH GOVERNMENT RESPONSE TO THE STAGE 1 REPORT

The Scottish Government’s analysis

34. We consider the reclassification of Scottish HEIs would be in no-one’s interests, given such a decision could cause very significant harm. We therefore consider all reasonable measures should be taken to minimise any risk of reclassification.

The classification by the Office of National Statistics (ONS) of Scottish higher education institutions (HEIs) has been central to our consideration of risk and the policy decisions taken throughout the development of the Bill. The Scottish Government’s assessment is that this Bill does not advance the risk of reclassification. As I said in my evidence before the Committee on 10 November 2015, re-classification is an outcome that the Scottish Government would never want to realise.

Although we are confident that the provisions in the Bill do not amount to government control as set out in the current ‘indicators of government control’ used by ONS, we have listened to what stakeholders have said in respect of certain provisions in the Bill at introduction. Having given the matter careful consideration, the Scottish Government is minded to put forward amendments at Stage 2 to remove sections 8 and 13 of the Bill. In addition, as is set out more fully in response to paragraphs 55 and 68 below, the Scottish Government is also minded to put forward amendments which would reduce or remove the need for regulation-making powers in sections 1 and 2 of the Bill.

As noted at paragraph 29 of the Committee’s report, sections 1, 8 and 13 have been identified by stakeholders as those which they believe would increase the risk of reclassification. While we do not share stakeholders’ fears, the action which the Scottish Government proposes to take should allay concerns that stakeholders have about the Bill contributing to reclassification.

35. Our scrutiny has taken into account not just the current Scottish Government’s intended approach, but also how the powers in question could be used by any future Scottish Government. We therefore welcome the Cabinet Secretary’s commitment to amending or removing the relevant provisions. We expect this to mean the powers could not be used in a way that would unjustifiably increase ministerial control. We consider there should have been more productive discussions between the Scottish Government and the HEI sector about the intended purpose of these provisions, some of which are commonly found in legislation.

The Scottish Government does not want to advance ministerial control over universities; we are clear that they are autonomous bodies. In particular, the powers in the Bill at sections 8 and 13 are fairly common of their type, where it is useful to future-proof primary legislation. However, as stated above, the Scottish Government is minded to put forward amendments at Stage 2 to remove sections 8 and 13, and to reduce or remove the need for regulation-making powers in sections 1 and 2 of the Bill.
As the Committee recognises, the ancillary regulation-making power at section 20 of the Bill is a standard provision that is included in many Bills. The provision gives the Scottish Ministers the power to make further provision via secondary legislation, if necessary or expedient to do so for the purposes of or in connection with the Bill as enacted. Therefore, the power is already limited in terms of the provision that can be made under it. Typically, the provision would allow Ministers to act quickly in order to fix technical problems with the operation of the Bill if any come to light during implementation. The Delegated Powers and Law Reform Committee did not raise any concerns about the provision. We do not therefore propose to remove section 20.

36. There has been considerable disquiet from Universities Scotland about the level of analysis undertaken by the Scottish Government on how the Bill may alter the risk of reclassification. We therefore agree with the Finance Committee that the Scottish Government should publish, before the Stage 1 debate, the full analysis it has undertaken on this issue.

A full, separate response to this recommendation will be issued to the Committee, and copied to the Finance Committee, prior to the Stage 1 debate.

37. The issues discussed above raise broader questions about the extent to which any future Scottish Government’s development of legislation, policy or funding relating to HEIs may, in effect, be constrained by the possible risk of reclassification. We would welcome the Scottish Government’s views on this issue.

The extent to which any future legislation proposed by the Scottish Government might represent a potential risk to the classification of Scottish HEIs, as private not-for-profit bodies, would have to be fully assessed in light of the particular proposals being considered, as it has been for this Bill. This is not a situation where there is a ‘one size fits all’ answer, as it will depend upon the detail in each case.

Charitable Status

41. The charitable status issue is connected to the question of whether the Bill increases ministerial control over HEIs, and, in particular, Scottish Ministers’ powers to make future regulations (as discussed above). We therefore reiterate our support (in paragraph 35) for the Cabinet Secretary’s commitment to amending or removing the relevant provisions, as we consider this would also remove any potential threat to HEIs’ charitable status.

The Scottish Government is aware of how important charitable status is, of its value to the higher education sector, and the benefits it helps institutions deliver to our society and economy. The Office of the Scottish Charity Regulator (OSCR) raised no significant concerns about the Bill’s provisions, as introduced, in its response to the call for evidence issued by the Committee. Its overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs.

However, OSCR rightly highlighted that, should regulations be made, it would have to consider whether, taken together with the existing provisions, these amounted to
ministerial control. While the Scottish Government may not share the view that there is any risk to HEI charitable status, we are, as set out in response to paragraph 35, minded to put forward amendments to remove sections 8 and 13 by amendment at Stage 2. This should reassure those stakeholders who have raised concerns about this issue (to the extent that they remained concerned despite OSCR’s positive assessment of the overall position).

54. HEIs have already taken steps to open up the process of recruiting governing body chairs, including the involvement of students and staff. We support measures that would potentially increase the pool of suitable candidates for the post of chair and agree that openness, transparency and consistency in the appointment process is desirable.

The Scottish Government values the Committee’s comments on this matter, which is central to the general principles underpinning the Bill.

55. At this point, the exact means by which the chair is to be appointed is not clear and our evidence-taking has indicated no consensus amongst stakeholders about a way forward. It therefore appears that the Scottish Government may have to adopt a model that will not attract unanimous support. In order to inform the Stage 1 debate on this key part of the Bill, the Scottish Government should provide more detail on the process envisaged, such as whether there will be a pre-selection of candidates before an election; if so, who will be responsible for conducting that process; and who exactly will form the electorate for the election of chair.

Having undertaken further engagement with stakeholders in the higher education sector, we are minded to put forward amendments to section 1 in order to put core provisions on the face of the Bill. Our intention is to require the appointment of the elected chair to be undertaken through a two stage process involving first selection and then election.

An appointment process for the elected chair would likely feature:

- open advertisement for the role of chair (specifically the role of the senior lay member of the governing body, as currently exists at all 18 Scottish HEIs (often called the senior governor or vice convenor));
- interview and selection of electoral candidates by a nomination committee (featuring both staff and students) based on an agreed competency criteria; and finally
- an election where the franchise is all staff and students of an HEI.

While we are aware that this model does not attract unanimous support, we believe it meets with our stated policy aim of embedding modern, inclusive and transparent processes. In addition, the inclusion of a robust selection element should ensure that candidates who want to take up the role have the ability required for the position.
56. Given the strong emphasis the sector has placed on maintaining an appropriate link between the chair and the rest of the board, it would be helpful if the Scottish Government could also provide examples of governing bodies in Scotland that do not directly appoint their own chairing member. Where such cases exist, have any evaluations been carried out to determine how this has affected the organisation's performance? Is the quality of governance in such bodies markedly different?

We note the points raised by the Committee in relation to this issue. The Scottish Government has not undertaken specific research in this area. However, the recommendation that the chair of the governing body of an HEI should be elected originates in the Review of Higher Education Governance in Scotland, a review which took wide ranging evidence from Scotland, the UK, Europe and beyond. Our HEIs are autonomous bodies with few, if any, directly comparable peers. The recommendations in the Review were tailored in response to the evidence collected by Professor von Prondzynski and his colleagues on the particular requirements, with regard to improving governance, of universities and other HEIs.

As all senior lay member candidates on the shortlist for election will be selected by a nominations committee in each HEI, this will ensure that all candidates will possess the attributes necessary to perform the role of leader of each governing body. The introduction of an election element to this process is in line with the principal objective of the Bill, to enable a framework of higher education governance in Scotland that is more modern, inclusive and transparent.

The role of rectors

64. It is regrettable that the position of rector has not been clarified by now and that there was no substantive discussion of this issue in the Bill or its accompanying documents. However, we welcome the Scottish Government’s reassurance that the role of rector will not diminish. The final model proposed by the Scottish Government must ensure there is no ambiguity about the roles of elected chairs and elected rectors, and that both figures are able to work together for the good of the institution.

Ministers appreciate the role that rectors play in those HEIs that have them (primarily the ancient universities), raising the profile of the sector and representing students. The role of rector will continue. The rector is part of the democratic tradition in our ancient universities, and is also in keeping with the spirit of democratic renewal informing this Bill.

We can also reassure the Committee that the Scottish Government’s plans for elected chairs, as set out in response to paragraph 55, will, if approved at Stage 2, result in no alteration of the statutory underpinning which exists for rectors in our ancient universities and will ensure that the role is not diminished. We intend to put forward amendments which will remove those consequential modifications in the Bill’s schedule which would have removed the right of rectors at the ancient universities to preside at meetings of the governing body.
The precise way in which the role of rector dovetails with the role of the new elected senior lay member (however it may be designated) will primarily be a matter for each of our autonomous HEIs which appoints a rector. This is the position now in the ancient institutions, as the rector has the right to preside at meetings of court but the substantive role of chair is undertaken by the senior lay member of the governing body, and we understand that the interaction between these roles has not proven problematic for the institutions in question.

The Committee has asked that the Scottish Government ensures there is no ambiguity about the respective roles of elected senior lay members of court and elected rectors. Rather than take powers to set out already established roles in statute, the current intention is that the dynamics between both roles is left to the five individual HEIs in question, as it is now.

Remuneration

68. The von Prondzynski review recommended that the chair should receive “some form of reasonable remuneration”. However, we remain unclear why the Scottish Government requires a statutory power to make regulations about remuneration when HEIs already have a power to remunerate chairs. We therefore call on the Scottish Government to set out the intended benefits it expects to derive from assuming this power. We also invite the Scottish Government to address the following points, which were not explained in the Bill’s explanatory notes—

- how it would intend to use the power, for example, whether it would expect to set remuneration at a significantly different level than universities would;
- why it is seeking to delegate to “other persons” the power to determine remuneration and allowances in certain cases. Which persons does the Scottish Government have in mind and why?

Having listened to stakeholders’ views, and having given this matter further consideration, the Scottish Government is minded to propose an amendment to this provision at Stage 2, replacing the regulation-making power at section 2 with full provision on the face of the Bill. The focus of such provision is likely to be a requirement that institutions must, upon request by the chair, provide reasonable remuneration to an elected chair in connection with carrying out that role. We think this approach can make a contribution to widening access to the role for candidates with lower incomes, or who are still working. In this context, remuneration should be construed as expenses or allowances, not salary.

On balance, we do not consider retention of a power for Ministers to set levels of remuneration or delegate this role to other persons to be necessary.

Governing body composition: the impact of new members

83. By definition, the Bill’s proposals on governing bodies would make them more inclusive, although it cannot be guaranteed that governance and decision-making would improve as a consequence. Nonetheless, we agree
with the principle that a diverse group of people, all of whom clearly have a shared interest in the institution’s continuing success and who bring a wide range of experience in skills and governance, should be included on the governing body.

The Scottish Government values the Committee’s support on this matter, which is central to the general principles underpinning the Bill.

84. We note that all members of a governing body are required to act in its best interest – a point acknowledged by trade unions – and therefore cannot agree that the appointment of trade union members would undermine this principle. HEIs have, however, asked legitimate questions about the Bill’s impact on existing governing body members. Although the Scottish Government does not envisage a problem with HEIs complying with this provision, it is the Scottish Funding Council that requires HEIs to follow the Code as a condition of grant of public funding. We therefore seek assurances from the SFC that no institution would be forced, by the Bill’s proposals, to remove existing members of governing bodies, several of whom are elected members of staff, and also that there would be no detrimental effect on university management if the governing body number exceeded 25.

The comments made in the Committee’s report on governing bodies and the role of trade union representatives are noted and welcomed.

The Scottish Government considers that it should be a matter for the governing body to determine how best to accommodate the new statutory members, and it will have the transitional period before the Bill comes fully into force to do this. It is anticipated that this will be approximately 4 years following the Bill’s enactment. The transition period for the Bill is aimed, amongst other things, at ensuring that HEIs will not be required to remove existing members of their governing bodies and that, rather, compliance with the Bill can be addressed alongside the natural turnover of membership of the governing body. However, the question submitted to the Scottish Funding Council by Committee is noted.

Specific issues

85. There are some other, more specific issues around these provisions that we wish to highlight. Glasgow School of Art (GSA) and other HEIs pointed out that they do not have a graduates association, which they consider would be needed to comply with this section of the Bill. GSA described the creation of such an association as “an extremely costly and time consuming exercise”. The Royal Conservatoire of Scotland has raised concerns about its ability to comply with the requirement to appoint trade union members. We call on the Scottish Government to address these specific concerns. More generally, given the diversity of the sector, we would welcome confirmation from the Scottish Government that all HEIs will be able to comply with the requirements of section 4.

As set out in response to paragraph 84, the Scottish Government considers that it should be a matter for the governing body to determine how best to accommodate
the new statutory governing body members. However, we have listened to the views presented by stakeholders and reviewed the evidence submitted to the Committee, and are minded to propose an amendment to reduce the number of statutory members to 7: two trade union members, two members of staff, two students, and the elected chair (senior lay member), removing the requirement for two graduate association members. This is in recognition of the fact that most institutions will naturally attract some graduates of that institution to serve on their governing body in any case.

The majority of institutions are likely to already have five of those seven roles on their governing bodies (staff, students and the senior lay member – albeit currently appointed slightly differently). As such, we do not consider that any institution will have difficulty in complying with this provision, and they can introduce these new members in a phased manner during the transitional period.

As far as the RCS' concerns about trade union members are concerned, we understand from its second written submission to the Committee that although it does not officially recognise any trade union, there are three trade unions which would satisfy the definition in section 4(2)(b) of the Bill. Should the RCS not wish to exercise its entitlement to choose between these three, the Bill specifically contemplates the possibility of HEIs allowing different bodies to work together to provide a joint nomination, and section 6(3)(a) allows for this.

86. We have been informed that elected student representatives (the student president and vice-president) would not be eligible to serve on the university court because they are on sabbatical and, therefore, technically not students. It would be helpful if the Scottish Government could clarify this point.

We are continuing to review this matter which was raised during the Committee evidence sessions on the Bill, and will consider putting forward an amendment to the Bill at stage 2 to clarify that relevant student representatives who are on sabbatical would be able to serve. The Scottish Government understands that student representatives in some HEIs remain students during their sabbatical office by virtue of specific provisions in the relevant governance instruments. However, it would appear that in some HEIs, as the Committee has noted, they do not in fact remain students and this will be taken into account in considering any stage 2 amendments.

87. We also note the Cabinet Secretary’s comments that one of the student representatives on the governing body would have to be the president of the students association and the other would have to be a woman. The Bill does not appear to contain such requirements and we therefore seek clarification from the Scottish Government on this point.

The requirement set out within the Bill is that there are two student members of the governing body nominated by the students of the institution from among the students of the institution. No additional requirements will apply to these two positions. The Bill leaves it to individual HEIs to determine the rules which will apply to the nomination process.
88. We have previously asked the Scottish Government whether, in theory, one person could fill the role of being both a graduate nominee and union nominee to the governing body. The Scottish Government confirmed this was not the policy intention. It added that “membership of each of the categories of governing body member is intended to be mutually exclusive” and said it would consider whether this needed to be made explicit. Given some of the concerns raised about trade union and graduate members of the governing body, we would welcome an update on the Scottish Government’s position in advance of Stage 2.

I can confirm that, as previously stated, the membership of each of the categories of governing body member is intended to be mutually exclusive. We think that this is strongly implicit, and we note that other Acts, including the Post-16 Education (Scotland) Act 2013, are framed in a similar manner in relation to the required composition of boards despite there being, in some cases, at least a theoretical possibility of overlapping appointments. Nonetheless, the Scottish Government is considering whether it would be helpful to make this explicit on the face of the Bill (while noting that we must be careful not to cast doubt on the effect of existing legislation). However, as confirmed in answer to the questions at paragraph 84 and 85, we are minded to put forward an amendment to the Bill at Stage 2 to remove the statutory obligation on HEIs to have two alumni members on the governing body.

Academic boards

98. The Scottish Government took the principles on the academic board from the von Prondzynski review. However, we are concerned about the lack of evidence on this issue and consider that the Scottish Government should provide a more detailed explanation as to why it should legislate on this body. We also ask whether there could be flexibility around the 120 member threshold.

The Scottish Government engaged with Professor von Prondzynski after the Stage 1 evidence session held on 10 November, in relation to the evidence supporting the recommendation that academic boards should comprise a maximum of 120 members. He noted that the Review Panel found that there were academic boards with so many members that meetings became hard to manage. Some Senate meetings struggled to hold quorate meetings due to their size.

Professor von Prondzynski confirmed that the Review Panel formed the view that some of these problems would be mitigated if academic boards were smaller, but also if they had an elected majority.

However, having given consideration to both this and the views of those who oppose this provision as set out in the evidence provided to the Committee detailing the substructures established in institutions which currently have academic boards exceeding the proposed cap, the Scottish Government is minded to consider putting forward an amendment at Stage 2 to remove this requirement (to abide by a cap of 120 members). While the Scottish Government is still of the view that each academic board needs to be of a manageable size and efficiently run, we are persuaded that, on occasion, this can be achieved by a larger academic board.
99. We understand the merit of having a student presence on academic boards and note that HEIs do not appear to have any significant concerns about this proposal. With reference to paragraph 92, it would be helpful if the Scottish Government could identify whether any more tangible benefits are likely to arise from this provision.

The specific improvements and benefits expected will flow from all parts of the HEI community having the ability to make their voices heard as part of the governance structures guiding an HEI. We envisage that the more inclusive approach proposed by the Bill will strengthen unity and the sharing of responsibility between different parts of the community within HEIs. Students can help mould the academic ethos within an organisation, and ensure that their voice is heard.

100. We are still not clear why – taking into account the explanation provided in paragraphs 93 and 94 – there is to be statutory student representation on academic bodies, but not statutory trade union or graduate representation. We therefore require further clarification on this point.

Governing bodies are the structures responsible for determining the overall strategic direction of HEIs. If trade unions are represented on governing bodies, their contribution to the HEI at that level can have a percussive effect throughout the institution. An institution’s academic board is accountable to its governing body, so the trade union members on the governing body will still have oversight of the academic board even if not directly represented on it. The Bill therefore limits the reach of this provision to only those groups at the very core of every institution: the staff and students. It is not our intention to micro-manage HEIs; this Bill aims to set out some high level obligations. How the different contributors work together as communities is rightfully a matter for them.

Academic freedom

117. Scottish Government officials committed to investigating the wording of the existing legislation on academic freedom and to establishing “what consideration, if any, was given to the student side of the equation”. We have not heard anything further from the Scottish Government on this matter and expect to receive an update before the Stage 1 debate.

As the Committee notes, officials agreed to investigate the construction of the standing definition in the Further and Higher Education (Scotland) Act 2005 and establish what consideration, if any, was given to the student side of the equation. That work is on-going and to date it appears that in the construction of the definition of academic freedom in the 2005 Act, the protection of the academic freedom of students was not something on which representations were made. However, we do not consider that the same policy rationale exists for students in this context, as at its core the safeguard is about appointments and staff privileges in the context of their work for an HEI or college. That said, where, for example, PhD students are involved in carrying out teaching, they would benefit from the same protection in relation to their teaching activities.
We have also taken careful note of all of the evidence presented, in particular the importance of ensuring that academic freedom cannot be cited as a cover for airing views that are offensive to the extent that their promulgation constitutes a criminal offence. As was stated by my officials in evidence before the committee, the criminal law would prevail in such cases, and the provisions of the Bill do not change that. However, in light of all of the comments made, we are considering the final form of the relevant provisions in this area, with a view to possibly putting forward an amendment at Stage 2.

118. We also look forward to receiving clarification on the following statement in the Bill's Financial Memorandum: “Alteration to the definition of academic freedom might change the nature of some internal disputes within HEIs. However, no additional costs are expected to arise.”. We also invite the Scottish Government's views on UCU Scotland's suggestion that academic freedom should also apply to academic related and support staff.

This passage simply means that academics may cite the new definition in a dispute by quoting the expanded scope of the definition - for example, the slightly stronger obligation on the HEI to ‘aim to uphold’. This might help some academics feel confident enough to cite academic freedom in a dispute situation, or to pursue a dispute for longer. However, it is unlikely that this would lead to an increase in the low number of existing cases, hence the assumption of low additional costs.

As regards academic related support staff, we have reviewed the construction of the definition of academic freedom in the Further and Higher Education (Scotland) Act 2005. This focuses solely on academic staff. We do not see a strong justification for extending the definition along these lines, as the intention is to protect views which relate to the teaching, learning provision or research that a staff member is directly engaged in, so as to avoid stifling academic debate. Accordingly, the Scottish Government does not consider it necessary to extend this further to academic and related support staff.

Financial memorandum

123. We acknowledge the concerns raised by the Finance Committee and stakeholders about the Financial Memorandum, and welcome the Cabinet Secretary’s commitment to examining these concerns.

The Scottish Government will update the Financial Memorandum following Stage 2 in accordance with the Scottish Parliament’s Standing Orders.

124. We also expect the Scottish Government to take the Finance Committee’s concerns about consultation into account, as appropriate, when preparing future Financial Memorandums.

The Scottish Government is committed to ensuring that each Financial Memorandum is of a high quality and provides the Parliament and interested parties with clear information about the financial implications of a Bill. The Finance Committee’s concerns will be taken into account when preparing future Financial Memoranda.
Conclusions

129. We welcome the Cabinet Secretary’s commitment to monitoring the Bill’s impact in conjunction with the sector as a whole, and her statement that the university sector advisory board could help to measure the Bill’s success. We look forward to receiving detailed information on how this board would work in practice, including how it could be informed by any other reviews of HE governance.

The University Sector Advisory Forum was established in 2012. The membership comprises Universities Scotland, institution representatives for the post ’92, ancient, and chartered institutions, unions and NUS Scotland.

The Forum meets once or twice a year and its remit is to consider the Scottish Government’s and SFC’s university sector strategies. The remit of the Forum has evolved since 2012 but specifically, it aims to provide the Scottish Government and the SFC with expert input into their key strategies.

Should the Bill be passed by the Scottish Parliament, the Scottish Government will keep the Committee informed of developments in monitoring its impact.

130. The Scottish Government has explained its reasoning for each of the Bill’s provisions. However, we have highlighted in this report examples of further information we believe the Scottish Government should provide in order that members’ participation in the Stage 1 debate is as informed as possible. We have also highlighted the concerns about the issue of reclassification, and have suggested a possible solution that we consider the Scottish Government should be able to deliver. While recognising there is a difference of opinion, as set out at the beginning of this report, we agree it is appropriate to seek to improve governance, particularly to try to avoid future problems arising. Taking all these points into consideration, we support the strengthening of governance in higher education and thus the Bill’s general principles. The Stage 1 debate will be an opportunity for all members to question in more detail the precise means by which this will be delivered.

The Scottish Government welcomes the Committee’s support and notes the comments made in the Stage 1 Report. The Scottish Government is happy to provide any further information required.
Dear Stewart,

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL: CLASSIFICATION OF SCOTTISH HIGHER EDUCATION INSTITUTIONS (HEIs) BY THE OFFICE FOR NATIONAL STATISTICS (ONS)

In the Committee’s Stage 1 Report on this Bill, it asks the Scottish Government to “publish, before the Stage 1 debate, the full analysis it has undertaken on this issue”.

Some higher education sector stakeholders have suggested that provisions in this Bill could lead to re-classification of Scottish HEIs as public sector bodies. Principally, this view arises from a perception that the Bill increases Ministerial control of autonomous institutions.

This is not an analysis that the Scottish Government agrees with. We aim to enable HEIs to improve the transparency and inclusivity of governance arrangements themselves, rather than seek any level of control. Indeed, re-classification of Scottish HEIs as public sector bodies is an outcome that we would always actively seek to avoid.

Following my letter of 5 October to the Convenor of the Finance Committee, sharing a summary of relevant analysis conducted prior to introduction of the Bill, I am happy to expand on our consideration of this important matter. I hope that the detailed treatment of the issue set out in this letter will be helpful to members of the Committee, and those on the Finance Committee, to whom the letter has been copied.
Scottish Government Analysis

As noted in my letter of 5 October, in classifying bodies as either public or private, the fundamental question for ONS is “does government exercise significant control over the general corporate policy of the unit?” The ‘Eurostat’ European System of Accounts guidance (ESA 2010) defines control as the ability to determine general corporate policy. This can be exercised, for example, through the appointment of directors, control of over half of the shareholders’ voting power, through special legislation, decree, or regulation. The difference between the public and private sectors is determined by where control over the organisation lies, rather than by “ownership”.

Whether or not such government control exists is assessed by considering a number of “indicators of government control” set out in the published ONS guidance. As explained in my letter in October, the Scottish Government considered each of the indicators in turn and how they relate, or not, to the provisions in the Higher Education Governance Bill. Rather than simply outline our analysis against each indicator again, I have attached the letter of 5 October to this letter for ease of reference. The analysis in the letter focuses on the main indicators of control; however, all other relevant sections of the ESA 2010 guidance were examined in forming our assessment. In summary, the Bill presents Ministers with no powers to:

- appoint, remove or approve a majority of officers, board of directors;
- appoint, remove or approve a majority of appointments for key committees;
- own a majority of the shares or voting interest (within an HEI);
- appoint or remove key personnel;
- rights under special shares and options;
- rights to control via contractual agreements;
- rights related to borrowing/financing;
- control via regulation (e.g. restriction on ceasing activities or from diversifying activities).

The various provisions in the Bill do not impose any direct Ministerial control over individual appointments to the governing bodies or academic boards of any institution. Instead, the Bill simply allows regulations to be made to set out consistent processes to be followed for appointment of a chair as well as setting out a minimum composition of governing bodies and academic boards. In addition to these (primary) indicators of control, ESA 2010 guidance sets out 5 indicators of control specific to classification determinations focused on not for profit (NPI) institutions in the private sector (such as HEIs). Guidance expanding on interpretation of each of these 5 indicators is set out in the accompanying Manual on Government Deficit and Debt (MGDD) updated in 2014. This material was also reviewed prior to introduction of the Bill in June. Each indicator is set out below with commentary extracted from

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the MGDD guidance, followed by Scottish Government analysis of risk proposed by
the provisions in the Bill at introduction:

a) The appointment of officers - The government may have the right to appoint the
officers managing the NPI either under the NPI’s constitution, its articles of
association or other enabling instrument.

SG Assessment: The Bill does not give Ministers the right to appoint officers
managing the NPI, both in the sense of staff employed or members of the
institution’s governing body or any other governance structure. The Bill does provide
for processes of appointment and specific categories of membership to be
represented on particular governance structures. However, Ministers have no ability
to appoint or remove any individual.

b) Other provisions of the enabling instrument – If, statutorily, the functions,
objectives and operating provisions (of the NPI) are already determined by
government, the appointment of officers would become of secondary importance.
But control by government would result if government would have the right to revoke
staff and to approve budget or financial arrangements. An NPI would be considered
to be controlled by government if approval of government would be required to
change the statute of the entity (or the type of activity carried out by the entity), or if
the entity could not dissolve itself or terminate any relation with government without
such approval.

SG Assessment: The Bill does not give Ministers the right to revoke any
appointment, either of staff or representatives on any HEI governance structure. In
addition, Ministers are afforded no new ability to approve budget or financial
arrangements. In relation to changes to the statute of an entity, the Bill does not
provide that government approval is required for changes to the governing statute (or
instruments) of the body. Scottish HEIs must seek the approval of the Privy Council
for such changes at the current time. The Bill does not provide Scottish Ministers
with any new power altering current arrangements in this regard.

c) Contractual agreements - Some NPIs may enter into contracts with government
units in order to perform tasks defined by government, acting as a specialised
operator, notably in social areas. When such contracts are the main, if not total, part
of the activity of the NPI, it is clear that government would be able to influence the
general policy of the NPI. However, control should be assessed if the approval of
government would be required for exiting from contracts with government.

SG Assessment: The Bill does not give Ministers any new powers relevant to
contractual agreements. The current outcome agreements formed between Scottish
HEIs and the Scottish Funding Council are not contractual agreements as envisaged
by the MGDD guidance. That guidance emphasises the performance of contractual
‘tasks defined by government’ and the approval of government being required for
institutions to ‘exit’ contracts. The outcome agreements arise from discussions
between the Scottish Funding Council and individual HEIs. The agreements seek to
measure the impact, in terms of outcomes, of the activity of an HEI, assisted by
public investment, rather than direct any of the discrete activities underpinning that
impact. Essentially, outcome agreements set out the aims and ambitions of
autonomous HEIs in assisting achievement of overall governmental strategic objectives.

d) **Degree of financing** - an NPI that is mainly financed by government may be controlled by government. “Mainly” must be as at least over 50%. The control would be assessed if such financing would be permanent (and not on temporary basis) and/or if it would result in a narrow monitoring of the use of the funds and a strong influence from government on the general policy of the entity.

**SG Assessment**: The Bill does not give Ministers any new powers to monitor the use of funds. It should be noted that the updated MGDD from 2014 notes that many educational units (including HEIs) are non-profit institutions and are generally largely funded by government. The guidance notes “…as a matter of principle, the mere financing of the educational unit should not be, as such, a determining criterion in classifying government-supported educational units”. Further, the guidance notes “…by application of the general rule, if government appoints the managers (or approves their appointment or holds a revocation right) or gives instructions related to the everyday management of the school (sic), thus leaving restricted decision-making capacity to educational unit’s officers, the unit should be classified in the general government sector”. The Bill does not provide Scottish Ministers with any new power to influence or control HEIs in that way.

e) **Risk exposure** - government “exposed to all, or a large proportion of, the financial risks associated with an NPI’s activities.” In this case, the arrangement would constitute government control. Financial risks refers to ex-ante commitments taken by government on some liabilities incurred by the NPI, on possible disruptions of other sources of revenue apart from those received from government, etc.

The provisions in the Bill are not directly relevant to this indicator. As autonomous organisations, the Scottish Government is not exposed to the form of risk described.

**Guidance from HM Treasury**

Treasury guidance from 2013 sets out a further 14 indicators of secondary control that ONS may refer to in making classification determinations. These were also considered by Scottish Government officials prior to introduction of the Bill, with a view to assessing whether planned provisions might propose any risk (of re-classification). The guidance asks, can the public sector:

1. determine aspects of how the body delivers its outputs;
2. have a final say in sale/acquisition of fixed assets;
3. take a share of proceeds of asset disposals that goes beyond the repayment of previous government support for capital formation;
4. close the body;
5. prevent the body from ending its relationship with the public sector;
6. veto any takeover (except in the case of an conventional special share);
7. change the constitution of the body, or veto changes to it;
8. decide what sort of financial transactions the body can undertake, or limit them;
9. prevent the body from receiving certain types of income from other sources;
10. exert numerous minor controls over how the body is run;
11. exert financial control (N.B. this is different from funding) as part of a general system of controlling public expenditure;
12. control dividend policy;
13. set pay rates; or
14. approve acquisitions (for non-regulatory reasons).

In summary, the Scottish Government concluded that the Bill did not propose any additional risk of re-classification, with specific reference to these secondary indicators of control. However, I am aware that legal advice procured from Anderson Strathearn by Universities Scotland raises concerns relevant to, at least, point 7 in this list. Specifically, these concerns relate to sections in the Bill, as introduced, featuring regulation making powers to enable Ministers to oblige variation of, for example, the composition of governing bodies or academic boards (sections 8 and 13).

Overall, we do not agree with the conclusions reached in the advice provided by Anderson Strathearn, on what is primarily a matter of statistical classification. However, we have taken careful note of all evidence shared with both the Finance Committee and the Education and Culture Committee. In light of this, I plan to lodge a number of Scottish Government amendments at Stage 2 of the Bill’s consideration. A number of these are relevant to the points made in the Committee’s Stage 1 report. Specifically, the Scottish Government will consider removal sections 8 and 13 in the Bill.

In my view, this is a discrete and focused Bill seeking to improve the transparency and inclusivity of higher education governance in Scotland. In summary, we do not view the Bill as affecting any existing level of assessed risk relevant to the current classification of Scottish HEIs not for profit, private sector bodies. Indeed, the Scottish Government has been clear that if there was any indication that this status may be altered, and we assess little likelihood of that, we would remove relevant legislation as required in order to avoid that outcome.

I, or my officials, would be happy to provide any further information that might be helpful to the Committee. Throughout the passage of this Bill I have made it clear that I want to listen to all ideas and constructive suggestions in order to make this legislation as impactful as possible in improving the governance of our higher education institutions.

ANGELA CONSTANCE
Dear Terry,

**Higher Education Governance (Scotland) Bill**

Thank you for your email of 16 December, in which you asked me to respond to the point addressed to the Scottish Funding Council (SFC) in paragraph 84 of the Committee’s report on the Bill:

‘We therefore seek assurances from the SFC that no institution would be forced, by the Bill’s proposals, to remove existing members of governing bodies, several of whom are elected members of staff, and also that there would be no detrimental effect on university management if the governing body number exceeded 25.’

As the SFC provides over £1 billion annually to universities in Scotland, we have an important interest in the governance arrangements within the sector and, in particular, in satisfying ourselves that governance is robust, effective, and demonstrates good practice. The Post-16 Education (Scotland) Act 2013 also contains a provision which allows Scottish Ministers to impose a condition on SFC that, when making a payment to a higher education institution, it requires the institution ‘to comply with any principles of governance which appear to the Council to constitute good practice in relation to higher education institutions’.

The mechanism that we use to meet the intent of the legislation, and our interest in good governance, is through our Financial Memorandum (FM), which regulates our financial relationship with universities. The FM requires the governing body of an institution to comply with the principles of good governance set out in the Scottish Code of Good Governance, but it does not specifically refer to the number of members on a governing body, or make any specific requirement about the number.
In the Scottish Code of Good HE Governance, Main Principle 10 states:

‘The governing body shall have a clear majority of independent members, defined as both external and independent of the Institution. A governing body of no more than 25 members represents a benchmark of good practice.’

We understand that, as a consequence of the Bill’s proposals, there might be an increase temporarily in the number of board members, which may take the number over 25 members. There is a review of the Code planned for 2016-17 by a representative sector group and our assumption is that it will incorporate any changes to governance brought about by the final legislation, and that there will be a period of transition.

We will seek to work closely with the sector group on the changes to the Code and I can confirm that, in terms of our FM with universities, during the transitional phase, we will not require any institution to remove existing members of its governing body and that there will be no sanction if the membership of the governing body exceeds 25 as a result of the legislation. Our primary concern is that independent (lay) members remain clearly in the majority on the governing body.

I hope that you find this response helpful. If you need any further information, please do not hesitate to contact me.

Yours sincerely

Laurence Howells
Chief Executive
Higher Education Governance (Scotland) Bill: The Cabinet Secretary for Education and Lifelong Learning (Angela Constance) moved S4M-15304—That the Parliament agrees to the general principles of the Higher Education Governance (Scotland) Bill.

After debate, the motion was agreed to ((DT) by division: For 84, Against 20, Abstentions 0).
Higher Education Governance (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Elaine Smith): Good afternoon. The first item of business this afternoon is a debate on motion S4M-15304, in the name of Angela Constance, on the Higher Education Governance (Scotland) Bill.

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): I am delighted to open the debate. I start by thanking the Education and Culture Committee for its stage 1 report, and also the Finance Committee and the Delegated Powers and Law Reform Committee for their contributions to the lead committee’s work.

I want to do three things in my opening remarks—first, to emphasise why the Scottish Government believes that the Higher Education Governance (Scotland) Bill will enable more modern, inclusive and transparent governance in our higher education institutions; secondly, to highlight the constructive engagement that we have had with stakeholders; and finally, to provide a summary of the amendments that we intend to lodge at stage 2 should Parliament vote for the bill to pass stage 1.

I consider the bill to be focused and discrete, with provisions that are informed by the review of higher education governance that was chaired by Professor Ferdinand von Prondzynski, whose report was published in 2012. Ministers commissioned that report to obtain evidence on how higher education governance could be refined as we move further into the 21st century.

Higher education institutions are autonomous—I am crystal clear on that. However, in tough economic times, the Scottish Government has again identified in its draft budget more than £1 billion of investment in our higher education sector, which will be provided next year. As part of the return on that investment, we expect institutions to adhere to the highest standards of governance.

Our higher education institutions are a great source of pride to Scotland and enjoy a worldwide reputation for excellent teaching and research. However, like any other group of high-performing organisations, they are capable of change and improvement. I want our institutions to embrace the changes that the bill will introduce. At its heart, the bill is about ensuring that all voices on campus are heard and empowered to contribute to decision making.
Jim Eadie (Edinburgh Southern) (SNP): I welcome the thrust of the bill, which seeks to make our universities’ governance arrangements more inclusive and accountable. The cabinet secretary will be aware of the evidence that was given by Tim O’Shea, who stated:

“the success of UK universities in comparison with universities in other parts of Europe is put down to our autonomy and our ability to operate.”—[Official Report, Education and Culture Committee, 6 October 2015; c 25.]

What further assurances can she provide that the wide scope of the proposed secondary legislative powers will not undermine the independence of our world-leading universities?

Angela Constance: As I have said to people repeatedly, our universities are and will remain autonomous. There is nothing in the bill as introduced, nor will there be anything in the bill after stage 2, that will advance ministerial control in any way. As I proceed with my opening remarks, I hope to outline fully to the Parliament how the Government will remove or reduce any regulatory powers that are deemed to be no longer necessary.

As is noted in the Education and Culture Committee’s stage 1 report, the bill

“contains relatively few provisions but has generated … considerable … comment”.

Our response to that has been to listen to those who support the bill and those who do not. I am grateful to all stakeholders for the views that they have offered and their participation in the meetings and workshops that we have hosted.

I welcome the committee’s support for the bill’s general principles. On Monday, I wrote to the committee to respond to its report and to set out the Scottish Government’s full analysis of any risk that the bill could present to the status of our higher education institutions as private not-for-profit bodies, as classified by the Office for National Statistics. The Scottish Government does not hold the view that the bill adds to any existing risk of reclassification of HEIs as public bodies.

Liz Smith (Mid Scotland and Fife) (Con): Will the cabinet secretary tell us where the mathematics or arithmetic is to back up that point?

Angela Constance: We can all have a good, robust debate about mathematics. I could take issue with some of the arithmetic and the evidence that was presented to the committee. If we look at the evidence from Universities Scotland and the action that it called for to reassure it that nothing in the bill will increase the risk of ONS reclassification, we find that—importantly—the Government is responding to those requests for reassurance, even though we do not think that reassurance is required. We are taking clear action to ensure that the sector can go forward collegiately and as one where possible.

In line with the substantive view that the Office of the Scottish Charity Regulator offered, the Scottish Government does not believe that the charitable status of Scotland’s HEIs is in any way jeopardised. However, we have considered whether amending the bill at stage 2 would assist in addressing concerns that stakeholders have expressed. I will summarise our plans for potential stage 2 Government amendments in a moment, but I will repeat what the Scottish Government has made clear on many occasions: reclassification of Scottish HEIs is an outcome that we would never want.

I turn to planning for stage 2. Although the Scottish Government is clear in its view that the bill does not advance any risk of reclassification by the ONS, I will lodge amendments to remove sections 8 and 13 of the bill, which give ministers the power to make regulations to alter provisions on the composition of governing bodies and academic boards.

The Scottish Government intends to lodge a stage 2 amendment to replace section 1 with full provision for a model for the operation of elected chairs.

Chic Brodie (South Scotland) (SNP): Will the cabinet secretary take an intervention?

Angela Constance: Perhaps I will if there is time later, Mr Brodie. I am keen to make more progress.

In summary, we will require HEIs to advertise those positions. Interested applicants will be selected for an interview on the basis of their ability to carry out the duties that are associated with leading a modern Scottish HEI. If successful at an interview process that is managed by a nomination committee, which will feature staff and student representatives, candidates would then participate in an election, in which all staff and students in an institution would be able to vote.

I can confirm that plans for elected chairs, who will be the senior lay members of all governing bodies and are often called senior governors or vice conveners at present, will result in no alteration of the statutory underpinning of existing rectors in our ancient universities. As is the case now, the way in which rectors dovetail with the new elected senior governors will be a matter for each autonomous institution.

We plan to lodge an amendment concerning the remuneration of chairs, which will alter section 2 to provide only that HEIs must offer reasonable remuneration to an elected chair in connection with carrying out that role, on request by the chair. On balance, I do not consider that retention of a
power for ministers to set levels of remuneration or to delegate that role to other persons is necessary.

Having scrutinised all the evidence provided by the committee and stakeholders on the composition of governing bodies, I intend to lodge an amendment to remove the obligation for HEIs to have two alumni on each governing body. That will assist institutions to accommodate staff, students and trade union members more easily on bodies on which the maximum number of members is set at 25 in the Scottish code of good higher education governance.

I am minded to lodge an amendment to remove section 9, which will mean that HEIs need not be obliged to limit the number on their academic boards or senates to 120. To ensure that institutions with larger academic boards have a fair representation of students, without being obliged to ensure that 10 per cent of the body comprises elected students, the Scottish Government favours a ceiling of 30 elected student members.

We have taken careful note of all the evidence that has been presented on academic freedom. In light of that, we are considering the final form of the relevant provisions. I have been struck by the importance of ensuring that academic freedom cannot be cited as a cover for any views that are offensive or, indeed, criminal.

All those potential amendments have been influenced by dialogue with stakeholders. Although stakeholders will be familiar with them, not all will support each proposed amendment. However, I am confident that broad support for a number of them will be evident.

In drawing to a close, I emphasise three key points. The Scottish Government values on equal terms Scotland’s higher education institutions, the staff who work in them and the students who attend them. I believe that this modest and focused bill can enable more modern, transparent and inclusive governance practice. I have been listening and I will continue to do so. I want to work with our universities in partnership in the years ahead.

I move,

That the Parliament agrees to the general principles of the Higher Education Governance (Scotland) Bill.

The Deputy Presiding Officer: I call Stewart Maxwell to speak on behalf of the Education and Culture Committee.

14:11

Stewart Maxwell (West Scotland) (SNP): There is a strong consensus that our higher education institutions should uphold the highest standards of governance. However, there are differences of opinion about the Scottish Government’s role, about current standards of governance in the sector and about some of the measures that are proposed in the bill.

As we are aware from the debate that was held in the chamber during our stage 1 scrutiny, there has been extensive discussion of an issue that is not even mentioned in the bill—namely, the possible risk of our universities being reclassified. According to many voices, higher education governance is in a good state. Certainly, universities were keen to point out the link between their international success and their existing governance arrangements, while highlighting their continuing work to make further improvements.

Neither the review that led to the bill, which Ferdinand von Prondzynski chaired, nor the cabinet secretary provided specific examples of deficiencies in the sector. Even some unions—the strongest proponents of change—acknowledged that the bill would not be starting from a position of real weakness. For example, the University and College Union Scotland said:

“No one is questioning that Scottish universities are good—they are good.”

Crucially, however, it added:

“What we are saying is that they could be so much better if staff, students and trade unions were fully involved in how they operate.”—[Official Report, Education and Culture Committee, 6 October 2015; c 11.]

That appears to us to be the nub of the bill. Will it help to make a good system even better? Will it help to reduce the risk of some of the poor instances of governance that were highlighted to us recurring?

Overall—with the exception of two members—the committee supported the bill’s general principles of strengthening governance in higher education. However, we were clear that the Scottish Government needed to provide further information on various issues to fully inform the debate. That demand reflected the fact that much of the bill’s detail was still under active consideration when we published our report.

I thank the Scottish Government for responding to our report in good time for the debate. It is clear from that response that, should the bill progress to stage 2, there will be a significant number of amendments for us to consider. Many of the proposed changes reflect the recommendations from our stage 1 report, and it is welcome that the Scottish Government has responded positively to our concerns.

The Scottish Government has taken into account our view that it should have provided more justification for some of the provisions contained in the bill. For example, we queried the
rationale for universities’ academic boards being limited to 120 members. The Scottish Government’s response says that it engaged with Professor von Prondzynski during stage 1 and subsequently came to the view that it might be better to remove the cap.

The Scottish Government has clarified another key provision of the bill, which is that the Scottish ministers are to determine a process by which institutions appoint the chairing member of their governing bodies. Our report expressed support for measures that could increase the pool of suitable candidates for the post of chair. We also agreed that openness, transparency and consistency in the appointment process are desirable.

However, we noted a lack of detail on how the chair is to be appointed, so I welcome the fact that the Scottish Government’s response provides more information on the steps involved. On the specific issue of possible remuneration for governing body chairs, I appreciate the fact that the Scottish Government has responded to our concerns by flagging up relevant amendments for stage 2.

We said that the role of rector—a historic and often high-profile figure in Scotland’s ancient universities—should be clarified. If there are to be elected chairs and elected rectors, there should be no ambiguity about their respective roles, and both figures should be able to work together for the good of the institution.

Chic Brodie: Is it not conceivable that the rector, having been elected by the wider franchise, could take a co-chair’s role in looking at the policy of the university? The chair, who must be elected by the court, would then be responsible for chairing items of operational performance. Would that be a suitable way to achieve the objectives of widening the franchise, making sure that the rector is where he or she should be and allowing the elected chair of the court to participate fully?

Stewart Maxwell: That is one of the possible models that could arise from the Scottish Government’s suggestions and the work that the Government and the sector will take on. Given that I am speaking as convener of the committee, I will not give a view on whether that model should be chosen. I will say only that there should be flexibility across the sector to allow it to figure out the best way of going forward along with the Government in subsequent discussions. I note that there will be amendments in this area and that the Scottish Government’s view is that it will be up to institutions to ensure that rectors and elected chairs work effectively together.

The bill proposes the inclusion of new members on the governing bodies of institutions, including trade union representatives. Higher education institutions stressed that union representatives on governing bodies should be there in a representative capacity for all staff, to avoid the possible accusation of a conflict of interest.

We were not persuaded by such arguments and we noted that all members of a governing body must act in its best interest. We also agreed with the principle that a diverse group of people should be included on the governing body and recognised that the bill’s proposals would make governance more inclusive. However, we recognised that such changes would not in and of themselves guarantee improved governance.

HEIs were concerned about how they would accommodate the changes to governing body membership, given that such bodies are not supposed to have more than 25 members. Concerns about changes to the governing body were just one of the reasons that the Royal Conservatoire of Scotland cited in its recent letter to the Scottish Government to ask to be excluded from the bill. I am sure that we would all very much welcome the cabinet secretary’s views on that request.

I would like to know whether institutions are likely to be reassured by the Scottish Government’s suggestion that governing bodies are not now to include two graduate members. That did not seem to be a major concern in our evidence taking. They might be more comforted by the Scottish Further and Higher Education Funding Council’s response to our report, which in summary said that it would not be concerned by a short-term increase in governing-body membership.

I have already touched on reclassification. There is no specific reference to Scottish HEIs being included in the relevant work that the ONS is carrying out. Nonetheless, we appreciate that reclassification would be in no one’s interest and recommended that all reasonable measures be taken to minimise any risk of it occurring.

In part, the HE sector’s concerns stem from the sections of the bill that would give the Scottish ministers the power to make regulations about governing bodies and academic boards. We therefore welcome the cabinet secretary’s commitment to amend or remove sections 8 and 13.

However, despite what the cabinet secretary said a moment ago, I remain disappointed that the Scottish Government has still not adequately addressed our request for further information on academic freedom and specifically on students’ freedom. I expect a response to the committee on that issue as soon as possible.
A key consideration when scrutinising any bill is the improvement that it is likely to deliver. Such a judgment may be particularly difficult with this bill, as separate efforts by HEIs are also under way to improve governance. We therefore asked the cabinet secretary how she would evaluate the bill’s success and were pleased when she confirmed that the sector would play a role in monitoring the bill’s impact. We expect that to be a fully inclusive exercise that involves all the relevant bodies in the higher education community. That would be consistent with the bill’s aims and would encourage everyone to continue to focus on improving our already world-class higher education sector.

14:19

Iain Gray (East Lothian) (Lab): It seems to me that we have debated the bill and its measures a number of times, so it is quite hard to believe that we are just at the stage 1 debate. Nonetheless, that is the case, and there is therefore some value in turning back to the bill’s first principles and to why, throughout the process, Labour has taken the position that it has taken.

We support democratic and transparent governance in our higher education institutions. It is our view that, as they are the recipients of more than £1 billion of public funding every year and are central to the future of Scotland, it is reasonable that we ensure that their governance is modern, transparent and fit for purpose.

We also support trade union and student representation on the council. That should be no surprise: we are the Labour Party and of course we support trade union representation. We have never accepted the argument mounted by some that trade union representatives on a body such as the council will face conflicts of interests and sometimes difficult situations when they are part of making collective decisions that those who they represent might find hard to understand. Those of us who have been trade union activists in other lives know that wherever trade unions have representation that is the sort of difficulty and contradiction that representatives have to deal with every day.

As a principle, we support the autonomy and academic freedom of our universities. Over centuries that has been one of their greatest strengths and it must be preserved.

Finally, we have been at pains to be clear that we do not support measures that pose a risk to the fiscal basis of the higher education sector through jeopardising either the institutions’ charitable status or their ONS classification.

Underpinning all that is our acceptance that the legislation is needed, largely because, we would argue, the voluntary code has failed. There has been a serious question around transparency of governance in the sector over recent years, which is perhaps most dramatically characterised by pay settlements for senior staff and particular principals. Although some have argued that the voluntary code developed by the principal of one of our universities would be enough, we are not convinced, because the voluntary code is in place but the transparency is not.

The University and College Union Scotland, in the helpful briefing that it provided for today’s debate, points out that after the voluntary code was put in place, it submitted freedom of information requests to try to ascertain how principals’ pay had been determined in remuneration committees. Only a handful of the 19 higher education institutions in Scottish were willing to provide that information, and many of those that were provided it in a form so redacted as to be completely useless. Therefore it is not the case that the voluntary code is enough.

Given that we are at stage 1 of the bill, we are entitled to consider the bill as introduced. Although we support the principle of the bill, we have been very clear that the bill as introduced fails on many counts. It fails to describe in detail the process of the election of chairs—a measure that we support—and includes sweeping discretionary ministerial powers that could be used to change the governance of higher education institutions in the future without reference to Parliament. The bill veers into areas that seem to us to be completely unnecessary, such as the size of the academic court, and it has ignored the historical position of rectors.

Jim Eadie: The member will be aware that the University of Edinburgh has very strong and inclusive governance arrangements, which include the election of the rector by both students and staff. Does he agree that the bill provides an opportunity to roll out that exemplar of good practice across our higher education institutions?

Iain Gray: In light of the amendments that the Cabinet Secretary for Education and Lifelong Learning has promised to lodge, the bill may at least recognise the strength of the model that is already in place in Edinburgh.

After many months of what the education secretary called “constructive engagement”, which was really much angst, she has finally explained to us how she intends to improve the bill. She says that she will do that by removing sections 8 and 13, which contain discretionary ministerial powers; detailing the elections and removing discretionary powers in that respect—that is all helpful in terms of the ONS point; and removing the cap on the size of the academic court. She also says that she recognises, and will ensure that the bill does not in
any way inadvertently end, the system of rectors in the ancients where it exists.

Of course, not all of that has been done with good grace. The education secretary continues to argue that there is no ONS reclassification risk. As I have pointed out before, that is not good enough. We have been here before: we were promised that the ONS issue with colleges would be resolved. However, it never has been, and as a result colleges have had to resort to arm’s-length trust funds, which is an extremely unsatisfactory position. I would argue that all that angst has been unnecessary and all those things could have been avoided if only the bill had been properly drafted in the first instance.

From the word go, the education secretary said that ministers have no desire to use discretionary powers to change the governance of institutions in the future. That begs the question as to why they were in the bill in the first place. The truth is that we—not us in particular, but the sector itself—have lost a lot of time over the bill. That time would have been better spent on what the sector does best, which is to educate our young people, carry out world-class research and make an enormous contribution to our economy. The process has been far more of a diversion than it would have been had the bill been delivered properly.

This evening we will give the bill the nod because we support the principle of it, but we will also be shaking our heads at the incompetent shambles of its handling.

14:26

Liz Smith (Mid Scotland and Fife) (Con): When the bill was first mooted, the Scottish Government made it very clear that its only intention was to make some minor amendments to allow greater transparency when it came to the governance and management of universities and their accountability for large sums of public money. That public money sits alongside lots of other income streams and lines of accountability about which there seem to be no concerns in relation to university governance.

Something very different has transpired, as is clearly set out in the Education and Culture Committee’s report and as the convener set out in his speech. Notwithstanding the strong support from the UCU and the NUS, the bill met with an exceptionally hostile reaction within the university sector, which is a sector that in my opinion has always bent over backwards to work with the Government. The committee’s report states that the bill also met with a hostile reaction from groups such as the Scottish Council for Development and Industry and the Institute of Directors, and from many in civic Scotland.

There are several reasons for that reaction, but, as the committee’s report makes clear, one of the most important is the stark lack of good-quality data and analysis to demonstrate why the Scottish Government considered the bill necessary and its failure to provide bona fide evidence to support the key assertions in the bill. Education and Culture Committee members castigated the Scottish Government no fewer than six times for that lack of evidence and the lack of clarity in the proposals. Therefore, for many people the main issue remains the utter failure to demonstrate that there is a problem with the existing system of governance that somehow acts to the detriment of higher education.

Jim Eadie: Will the member take an intervention?

Liz Smith: I will not, if the member does not mind.

It became increasingly evident that there was some seriously flawed thinking in the bill when it came to the question of ministerial powers, ONS reclassification and democratic accountability in governance. The whole sector, including the unions, was crystal clear that several key aspects of the bill, most of which related to sections 8 and 13, would change the very nature of our higher education institutions, specifically by increasing ministerial powers and making universities public sector bodies. The Scottish Government denied that that was its intention but that was indeed the interpretation of the wording in the bill.

Universities Scotland had, and still has, substantive reasons for being concerned about the prospect of ONS reclassification of universities. When the Government persisted in its claims that reclassification presented zero additional risk, there was no detailed independent advice—and there still is none. Indeed, there were no estimates of the costs that universities might face—

John Mason (Glasgow Shettleston) (SNP): Will the member give way?

Liz Smith: If the member does not mind, I will not as I am very short of time.

That crucial point was very clearly expressed by Alastair Sim, Professor Anton Muscatelli and Garry Coutts at the Finance Committee. We do not have that information.

Another crucial point relates to the section whose wording expressly gives ministers the power to amend universities’ constitutions by altering the composition of their governing bodies—

The Deputy Presiding Officer: Ms Smith, can I stop you for just a second? I am afraid that we had a slight problem with the clock, so please do not think that you are at 10 minutes. I have a little bit
of extra time in hand. It is your choice how to proceed.

Liz Smith: I will take 20 minutes, Presiding Officer, if you so wish. [Laughter.] How long do I have?

The Deputy Presiding Officer: I can give you another two or three minutes.

Liz Smith: Thank you very much.

The third issue, which is crucial, is about governance and democratic accountability. Some commentators seem to argue that the universities criticise the relevant part of the bill because they cannot see beyond their ivory towers and are choosing to hide behind the convenient protection of autonomy because they do not want any change. Nothing could be further from the truth.

Indeed, universities have gone to great lengths to demonstrate why the bill would actually diminish rather than enhance democratic accountability, and to argue for the benefits of the code, which was designed by all stakeholders. They have explained to the Scottish Government many times why the crucial trust between a chair and the board might be compromised by the system of elected chairs that the Government is proposing. They ask why on earth a Government would want to legislate on the size of academic boards and the definition of academic freedom. They ask why there is a complete lack of clarity about how the post of rector fits into the new proposals. They ask about the nonsensical commitments to the stipulations about the size of governing bodies, which would mean that certain posts, which are elected by staff, would disappear. They have asked the Government to address concerns about whether a good range of candidates will come forward, given the experiences that have been flagged up by the NUS. Finally, they have asked, yet again, the Scottish Government to answer—with evidence—the Education and Culture Committee’s 17 concerns. To date, there has been an entirely unsatisfactory response. Indeed, with regard to the question about maintaining the strong link between chair and board, the Scottish Government woefully admits that it has “not undertaken specific research in this area”, and it seems that the Scottish Government thought to consult Ferdinand von Prondzynski on the academic boards only after the bill had been published and the stage 1 evidence sessions had taken place.

Jim Eadie: Will the member give way?

Liz Smith: I am in my last minute.

Governance arrangements that minimise the likelihood of serious conflict in the governing body are those that are most likely to promote good governance. The bill, however, does not do that.

There are some who believe that the bill as introduced would pave the way for a sector that would be bound by a new and, in their eyes, better approach to governance, making the 19 higher education institutions much more uniform in their structures, much easier to control and therefore better able to deliver best value for students and staff. However, the evidence for that is simply not there, which is why there is such strong public outcry at what the bill could do—wittingly or unwittingly—to one of the jewels in the crown of Scottish life. The bill could undermine the very foundations and principles on which the sector has survived and thrived for hundreds of years. On that basis, we cannot support it at stage 1.

14:32

George Adam (Paisley) (SNP): I welcome this stage 1 debate although, like Iain Gray, I feel as if we have had this debate already on a number of occasions.

I want to raise a couple of issues. The first is that the Scottish Government is clear that our successful and internationally renowned universities are, and will remain, autonomous bodies. That is only right; the important point for me is how we can help them to grow to become even better than they are at the moment.

I do not think that the Scottish Government is being unreasonable when it asks for the very highest standards of governance, considering that it invests more than £1 billion every year in the sector. It is only right that it would expect those high standards—surely that is not too much to ask.

I could stop at that, Presiding Officer—some in the chamber of might think that that is a good idea—but I will not, as I have much more to say.

Many who provided evidence to the committee agreed that the debate and the bill are about ensuring that our universities continue to succeed. Stewart Maxwell, the convener of the committee, has already quoted Mary Senior, of UCU Scotland, but I think that it is a very important quote. She said:

“No one is questioning that Scottish universities are good—they are good. What we are saying is that they could be so much better if staff, students and trade unions were fully involved in how they operate.”—[Official Report, Education and Culture Committee, 6 October 2015; c 11.]

That shows the enthusiasm for the bill that exists in the sector, and the enthusiasm of the sector to work to make the bill even better. We also heard from Professor Von Prondzynski, the principal and vice-chancellor of Robert Gordon University. He said:
“Universities are autonomous bodies, and should be. But their autonomy should not shield them from legitimate expectations that they engage with staff, students and external partners, or from the need to behave in an accountable manner.”

Those quotes explain the position perfectly. Here are two individuals who work in different parts of the sector, both coming to the conclusion that we must move forward. We cannot allow these world-renowned universities to be left behind. The world continues to spin, time moves on and we all need to move forward and progress.

That brings me to the ONS question. In all honesty, I believe that the argument has been used in order to keep us from talking about the many positives of the bill. That in no way means that I take the threat of ONS reclassification lightly, and nor does the Scottish Government, which has stated continually that it does not believe that the bill would lead to reclassification and that, if universities were to be reclassified, it would do all in its power to fight against that. I agree with the cabinet secretary, who states in her letter of 11 January to the committee that “the Scottish Government concluded that the Bill did not propose any additional risk of re-classification, with specific reference to these secondary indicators of control ... we do not agree with the conclusions reached in the advice provided by Anderson Strathern on what is primarily a matter of statistical classification. However, we have taken careful note of all evidence shared with both the Finance Committee and the Education and Culture Committee. In light of this, I plan to lodge a number of Scottish Government amendments at Stage 2 of the Bill’s consideration. A number of these are relevant to the points made in the Committee’s Stage 1 report. Specifically, the Scottish Government will consider removal of sections 8 and 13 in the Bill.”

That is welcome, because it gives us the opportunity to discuss the important parts of the bill. Too much time has been spent on what could have happened or should have happened—

Sandra White (Glasgow Kelvin) (SNP): George Adam has mentioned the amendments that will be lodged at stage 2. Will they be effective in the case of the Royal Conservatoire of Scotland and Glasgow School of Art, which have made representations to the committee?

George Adam: I remember their evidence well. I will need to wait and see what is proposed at stage 2 in order to discuss where we might go with that.

A lot of our discussions have been about what might have happened, could have happened or should have happened with the Higher Education Governance (Scotland) Bill, and we have not said enough about what it actually delivers. It will deliver a democratic structure of accountability for all our institutions, whether they are relatively new institutions or one of the ancient establishments. It will bring all their governance structures into the modern era. There is not only a need for accountability for the money invested by the taxpayer, but a need for a more diverse governance model.

That for me is the prize. We can make a difference and move our institutions forwards, away from what appears to be a Victorian gentlemen’s club. The bill gives us an opportunity to take our successful universities and not only make them more transparent but ensure that they are fit for purpose in the current century. I hope that we can all agree that the bill is a starting point for the future of our higher education sector, and I encourage my fellow MSPs to work together to make that vision a workable reality.

14:37

Cara Hilton (Dunfermline) (Lab): I am pleased to follow George Adam. I think that that was the first time that he did not mention Paisley in a speech—very novel. It is pleasing, too, to have an opportunity to speak in today’s debate.

Our universities make an outstanding contribution to the academic, economic, social and cultural life of our country, and Scottish Labour welcomes their continued success in the face of budget pressures, in attracting high-quality staff and students from right across the world and producing groundbreaking research. We also value the vital role that our universities play in the economy by employing more than 42,000 people and supporting more than 144,000 jobs across Scotland.

However, there is no doubt that our higher education institutions could benefit from being a lot more open and accountable. Although universities rightly value their academic freedom, which must be protected, that does not exempt them from the need to be governed properly and run effectively. The bill provides real opportunities to address the shortfalls in university governance.

Liz Smith: Universities Scotland is adamant that there are about 500 lines of accountability with bodies other than the Scottish Government. None of them seems to have any problem with that. What is Cara Hilton’s comment?

Cara Hilton: If Liz Smith waits until I am further into my speech, she will hear why I think that the issue needs to be addressed. She should just be a wee bit patient.

I welcome the measures in the bill to improve accountability and transparency in decision-making structures, which will give staff, students and trade unions a real voice and a real say in the future of the universities in which they learn, teach and work.
It is only right that public institutions that receive many millions of pounds from the taxpayer are run openly, democratically and transparently. When we consider some of the issues that have hit the headlines in recent months and years—notably universities’ investment decisions, job losses and senior management pay—we get a flavour of why more democracy and transparency are so important. I have no doubt that governing boards would make better decisions if they better reflected the student and staff body, so the proposed changes are welcome. However, we can do more to make university governance better and more representative and inclusive.

In its briefing for the debate, NUS Scotland highlights the fact that although women make up more than half the student population, only a third of governing board members are women. I would like to see the bill go further by introducing quotas on university boards in order to ensure fair representation. That was recommended in the 2012 review—not including that measure in the bill would be a missed opportunity.

Iain Gray highlighted senior management pay. Although I hope that that issue will come under much greater scrutiny with student and trade union involvement on governing bodies, that alone is not enough to tackle the unreasonable pay increases in the sector. Research by NUS Scotland found that 88 individuals at Scottish universities earn more than the First Minister and that only one principal earns less than £140,000 a year. It cannot be right that university principals on six-figure salaries are taking huge pay increases of up to 13 per cent, along with expenses allowances that are often worth tens of thousands of pounds, while their staff are told year in and year out to accept pay increases that are below inflation and represent real-terms pay cuts.

Iain Gray also highlighted the secrecy that surrounds such pay decisions. That secrecy cannot be right, either. The University and College Union highlighted in its briefing that more than two thirds of higher education institutions failed to respond to its FOI request on the rationale behind those out-of-touch pay rises for university principals.

Given that every year more than a billion pounds of public money—quite rightly—goes to support our universities, it is only right that there should be public scrutiny of the excessive wages that many people at the top in our universities receive while staff at the lower end of the scale struggle to get by. I hope that we can look at strengthening the bill at stage 2—or at least produce guidance—to ensure fairness in pay structures.

The bill is not perfect by any stretch of the imagination, and its limitations have been raised by members today and in our previous debates, but it is a welcome step forward. It provides an opportunity to make university governance better, so I am pleased that the cabinet secretary and the Scottish Government have listened to Scottish Labour and others’ concerns about the more controversial aspects, such as the election of chairs and ministerial powers. There are issues in relation to Office of National Statistics classification that I hope can be resolved before the bill is passed. I also hope that we will see progress on gender balance and fair pay, and that we can work together to ensure the best possible outcomes for staff and students and for the higher education sector.

14:42

Clare Adamson (Central Scotland) (SNP): As a member of the Education and Culture Committee at the start of the process who left some months ago, I was glad to see in the stage 1 report and the Government’s response to it the progress that has been made, which displays an open and inclusive process in which stakeholders have been able to make their concerns known and their voices heard throughout. That reflects a collegiate approach to where the bill will go as it progresses through stages 2 and 3.

The process began with the commissioning of Professor von Prondzynski’s review, which was published in January 2012. We have had one quotation from the professor: I want to share another. In March 2015, he said:

“None of this is about government control. None of our recommendations, and indeed none of the proposed elements of the government’s planned legislation, would give any power to ministers to interfere in the running of institutions. Indeed the government has made it clear that it has no wish to exercise any such power.”

It is an important principle to have been established as we progress the bill that the academic freedom of the universities and the higher education institutions will not be compromised by the proposed governance changes.

Nonetheless, we have to make progress: this is the 21st century. I agree with some of Cara Hilton’s comments about diversity in our universities. The UCU, in its briefing for the debate, states that it can

"welcome the decision of the Education and Culture Committee to support the bill at stage one."

It goes on to state:

"The measures contained in this bill, particularly those to introduce elected chairs of governing bodies and for trade union and students nominees to have places on the governing body are areas where UCU have campaigned over many years. We are also supportive of the limited
proposal to extend the 2005 definition of academic freedom contained in the bill.”

Such a response to the proposals and the stage 1 report shows that we are moving in the right direction in respect of diversity, transparency and openness in the governance of our HE bodies.

The question has been asked, and there has been some comment, about why the legislation is necessary and whether such a way forward should have been adopted at any stage. NUS Scotland, in its briefing for the debate—which has already been quoted—states:

“We believe that an inclusive governing body can only be so when it accurately represents the community it governs and as the HE Governance bill currently stands it would fall short of its desired benefits. NUS Scotland would welcome the opportunity to work with MSPs to explore amendments at Stage 2 concerning fairer representation on governing bodies.”

I am not sure that such amendments are needed at stage 2, because there will be a lot of guidance associated with the bill that could address some of the equalities issues in the way that NUS Scotland is looking for. However, that comment from the NUS shows that our universities do not reflect our communities or their own university communities.

The move to include trade unions and students in the governance and on the academic boards of the universities is a positive measure for the future. I hope that the guidance and the organisations that will contribute and nominate people to the boards and governing bodies will consider all aspects of diversity and equality.

14:47

Liam McArthur (Orkney Islands) (LD): I start by echoing the convener’s thanks to all those who helped the committee in its stage 1 scrutiny of the bill.

Earlier this week we debated how to create a world-class education system. I said then that there are examples of where that is already the case in Scotland, and nowhere is it more evident than in our university sector, where the figures—I believe—speak for themselves. I accept that constant improvement is essential, and that adapting to changing needs, expectations and circumstances is the only way of safeguarding and enhancing standards and reputation. However, we have something to celebrate, value and respect—unfortunately the bill fails to do any of those things.

George Adam’s description of our universities as being akin to “a Victorian gentlemen’s club” is one that the sector would fiercely reject, and one that I think Mr Adam may come to regret. One of the sector’s great strengths is its differences—from the variety of its institutions to the diversity of staff and student populations. The governance of our universities should reflect that diversity. Given

the significant public investment, Parliament and Government also have a legitimate interest in that respect. However, ministers—indeed, all politicians—should tread with care. In the bill, sadly, care has been abandoned as ministers appear to be intent on putting into statute things that do not belong there.

The Government is legislating not because it should or because it needs to, but because it can. Time and again—as the convener fairly pointed out—our committee sought evidence for why ministers are acting in that way. What governance models elsewhere in the world are we trying to emulate, and how can we be assured that ministerial meddling will make things better and not worse? None of those questions has been answered to any satisfactory extent.

On the up side, I note that the education secretary is minded to remove from the bill sections 8 and 13, which run the risk of leading to universities being reclassified. Whatever the scale of that risk, ministers should not, given the serious financial consequences for our HE sector, be playing a game of chicken with the ONS. Likewise, it is good to see that the Government does not now plan to legislate on the size of university senates—but why on earth was it meddling there in the first place?

As for elected chairs of governing bodies, the plans that have been arrived at look like the dog’s breakfast that many people predicted. During stage 1 evidence taking, the committee convener expressed his curiosity about how the Government would “square the circle” of having elected chairs on the one hand and the minister’s commitment not to diminish the role of rectors on the other hand. Frankly, that still looks pretty circley to me. We now have a mix of legislating for what happens already with a potential arm-wrestle between chairs and rectors over whose democratic mandate is bigger.

Even on union and student representation, given the funding levers that are at ministers’ disposal and the direction in which the existing code of governance is going, it is not clear why legislation is seen as being essential.

The Minister for Learning, Science and Scotland’s Languages (Dr Alasdair Allan): Will Liam McArthur concede that, even under the bill, the roles of rectors and chairs in terms of their day-to-day functions are so distinctive that any confusion about their jobs is unlikely?

Liam McArthur: As I said, what we appear to have in the bill is a pre-selection process for candidates that is very much in line with what happens already. It is not clear how that will expand the pool of applicants, although I am fairly sure that students and, indeed, unions will be alive
to the opportunities there. In terms of the role of rector, it is not clear to me how to settle the question who has the democratic mandate to do what in our universities.

The staff, students, management and stakeholders of the Royal Conservatoire of Scotland have all made clear their outright opposition to what is proposed. They have demanded, as others have mentioned, an exemption from the legislation, which the Glasgow School of Art, Scotland’s Rural College and even the University of the Highlands and Islands might feel should apply to them as well.

All the evidence shows that, as Jim Eadie rightly indicated earlier, the best-performing universities worldwide are those that exercise the greatest responsible autonomy. They should be accountable and transparent and they should reflect the diversity of the communities that they serve. How that is best achieved, though, should not be second-guessed by ministers, using the blunt instrument of legislation. Previously, Stewart Maxwell described the bill as “thin”; the minister plans to make it thinner still. Given the complete absence of any evidence to justify the bill and the potential for it to harm rather than help our world-class universities, I respectfully suggest that it is time to make the bill vanish completely.

14:52

Joan McAlpine (South Scotland) (SNP): I start by declaring an interest in that my former partner and the father of my children is a former rector of the University of Glasgow.

I welcome the chance to speak in today’s debate and I am proud of Scotland’s reputation for providing accessible world-leading education. I support the bill’s aim to make our institutions more effective, inclusive and transparent by creating a framework to strengthen the practice of governance in universities and other higher education institutions. It seems to me that the bill seeks to safeguard the autonomy of institutions while ensuring their accountability to the key stakeholders whom they serve—namely, their staff and students. I am pleased to note that the bill has the backing of the Scottish Trades Union Congress, the UCU and the student body NUS Scotland.

Although it is right that we also listen to the concerns of those at the top of our HE institutions, it is vital that we assert from the outset the point that self-regulation has been shown to be somewhat insufficient on many issues. I take this opportunity to highlight a fundamental aspect of accountability: the question of remuneration. I previously raised that issue when I was a member of the Education and Culture Committee in 2013 and we were taking evidence on the draft Scottish code for good higher education governance. At that time I asked the vice-convener of the court of the University of Edinburgh—Professor Stuart Munro—whether it was right that a university principal was paid more than the Prime Minister, and he told us that he had “concerns” about having to cap the principal’s salary at £227,000.

Professor Munro was one of three senior university figures to address the committee at that evidence session. He made the comments about the principal’s salary after that group had caused controversy by suggesting that it was unnecessary to introduce legislation to cap tuition fees at £9,000 for rest-of-UK students. At that meeting, Professor Munro said that he did not think that he could recruit a principal on the same salary as the Prime Minister’s. Perhaps that reflects his view of the Prime Minister; I do not know. He might well be right, but the point is that such things must be discussed in an accountable manner.

Introducing trade union members and students on to the boards will allow more discussion of how decisions on salaries are reached. The salary of £227,000 for the principal of the University of Edinburgh is not the highest salary: Scotland's Rural College has been mentioned: its principal's salary is £290,000, which many people will blink at.

Mary Scanlon (Highlands and Islands) (Con): Many of our senior national health service managers and other people in councils and right across the public sector are paid more than the Prime Minister. Should we bring in legislation to make sure that that does not happen?

Joan McAlpine: Such decisions should be reached using democratic accountability. Maybe the amounts are correct, but the way in which they are decided on leaves a lot of people questioning them. The measures that the bill will put in place will allow university governing bodies to come to those decisions in a more democratic manner. I am not saying that the people who work at the top of universities and colleges should not be well paid: far from it. They make a vital contribution to the success of our universities.

I want to say a word about rectors. At the beginning of my speech, I declared an interest. I have watched closely the job of a working rector. We have seen the recent example of Mr Iain Macwhirter, the journalist, at the University of Edinburgh, which includes staff in electing the rector. Mr Macwhirter did a fantastic job in campaigning for staff and students on issues including fees.

Mr Patrick Kane, who was Lord Rector of the University of Glasgow in the 1990s, has recently written about his experiences as rector. When he
campaigned for the post, he did so on the basis of, for example, introducing crèches and more access for disabled people, which was quite revolutionary at the time. He and other working rectors have showed how important it is to hear other voices and have other influences.

Patrick Kane wrote recently that the bill contains the spirit of rectorship and the democratic nature of Scottish education going back many centuries, and that it avoids universities becoming “Knowledge plc” rather than being communities.

14:58

John Mason (Glasgow Shettleston) (SNP): I will speak mainly from the angle of the Finance Committee, which spent a fair bit of time looking at the bill and its financial memorandum, and came up with a fairly serious report as a result.

A number of points of a financial nature arose. First, there was the cost of the universities amending their governing instruments, which was not included in the financial memorandum; I refer to page 14 of our report. Secondly, there was the cost of recruiting a chair, on which a commitment was given to undertake further work; we welcomed that on page 16 of our report. There was also the time commitment, and therefore the costs, for a chair. There seemed to be quite a lot of disparity between the Government’s view of that time commitment and the view of the HEIs; that is referred to on page 17 of our report and, again, further work was promised on that.

However, the main concerns and focus for the Finance Committee were on two other areas—the potential loss of charitable status and the potential reclassification of HEIs as public sector bodies by the ONS. One of the main challenges for me and the Finance Committee was the question whether those financial concerns were real or whether they were a just a smokescreen and had been raised because people did not want there to be any interference or for the universities to have any accountability to wider society.

On the charity point, OSCR had responded by the time that the committee met, which seemed to offer the reassurance that there would not be a problem with charitable status. We concluded:

“The Committee notes that a number of concerns were raised in written evidence in relation to HEIs’ charitable status but is satisfied that these were addressed in OSCR’s submission to the lead committee.”

Given that the charitable status point seemed to have been overstated, the question for us was whether the ONS reclassification point had also been overstated. There was a lot of talk of ministerial control, but to me the control seemed to be in the wider sense, in that Government would be able to set out the structure. Of course, the reality is that Governments set out the structures of and get involved in many organisations, be they commercial businesses, third sector organisations or whatever. That is a crucial difference between such Government involvement and ministers actually appointing Mr or Ms Jones to a university board.

The question of what the ONS thought was a difficult one for the committee, because the ONS does not give its opinion on something before it happens. Even asking the ONS for its opinion, as some suggested that we should do, could have raised the risk of reclassification by putting doubt in its mind. It would be like going to the police when one has been driving at 32mph and asking whether one has broken the speed limit.

There were also vague suggestions that the Government or the Parliament should take advice from hypothetical experts on reclassification. Liz Smith mentioned that today, although she would not take an intervention from me on that point.

Liz Smith: Will the member take an intervention?

John Mason: Let me finish. It also became apparent that even the ONS considered the Scottish Government to be one of the main experts in the field. At the time, no one could suggest to the committee an expert to whom we should speak. Liz Smith will tell us who the expert is.

Liz Smith: I will be very happy to do that, but first I praise John Mason for his assiduous scrutiny in the Finance Committee, to which I listened carefully. When it comes to the debate that he has just outlined and the challenges of who is right and who is not right, would it not have been helpful if the Government could have come forward with evidence that backed up or contradicted the Anderson Strathern evidence on university reclassification? Does he accept that?

John Mason: That is the point that I was trying to make. I have not heard who these great experts in the field are, who know more about the issue than the Scottish Government does. The bill team was good at explaining the issue and we took detailed evidence on how much study had taken place. It had met the ONS frequently, which is unusual—I suspect that not many Joe Bloggs meet the ONS regularly. It went through how the ONS thinks and how it looks at things. It seems to me that the Government has a pretty good understanding of the issue. The point is that the Government does not want reclassification. It has not given its opinion on something before it happens. Even asking the ONS for its opinion, as some suggested that we should do, could have raised the risk of reclassification by putting doubt in its mind. It would be like going to the police when one has been driving at 32mph and asking whether one has broken the speed limit.

Another key point that came up was that if reclassification was proposed, it would not have immediate effect. There would be an opportunity
to look at the proposal and change how things were being done. The committee noted, in its conclusion on this topic on pages 9 and 10 of its report, the financial concerns regarding reclassification and the Government’s clear desire not to see reclassification happen.

At paragraph 47 of its report, the committee made the point that primary legislation is seen to be safer than legislating by statutory instrument, because it gives less scope to ministers. I am happy to welcome the minister’s proposal. On behalf of the Delegated Powers and Law Reform Committee, on which I also sit, I say that we are happy that more is in primary legislation and less will be in secondary legislation.

15:04

Hanzala Malik (Glasgow) (Lab): It is an honour to speak in the debate on the Higher Education Governance (Scotland) Bill. There is widespread agreement in the chamber and outside it that Scotland’s universities punch above their weight. They make a major contribution to our economy directly and indirectly, through the human capital that they help to develop.

I believe that every organisation, however successful, needs to review and reform to ensure that it is fit for purpose. Organisations in the higher education sector are no different. We need to get a balance between reforms that increase transparency and accountability, and the maintaining of autonomy. Now that the Scottish Government’s proposed changes at stage 2 will remove the ministerial powers and, therefore, the threat of ONS reclassification of universities that would lead to the loss of funding routes, I do not feel that the Higher Education Governance (Scotland) Bill compromises academic autonomy.

With regard to financial decisions, higher education institutions that receive higher amounts of public funds should be open to greater financial accountability. Their lack of accountability has been symbolised by reports of high levels of pay and bonuses for principals, while junior staff suffer low pay and insecurity as a result of zero-hours contracts. Zero-hours contracts are the scourge of our industry just now. Education in particular suffers very badly in that area because of its importance not only to our country and to our academic teaching staff, but, more important, to the future students who will play the role of running our country and taking us forward.

I do not believe that the voluntary introduction of a governance review will automatically provide the required transparency and accountability. As each university is different, we should not assume that one size fits all. We need reforms that provide basic and clear governance structures that have the means to balance and correct themselves. The election of chairs could probably help to provide checks and balances, as would greater diversity on ruling bodies. I welcome the Government’s clarification of the process of election of chairs and its preservation of the post of rector for our older institutions.

As with any stage 1 debate, we can agree on general principles, but the details are important. There is still more clarification and tidying up to be done before we can be clear that the Higher Education Governance (Scotland) Bill will deliver the desired improvements in accountability.

Many of us have felt, particularly since the Government first interfered—if I can use that phrase—in the education sector, that many principals and boards had been gagged. They had been put in a position where they could not speak freely. They felt trapped, and they felt that they were unable to speak up about the realities of the conditions that faced them. The fact that the powers of hiring and firing lay with the minister meant that the universities, in particular, were in danger of losing the possibility of some very highly educated academics joining them, because they felt insecure about what was happening.

However, the new Government proposals are very welcome. We are going in the right direction, although a lot of work is still to be done. We must ensure that we are in a position to demonstrate to our universities that we will take their interests to heart and deliver a workable programme for them so that they are able to be transparent and to be more accountable than they are now.

15:09

Colin Beattie (Midlothian North and Musselburgh) (SNP): The SNP’s continuous commitment to higher education has proven to be extremely effective in advancing Scotland’s students and society as a whole. For example, in the past four years the Scottish Government has invested more than £4 billion in the higher education sector. That, in part, has resulted in Scotland’s students having the lowest average student loan debt in the United Kingdom, which ensures that university education is based on the ability to learn rather than the ability to pay.

The Scottish Government’s commitment to higher education has strengthened the reputation of our universities. Government funding has helped to sustain Scotland’s position of having five universities in the top 200 in the world—the University of Edinburgh is number 24. In academic research, Scotland’s universities are outperforming those in the rest of the United Kingdom and competing globally at an extremely high level.
Given that taxpayers invest £1 billion every year in higher education, and given that enrolment and acceptance of young Scottish adults in our universities is on the rise, with university applications up 50 per cent since 2006, the SNP expects the highest standards of governance in our institutions.

Although the previous agenda has proved successful in many ways, there is more that we can do for our youth, through the Higher Education Governance (Scotland) Bill. The Scottish code of good higher education governance has failed to address the need for a modern, democratic culture in governing bodies, transparency in who makes decisions and how, and fair representation and diversity in governance. The SNP argues that further legislation is required, to provide for places on governing bodies for staff and student unions and to support the principle of elected chairs.

The bill will give students and staff a genuine, democratic say in the leadership of universities. It will provide the transparency that our higher education system requires if it is to maintain its global reputation and its effectiveness for our youth.

Professor von Prondzynski’s “Report of the Review of Higher Education Governance in Scotland”, which was published in 2012, made recommendations about how to strengthen Scotland’s higher education system. As principal and vice-chancellor of Robert Gordon University in Aberdeen, Professor von Prondzynski has a considerable understanding of the needs of students and faculty in higher education institutions. He began his review by addressing the necessity for autonomy, democracy and transparency in higher education, all of which I support.

Liam McArthur: Colin Beattie will be aware that there are questions about the evidence base on which Professor von Prondzynski drew and about the international comparators to which we aspire. Neither Professor von Prondzynski nor the minister has been able to point to those international comparators and give us confidence that what we aspire to do has been working in practice—and working better than the approach that is currently in place.

Colin Beattie: Professor von Prondzynski’s reputation in the sphere of higher education is pretty much undoubted and I accept his approach and his review.

The bill used Professor von Prondzynski’s review as an outline and has the goal of modernising and strengthening governance, to instil principles of democracy and accountability in the higher education sector.

First, a greater democratic culture in governing bodies will be emphasised, by giving staff and students the right to elect a single voice to advocate for their interests on the governing body. That feature complements the democratic approach that the bill proposes. Secondly, greater transparency in decision making will be ensured through greater involvement of stakeholders across the board.

Finally, the bill will establish fair representation and diversity in governing bodies. According to research that NUS Scotland conducted in 2014, university courts are overwhelmingly dominated by men. The code of good governance recommended change in that regard, but there is no evidence that such changes have been made. Professor von Prondzynski’s report made clear that quotas should be utilised to enhance diversity, given that women make up the majority of our university population but are exceedingly underrepresented in governing bodies.

Despite the benefits that the bill will bring, many people have criticised it, citing the potential for reclassification and other governance issues that might arise. Some critics go as far as to suggest that the bill will remove rectors and sever the historic ties between students and their primary advocate by eliminating the rector’s right to chair court. Autonomy in Scotland’s higher education institutions is a central factor in the success of our universities and should be explicit in the bill.

The bill’s principal objective is to establish a high-level framework in Scottish universities that is more modern, inclusive and transparent. Such an approach is in line with the SNP’s commitment to a fairer Scotland and it is right to take it.

15:15

Mary Scanlon (Highlands and Islands) (Con): Like you, Presiding Officer, since 1999 I have scrutinised many bills that have gone through the Parliament on issues such as free personal care, mental health, antisocial behaviour and the Office of the Scottish Charity Regulator, and we are now looking at the attainment gap in schools. Although, across the parties, members have always had differing views on how to address the problems, at least we have all known what the problems were. However, the bill that we are debating today is a solution looking for a problem. It is not just me saying that; that is acknowledged by the principal and vice-chancellor of the University of Edinburgh, who has stated:

“We do not think that there has been any compelling explanation of what the problem is that needs to be fixed here.”

Of course, our universities should uphold the highest standards of accountability, transparency
and inclusion in their governance, which at all times should be “modern, inclusive and accountable”. If the Scottish universities were the worst offenders on those issues and principles, and if nothing was happening to address the deficit, I could and probably would support legislation. However, the code of governance that was introduced in the summer of 2013, which is due to be reviewed this year, has brought changes. According to a Universities Scotland briefing paper, the code has delivered 350 positive changes to enhance higher education governance and it has been adopted by the Scottish funding council as encapsulating the standards of good higher education governance.

The following are examples of that progress. Every Scottish higher education institution has staff and students as full members of court, with 72 per cent of institutions having two or more student governors and 94 per cent having two or more staff governors. Despite what was said by Colin Beattie, for whom I have great respect as I sit on two committees with him, on the issue of gender balance, eight out of the past 10 appointments to the role of chair have been women, which brings the percentage of women chairs to 44 per cent. Many organisations—including the Scottish Parliament—would be very proud to have a 44 per cent representation of women, so I do not think that we should be too critical of that. Even the cabinet secretary has acknowledged:

“The premise that I am starting from is not the premise that there is a deficit. I am not for a minute saying that governance in our university sector is poor.”—[Official Report, Education and Culture Committee, 10 November 2015; c 4.]

which gives rise to the question: why are we here, and why do we have the legislation?

The Education and Culture Committee’s report is 27 pages long compared to a bill of 10 pages, but that was necessary because of the lack of clarity and reasoning on so many issues. There are 17 separate issues on which the committee reasonably sought more information. I read the Scottish Government’s response three times—I think that it is trying to be helpful, but I am not sure—and the promise of further amendments to address the concerns is, in my book, a worrying feature given what we have seen so far.

Today, the SNP back benchers would have been wise to listen to the SNP convener of the committee instead of being fed the party line. I commend Jim Eadie and Sandra White, who have obviously talked to the University of Edinburgh and the Royal Conservatoire of Scotland and are listening to the reasonable concerns of those higher education institutions.

Jim Eadie: Will the member take an intervention?

Mary Scanlon: I am sorry, but I have less than 30 seconds left.

Stewart Maxwell has to be commended for steering the committee this far. His speech was a fair reflection of the cross-party concerns about the bill. Chic Brodie has to be commended, too, because his scrutiny of the bill has been first class. In raising concerns on behalf of the committee today, Stewart Maxwell acknowledged that the cabinet secretary had not provided specific examples of deficiencies in the sector, that much of the detail of the bill is still under consideration and that amendments are needed.

It is quite incredible that every higher education institution in Scotland is against the bill. We should be listening more carefully to what they are saying.

15:20

Mark Griffin (Central Scotland) (Lab): As Iain Gray set out at the start of the debate, Labour supports the general principles of the bill, which has the laudable aim of ensuring that the structure of our universities’ governance continues to develop and adapt in order to maintain our first-class university provision, in which we should all take pride.

From the start of this process, we have offered support for the inclusion of trade union reps and student reps on governing bodies as part of the democratisation of higher education institutions’ governing bodies. That support has been echoed by all my Labour colleagues who have spoken in the debate.

All parties today have recognised the importance of the higher education sector to Scotland’s economy and our international standing, so we should listen to the sector’s views and respond to its concerns.

The value that we place on our higher education system in Scotland is part of our cultural DNA. We extol the virtues of our historic and new universities and talk with great pride about their contribution to the world, not just in educating our own young people but in undertaking world-leading research and dynamic entrepreneurship that is recognised across the globe. We must view the bill in that context—a context that has seen our universities continue to succeed in an increasingly competitive international climate.

We must be cautious that in attempting to improve the way that our esteemed institutions operate we avoid diminishing or restricting the freedom that has contributed to that success. Scottish higher education has a long history of having staff and students at the heart of its
mechanisms of governance. Staff and students are full members of a university’s governing body—the court—at every institution. According to Universities Scotland, 94 per cent of institutions have two or more staff members of court and 72 per cent have two or more student members of court. We all recognise that we should seek to build on that record, rather than suggest that there is a problem with university governance that requires a top-down overhaul.

A significant number of unintended consequences and unanswered questions were identified in respect of the bill, many of which were highlighted through the committee’s scrutiny and the evidence with which we were provided.

In committee, I said that ONS reclassification was quickly becoming a key issue for the Scottish Government, which was understandable, given its potential impact on the sector. It is rare in politics these days for someone to take responsibility and stand up and say that they have got it wrong, so I commend the cabinet secretary for doing just that today.

Universities Scotland suggested that if the ONS was to reclassify Scotland’s universities as public bodies, the sector would stand to lose competitively-won income from charities and philanthropy and income earned by the universities through entrepreneurial activity and that institutions’ capacity to borrow would be reduced or removed. That could have cost the sector well in excess of £400 million per year at a conservative estimate.

I note from the Scottish Government’s response that it is minded to lodge amendments at stage 2 to remove sections 8 and 13 of the bill. In addition, the Government is minded to lodge amendments that would reduce or remove the need for regulation-making powers in sections 1 and 2 of the bill. It is fundamental to the sector that the Scottish Government takes that action. The consequences of it not doing so are stark.

Removing sections 8 and 13 of the bill would alleviate another concern that was raised in committee and by the sector more widely. The fact that the Scottish Government had to state explicitly that it did not want to advance ministerial control over universities is an indication of the worry and concern in the sector about the direction that the bill was taking. Our universities must remain independent and autonomous bodies, free from ministerial pressure and control.

I am also pleased about the amendment that is to remove sections 8 and 13 of the bill. A number of speakers have talked about the situations in universities throughout Scotland, particularly the University of Edinburgh.

Liz Smith: Why does Mark Griffin feel that legislation is necessary on academic boards?

Mark Griffin: I do not feel that the cap of 120 members was necessary. I am glad that the Government proposes to remove that measure. However, we should still have the option of legislating for the composition of student membership of academic boards. We would support that.

We offer our conditional support for the bill at this stage. The amendments that the Scottish Government has suggested that it will lodge appear at first glance to address the issues that were raised in committee. The cabinet secretary is to be commended for the changes that she has made after listening to the committee, the sector and members. The repercussions of the Government getting it wrong on higher education governance are so serious that we will watch carefully and scrutinise every amendment at stage 2. We will ensure that our world-class universities are supported with the freedom and framework to continue to provide a first-class education and the ground-breaking research for which they are well known.

15:27

Angela Constance: I thank members for their contributions to the debate. I am glad that, in considered tones, Mark Griffin and Cara Hilton, although outlining their views on the bill and how it could be improved further, acknowledged that the Government had listened and worked with a range of stakeholders.

Cara Hilton spoke about the importance of improving the representation of women within governing bodies. Mary Scanlon pointed to the progress that has recently been made. It is important that we maintain the progress that has been made in a wide range of areas of governance following the von Prondzynski review and the introduction of the code of good governance.

The principles of the bill are consistent with where modern Scotland sits. Stewart Maxwell and others recognised that the fundamental question is how the bill helps to make a good system better. In the modern day, most people accept that the greater participation of a greater diversity of people who have a shared interest in improving the institution and acting in the interests of staff and students improves governance.

Participation and diversity improve governance, and the Government has set participation as one of its three key priorities. We have set ourselves the challenge of finding ways of handing decision-making powers back to communities.
Liz Smith: Will the cabinet secretary give way?

Angela Constance: Not just now.

Therefore, the bill is very much aligned with our commitment to a fairer, more inclusive Scotland that better reflects the diversity of our society and where everyone gets to have their say. The bill aims to reflect those priorities and values by strengthening community—in this case, staff and students—participation in decision making. At its heart, the bill seeks to enable every voice on campus to be heard, and I hope that that is a principle that we can all endorse.

Sandra White: The cabinet secretary mentioned staff and students being involved in decision making. That already happens at the Royal Conservatoire. I hope that she will reflect on that and perhaps answer the questions that Stewart Maxwell asked about the Royal Conservatoire. Can she give us an update on the position with the conservatoire and the Glasgow School of Art?

Angela Constance: The reality is that the vast majority of institutions in Scotland already have five of the statutory members that are required. If the bill proceeds from stage 1 to stage 2 and is amended in the way that is proposed, it will specify that there must be seven statutory members on a board. Most institutions, including the Royal Conservatoire, are well on their way to achieving that.

I want to say a little about ONS reclassification, although it is an issue on which we have been around the houses in a variety of forums. I want to strike a consensual note. John Mason helpfully identified that it is an issue of statistical classification rather than, say, a legal issue. Like John Mason, Liz Smith and Universities Scotland—although I admit that they see things from a different side of the mountain—both acknowledge that, in many ways, this is a matter of interpretation and difference of opinion. I and the Government have our opinion.

In its briefing, Universities Scotland says that it believes that the only complete way to address the risk of reclassification is to remove sections 8 and 13 from the bill. I have made my intentions on the matter crystal clear, although there has never been anything in the bill that would advance ministerial control.

Liz Smith: I made it very clear that we are delighted that those two sections, which should never have been in the bill in the first place, are to be removed, but why is it that the Government can seek information and evidence about ONS reclassification for other projects in Scotland, such as the Aberdeen western peripheral route—I think that it sought such evidence on four different occasions—yet we have not had definitive information in this case?

Angela Constance: I beg to differ on that point. I have written to the respective committees twice on this matter and have identified that not just education officials but officials across Government have looked very closely at the European system of accounts 2010 and the indicators of Government control and, in our view, there has never been anything in the bill that increased the risk of ONS reclassification, because there has never been anything in the bill that required autonomous institutions to ask for Government permission to conduct their day-to-day business.

I turn to the issue of elected rectors, which Stewart Maxwell, Chic Brodie, Jim Eadie and Liam McArthur all raised. I emphasise that the Government is not altering rectors’ existing statutory rights. Rectors have the right to chair court, should they choose to exercise it. As things stand, it is up to the ancient universities how they dovetail the role of senior governor, who will now be elected, with that of an elected rector. It is extremely important to remember that the role of rector and that of an elected chair, who is otherwise known as the senior governor, are very distinct. Rectors are part of the democratic tradition of our ancient universities. They have an ambassadorial role, they raise the profile of the sector and they have the role of representing staff and students. The role of rector is a very influential one. The role of elected chair or senior governor or vice-convener is to oversee governance. They are steeped in day-to-day governance. Crucially, they appraise the principal’s performance, and they often serve on many of the working groups and sub-committees. Theirs is a very powerful role, so it is correct that they are elected in a transparent and modern process.

Liam McArthur: Will the cabinet secretary take an intervention?

Angela Constance: No. I am running out of time.

Elected chairs would allow all staff and students to choose the candidate who can lead the entire campus community in a common purpose, but they must also be equipped to perform the duties associated with a modern Scottish higher education institution. For that reason, there must be appropriate candidate selection.

I note what has been said about the link between the chair and the institution’s governing body. Other members have raised that issue. However, the selection phase should ensure that every electoral candidate has the necessary leadership skills and qualities. I very much note the representations and views of NUS Scotland and the UCU, which say that that should be about
ensuring capacity and skills, and it should not be used as a bar on suitable candidates.

The convener of the committee, Stewart Maxwell, raised a number of other issues. As time is short, I will write to him.

We continue to work through the issues around academic freedom. We removed the requirement to have alumni and graduate members on governing bodies. That was very much at the request of post-1992 institutions.

On the issue of evidence, the von Prondzynski review took evidence from a range of stakeholders at the United Kingdom and European levels and from Scotland.

With the best will in the world, I have to accept that, on some occasions, nothing will satisfy those who are determined to oppose the bill. Liam McArthur said that the Government is legislating because we can. I would not have invested the time, energy and engagement that are acknowledged in the briefings from the UCU, the NUS and Universities Scotland if I was merely going to rely on the size of my parliamentary group in comparison with his parliamentary group.

I hope that members can move forward and support this very important bill at stage 1.
Decision Time

17:01

The Presiding Officer (Tricia Marwick): The first question is, that motion S4M-15304, in the name of Angela Constance, on the Higher Education Governance (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, George (Paisley) (SNP)
Adamson, Clare (Mid Scotland and Fife) (SNP)
Alasdair, Christian (North East Scotland) (SNP)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Claire (Mid Scotland and Fife) (Lab)
Baxter, Jayne (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Bibby, Neil (West Scotland) (Lab)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (Mid Scotland and Fife) (SNP)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Dorrian, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Harvie, Patrick (Glasgow) (Green)
Hilton, Cara (Dunfermline) (Lab)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Martin, Paul (Glasgow Provan) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McDougall, Margaret (West Scotland) (Lab)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
McTaggart, Anne (Glasgow) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pearson, Graeme (South Scotland) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (Ind)
Yousaf, Humza (Glasgow) (SNP)

Against
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Frasier, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McGregor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

The Presiding Officer: The result of the division is: For 84, Against 20, Abstentions 0.

Motion agreed to,

That the Parliament agrees to the general principles of the Higher Education Governance (Scotland) Bill.
January 2015

Dear Convenor

HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL

The Education and Culture Committee took evidence from the Cabinet Secretary for Education and Lifelong Learning on the Higher Education Governance (Scotland) Bill on 10 November. During that session, additional information was requested by the Committee on a small number of specific issues. It was agreed that Scottish Government officials would write to Committee to provide the information requested.

With regard to ONS re-classification, during the 10 November Evidence Session, Committee asked that the Scottish Government’s full analysis of the risk of ONS re-classification posed by the Bill be published. This issue has been addressed in a separate, detailed response which was sent to you on 11 January.

In addition, Mark Griffin MSP asked for clarification of the Scottish Government assessment of the risk of ONS reclassification, with reference to evidence provided by Scottish Government officials during previous evidence sessions, stating that there appeared to be a ‘change in rhetoric’. For clarity on this point, the Scottish Government’s opinion (as set out at Committee on 10 November, and in the letter of 11 January) is that the Bill does not advance any existing risk of reclassification.

The Scottish Government agreed to examine the official report of the 10 November and previous Education and Culture and Finance Committee evidence sessions, and provide clarification where any seeming inconsistency in the use of language arises. We examined the official report in detail and identified one instance where a difference in the language used by officials appeared relevant.

During the 16 September Finance Committee evidence session, Stephen White said “The Scottish Government’s conclusion is that the risk that is posed by the bill does not advance beyond any risk that existed prior to it” (official report column 38-39). During the same session, Kerry Twyman said “In this case, we have decided that there is low risk and it is around factors that were already present in universities. In our belief, nothing that is being done will increase that risk”. (official report column 39).
On 6 October, during the Education and Culture Committee evidence session Stephen White said “I repeat what I said to the Finance Committee. The internal analysis concluded that the bill’s provisions complied with the indicators of control and that risk was not advanced by the bill. (official report column 41-42).

Please accept our apologies for the inadvertent use of imprecise language with regard to this matter. Although a reference is made to ‘low risk’, the second part of Ms Twyman’s comment clearly refers to the absence (in the view of the Scottish Government) of additional risk. The earlier reference to ‘low risk’ equates to the level of existing risk, without the Bill.

In respect of academic boards, the Committee asked that further information be provided on the supporting rationale for the requirement within the Bill that there should be a maximum of 120 members on academic boards, and evidence of the dysfunctionality of academic boards. The origins of both can be found in the Review of Higher Education Governance in Scotland, as such officials contacted Professor von Prondzynski, the chair of the Review, to seek his recollection of the Review Panel’s rationale behind the relevant recommendations.

As set out in the Cabinet Secretary’s letter to you of 11 January, the Scottish Government engaged with Professor von Prondzynski after the Stage 1 evidence session held on 10 November, in relation to the evidence supporting the recommendation that academic boards should comprise a maximum of 120 members. He noted that the Review Panel found that there were academic boards with so many members that meetings became hard to manage. Some Senate meetings struggled to hold quorate meetings due to their size.

Professor von Prondzynski confirmed that the Review Panel formed the view that some of these problems would be mitigated if academic boards were smaller, but also if they had an elected majority.

However, having given consideration to both this and the views of those who oppose this provision as set out in the evidence provided to the Committee detailing the substructures established in institutions which currently have academic boards exceeding the proposed cap, the Scottish Government intends to put forward an amendment at Stage 2 to remove this requirement (to abide by a cap of 120 members). While the Scottish Government is still of the view that each academic board needs to be of a manageable size and efficiently run, we are persuaded that, on occasion, this can be achieved by a larger academic board, particularly where the bodies have taken steps to make the larger academic boards more workable as is currently the case in the bodies whose academic boards exceed 120.

Furthermore, whilst gathering evidence for the Review, the Review Panel issued a consultation paper on a number of issues. In response to a question on how governing bodies could be improved the following responses were received:

A university Joint Union Liaison Committee (who asked to remain anonymous) indicated that, in their view, Senate is an important vehicle but membership of 750 makes it unwieldy and representation ineffective with meetings that are poorly attended.

A senate member from Glasgow University indicated that in their view Senate is probably too big stating “… at over 500 members, a Senate such as at Glasgow is more of a parliament than a governing body, and there would be a good case for considering a smaller body drawn from Senate, with as few as 50 or 60 members, and which could function as the academic governing body of the university”
With reference to academic freedom, officials agreed to investigate the construction of the standing definition in the Further and Higher Education (Scotland) Act 2005 Act and establish what consideration, if any, was given to the student side of the equation. That work is now complete and it appears that in the development of the provision for academic freedom in the 2005 Act the Government’s and the Parliament’s focus throughout the course of the Bill for that Act was exclusively on the academic staff.

The Further and Higher Education (Scotland) Bill, at introduction, did not contain any provision in relation to academic freedom and therefore there is no direct reference to this in the supporting documents. There is however a general reference to academic freedom at paragraph 27, of the Policy Memorandum which states:

“The Bill does not seek to alter the fundamental basis on which individual institutions are established. The legal framework in this area remains unchanged. It will continue to be the case that colleges and higher education institutions are independent organisations, responsible for making their own decisions about what activities they will and will not undertake, whose governing bodies are responsible for setting the direction for each institution and balancing the accountability of the institution to a range of funders and constituencies. Scottish Ministers believe that the independence of institutions has served Scotland well in terms of nurturing creativity, protecting academic freedom and allowing responsiveness to local needs”.

While academic freedom did not feature in the Bill at introduction, it was discussed during stage 1 evidence sessions on the Further and Higher Education (Scotland) Bill. Dr Hunter of AUT (now UCU), in his evidence, raised the benefit of extending the principle of academic freedom as widely as possible, however this appears only to be in terms of extension of the principle to institutions and individuals who were not, at that time, covered. In terms of individuals these were cited as “researchers and people in universities who are in support roles and are involved in teaching and research”.

In supplementary written evidence to the Enterprise and Culture Committee EIS stated “We welcome the proposal to extend academic freedom to FECs (further education colleges). However, we would need assurance that the academic freedom enjoyed by higher education academic staff is also extended to further education lecturers”. The stage 1 report recommended that amendments were brought forward to “ensure parity of treatment in relation to academic freedom between higher education and further education and the individuals employed therein”. The focus appears to have been extension of academic freedom provisions to institutions beyond the higher education institutions which were covered by the provisions of section 202 of the Education Reform Act 1988. There was no discussion of extension of the principle to students.

Academic freedom provisions were added to the Bill during stage 2 by non-government amendment. The focus of the provisions as then added was on the protection of the academic freedom of academic staff, and this remained the case at Stage 3 when the provisions on the topic were reworked by government amendment.

As set out in the Cabinet Secretary’s response to the stage 1 report, we do not consider that the same policy rationale exists for students in this context, as at its core the safeguard is about appointments and staff privileges in the context of their work for an HEI or college. That said, where, for example, PhD students are involved in carrying out teaching, they would benefit from the same protection in relation to their teaching activities.
We have also taken careful note of all of the evidence presented; in particular the importance of ensuring that academic freedom cannot be cited as a cover for airing views that are offensive to the extent that their promulgation means that an academic is no longer acting with the law. Academic freedom is not protected under the existing provision in section 26 of the Further and Higher Education (Scotland) Act 2005 if the person exercising their freedom is not acting within the law. As was stated by officials in evidence before the committee, other requirements of either civil or criminal law would prevail in such cases, and the provisions of the Bill do not change that. However, in light of all of the comments made, we are considering the final form of the relevant provisions in this area, with a view to putting forward an amendment at Stage 2.

In relation to academic freedom, Mrs Scanlan asked, during the evidence session on 10 November, about section 26(1) of the Counter-Terrorism and Security Act 2015. We should like to advise that the relevant provisions in that Act have been amended by the Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015 and the duty in section 26(1) to prevent people being drawn into terrorism does apply to Scottish higher education institutions.

Finally, in respect of the Scottish Governments response to the Universities Scotland letter of 29 October, officials agreed to share that response with Committee, that letter issued on 3 December and can be found at the Annex to this letter.

Yours sincerely

Laura Duffy
Higher Education and Science Division
Dear Alastair

Thank you for your letter of 29 October in response to my letter of 16 October regarding the Higher Education Governance (Scotland) Bill (“the Bill”). You asked for further information in respect of some of the issues addressed in my earlier letter and I have addressed these below.

**ONS Classification of Scottish HEIs**

With regard to Office for National Statistics (ONS) classification, you set out in your letter that the fullest articulation you have seen of the Scottish Government’s reasoning on ONS classification is the 5 October letter from the Cabinet Secretary for Education and Lifelong Learning to the Scottish Parliament Finance Committee, and indicated that you consider that the Scottish Government has not yet made an adequate assessment of the risk of ONS re-classification of HEI’s.

The letter of 5 October which you refer to is simply intended to provide a summary of the relevant Scottish Government analysis, as requested by Gavin Brown MSP during the 16 September Finance Committee evidence session on the Bill. During that session Mr Brown asked that the Scottish Government share some of their analysis of risk with regard to provisions in the Bill and potential ONS re-classification. Following on from the letter of 5 October, Finance Committee, in their report to the Education and Culture Committee, recommended the Scottish Government publish their full analysis in advance of the Parliament being asked to vote on the Bill at Stage 1. The Scottish Government has been clear that we will consider this recommendation alongside all other requests made by Committee.

Furthermore the Cabinet Secretary, during the Education and Culture Committee evidence session on 10 November on the Bill, noted that the Scottish Government will address this recommendation made by the Finance Committee. We will of course share that with the Education and Culture Committee and will be happy to also share that with you. I would hope that the points made in your latest letter would be addressed in that correspondence.
However, in advance of that, I would reiterate that the Scottish Government considers that it has assessed any risk thoroughly and remains of the view that the content of the Bill is compliant with all of the indicators of control, and that its provisions do not add to any risk of re-classification.

Charitable Status

As set out in my letter of 16 October, OSCR raised no concerns about the Bill’s provisions, as introduced, in their response to the call for evidence issued by the Education and Culture Committee. Their overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs. OSCR stated that “Our view is that the provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4) (b) of the 2005 Act.”

As you state OSCR also specifically address section 8 of the Bill rightly pointing out that they cannot make an assessment of the potential impact of section 8 in advance of regulations being made. I would reiterate that the powers in the Bill at section 8 are not unusual when legislation makes provision regarding the composition of a governing body and they were intended to allow some future proofing of the Bill so that small changes which might be established to be necessary could be done without the need for primary legislation. They are relatively limited in scope and, if used, would be required by Parliament to be in the spirit of the Act. That aside, as set out by the Cabinet Secretary on 10 November, I hope you will be reassured to note that the Scottish Government has committed to consider these powers further in light of stakeholder views on their potential impact on the risk of reclassification. While the Scottish Government may not share these views on the risks associated with section 8, we are committed to continuing to listen to the views of others. You will be aware that Sections 8 and 13 of the Bill were the subject of dialogue at the recent Bill Working Group meeting on 26 November, attended by Dan Wedgewood.

Charity Law: role of members: conflict of interests

I note your suggestion that there is an expression of the intention that all members of governing bodies are required to act in the best interests of the HEI; however as I have referred to previously and as you set out in full in your letter of 13 August 2015, this is an existing statutory requirement under section 66 of the Charities and Trustee Investment (Scotland) Act 2005 and as such it is not considered necessary to restate this within this Bill. It would be highly unusual to duplicate an existing statutory duty in new legislation as such practice could give rise to confusion about what provision applies. There is no doubt that section 66 will continue to apply to all HEIs. It is a matter for each governing body to ensure its members are aware of the statutory duties they are required to adhere to. This is also in accordance with Main principle 2 of the Scottish Code of Good HE Governance which requires that the governing body regularly review its policies relating to compliance with its statutory and other duties, including the defence of academic freedom, compliance with equality and diversity requirements and meeting the requirements of charity and company law, to ensure that they conform to good practice.
Governing Body Composition

As set out in my previous letter the Scottish Government has undertaken an analysis of the potential impact of the requirements of the Bill on the existing membership of the governing bodies of HEI’s. The governing instruments setting out the current composition of the governing bodies were examined and collated, an analysis was made of the potential impact of the statutory members required by section 4 of the Bill, and of where there existed alignment with current governing body composition and the Bill requirements.

This informed the development of section 4 of the Bill and thinking on appropriate periods of transition for this section. Main Principles 9 and 10 of the Code were also considered. From that analysis it was clear that there are some areas where the requirements of the bill align well with the existing composition of the governing bodies of HEIs and other areas which align less well. Using that analysis it was determined that it should be a matter for the governing body to determine how best to accommodate the new statutory members, over the period of transition for the Bill, which it is anticipated will be approximately 4 years following its enactment.

Costs to Institutions

As regards the estimation of the potential additional cost to institutions of the implementation of the Bill, this is a matter that Scottish Government will be happy to examine further as the Bill progresses through Parliamentary. In doing so we will consider all evidence provided to the Finance Committee in response to their call for evidence very carefully, as well any provided by you directly, should you wish to do so, and if considered necessary the Financial Memorandum to the Bill will be revised.

I hope you find this information helpful.

Yours sincerely

Laura Duffy
Higher Education and Science Division
Ms Laura Duffy  
Higher Education & Science Division  
Scottish Government  
Atlantic Quay  
150 Broomielaw  
GLASGOW  
G2 8LU  

29 October 2015  

Dear Laura,  

Higher Education Governance (Scotland) Bill  

Thank you for your letter of 16 October in response to mine of 13 August.  

There are some issues in that letter where Universities Scotland does not believe that the Scottish Government has yet made a full and evidence-based response to our concerns.  

Universities Scotland will welcome further constructive exploration with Scottish Government of ways of improving the Bill that respond to our concerns.  

ONS classification  

The fullest articulation we have seen of the Scottish Government’s reasoning is in the Cabinet Secretary’s letter of 5 October to the Scottish Parliament’s Finance Committee.  

In Universities Scotland’s view, supported by our legal advice, the Scottish Government has not yet made an adequate assessment of the risks of ONS reclassification of higher education institutions. The legal advice which we have shared with the Scottish Parliament states that:  

*Our advice is that the Bill, based on an assessment of the range of factors that ONS would consider as part of an assessment of the classification of HEIs, heightens the risk of HEIs being reclassified by the ONS as being within the General Government category. We think that, when considered cumulatively with other existing government controls over HEIs, the provisions in the Bill would take HEIs into “borderline” territory in terms of their current ONS classification, for the reasons set out in this note of advice.*
I attach that advice in full for your consideration. Universities Scotland has also had the benefit of further advice, having seen the rationale set out by the Scottish Government in their letter of 5 October, and this is reflected below.

In summary, reasons why the Scottish Government's analysis appears insufficient include:

- The Scottish Government’s approach to assessing the additional risk of ONS reclassification arising from the Bill appears to be based on the application of 8 indicators of control set out (a) to (h) of paragraph 2.38 of ESA 2010, which are indicators that ONS would use as the “main factors to consider in deciding whether a corporation is controlled by government” (see page 33, ESA 2010). In doing so, the Government has not made reference to the additional guidance on these “main factors” set out at paragraphs 20.309 of ESA 2010, nor has it noted that each classification will be “judged on its own merits and some of these indicators may not be relevant to the individual case” (paragraph 20.310, ESA 2010).

- The Scottish Government has placed weight on its application of some indicators in 2.38 of ESA 2010 that are not relevant to HEIs when assessing government control. However, recent correspondence with ONS suggests that any reconsideration of the current ONS classification of a non-profit institution (NPI), such as an HEI, should take into account the 5 indicators of control listed at (a) to (e) in paragraph 2.39 of ESA 2010 specifically provided for the consideration of NPIs, together with the relevant guidance in chapter 20 of ESA 2010 and in the Manual on Government Deficit and Debt.¹

- The Scottish Government’s risk assessment in relation to ONS reclassification appears, from the content of the letter dated 5 October 2015 from the Cabinet Secretary to the Convener of the Finance Committee, to have completely overlooked the 5 specific indicators of control for non-profit institutions (such as HEIs) contained in paragraph 2.39 of ESA 2010, as developed in paragraphs 20.13 to 20.16 of ESA 2010 and supplemented by the guidance in MGDD I.2.3 (paragraphs 15 to 20 – ‘Control of Non-Profit Institutions’ and ‘Control of educational units’).

   Consideration of these 5 indicators for NPIs has informed the external legal advice given to Universities Scotland (see attached external legal advice for details of the 5 indicators of control from ESA 2010 used for NPIs). However, no explanation has been provided in correspondence from the Scottish Government to either the Scottish Parliament or Universities Scotland as to why the Government considers that the specific indicators of control for NPIs in ESA 2010 and

¹ By email dated 30 September 2015 from ONS to US’s legal advisers, when asked whether ONS would only apply the specific NPI criteria at para 2.39 of ESA 2010 when making an assessment of whether an NPI fell within the ‘NPI within general government’ classification, or whether they would also apply the general criteria at para 2.38 of ESA 2010 to decide whether an NPI was controlled by government, ONS confirmed that: “for all NPIs, ONS would review their classification based on the NPI criteria in ESA 2010 paragraph 2.39 supplemented by Manual on Government Deficit and Debt guidance in Part I.2 ‘Criteria for classifying units to the general government sector’.”
the relevant guidance in the MGDD should not form the basis for the Scottish Government’s risk assessment in relation to the Bill and ONS reclassification.

• The Scottish Government’s risk assessment does not appear to have taken account of the Treasury’s guidance on sector classification. The MGDD and the Treasury guidance identify government powers in relation to the ‘enabling instruments’ or constitutions of bodies as being indicators of government control which may lead to institutions’ classification as government bodies. Ministers are clearly taking power over HEIs constitutions by creating powers which enable them to change the composition of governing bodies and academic boards; and to specify the means and duration of appointment of chairs of governing bodies and their remuneration.

• ESA 2010 states that, in relation to NPIs, a single indicator can be sufficient to establish control although, in most cases, a number of indicators will collectively indicate control (ESA 2010, paragraph 20.15). Overall, the Scottish Government’s assessment of the additional risk of ONS reclassification arising from the Bill, as set out in the 5 October letter, is not adequate. It understates the risk created by Ministers’ proposed powers over the composition of governing bodies and it has failed to take account of the existing controls on universities which represent a baseline level of risk prior to the introduction of the new Ministerial powers proposed in the Bill. The Bill effectively gives Ministers unlimited power to change the composition of governing bodies, which is highly likely to be seen as an indicator of control by ONS. The cumulative impact of the provisions in the Bill relating to appointments to HEIs, taken together with existing controls exercised by Ministers and the Scottish Funding Council over HEIs, underpins Universities Scotland’s view in relation to the additional risk posed by the Bill to the current classification of HEIs as Non-Profit Institutions Serving Households.

ONS remain committed to a review of universities’ classification in the first half of 2016.

I would be grateful if you could share with Universities Scotland the Scottish Government’s reasoned assessment of the evidence we have presented about the heightened risk of HEIs’ reclassification by the ONS.

Charitable status

OSCR have been clear that the exercise of the Ministerial powers proposed in the Bill could give rise to a risk to charitable status, on the basis that HEIs are subject to Ministerial powers of direction and control. OSCR’s stage 1 evidence submitted to the Scottish Parliament explicitly states that:

Section 8 of the Act gives Ministers the power to make regulations to modify the categories of membership set out in section 4 and the numbers in each category. Should such regulations be made when the Bill is enacted we would have to consider whether taken together with the existing provisions these amounted to ministerial control. Similarly, Section 20 of the Act gives Scottish Ministers wide power to make such further regulations ‘as they consider necessary or
expedient for the purposes of or in connection with this Act’. Should such regulations be made in respect of Part 1 of the Bill when enacted we would have to consider the impact of these measures with respect to ministerial control.

Charity law: role of members: conflicts of interest

We note the policy intention that all members of governing bodies should be required to act in the best interest of the HEI, as opposed to any constituency which nominated (or elected) them. We would welcome expression of this intention in the drafting of the Bill.

Governing body composition

Universities Scotland is disappointed that the Scottish Government has presented no evidence of analysis of the impact of the Bill on the composition of the governing body of individual institutions. We had expected to see analysis of how institutions could accommodate the membership proposed in section 4 of the Bill while complying with the Higher Education Governance Code’s requirements for a majority of independent members and a maximum membership of 25.

The fact is that, for the majority of institutions, this cannot be done unless existing members are removed. The members who would typically have to be removed to maintain an independent majority and a membership no higher than 25 would be staff representatives elected from categories not set out in the Bill (e.g. elected by the Senate or academic board), or members elected by all staff additional to two elected staff members prescribed in the Bill.

The impact of the Bill on institutions’ membership is set out in Annex A.

Some specific examples of this impact may be useful. For instance, Queen Margaret University has commented to Universities Scotland that:

Were the Bill to pass into legislation in its current form, the University Court would need to consider either increasing its total membership (in breach of the Scottish Code), or reviewing the other current categories of staff membership.

The University of St Andrews has noted that:

Our Court is limited by statute to 23. This includes 3 student representatives (4 if you count the Rector); 4 Assessors elected by the academic community; one Assessor elected by the non-academic staff; the Principal and Deputy Principal; and 12 non-executive members. To preserve a majority of non-executives whilst accommodating the requirements of the Bill, we would have to replace the Assessor directly elected by the entire non-academic staff of the University with one of Trade Union nominee. The other Trade Union nominee would have to replace either one of the student representatives or one of the elected Academic assessors.
Written submissions to the Education & Culture Committee made similar points, e.g.:

**University of Aberdeen**

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.

**Abertay University**

Abertay’s governing body already includes two members elected by, and from among, all academic staff and all support staff. If we were required to add two members nominated by academic and other unions, […] we would either have to remove positions currently held by independent members or other categories of member such as those nominated by Senate as we cannot increase the overall size of the current governing body, which is already a maximum of 25, in accordance with the Code. If existing staff members are to be replaced by union nominees it is hard to see how this increases accountability and inclusiveness when fewer than half of Abertay University’s staff members are members of recognised trade unions.

**University of Stirling**

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).

So the impact of the Bill, perversely, will be to reduce elected staff membership of a range of governing bodies.

**Costs to institutions**

Universities Scotland cannot accept the assertion that absorbing the costs of implementation of the Bill is ‘mainstream business’. As we made clear to the Finance Committee, Universities Scotland was disappointed that there was no consultation with the sector about the costs of implementation.
Evidence presented by institutions to the Finance Committee shows that, even without ONS reclassification, significant new costs would have to be absorbed by HEIs, with consequent opportunity costs for spending on educational, research or innovation initiatives. These include:

- Significant staff time, estimated at the equivalent of at least one full-time senior member of staff per HEI for a year, to implement changes required by the Bill. (HEIs have already devoted significant resources to implementing change required by the Code.)
- At least £16,000 – £26,000 a year for each HEI to remunerate the Chair of the governing body, or £275,000 – £460,000 per annum for the sector.
- Significant costs to establish and run additional electoral processes for members and Chairs of governing bodies: for instance the University of Dundee noted in evidence to the Finance Committee that electoral processes had a significant cost:
  - ‘A recent election at the University of Dundee for the post of Graduates’ Assessor on Court which was outsourced to the Electoral Reform Society cost £21,000’.
- Legal fees for changes to HEIs’ governing instruments, likely be a four-figure sum for each HEI.

**Conclusion**

Universities Scotland remains concerned that the Scottish Government has not made a sufficient appraisal of the risks, consequences and costs of this Bill. We look forward to further constructive exploration of how the Bill can be improved in a way that addresses our concerns.

You shared your letter with the Education & Culture Committee, and I am also sharing this further correspondence with them.

Yours sincerely,

Alastair Sim
Director
Annex A

Summary of the HE Governance Bill’s effects on the size and balance of governing bodies

Based on the composition of governing bodies as of September 2014:

- Eight HEIs would be pushed over the 25 member limit by implementing Section 4 of the Bill. (NB. includes Aberdeen, which already had >25)
- Nine HEIs would have to make changes to restore a lay member majority, following implementation of Section 4. If this were achieved simply by adding lay members, a further four HEIs would be pushed over the 25 member limit.
- Therefore, at least 12 HEIs would have to remove at least one current member of the governing body in order to maintain both a lay member majority and no more than 25 members.

Details below:

<table>
<thead>
<tr>
<th>Institution</th>
<th>Total Members</th>
<th>Additional Members needed for compliance</th>
<th>New percentage of lay members once additional members have been added</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Aberdeen</td>
<td>27</td>
<td>1 union rep 1 student rep</td>
<td>45</td>
</tr>
<tr>
<td>Abertay University</td>
<td>25</td>
<td>2 union reps 1 student rep 2 alumni reps.</td>
<td>60</td>
</tr>
<tr>
<td>Edinburgh Napier University</td>
<td>22</td>
<td>2 union reps 2 alumni reps</td>
<td>54</td>
</tr>
<tr>
<td>Heriot-Watt University</td>
<td>25</td>
<td>2 union reps</td>
<td>48</td>
</tr>
<tr>
<td>University of the Highlands and Islands</td>
<td>25</td>
<td>2 union reps 2 alumni reps</td>
<td>48</td>
</tr>
<tr>
<td>Royal Conservatoire of Scotland</td>
<td>21</td>
<td>1 student rep 2 union reps 2 alumni reps.</td>
<td>58</td>
</tr>
<tr>
<td>University of Stirling</td>
<td>24</td>
<td>2 union reps 1 alumni rep</td>
<td>48</td>
</tr>
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Our ref: A12439171
16 October 2015

Dear Alastair

Thank you for your email of 13 August to Rebekah Widdowfield regarding the Higher Education Governance (Scotland) Bill (“the Bill”). Firstly I would like to offer my sincere apologies for the delay in responding to you on this matter. As a wide range of issues were raised in your correspondence it has taken time to collate a response.

You asked a number of specific questions in respect of the Bill which I have addressed in turn below.

ONS Classification

What legal advice did Scottish Government take on the Bill’s potential impact on the ONS classification of higher education institutions?

What advice have Scottish Government taken directly from ONS about the potential impact of the Bill?

The Scottish Ministerial Code provides that Scottish Ministers may not reveal the source or content of any legal advice. However, we can confirm that, in respect of ONS classification, as explained by officials during the Finance Committee evidence session on 16 September, assessment of this risk was conducted prior to introduction of the Bill in June. Key to this assessment was the level of government control over higher education institutions (HEIs) activities, based on the Eurostat European System of Accounts published guidance on classification from 2010. The guidance has been examined carefully, with each of the indicators considered in turn and how they relate, or not, to the provisions in the Bill. It is the view of the Scottish Government that the content of the Bill is compliant with the indicators of control.

As was also set out by officials during the evidence session on 16 September, there have been no formal discussions with the Office for National Statistics in respect of the Bill.
Charity law: Charitable status of institutions

Have the Scottish Government taken advice from OSCR about the implications of the Bill for institutions’ charitable status?

If so, what advice was offered by OSCR?

The Scottish Government has not taken direct advice from the Office of the Scottish Charity Regulator (“OSCR”) about the implications of the Bill for the charitable status of HEIs. OSCR did however respond to the Consultation Paper on a Higher Education Governance Bill (“the Consultation”) raising no concerns about the Bill’s provisions as set out in the Consultation, stating that “…in our view they would not affect the constitutions of higher education institutions in ways that would give Ministers the power to direct or control these institutions’ activities.”

Further, OSCR raised no concerns about the Bill’s provisions, as introduced, in their response to the call for evidence issued by the Education and Culture Committee. In that response, OSCR set out its consideration of the proposals in the Bill and analysed how those proposals would work alongside the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). OSCR specifically considered the alignment of the proposals with section 7(4)(b) of the 2005 Act, which relates to Ministerial powers of direction and control over charities.

OSCR’s overall assessment was that the Bill as introduced would not pose a threat to the charitable status of HEIs. OSCR stated that “Our view is that the provisions do not form part of the constitutions of the chartered universities or designated institutions, and that ministerial control therefore does not fall to be considered in respect of these charities. In terms of the older universities where Part 1 would form part of their constitutions, our view is that when taken together these provisions in the Bill do not amount to the existence of Ministerial control in a way that would cause the older universities to breach section 7(4) (b) of the 2005 Act.”

Charity law: role of members

Have the Scottish Government taken advice from OSCR about the difficulties which nominated members may have in complying with the general duty on charity trustees and the requirements of the HE governance code?

If so, what advice was offered by OSCR?

What is the Scottish Government’s policy intention about the nomination of members of the governing body in the circumstances outlined above?

The Scottish Government has not taken direct advice from OSCR about any difficulties which nominated members may have in complying with the general duty on charity trustees and the requirements of the Scottish Code of Good Higher Education Governance (“the Code”). However, in their response to the call for evidence issued by the Education and Culture Committee, OSCR also considered how the proposals in the Bill would work alongside the 2005 Act given that members of HEI governing bodies are also charity trustees and, therefore, subject to duties under section 66 of the 2005 Act.
OSCR concluded that “it is not particularly unusual for charities to have charity trustees nominated by other bodies or groups” and, given the overall size and composition of governing bodies as provided for in the Bill, there is nothing to prevent any conflicts of interest which do arise from being dealt with in a way that enables members of governing bodies from meeting their duties as charity trustees.

Furthermore, as set out in the Policy Memorandum to the Bill and in line with the duties and responsibilities set out in section 66 of the 2005 Act, it is the Scottish Government’s intention that governing body members, as charity trustees and given the aspects of the Code that you quote in your question, will be required to act in the best interest of the HEI, as opposed to any constituency which nominated them.

Charity law: Skills and expertise

*What analysis have Scottish Government made of the specific impact of the Bill on each institution’s ability to meet the requirements of the code set out above?*

*What policy consideration did Scottish Government give to whether the provisions in the Bill were consistent with the requirements on institutions under the code?*

The Scottish Government reviewed the provisions of the Bill in the context of Main Principles 9 and 10 of the Code, against the existing composition of HEI governing bodies. The Scottish Government acknowledges the requirements placed on HEI governing bodies by the Code and their interaction with the requirements of the Bill; while the requirements of the Bill stipulate a number of required positions within the membership, they do not prescribe the full membership of the governing body, that remains a matter for each individual HEI. It will therefore be a matter for each institution to determine how the requirements of the both the Code and the Bill are best accommodated in their HEI.

It is the view of the Scottish Government, that the members required by the Bill could be accommodated by all 18 institutions to which the Bill applies.

*How to deal with conflict between the requirements proposed in the Bill and the requirements of institutions’ own governing documents?*

*What consideration the SG gave to the extent to which:*

- the composition of each governing body already reflected the various groups who would have a right to appoint members of that governing body under S4; and
- the introduction of members in implementation of section 4 would put governing bodies in breach of the Code unless they removed members appointed under their existing statutes.

As set out above, the Scottish Government reviewed the requirements of the Bill in the context of the Code and the existing composition of the governing bodies and academic boards of HEIs, as set out in their governance instruments. It was evident from that analysis that the majority of HEIs already include staff and student members and that there are no existing positions specifically allocated to members of trades unions.

The Scottish Government is aware that in order for each institution to meet with both the requirement for new members as set out in the Bill and Main Principle 10 of the Code (which requires that “The governing body shall have a clear majority of independent members, defined as both external and independent of the Institution. A governing body of no more
than 25 members represents a benchmark of good practice"), HEIs may need to review the overall composition of their governing body in order to accommodate new statutory members. We address the fact that governance instruments may have to be updated below.

More generally, what consideration has the Scottish Government given to the conflict between the provisions of the Bill and the requirements on each institution under the various governance instruments outlined above?

**How does the Scottish Government believe these conflicts can be resolved if no provision for this is made in the Bill?**

The Scottish Government has reviewed the requirements of the Bill in respect of the existing governance instruments of HEIs and is aware that the requirements of the Bill are, as was the case with the Code, likely to create conflicts with HEIs’ existing governance instruments. It is anticipated that over a period of transition HEIs will amend their governing instruments in line with the new statutory requirements. As these will be statutory requirements, there is no need for the Bill to explicitly require HEIs to update their governance instruments.

**What relationship is envisaged between ‘rules’ proposed in the Bill (sections 5, 6, 11) and existing governance instruments?**

Sections 5, 6, and 11 of the Bill provide that the election and nomination processes in respect of both governing bodies and academic boards are to be conducted in accordance with rules made by the governing body of each HEI. These provisions ensure that, beyond the minimum requirements of sections 4 and 10 about composition and the provisions about the appointment of a chair, it will be for each individual HEI to determine the election and nomination processes in accordance with their own rules. It will be for each HEI to amend as necessary their existing governance instruments in order to meet with the requirements of the Bill over a transition period and it will then be for HEIs to make the rules referred to in sections 5, 6 and 11 in accordance with their governance instruments. The Bill does not propose to change the existing relationship between rules and governance instruments.

**Has the Scottish Government made any estimate of the costs to institutions if existing governance instruments require change?**

Specific analysis of the costs to institutions of updating governance instruments in light of the Bill’s provisions has not been undertaken. Updating governance as part of the compliance with the Code, as well as many other decisions that HEIs make, is part of mainstream business, and the provisions of the Bill will be staggered in their implementation. Given that all HEIs have different numbers of staff and legal advisers; it is difficult to estimate the costs of making the necessary changes to governance documents.

**Has the Scottish Government consulted the Privy Council Office about processes for changing existing governance instruments, and if so what advice was given by the Privy Council?**

The Scottish Government has consulted with the Privy Council Office in respect of the Bill. The actual process for making changes to governance instruments in order for HEIs to meet with the requirements of the Bill will remain unchanged. As set out above, it is the intention of the Scottish Government that the requirements of the Bill will be commenced over a
suitable period of transition, however it is also acknowledged that there may be some periods of higher that usual activity in terms of changes to existing governance instruments.

**What timescale does the Scottish Government envisage for any action to make existing governance instruments consistent with the requirements set out in the Bill?**

It is anticipated that a period of transition of approximately 4 years will follow the enactment of this Bill. However it is likely that the transition period for some specific elements of the Bill will be shorter than others. For example: the provision about academic freedom is likely to be commenced more quickly than provisions that will require changes to existing governance instruments such as the provisions about the membership of governing bodies.

In respect of the Bill in general, the Cabinet Secretary and officials will continue to, listen carefully to the views of Universities Scotland and other stakeholders and to consider all constructive suggestions raised in evidence and as the Bill is debated in Parliament.

I hope you find this information helpful.

Laura Duffy  
Higher Education and Science Division
Higher Education Governance (Scotland) Bill

Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

- Sections 1 to 21
- Sections 22 and 23
- Schedule
- Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Before section 1

Angela Constance

3 Before section 1, insert—

<Senior lay member of governing body

Position of senior lay member

(1) The governing body of a higher education institution is to include the position of senior lay member (however the institution chooses to name the position).

(2) The senior lay member of the governing body of a higher education institution has—

(a) the duty to preside at meetings of the governing body,

(b) a deliberative and a casting vote at such meetings,

(c) responsibility for—

(i) the leadership and effectiveness of the governing body,

(ii) ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution.

(3) Another member of the governing body of a higher education institution may be selected by the governing body to exercise any of the functions mentioned in subsection (2) in the absence of the senior lay member or while the position is vacant.

(4) Subsections (2) and (3) are subject to section (Interaction with role of rector).>

Angela Constance

4 Before section 1, insert—

<Interaction with role of rector

(1) Subsection (2) applies in the case of a higher education institution at which there is a rector who has functions under section 4 of the 1858 Act and section 5(5) of the 1889 Act (each of which contains provision relating to the role of the rector at an older university).
(2) Paragraphs (a) and (b) of subsection (2) of section (Position of senior lay member) and subsection (3) of that section so far as relating to those paragraphs are of no effect in relation to the institution (but see section 5(5) of the 1889 Act (which also contains provision about who is to preside at certain meetings in the absence of the rector)).

(3) Subsection (4) applies in the case of a higher education institution at which there is a rector if—
(a) the rector has been elected to office, and
(b) the electorate comprised or included the students of the institution.

(4) In so far as provided for in rules made by the governing body of the institution—
(a) if the institution is one to which subsection (1) refers, the functions mentioned in paragraph (c) of subsection (2) of section (Position of senior lay member) are exercisable by the rector of the institution instead of the senior lay member of the governing body,
(b) if the institution is not one to which subsection (1) refers, any of the functions mentioned in subsection (2) of section (Position of senior lay member) are exercisable by the rector of the institution instead of the senior lay member of the governing body.

(5) In this section—
“the 1858 Act” means the Universities (Scotland) Act 1858,
“the 1889 Act” means the Universities (Scotland) Act 1889.

Stewart Maxwell

4A As an amendment to amendment 4, line 7, at beginning insert <In so far as provided for in rules made by the governing body of the institution,>
(ii) the academic board of the institution,
(iii) the staff and students of the institution.

(3) The membership of the committee must include at least one person from each of these categories—
   (a) the staff of the institution,
   (b) the students of the institution.

(4) Rules made by the governing body of the institution may make provision for the process for filling the position of senior lay member of the governing body (subject to sections (Advertisement and application) to (Appointment and tenure)).

Angela Constance

6 Before section 1, insert—

<Advertisement and application

(1) A current or upcoming vacancy in the position of senior lay member of the governing body of a higher education institution is to be advertised by the governing body, including by publication—
   (a) on the institution’s website, and
   (b) in the print or internet version of at least one national newspaper in Scotland.

(2) The committee mentioned in section (Relevant criteria etc.)(1) is to ensure that the advertisement—
   (a) sets out the functions exercisable by the senior lay member of the governing body under section (Position of senior lay member)(2),
   (b) summarises the relevant criteria with respect to the position and states how more information about the relevant criteria can be obtained,
   (c) explains—
      (i) the process for filling the position,
      (ii) how the application form in relation to the position can be obtained,
      (iii) what reimbursement is offered of expenses incurred in connection with attending an interview or campaigning in an election for the position,
      (iv) what remuneration and allowances are available in connection with the holding of the position.

Angela Constance

7 Before section 1, insert—

<Interview of certain applicants

(1) If—
   (a) an application for the position of senior lay member of the governing body of a higher education institution is made in the correct form in response to an advertisement under section (Advertisement and application)(1), and
   (b) the application appears to the committee mentioned in section (Relevant criteria etc.)(1) to show that the applicant meets the relevant criteria with respect to the position,
the applicant must be invited to an interview conducted by the committee.

(2) If the applicant satisfies the committee at such an interview that the applicant meets the relevant criteria, the applicant is entitled to stand as a candidate in an election for the position.

(3) The governing body of the institution is to offer every applicant for the position reimbursement of reasonable expenses that are incurred by the applicant in attending such an interview.

Angela Constance

8 Before section 1, insert—

<When election to be convened

(1) An election for the position of senior lay member of the governing body of a higher education institution must be convened if more than one applicant—

(a) is entitled under section (Interview of certain applicants)(2) to stand as a candidate in the election, and

(b) confirms an intention to stand as a candidate in the election.

(2) If the number of candidates in the election subsequently falls to below two—

(a) the election is to be postponed until the election can be held with more than one candidate standing (and the vacancy must be advertised under section (Advertisement and application)(1) again),

(b) the remaining candidate (if there is one) continues to be entitled to stand as a candidate in the election.

(3) The governing body of the institution is to offer every candidate in the election reimbursement of reasonable expenses that are incurred by the candidate in campaigning in the election (up to the limit per candidate that is fixed by the governing body).

Angela Constance

9 Before section 1, insert—

<Election franchise and result

(1) These persons are entitled to vote in an election under section (When election to be convened) for the position of senior lay member of the governing body of a higher education institution—

(a) the members of the governing body,

(b) the staff of the institution,

(c) the students of the institution.

(2) No individual is entitled to cast more than one vote in the election.

(3) Each vote cast in the election carries equal weight.

(4) The election is won by the candidate who secures a simple majority of the total number of votes cast.

(5) In the event of a tie between two or more candidates for the highest number of votes cast, the election is won by whichever of them is deemed to be the winner in accordance with rules made by the governing body of the institution.>
Angela Constance
10 Before section 1, insert—

<Appointment and tenure

(1) The winning candidate in an election under section \(\text{When election to be convened}\) for the position of senior lay member of the governing body of a higher education institution is to be appointed to the position by the governing body.

(2) An appointment to the position is for the period specified in rules made by the governing body, but the period of such an appointment may be extended in accordance with the rules.

(3) The position cannot be filled otherwise than by an appointment made by virtue of this section.>

Angela Constance
11 Before section 1, insert—

<Remuneration and conditions

(1) The governing body of a higher education institution is, on the request of a person appointed to the position of senior lay member of the governing body, to pay reasonable remuneration and allowances to the person (which are to be commensurate with the nature and amount of the work done by the person in that capacity).

(2) A person appointed to the position may not be a student of, or one of the staff of, the institution during the period of the person’s appointment.

(3) The holding by a person of the position is in all other respects subject to such terms and conditions as are specified by the governing body.>

Section 1

Liam McArthur
27 In section 1, page 1, line 12, leave out from <a> to <Regulations> in line 14 and insert
<arrangements set out in rules to be made by the governing body of the institution.

(1A) In making rules under subsection (1), the governing body must have regard to any principles which appear to the Scottish Further and Higher Education Funding Council to constitute good practice in relation to higher education institutions in accordance with section 9A of the Further and Higher Education (Scotland) Act 1995.

(2) Rules>

Liam McArthur
28 In section 1, page 1, leave out line 21 and insert—

<(v) arrangements for election of candidates,>

Liam McArthur
29 In section 1, page 1, line 22, leave out <expenses incurred in the process.> and insert <reasonable expenses incurred in the process of selection and election.

(3) Rules under this section must include provision for students and staff of the institution to be represented in the process of selecting candidates for election to the position of chairing member of the governing body.>
Angela Constance

12 Leave out section 1

After section 1

Liz Smith

30 After section 1, insert—

<Resignation or removal of chairing member

(1) The chairing member of the governing body of a higher education institution may resign from office by giving written notice to the secretary of the governing body.

(2) Where notice is given under subsection (1), the resignation has effect at the end of—

(a) the period of 3 months beginning with the date of receipt of the notice by the secretary of the governing body, or

(b) such other period agreed between the chairing member and the secretary of the governing body.

(3) The chairing member of the governing body of a higher education institution may, by resolution passed by a majority of not less than two thirds of the members of the governing body, be removed from that office where the governing body considers that any of the grounds in subsection (4) are established.

(4) The grounds are that the chairing member is—

(a) unable,

(b) unwilling, or

(c) unsuitable,

to continue to perform the functions of the office, in accordance with rules to be made by the governing body.

(5) In considering for the purposes of subsection (3) whether any of the grounds in subsection (4) are established, the governing body may have regard, in particular, to—

(a) whether the chairing member has frequently failed without reasonable excuse to attend meetings of the governing body,

(b) any conduct of the chairing member that is in breach of any of the duties with which the chairing member is required to comply as a trustee under the Charities and Trustee Investment (Scotland) Act 2005,

(c) any conduct of the chairing member that is considered by the governing body to bring the higher education institution into disrepute.

(6) A chairing member of a governing body of a higher education institution who is the subject of a resolution under subsection (3) is not entitled to vote on that resolution.

(7) If a resolution to remove a chairing member of a governing body of a higher education institution is agreed to by the governing body in accordance with subsection (3), the chairing member must be given a right of appeal against the decision, in accordance with arrangements made from time to time by the nominations committee of the institution.>
After section 1, insert—

**Election as chairing member of the Royal Conservatoire of Scotland**

The chairing member of the governing body of the Royal Conservatoire of Scotland is to be elected in accordance with the process set out in section (Royal Conservatoire of Scotland: when election to be convened).

**Royal Conservatoire of Scotland: when election to be convened**

1. An election for the position of chairing member of the governing body of the Royal Conservatoire of Scotland must be convened if more than one applicant confirms an intention to stand as a candidate in the election.

2. If the number of candidates in the election subsequently falls to below two—
   
   a. the election is to be postponed until the election can be held with more than one candidate standing.

   b. the remaining candidate (if there is one) continues to be entitled to stand as a candidate in the election.

3. The governing body of the Royal Conservatoire of Scotland is to offer every candidate in the election reimbursement of reasonable expenses that are incurred by the candidate in campaigning in the election (up to the limit per candidate that is fixed by the governing body).

**Royal Conservatoire of Scotland: election franchise and result**

1. Only members of the governing body of the Royal Conservatoire of Scotland are entitled to vote in an election under section (Royal Conservatoire of Scotland: when election to be convened) for the position of chairing member of the governing body of the Royal Conservatoire of Scotland.

2. No individual is entitled to cast more than one vote in the election.

3. Each vote cast in the election carries equal weight.

4. The election is won by the candidate who secures a majority of the votes cast, always providing that this majority includes a majority of staff and students, such provision being particular to the Royal Conservatoire of Scotland.

5. In the event of a tie between two or more candidates for the highest number of votes cast, the election is won by whichever of them is deemed to be the winner in accordance with rules made by the governing body of the Royal Conservatoire of Scotland.
After section 1, insert—

<Royal Conservatoire of Scotland: appointment and tenure>

(1) The winning candidate in an election under section (Royal Conservatoire of Scotland: when election to be convened) for the position of chairing member of the governing body of the Royal Conservatoire of Scotland is to be appointed to the position by the governing body.

(2) An appointment to the position is for the period specified in rules made by the governing body, but the period of such an appointment may be extended in accordance with the rules.

(3) The position cannot be filled otherwise than by an appointment made by virtue of this section.>

Section 2

Leave out section 2 and insert—

<Payment of remuneration or allowances to chairing member>

(1) The governing body of a higher education institution may make such arrangements to pay remuneration or allowances to the chairing member of that governing body as it sees fit.

(2) Any remuneration or allowances paid to the chairing member are to be determined by the governing body and must be in accordance with any principles which appear to the Scottish Further and Higher Education Funding Council to constitute good practice in relation to higher education institutions in accordance with section 9A of the Further and Higher Education (Scotland) Act 2005.

(3) The chairing member is not entitled to vote in respect of any decision of the governing body under subsection (1) or any determination by it under subsection (2).>

Leave out section 2

Section 3

Leave out section 3

Section 4

In section 4, page 2, line 17, leave out from first <as> to end of line and insert <to the position of senior lay member by virtue of section (Appointment and tenure).>
In section 4, page 2, line 18, after first <by> insert <either—

(i) both persons>
Section 5

Liam McArthur

40 In section 5, page 3, line 15, leave out <support> and insert <professional>

Liz Smith

41 In section 5, page 3, line 16, at end insert <, or

( ) members of the academic board of the institution.>

After section 5

Chic Brodie

63 After section 5, insert—

<Resignation or removal of ordinary members of governing body>

(1) A person appointed, nominated or elected as a member (other than the person appointed under section 4(1)(a)) of the governing body of a higher education institution (in this section an “ordinary member”) may resign from that position by giving written notice to the chairing member of the governing body.

(2) Where notice is given under subsection (1), the resignation has effect at the end of—

(a) the period of 1 month beginning with the date of receipt of the notice by the chairing member, or

(b) such other period agreed between the ordinary member and the chairing member.

(3) A person appointed, nominated or elected as an ordinary member of the governing body of a higher education institution may, by resolution passed by a majority of not less than two thirds of the members of the governing body, be removed from that position where the governing body considers that any of the grounds in subsection (4) are established.

(4) The grounds are that the ordinary member is—

(a) unable,

(b) unwilling, or

(c) unsuitable,

to continue to perform the functions of the position, in accordance with rules to be made by the governing body.

(5) In considering for the purposes of subsection (3) whether any of the grounds in subsection (4) are established, the governing body may have regard, in particular, to—

(a) whether the ordinary member has frequently failed without reasonable excuse to attend meetings of the governing body,

(b) any conduct of the ordinary member that is in breach of any of the duties with which the member is required to comply as a trustee under the Charities and Trustee Investment (Scotland) Act 2005,

(c) any conduct of the ordinary member that is considered by the governing body to bring the higher education institution into disrepute.

(6) An ordinary member of a governing body of a higher education institution who is the subject of a resolution under subsection (3) is not entitled to vote on that resolution.
(7) If a resolution to remove an ordinary member of a governing body of a higher education institution is agreed to by the governing body in accordance with subsection (3), the ordinary member must be given a right of appeal against the decision, in accordance with arrangements made from time to time by the nominations committee of the institution.

Section 6

Liz Smith

42 In section 6, page 3, line 21, leave out <each of paragraphs (c) to (f)> and insert <paragraph (e)>

Angela Constance

18 In section 6, page 3, line 21, leave out <(f)> and insert <(e)>

Section 8

Angela Constance

1 Leave out section 8

Section 9

Jim Eadie

Supported by: Liz Smith

19 Leave out section 9

Section 10

Liam McArthur

43 In section 10, page 4, line 13, after <principal> insert <or director>

Liam McArthur

44 In section 10, page 4, line 14, leave out <heads of school of the institution,> and insert <senior academic staff of the institution, to be designated by the institution as it sees fit,>

Angela Constance

20 In section 10, page 4, line 25, at end insert—

<(3) Despite subsection (2)(b), the academic board is not required to have more than 30 members who fall within subsection (1)(d).>

Liz Smith

45 Leave out section 10

Section 11

Liz Smith

46 Leave out section 11
Section 12

Liz Smith
47 Leave out section 12

Section 13

Angela Constance
Supported by: Liz Smith
2 Leave out section 13

After section 13

Sandra White
48 After section 13, insert—

<CHAPTER
SMALL SPECIALIST INSTITUTIONS

Small specialist institutions
5 (1) The Scottish Ministers may by regulations modify this Act to exclude any or all small specialist institutions from any or all of the provisions of this Act.

(2) In considering whether to make regulations under subsection (1) the Scottish Ministers must consult such persons as they consider appropriate.>

Liz Smith
48A* As an amendment to amendment 48, line 6, at end insert—

<( ) In considering whether to make regulations under subsection (1), the Scottish Ministers must have regard to any report from the Scottish Further and Higher Education Funding Council made under section (Small specialist institutions: duty on the Scottish Further and Higher Education Funding Council).>

Liz Smith
64* After section 13, insert—

<CHAPTER
SMALL SPECIALIST INSTITUTIONS: DUTY ON THE SCOTTISH FURTHER AND HIGHER EDUCATION FUNDING COUNCIL

Small specialist institutions: duty on the Scottish Further and Higher Education Funding Council

(1) The Scottish Further and Higher Education Funding Council must send a report to the Scottish Ministers recommending whether the provisions of this Act should apply to any or all small specialist institutions.

(2) For the purposes of the report the Scottish Further and Higher Education Funding Council may recommend that—

(a) the Act should apply to all small specialist institutions,

(b) the Act should not apply to any small specialist institution,
(c) the Act should apply to specific small specialist institutions,
(d) particular provisions of the Act only should apply to all small specialist institutions,
(e) particular provisions of the Act only should apply to specific small specialist institutions.

(3) In making its recommendations, the Scottish Further and Higher Education Funding Council must take account of—
(a) the relevancy of the provisions to all or specific small specialist institutions
(b) the proportionality of applying the provisions to all or specific small specialist institutions,
(c) the nature, scale and governance structure of the small specialist institution.

Section 14

Angela Constance

21 Leave out section 14

Section 15

Liz Smith

65 In section 15, page 5, line 30, at end insert—

( ) excludes small specialist institutions.

Angela Constance

22 In section 15, page 5, line 33, leave out <include or>

After section 18

Angela Constance

23 After section 18, insert—

<References to students

(1) In this Act, a reference to the students of a higher education institution includes all persons holding sabbatical office in a students’ association of the institution (whether or not they remain as students of the institution during their period of office).

(2) But this section does not apply to the reference to such students in section (Interaction with role of rector) (3)(b).

Angela Constance

23A As an amendment to amendment 23, leave out lines 6 and 7

Sandra White

Supported by: Liz Smith

49 After section 18, insert—

<Meaning of small specialist institutions

(1) In this Part, “small specialist institutions” means the following institutions—
(a) the Royal Conservatoire of Scotland,
(b) Glasgow School of Art.

(2) The Scottish Ministers may by regulations modify the definition in subsection (1) so as
to include or exclude a particular institution.

(3) Regulations under subsection (2) are subject to the affirmative procedure.

Liam McArthur

50 After section 18, insert—

"Meaning of academic staff and professional staff"

(1) In this Part, “academic staff” in relation to an institution means—

(a) any person holding a contract of employment with the governing body of the
institution as a professor, reader, senior lecturer or lecturer of the institution, or
(b) any other person holding a contract of employment with the governing body who
is engaged in teaching, the provision of learning or research in the institution.

(2) In this Part, “professional staff” means any person holding a contract of employment
with the governing body of the institution other than a contract of employment described
in subsection (1).

Liam McArthur

66 After section 18, insert—

"Exemptions"

Exemptions

(1) If a higher education institution considers that, for whatever reason, it is unable to
comply with any provision of this Part, it may apply in writing to the Scottish Ministers
for an exemption from that provision.

(2) The Scottish Ministers must, within two months of receiving an application under
subsection (1) and having given due consideration to all relevant matters, determine
whether to grant an exemption and give reasons for that decision.

(3) If the Scottish Ministers grant an exemption, they must issue an Exemption Order in
writing to the higher education institution.

(4) An Exemption Order—

(a) must set out the provisions with which the higher education institution need not
comply,
(b) may set out—

(i) the extent to which the institution need not comply with a provision,
(ii) the duration for which the institution need not comply with a provision,
(iii) such other conditions as the Scottish Ministers consider appropriate.

Section 19

Liz Smith

51 In section 19, page 7, line 2, leave out "aim to" and insert "have regard to the desirability of"
Liz Smith
52 In section 19, page 7, line 3, leave out <uphold> and insert <upholding>

Stewart Maxwell
53 In section 19, page 7, line 3, after <uphold> insert <(so far as the body considers reasonable)>

Liz Smith
54 In section 19, page 7, line 4, leave out <ensure> and insert <ensuring>

Stewart Maxwell
55 In section 19, page 7, line 4, after <ensure> insert <(so far as the body considers reasonable)>

Liz Smith
56 In section 19, page 7, line 15, after <law> insert <, provided they are not motivated by malice,>

Liz Smith
57 In section 19, page 7, line 16, at end insert <together with the facts upon which those opinions are based,>

After section 19
Chic Brodie
67 After section 19, insert—

<Post-legislative scrutiny>
The Scottish Parliament may designate one of its committees to carry out, at such time as the Scottish Parliament may determine, a review of the impact of this Act on the effectiveness of higher education institution governance in Scotland.

Section 20
Liam McArthur
68 In section 20, page 7, line 28, leave out <are subject to the affirmative procedure if they> and insert <may not>

Liam McArthur
69 In section 20, page 7, line 30, leave out <otherwise,>

Schedule
Angela Constance
24 In the schedule, page 9, leave out line 8

Liz Smith
58 In the schedule, page 9, leave out lines 9 to 11
Angela Constance

25 In the schedule, page 9, line 18, leave out from <word> to end of line and insert <words “a vice-chairman elected by the Court from among all its members” there is substituted “the senior lay member”>,

Angela Constance

26 In the schedule, page 9, line 20, leave out from <“chairing” to <1(1)> in line 21 and insert <“senior lay member” means the person appointed to the position by virtue of section (Appointment and tenure)>
Groupings of Amendments for Stage 2

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated during Stage 2 consideration, set out in the order in which they will be debated. **THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.**

Groupings of amendments

**Senior lay member and chairing member role**
3, 4, 4A, 4B, 21, 24, 25, 26

**Senior lay member and chairing member: appointment process**
5, 6, 7, 8, 9, 10, 11, 27, 28, 29, 12, 31, 13, 14, 15

**Resignation and removal of chairing member and ordinary members**
30, 63

**Royal Conservatoire of Scotland: election and appointment of chairing member**
59, 60, 61, 62

**Composition of governing body**
32, 33, 34, 35, 36, 37, 38, 16, 39, 40, 17, 41, 42, 18, 1, 50

  **Notes on amendments in this group**
  Amendment 34 pre-empts amendments 35 and 36
  Amendment 42 pre-empts amendment 18

**Academic boards**
19, 43, 44, 20, 45, 46, 47, 2, 58

**Application of Act to small specialist institutions**
48, 48A, 64, 65, 49

**Exemptions**
22, 66

**References to students**
23, 23A

SP Bill 74-G

Session 4 (2016)
Upholding academic freedom
51, 52, 53, 54, 55, 56, 57

Post-legislative scrutiny
67

Ancillary regulations
68, 69
EDUCATION AND CULTURE COMMITTEE

EXTRACT FROM THE MINUTES

5th Meeting, 2016 (Session 4)

Tuesday 9 February 2016

Present:
George Adam
Chic Brodie
Gordon MacDonald
John Pentland
Tavish Scott (Committee Substitute)

Colin Beattie
Mark Griffin (Deputy Convener)
Stewart Maxwell (Convener)
Mary Scanlon

Also present: Jim Eadie, Iain Gray, Liz Smith, Sandra White.

Apologies were received from Liam McArthur.

Higher Education Governance (Scotland) Bill: The Committee considered the Bill at Stage 2.

The following amendments were agreed to (without division): 4B, 4, 12, 13, 14, 15, 16, 17, 18, 1, 19, 20, 2, 21, 22, 23A, 23, 53, 55, 24, 25 and 26.

The following amendments were agreed to (by division)—

3 (For 5, Against 4, Abstentions 0)
5 (For 7, Against 2, Abstentions 0)
6 (For 6, Against 2, Abstentions 1)
7 (For 6, Against 3, Abstentions 0)
8 (For 6, Against 3, Abstentions 0)
9 (For 6, Against 3, Abstentions 0)
10 (For 6, Against 2, Abstentions 1)
11 (For 6, Against 2, Abstentions 1)
30 (For 5, Against 4, Abstentions 0)
63 (For 5, Against 4, Abstentions 0).

The following amendments were disagreed to (by division)—

27 (For 2, Against 7, Abstentions 0)
28 (For 2, Against 6, Abstentions 1)
29 (For 4, Against 4, Abstentions 1; amendment disagreed to on casting vote)
59 (For 2, Against 7, Abstentions 0)
60 (For 2, Against 7, Abstentions 0)
61 (For 2, Against 7, Abstentions 0)
62 (For 2, Against 7, Abstentions 0).
31 (For 4, Against 4, Abstentions 1; amendment disagreed to on casting vote)
32 (For 2, Against 5, Abstentions 2)
33 (For 2, Against 5, Abstentions 2)
34 (For 2, Against 5, Abstentions 2)
35 (For 2, Against 5, Abstentions 2)
36 (For 2, Against 5, Abstentions 2)
37 (For 2, Against 5, Abstentions 2)
38 (For 2, Against 5, Abstentions 2)
39 (For 2, Against 5, Abstentions 2)
40 (For 2, Against 5, Abstentions 2)
41 (For 2, Against 5, Abstentions 2)
42 (For 2, Against 7, Abstentions 0)
43 (For 4, Against 5, Abstentions 0)
44 (For 4, Against 5, Abstentions 0)
45 (For 2, Against 7, Abstentions 0)
46 (For 2, Against 7, Abstentions 0)
47 (For 2, Against 7, Abstentions 0)
48A (For 4, Against 5, Abstentions 0)
48 (For 4, Against 5, Abstentions 0)
64 (For 4, Against 5, Abstentions 0)
65 (For 2, Against 7, Abstentions 0)
50 (For 2, Against 5, Abstentions 2)
66 (For 2, Against 5, Abstentions 2)
51 (For 2, Against 7, Abstentions 0)
52 (For 2, Against 7, Abstentions 0)
54 (For 2, Against 7, Abstentions 0)
56 (For 2, Against 7, Abstentions 0)
57 (For 2, Against 7, Abstentions 0)
67 (For 3, Against 6, Abstentions 0)
68 (For 2, Against 7, Abstentions 0)
69 (For 2, Against 7, Abstentions 0)
58 (For 2, Against 5, Abstentions 2).

The following amendments were not moved: 4A and 49.

The following provisions were agreed to without amendment: sections 5, 7, 11, 12, 16, 17, 18, 20, 21, 22 and 23, and the long title.

The following provisions were agreed to as amended: sections 4, 6, 10, 15 and 19 and the schedule.

The Committee completed Stage 2 consideration of the Bill.
Scottish Parliament
Education and Culture Committee
Tuesday 9 February 2016

[The Convener opened the meeting at 09:52]

Higher Education Governance (Scotland) Bill: Stage 2

The Convener (Stewart Maxwell): Good morning, and welcome to the fifth meeting in 2016 of the Education and Culture Committee. I remind everybody to ensure that all electronic devices are switched off at all times.

Our first item is to consider the Higher Education Governance (Scotland) Bill at stage 2, for which I welcome the Cabinet Secretary for Education and Lifelong Learning and her officials. I also welcome Tavish Scott, who is substituting for Liam McArthur, and Jim Eadie, Iain Gray, Liz Smith and Sandra White, who are attending for this item of business.

Everyone should have a copy of the bill as introduced, the marshalled list of amendments and the groupings of amendments. For the debate on each group of amendments, I will call the member who lodged the first amendment in that group to speak to and move that amendment and to speak to all the other amendments in the group. All other members who have amendments in the group, including the cabinet secretary, if her doing so is relevant, will then be asked to speak to them. Members who have not lodged amendments in the group but who wish to speak should indicate that by catching the attention of me or the clerks.

If the cabinet secretary has not already spoken on the group, I will invite her to contribute to the debate just before moving to the winding-up speech. The debate on the group will be concluded by me inviting the member who moved the first amendment in the group to wind up. Following debate on each group, I will check whether the member who moved the first amendment in the group wishes to press it to a vote or to withdraw it. If they wish to press it, I will put the question on that amendment. If a member wishes to withdraw their amendment after it has been moved, they must seek approval to do so. If any member objects, the committee immediately moves to the vote on that amendment.

If any member does not want to move their amendment when it is called, they should say, “Not moved.” Please note that any other member of the Scottish Parliament may move the amendment. If no one moves the amendment, I will immediately call the next amendment on the marshalled list.

Only committee members are allowed to vote. Voting in any division is by a show of hands. It is important that members keep their hands clearly raised until the clerk has recorded the vote. The committee is required to indicate formally that it has considered and agreed each section of the bill, so I will also put a question on each section at the appropriate point. We intend to get through all amendments today.

Before section 1

The Convener: Amendment 3, in the name of the cabinet secretary, is grouped with amendments 4, 4A, 4B, 21 and 24 to 26.

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): In considering this group, and indeed all the groups of amendments, it is important to bear in mind the purpose of the bill. Essentially, the Government aims to ensure that every voice in the higher education community is heard and that we can, through this modest and focused bill, enable an approach to governance that is based on greater transparency and inclusivity, thereby supporting continuous improvement in the operation of our higher education institutions. Provision for the election of a senior lay member to the governing body of each Scottish HEI institution is key to that ambition. The amendments in the group set out that new role and how it would interact with the statutory role of rectors, where they exist.

As promised at stage 1, the amendments seek to make—in place of the original regulation-making power in section 1—provision in the bill for the establishment of an elected chairing member. Throughout stage 1, we listened to the views of stakeholders and the committee and I very carefully considered the views of rectors and their supporters in particular. That engagement informed the development of the wider provisions that are set out chiefly in amendments 3 to 10.

To avoid impinging on the statutory role of rectors, and to respect their valued contribution to our institutions, the elected position that is provided for in our amendments is that of the senior lay member of the governing body of all Scottish HEIs. With reference to that role, the “Scottish Code of Good Higher Education Governance” separates it from the role of the rector by referring to it as the “extensive role of the ‘chair’ ... variously called senior governor, vice convener or convener”.

Therefore, there can be no ambiguity about the pivotal role that will be played by the senior lay member in each higher education institution.
The provisions in amendment 3 oblige each Scottish higher education institution to feature the position of senior lay member on its governing body, and they specify the core functions of the lay member. Those functions include

“a duty to preside at meetings of the governing body ... a deliberative and casting vote at such meetings”

and

“responsibility for the leadership and effectiveness of the governing body”.

They also ensure that there is an

“appropriate balance of authority between the governing body and the principal”—

a term whose ordinary meaning is understood to encompass other designations—for example, director—that are used in some HEIs.

Subsection (3) of amendment 3 will enable higher education institutions to select another member of the governing body to perform those functions when the position of senior lay member is vacant, or the holder of that position is unable to attend a meeting.

Crucially, subsection (4) of amendment 3 makes it clear that the functions of the senior lay member are subject to the provisions of amendment 4. Subsections (1) and (2) of amendment 4 will ensure that the historical role of rector, which is provided for in statute, is protected in the ancient universities. Mr Maxwell’s amendment 4A would dilute the statutory protection in subsections (1) and (2), effectively allowing for removal of the statutory rights of rectors by the governing bodies of higher education institutions. I do not think that that is an outcome that any of us wants. Therefore, I hope that Mr Maxwell will not move his amendment 4A.

Amendment 4, which was lodged on 2 February in my name, will also enable the governing bodies of universities that have rectors to allow the rector to take on some of the role of the senior lay member, as described in amendment 3. Subsections (3) and (4) in the amendment allow that, but only where a governing body wishes to do so. I must make it clear that the subsections do not affect the statutory protection of the role of rector in the ancient universities under subsections (1) and (2) of amendment 4. The power at subsections (3) and (4) is intended to recognise the autonomy of universities and will give them maximum flexibility within the governance requirements of the bill.

However, having considered Mr Maxwell’s amendment 4B, which would, in effect, remove subsections (3) and (4) in my amendment 4, I am content to encourage the committee to support it because it achieves the core intentions of amendment 4. Amendment 4B seeks to protect the statutory role of the rectors at the ancient universities and goes no further than that. On balance, there is an advantage in the provisions remaining focused on the core intention of protecting the statutory role of rectors.

I turn briefly to the remaining amendments in the group. Amendment 21 will remove section 14 of the bill because the regulation-making powers in sections 1, 2, 8 and 13 are now subject to other Government amendments that will remove them. Therefore, section 14 will not be required. I am mindful that many of our higher education institutions perceived the extent of regulation-making powers in the bill as having a detrimental impact on their autonomy, and I hope that amendment 21 and others that have been lodged at this stage will remove all concerns in that regard.

10:00

Amendment 24 will ensure restoration of the statutory role of rector under section 4 of the Universities (Scotland) Act 1858, which applies to the ancient universities of Glasgow, Edinburgh, St Andrews and Aberdeen and provides that the rector is the ordinary president of the court with a deliberative and a casting vote. I felt that it was necessary to remove that provision at introduction, given that section 1 of the bill proposed that regulations make provision for the appointment of a chairing member. However, as amendments 3 to 10 and 12 propose to replace that regulation-making power with full provision on the face of the bill to protect the statutory role of rectors, it is therefore appropriate to ensure that section 4 of the 1858 act continues.

Likewise, amendment 25 ensures restoration of the statutory role of rector under section 5 of the Universities (Scotland) Act 1889, which applies to the ancient universities of Glasgow, Edinburgh, St Andrews and Aberdeen and provides that the rector has the right to preside at meetings of the court and has a deliberative and casting vote. Crucially, amendment 25 also provides that the senior lay member should preside at meetings of the relevant governing body or court when the rector cannot attend or preside. The 1889 legislation sets out that in the absence of the rector in an ancient institution, a vice-chancellor who has been elected by the governing body can preside. It is our view that because the new senior lay member is an elected post, that person should preside when the rector is unable to.

Lastly, amendment 26 is consequential on amendment 25 and seeks to amend paragraph 2(2)(d) of the bill’s schedule to provide a definition of the term “senior lay member” in the 1889 act that clearly links it to the meaning that is set out in the bill. As a result of amendment 25, there is now
a need to define in the 1889 act the term “senior lay member” rather than “chairing member”.

I ask the committee to support my amendments as well as Mr Maxwell’s amendment 4B. For the reasons that I have given, I ask Mr Maxwell not to move amendment 4A; if it is moved, I ask the committee to reject it.

I move amendment 3.

The Convener: Amendments 4A and 4B in my name have been lodged on the back of discussions that we had last week with the HE sector in relation to Government amendments 3 and 4. The clear view of many in the sector is that amendment 4—and, as the cabinet secretary has said, subsections (3) and (4) in particular—sought to transfer some responsibilities with regard to the governing body of each institution. Instead of each institution being able to determine things, the role of rectors would have been changed and there would be a change with regard to setting the rules. That move was not welcomed.

In an attempt to resolve the matter, I lodged amendments 4A and 4B on Thursday morning. Of course, members will remember that on Thursday morning an electronic problem meant that there was no email or printing available. That morning we had a rather scrambled situation—that was my fault—as we attempted to resolve the matter.

I fully accept the Government’s view on amendment 4A and the views of a number of individuals from the sector to whom I spoke on Friday, over the weekend and again by email this morning. It is clear that amendment 4A would have unintended consequences—I had intended to ensure that rectors would be unaffected by the legislation—so I do not intend to move it.

However, I think that amendment 4B provides at least comfort—if not more than that—to the sector in seeking to remove subsections (3) and (4) of the proposed new section. As the cabinet secretary has described, that will allow the current arrangements to remain in place and not to be impacted on by the legislation. I therefore intend to move amendment 4B at the appropriate point.

Liz Smith (Mid Scotland and Fife) (Con): Amendments 3 and 4 will fundamentally change the role of the rector at the universities where that role exists. That is at odds with what the Scottish Government promised at stage 1. I will quote to the committee what the cabinet secretary said at that stage:

“It is extremely important to remember that the role of rector and that of an elected chair, who is otherwise known as the senior governor, are very distinct.”—[Official Report, 14 January 2016; c 66.]

That is not the case with amendments 3 and 4. In universities with rectors there would be two different, yet overlapping, electorates, which I am sure—I hope—is not the Scottish Government’s intention.

I understand that Universities Scotland has taken legal advice on the issue. That advice concluded that there is very considerable ambiguity in the drafting, and that it seems likely that the rector would take on the two specific roles of the senior governor: namely, responsibility for the leadership and effective operation of the governing body and ensuring that there is the appropriate balance of authority between the governing body and the principal. However, within that institution there would then be an advertisement and an electoral process for a disempowered position. Again, I hope that that is not the Scottish Government’s real intention.

Just as worrying is the fact that the Government amendments would mean that in universities that have rectors—with the exception of the University of Edinburgh, of course—staff would be excluded from the electorate for the position that is most empowered. That is not acceptable.

I understand, convener, why you have lodged amendments 4A and 4B. I have some sympathy with that, but the fact that they exist is acknowledgement that amendments 3 and 4 will create a real mess. Although they are an attempt to preserve the rector role, they do not do anything to address the fundamental weakness of the Scottish Government’s proposals, which will mean overlapping electorates and an unworkable system. That, to be frank, is just not acceptable to the sector. It would create instability and—as Universities Scotland argues—the possibility of a considerable argument about which post has the stronger and more democratic mandate.

Convener, that part of the bill is a real mess, which is regrettable; I think that we all believe that real effort was being made to find a consensus that was acceptable to all parties. Now, quite frankly, that has blown apart completely and I cannot think that anything will solve that other than starting again on that part of the bill. Students and staff are not at all happy about the situation and, quite properly, university courts worry about the destabilising effect on their institutions. In short, it demonstrates everything that is wrong with the bill.

The last meeting that the Scottish Government had with all the stakeholders was way back at the end of November. I understand that there has been no consultation whatsoever between stage 1 and stage 2. For the people who are actually going to have to deliver the legislation, that is just not acceptable.

Mark Griffin (Central Scotland) (Lab): I agree with a lot of what Liz Smith has said. The Government was working towards a consensus
around the bill, but the amendments—in particular, 3 and 4—seem to have blown that apart.

Our stage 1 report said that the role of rector, which is an historic and often high-profile role in Scotland’s ancient universities, should be clarified. It said that if there are to be elected chairs and elected rectors, there should be “no ambiguity about” their respective roles and “both figures” should be “able to work together for the good of the institution”.

Unfortunately, rather than clarifying the situation, the Government has muddied the waters further with amendments 3 and 4.

At stage 1, the cabinet secretary said that the aim was not to change the role of rector, but as far as I can see amendments 3 and 4 will do exactly that. That is either a change in position by the Government or an error in drafting. We would like proper consultation of the sector—which has not happened, as far as I can see. We ask the Government not to press the amendments and to work with the sector in advance of stage 3 to build the consensus that had seemed to be coming together.

Tavish Scott (Shetland Islands) (LD): First, I pass on Liam McArthur’s apologies. I am sure that members are familiar with the trials and tribulations of Loganair—I could do 10 minutes on that. I was an hour and a half late into Aberdeen last night and I got a speeding ticket on the way down.

In the best of moods to take on the amendments, the thing that struck me most in reading them all yesterday and this morning was the Government’s assertion that it has consulted on these matters. My reading of the situation is that although there might have been some consultation much earlier in the process, as Liz Smith and others said, the Government should not bring forward fundamental changes to law—that is what we are dealing with today—through rushed amendments at the last minute. The cabinet secretary has proposed fundamental and important changes to how our universities are to operate that in effect are being pushed through the Parliament without proper pre-legislative scrutiny, or indeed any other kind of scrutiny.

The Government should be embarrassed by that and should admit that it is wrong. Mark Griffin is right; the Government should withdraw amendment 3, not move the other Government amendments in the group and go back to the sector to work out the right thing to do. It cannot be right for the Parliament to operate in the way that is proposed.

I am told that there is nothing that could be described as the product of consultation or consensus in the Government’s amendments. The idea of electing both a rector and a senior lay member attracted no consensus in the meetings that took place during—not after, but during—stage 1. The Government cannot assert that it has consulted adequately on the matter.

It is not just university principals, chairs and courts that have been making that point more widely. The other day, the president of the University of Glasgow students representative council said:

“I am perplexed ... as to how the Scottish Government has managed to botch this Bill so profoundly. From inadvertent clauses that risked turning Scotland’s universities into public bodies to utter ignorance of relationship between the role of Rector and role of ‘chair’ of court. This Bill has been an unmitigated disaster.”

I would have thought that the Government should pay pretty close attention to such comments from people who are knowledgeable about their sector.

The verdict of “disaster” is epitomised by amendment 3. I am told that the cabinet secretary gave an assurance to the committee and the Parliament that she would not seek to change the role of the rector, but that is precisely what amendment 3 and the other Government amendments in the group do.

The Government amendments also set out in extraordinarily elaborate detail the mechanism for advertising for and electing a senior lay member, who has in effect been disempowered. I am not sure what Government wants to achieve by that kind of micromanagement of the public sector.

As Liz Smith said, in the universities that have rectors, with the exception of the University of Edinburgh, the amendments will exclude staff from voting for the person who will be substantially empowered—that is, the chair of the governing body. That seems extraordinary—I say to my good friend Iain Gray that it sounds like Labour’s old electoral college. Different and overlapping electorates will be asked to vote for two different people who have poorly differentiated roles on the governing body. That cannot be good policy or a good approach.

I acknowledge the convener’s attempts to get the cabinet secretary out of the hole that she has dug for herself by proposing to move amendment 4B, but that does not get round the fact that what is being put in place is an unworkable system of overlapping roles and functions. The Scottish Government is building in an incentive for an arm-wrestling contest between rectors and elected chairs over whose democratic mandate is the greater. I cannot believe that that is a good way to reform our university sector.

If the Government’s intention really is to avoid altering the role of the rector or setting the rector
up in conflict with the senior lay member, I urge
the cabinet secretary to withdraw amendment 3
and seek to find a way to work constructively with
universities on a solution that honours the
commitments that were given earlier, which are
certainly not being honoured in the Government’s
amendments today.

Iain Gray (East Lothian) (Lab): Members
round the table come at the issue from different
starting points. Labour supported the Scottish
Government on the principle of elected chairs of
court in our universities; other members did not
support that principle. However, I think that we all
agree that at stage 1 the cabinet secretary
committed to lodging amendments at stage 2 to
provide clarity, first, on the process of elections for
chairs, and secondly, on the relationship in the
ancient universities between the chair and the
ancient position of rector. It seems clear to me that
the cabinet secretary has failed to do that.

Bringing such amendments forward means doing
so with some evidence of support from, or at least
acceptance by, the different interest groups within
the sector: rectors, the institutions, the staff trade
unions and the National Union of Students
Scotland.

Instead of amendments that created clarity and
demonstrated consensus that they were a good
way forward, the amendments that came forward
late last week added to the ambiguity and have led
to bewilderment on all sides. Any possibility of a
fragile consensus being created within the sector
to take the proposals forward was shattered.

Like Mr Scott, I appreciate the attempts that the
convener has made to try to dig the Government
out of the hole in which it has put itself. That is not
the convener’s job, and it is unfortunate that he
has been put in that position.

I agree with colleagues that, given the situation
that we have arrived at, the only sensible way
forward is for the cabinet secretary to withdraw
amendment 3, to recommit to what she promised
at stage 1 and to bring forward stage 3
amendments that she can demonstrate are clear
and have the support, or at the very least the
acceptance, of the sector.

I welcome subsection (3) of the new section that
would be inserted by amendment 3. Subsection
(3) says:

“Another member of the governing body of a higher
education institution may be selected by the governing
body to exercise any of the functions mentioned in
subsection (2)”.

Those functions include responsibility for
“leadership and effectiveness” and for establishing
“an appropriate balance of authority”.

Angela Constance: The Government has
made good its commitment to protect statutory
provision for rectors. As I am sure many members
of the committee already know, there was
extensive consultation in November with the
sector—with Universities Scotland, rectors, the
trade unions—

Liz Smith: Will the cabinet secretary take an
intervention?

Angela Constance: Certainly.

Liz Smith: How much consultation has there
been with Universities Scotland and the chairs of
court between stages 1 and 2 to try to build
consensus?

Angela Constance: There has been extensive
consultation between officials and all stakeholders.
Workshops on the election model were convened,
because we were pressurised to remove the
regulation-making power and set out the model for
electing chairs on the face of the bill.

There were two specific workshops on the
model for electing chairs. There was specific
engagement with rectors, and discussions around
the model strayed into the area of ensuring that
the roles of the senior lay member and the rector
were appropriately dovetailed.

I was very pleased to receive today
correspondence from Catherine Stihler, who says:

“I welcome your attempts to retain the statutory role
of the Rectors in the Ancient Universities. You have always
been throughout our discussions clear that the Scottish
Government would continue to support the role of the
Rector and the statutory rights to preside over university
court.”

As I said in my opening remarks, the aim of
amendments 3 and 4 is very much to address the
position of the senior lay member and the interaction
with the role of the rector.

Liz Smith: Will the cabinet secretary take an
intervention?

Angela Constance: Just let me make this point,
please.

For clarity, subsections (3) and (4) of
amendment 4, which was lodged on 2 February in
my name, enable all universities with a rector to
allow the rector—should they wish to do so—to take on some of the role described for senior lay members in amendment 3. The flexibility already exists in the ancient universities to dovetail the role of the senior lay member with that of the rector. Subsections (3) and (4) merely express that.

Iain Gray: If it is in fact the case, as the cabinet secretary implies, that there has been widespread consultation and that there is widespread agreement on that approach in the sector, what would be lost by withdrawing or not moving the amendments now, taking the time to demonstrate that acceptance and agreement to us and making the changes at stage 3? Nothing would be lost.

Angela Constance: The fundamental issue is that there is a misunderstanding of what the Government’s provisions attempt to do. There has been consultation with the chairs of court, Universities Scotland and the Edinburgh rector, as well as a wider group of rectors. I have clearly stated the rationale for amendment 3. Subsections (1) and (2) of amendment 4 are about making good our commitment to protect the role of rector. I see no need to row back from that. I have indicated that we can accept Mr Maxwell’s amendment 4B, which would mean that we would go no further than protecting the statutory role of rectors as it is.

Liz Smith: I repeat what you said, which was that

“It is extremely important to remember that the role of rector and that of an elected chair, who is otherwise known as the senior governor, are very distinct.” — [Official Report, 14 January 2016; c 66.]

Amendments 3 and 4 do not represent that distinction. Could you comment on that?

Angela Constance: I have always been crystal clear, both in plenary debates in the chamber and in stage 1 evidence at this committee, that the roles of senior lay member and rector are very distinct. It is important to recognise that amendment 4 seeks to protect the rector’s right to preside and his or her deliberative and casting vote in meetings. I therefore see no need to row back from that commitment, which we have made very clear at various stages of the bill.

Iain Gray: The cabinet secretary said earlier that there was widespread misunderstanding about the intention of the amendments. I do not doubt her intention to deliver what she promised at stage 1, but she has acknowledged that there is widespread misunderstanding about whether the amendments achieve that aim. What is to be lost by simply taking the amendments away, addressing that misunderstanding and coming back at stage 3 with something that everyone can sign up to?

Angela Constance: I contend that there is no dubiety with regard to amendments 3 and 4 —

Iain Gray: You just said that there was.

Angela Constance: Not in terms of the Government’s intentions. Mr Gray could have acknowledged that I have received correspondence from a colleague of his welcoming the Government’s efforts in this area. Amendment 3 and subsections (1) and (2) of amendment 4 are very clear. Further, I have indicated that the Government is content with Mr Maxwell’s amendment 4B. I am clear that others may have misunderstood the intent of the amendments, but the amendments are clear.

Tavish Scott: I totally take the point that the cabinet secretary is clear about the amendments. Will she tell the committee on what date she or her officials discussed the amendments with the university sector?

Angela Constance: Members will be aware that the amendments were lodged last week, but I stress that we have had extensive discussions with all stakeholders regarding most aspects of the bill. I have to accept that some people will never be content with the bill or, indeed, with some of its provisions, but I would have hoped that we could all agree that the provisions in amendment 3 and proposed new subsections (1) and (2) in amendment 4 achieve the intentions that we have discussed at length at the committee to protect the statutory position of rectors in our ancient universities.

The Convener: The question is, that amendment 3 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Against
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 3 agreed to.

Amendment 4 moved—[Angela Constance].

Amendment 4A not moved.

Amendment 4B moved—[Stewart Maxwell]—
and agreed to.
Amendment 4, as amended, agreed to.

The Convener: Amendment 5, in the name of the cabinet secretary, is grouped with amendments 6 to 11, 27 to 29, 12, 31 and 13 to 15.

Angela Constance: The Scottish Government amendments in the group are focused chiefly on setting out the process that Scottish higher education institutions would be required to follow in appointing their senior lay member. Throughout stage 1, we listened to the views of stakeholders and took note of the evidence that was gathered by the committee. In addition, we engaged senior sector stakeholders in workshops related to this and other parts of the bill at the end of last year.

Amendment 5 is the first in a suite of amendments that effectively replaces section 1 as introduced with provision on the face of the bill—rather than in regulations—for a single model for the appointment of the elected senior lay member of higher education institutions’ governing bodies. The amendment obliges a higher education institution, when a vacancy for the senior lay member arises, to delegate responsibility for the recruitment process to a committee featuring at least one student and one staff member drawn from the institution.

Those committees are commonly known as nominations committees. However, the role of the committee that is formed to appoint an elected senior lay member is not one of nomination, but rather of selection to stand for election against criteria devised by that committee. Subsection (2) of amendment 5 allows for the committee to determine relevant criteria for the role of senior lay member that encompass key principles of competence. The intention is to allay previously raised concerns from some stakeholders about who might be elected to lead governance of an institution.

Amendment 6 obliges higher education institutions to advertise a vacancy for the post of senior lay member to the general public through established methods to attract interest from a wide range of candidates. Subsection (2) of amendment 6 sets out plainly the obligations required in relation to the advertisement. The intention is to advertise widely and fully inform potential applicants of the nature of the role and what the recruitment process will involve further down the line.

The requirement for an application to be in a certain form and for the relevant criteria to be made available will ensure that there is a fair playing field for all applicants and that their applications are considered in a consistent way. It is worth noting that existing legislation already obliges an institution to make appointments to its governing body in a way that encourages equal opportunities and does not discriminate against any individual with characteristics that are protected by equalities legislation, such as race, gender or disability, to name a few.

10:30

The advertisement and application stage is an important part of improving access to the position of senior lay member. Amendment 7 seeks to ensure that, if in response to the advertisement of a vacancy in the position of senior lay member, an applicant has submitted an application on the correct form and met the criteria that are set out for the role of senior lay member by presenting sufficient relevant evidence on the application form, the committee must invite that applicant to attend an interview for the role. In short, that is very much like any transparent and modern recruitment exercise. If at the interview the applicant again satisfies the committee that they meet the criteria for the post, they will be entitled to stand for election for the role of senior lay member.

Subsection (3) of amendment 7 requires every HEI to offer applicants reimbursement of reasonable expenses that are incurred in connection with attending an interview. In keeping with the bill’s intention to respect the autonomous nature of HEIs, it will be for each HEI to determine what is reasonable.

Amendment 8 provides that a higher education institution will be required to convene an election for the position of senior lay member of the governing body if, after interviews, more than one candidate is entitled to stand and confirms their intention to stand. If an institution fails to identify two candidates who fit the criteria for the role, the bill will require that it repeats the process from the point of advertisement. In that way, the bill ensures a real and meaningful election in keeping with its overall aim of establishing an open, transparent and more democratic appointment process across all higher education institutions for the role of senior lay member.

Amendment 9 provides details on the franchise, mechanism and result of the election of a senior lay member of the governing body. Specifically, it provides that the franchise must consist of the governing body itself and all staff and students of the HEI. That makes clear the Government’s intention to democratis the process of appointing a senior lay member and allow everyone in the institution’s community a say in who that should be.

Amendment 10, which sets out the final step in the recruitment process, provides that the winning candidate at the preceding election must be
appointed to the position of senior lay member and that that is the only way in which such a position may be filled.

On a connected note, amendment 11 replaces section 2 of the bill with provision on the face of the bill rather than in regulations for remuneration of the senior lay member. That ensures that a senior lay member of the governing body can request and will be paid reasonable remuneration from the higher education institution that is commensurate with carrying out the functions of that office. That payment will not amount to a salary. The relevant amount must be reasonable and commensurate with work that has been done.

Given that amendments 3 to 11 make provision on the face of the bill for the appointment and remuneration of the senior lay member, amendments 12 and 13 remove the regulation-making powers in sections 1 and 2 of the bill as introduced.

The purpose of amendment 14 is to remove section 3 of the bill as introduced, which obliges the Scottish ministers to consult higher education institutions and other appropriate persons prior to making regulations under sections 1 or 2 of the bill as introduced.

Amendment 15 is a consequential amendment that ensures that all Scottish HEIs must include the new elected senior lay member as a member of their governing bodies. The amendment is necessary in order to replace reference to "the chairing member" in section 4(1)(a) of the bill as introduced.

I hope that the committee can support amendments 5 to 15.

Amendment 31, which was lodged by Liz Smith, is not necessary, as it provides for a power that already exists. Higher education institutions can currently provide remuneration if they wish. Compliance with the code of good HE governance in that respect is also currently required.

My amendment 11 ensures that a senior lay member or chair of the governing body can request and will be paid reasonable remuneration that is commensurate with the responsibilities of carrying out the functions of that office. That is not akin to a salary or unlimited payment, but it is a right for a senior lay member to request reasonable remuneration and allowances for the work that they have done and a duty on higher education institutions to make such payments where reasonable. I therefore cannot support amendment 31, which describes a discretion that HE institutions already have. I ask Liz Smith not to move the amendment, and I ask the committee to reject it if she moves it.

I do not believe that amendments 27 to 29, in the name of Liam McArthur, would have a positive impact on the process for the appointment of the chairing member. The bill's principal aim is to enable the development of a framework of governance that is more modern, accountable and inclusive. I consider that Liam McArthur's amendments would make little substantive change to current practice, effectively returning us to the status quo and leaving the decision making in the process of appointing the chairing member—as at present—to the governing body to create its own rules and restrict the electorate for the chairing member to the members of the governing body only.

Although Mr McArthur's amendments would require the rules to include provision for students and staff to be represented in the process of selecting candidates for election, they would simply allow for, rather than require, an institution to undertake an election. As such, the amendments make no provision for consistency across the sector, as they would allow different rules to be developed by different institutions, albeit with regard to the Scottish code of good higher education governance.

The principles underpinning the bill are to enhance inclusion, participation, transparency and consistency in governance arrangements in our HEIs. Unfortunately, none of Mr McArthur's amendments would meet any of those principles at the most basic level. For that reason, I ask Mr McArthur not to move his amendments, and I ask the committee to reject them if he moves them.

The amendments in my name in this group provide for consistency, robust selection and a fair election. We have consulted and listened to stakeholders and responded to their concerns by setting out what should happen on the face of the bill. I hope that they are supportive of that considered approach.

I ask the committee to support my amendments. For the reasons that I have given, I ask the committee to reject amendments 27 to 29 if they are moved, and amendment 31 if it is moved by Liz Smith.

I move amendment 5.

**Tavish Scott:** First, I observe that this Government seems to want to be on top of absolutely every detail of what goes on in our universities. I was quite taken aback by the cabinet secretary's contribution to the debate this morning. I totally understand her sincerity in lodging the amendments, but her approach is quite breathtaking in its desire to be all over every detail of what goes on across this aspect of university activity, and I think that that is wrong.
The cabinet secretary gave the game away at the end of her remarks when she said that Liam McArthur's amendments were not right because they would allow different universities to come up with different options. That says it all, does it not? We are all to do exactly what the Government says.

I will make the argument for amendments 27 to 29. Instead of the unbelievably detailed and mechanistic approach that is taken by the Government, the amendments seek to provide a workable framework for the election of chairs of governing bodies, giving institutions appropriate discretion to set out arrangements. I would have thought that this committee, above all committees in the Parliament, would believe in discretion in education.

The amendments require that that should be done in accordance with the standards set out in the higher education governance code—which the cabinet secretary rightly mentioned, although she went on to say that it did not really matter—which, unlike primary legislation, is subject to regular changes. Good practice evolves—I thought that that was the whole point of the higher education governance code. When ministers previously appeared before the committee to discuss other pieces of legislation, I understand that they said that that approach was right and that it was the means by which to achieve what is loosely described as future proofing, which strikes me as a dreadful phrase that we all use in public life these days.

The proposals would absolutely require the engagement of students and staff in the process of selecting the chairs of governing bodies—that process might be different in different institutions, but I would have thought that that would be a strength of the approach, rather than a weakness as the Government appears to believe—primarily through the membership of the nomination committees that select candidates. Amendments 27 to 29 would have the added advantage of delivering exactly what the cabinet secretary said that she previously wanted to achieve. They would leave the role of the rector untouched, and would allow institutions to avoid the nonsense of having student and staff elections for both the rector and the senior lay member.

I am sure that members who have much more experience of this committee than I have will look closely at those measures, but it must be important that the committee tries to save the Government from itself instead of allowing the hole to be dug ever deeper, and that is what the amendments would do. The overly detailed and interventionist approach in amendments 5 to 11 will simply store up problems for the future. Amendment 5 illustrates that perfectly, while amendment 6 sees ministers attempting to write into primary legislation—into law—every last detail of a job advert, while removing any scope for universities to negotiate remuneration and allowances with their chairs. That is an extraordinary level of influence, if not the heavy hand of the law over the practical activities of an independent institution, and I urge the committee to think about that rather than just passing it on the nod.

In that context, the more flexible and pragmatic approach that is set out in Liz Smith's amendment 31 is more sensible. Amendment 8 fails to address the problem of the governing body being denied the opportunity to elect its own chair, which must be deeply ironic in the context of what this Parliament has decided to do with committees, but there we go—nothing surprises me any longer.

As for the introduction of a measure allowing candidates to claim election expenses, that has emerged, I am told, from nowhere. It is supported by no evidence, including the costs, which presumably will be borne by universities, and it smacks of understandable populism on the part of ministers.

The cabinet secretary's amendment 12, which removes section 1, is right, but I urge the committee to replace it with a more flexible and proportionate framework, as set out in amendments 27 to 29, along with amendment 31, rather than the unworkable prescriptions that have been put forward this morning.

Liz Smith: Amendment 31 is required because it countermands one of the Scottish Government amendments that is based on payment on demand rather than on need. Amendment 31 requires decisions about the remuneration of chairs to be made in accordance with current and evolving best practice, which is very important and is set out in the higher education governance code, based on the need for remuneration or allowances to enable someone to discharge that role in the circumstances of the institutions. It also removes ministers from a decision-making role in relation to the remuneration of chairs.

I agree with every comment that Tavish Scott made regarding amendments 27 to 29. He is absolutely right. If there is anything that has led to the success of our universities, it is their diversity and their ability to respond to increasing global competition, so to condition that down to what the Government says is, quite frankly, not acceptable.

In amendment 5, having disempowered the senior governor institution with rectors, the Scottish Government has now set out the criteria for the selection of the senior governor whether or not they actually have that meaningful role. The code of governance provides for a process that is
In amendment 6, since the code already requires transparency and compliance—which I have to say is required by law—there is no need for the oversimplification of the process. As Tavish Scott rightly says, it is centralisation of the worst sort. Indeed, it makes me wonder whether the Scottish Government really knows what it is talking about when it comes to how advertisements actually appear in national newspapers and whether it would ever consider setting out the full description of the post and how applicants could claim their expenses. Furthermore, the expectation that a university will pay for people to campaign—be it the senior lay governor or anyone else—is utterly ludicrous. That has never been the subject of consultation, nor has the cost been addressed in the financial memorandum—as the committee knows, that document has already been torn apart by the Finance Committee—and that shows clearly that the Government has in mind a competitive, adversarial election, along the lines of the election of student officers. There are serious concerns about amendment 6.

The real worry about amendment 7 is the fact that it provides the nominations committee with little more than a tick-box role in determining whether the candidate fits the criteria that are specified. I believe that that has been written with ignorance about modern, effective practice when it comes to selecting people for senior roles. It gives no capacity to the nominations committee to make a judgment about who among the so-called tick-box candidates has the strength of skill, experience and commitment to that institution’s mission.

I turn to amendment 8. The committee is well aware that Universities Scotland remains wholly unconvinced of the wisdom of having an election of chairs from a body that is outwith the governing body, which is in itself inclusive of staff and students. It rightly points to examples in the outside world and, indeed, within the Parliament’s committee structures, which are held up as good practice precisely because the governing body is the group that elects the chair. There is a good reason for that, namely the essential need to ensure that there is full trust between the chairman and the governing body. If that trust is broken, the whole institution would be undermined, hence the outcry from so many quarters about the proposal.

Amendment 8 has two other crucial failures. First, in the highly possible event that there is only one willing candidate, it provides for paralysis for an indefinite period. Again, any institution that is operating without a chair is likely to be in a difficult position. Secondly, I understand that there was no consultation about the proposal; it was not even mentioned at stage 1. It will create an absurd situation in which institutions will be paying candidates’ campaign expenses. As far as I can see, that has not been costed and it is very likely to attract vexatious campaigners who do not have at heart the institution’s best interests. The amendment is one of the most problematic in the whole bill. We certainly cannot support it.

Amendment 9 gives by far the greatest power to choose a role about the long-term view of the institution to the most transient community—the students. If there is to be an election with student and staff franchises, there should be equal weighting for the electoral colleges of governing body students and staff. Institutions will need to be able to able to make rules about who qualifies as members of the electorate. For example, is it acceptable that an overseas student who is doing distance learning over a short period will become part of the electorate? The proposal has not been thought through.

Amendment 10 obviously relates to amendments 3 to 9, but again I ask what happens under amendment 8 if there is only one candidate and an appointment cannot be made.

Amendment 11 would be open to abuse, because in effect it provides for payment on demand and as such would attract some of the wrong people. It restricts itself to disempowered senior lay members and not the empowered rector. We saw comments in yesterday’s newspapers about that.

Cabinet secretary, there are serious implications for amendments 5 to 11. I would ask that you think again about them.

Chic Brodie: In my previous offering, I said that inconsistency is a major feature of the bill, as is the need to reduce points of conflict in it. Of course, given the momentum behind the education institutions, there must be flexibility.

On the issue of inconsistency and turning to amendments 6 to 9, I have made it absolutely clear in the past—I do so again today—that I am against the election of chairs on a wider franchise. In making my offerings, I suggested a mechanism by which the rectors elected by the wider franchise could co-chair the court with the senior lay member—or whatever he or she is called—on the basis that the rector could chair policy items, which would affect the university’s direction, but that the day-to-day operations should be convened and chaired by a lay member elected by the court.
An issue that I am concerned about—it is why I asked my earlier question—arises in subsection (2) of amendment 8 as proffered:

“the election is to be postponed until the election can be held with more than one candidate”.

That could go on for a long time, particularly because those who might aspire to be the senior lay member, the chair or what have you, may not wish to go through an election process. That said, and this is what makes it so interesting, if an election were to be postponed—let us say for year—in order to get more than one candidate, we would then have a situation in which another member of the governing body of a higher education institution might be selected by the governing body. Therefore, while we are waiting for the election, someone will be in position who is elected by the governing body. I fail to see why that is relevant.

In addition, subsection (5) of amendment 9 says:

“In the event of a tie between two or more candidates”—
let me suggest that there are three candidates—
“for the highest number of votes cast, the election is won by whichever of them is deemed to be the winner in accordance with”

whatever the rules are. Let us say that the person who wins has fewer votes than the aggregate of the other two candidates. Someone mentioned the parallel with what happens in this Parliament. That is true in a constituency vote, but we use proportional representation by top-up. What we are saying is that a chair—or a senior lay member or convener—could be elected on a minority of the franchise. Not only that, but they will then have to engender trust in a body that has had no say in appointing them. I will come on to other issues, such as the removal of members, when we deal with other amendments later.

I am confused by the whole process. I repeat that I will not support the election process for a chair that is being recommended on the basis of the reasons that I have given. I could go on to talk about the vetting process and how good it is. Will candidates who have the appropriate skills be put forward? I agree that there should be staff and student involvement at the appropriate level; they should certainly be involved in the election of rectors and in helping to put forward a candidate or candidates to the court for election.

In mentioning the need for consistency, I hope that I have been as constructive as possible. That will help us to reduce what I assure you will be major points of conflict.

George Adam (Paisley) (SNP): I want to talk about amendments 8 and 9, which set out the arrangements for the electoral franchise. The heart and soul of the bill is the democratisation of the process. As elected members, we should not fear democracy—we should not fear the idea of bringing into the process people from the communities of higher education institutions. We should not back away from pushing forward in that way because, for me, that is the heart and soul of the bill. We should promote that all the time.

Amendments 5, 6 and 7 propose a sifting process to ensure that the right candidate is put forward so that we do not end up in a situation in which someone goes through the process just to get some form of publicity. I believe that if we reject any of the amendments that I have mentioned, we will detract from the fundamental principle of the bill, which is to ensure that every person who is involved in an institution gets the opportunity to be part of it and to move things forward.

Chic Brodie: I made a point about having the rector elected on a wider franchise to secure their attendance to project policy, which is clearly a driver for any institution. That would allow us to make sure that that democratisation applies at the very point of policy projection. I do not understand why that is not acceptable.

George Adam: I know that Mr Brodie is a man of principle, but the principle of the bill is to make sure that we open up higher education institutions to democratisation and make sure that more people get involved in the process. That is the important thing here—that is the message that we want to send out to those institutions. For far too long, it has been a closed process.

I am not saying that there have been issues, but because of the lack of openness and transparency in the process, our institutions could be accused of quietly making decisions in secret corridors of power. I am not saying that that is the situation, but that is how it could be perceived.

Liz Smith: Does George Adam agree that, regardless of the process, there is not a person at this table who does not want democracy and transparency in our universities? Do you accept that, with many of the Scottish Government's amendments, the process through which it is trying to achieve that is fundamentally flawed?

George Adam: That is where Liz Smith and I disagree, because I can see how the process can work and allow institutions to deliver what we all want them to deliver. As I said, we should not fear democracy. We should not get to a situation in which we do not allow institutions to empower the people in their communities. That is the important part of the bill—indeed, it is its heart and soul. I therefore encourage everyone to support amendments 5, 6, 7, 8 and 9.
Mary Scanlon (Highlands and Islands) (Con): I am really just seeking some clarity. This follows what George Adam said. I agree with Liz Smith that no one does not want democracy, transparency and accountability in respect of every part of public funding in Scotland. I also want to drill down into Tavish Scott’s point on amendment 6. I would like the cabinet secretary to clarify some points in her summing up.

Since I came here in 1999, we have passed a lot of life-changing legislation—rightly so. Parliament has an excellent reputation for that. Today we are looking at our world-class universities. In this country, we have universities that are in the top 100 in the whole world. We are not talking about Scotland, the United Kingdom or Europe; we have world-class universities. It is important to put that on the record.

George Adam talked about the “secret corridors of power”. I am shocked that learned individuals in our world-class universities have to be told in legislation to put an advert on their website to tell people how to get an application form. Is that really what the legislation of the Scottish Parliament is about? Do the universities not know about technology? Do they not know that, when there is a vacancy for a senior post, an advert should be put on the website? Do they not know that it is important that people know from where to get an application form? What I am asking the cabinet secretary is this: where is the problem? Where are the “secret corridors of power”? Where are the secret deals? Where is the necessity to use primary legislation to tell our world-class universities to put adverts on their websites and to direct people to where they can get application forms from?

I find it quite embarrassing to be sitting here debating such legislation. Democracy is one thing; micromanagement and the arrogance of doing that are something else. I seek clarity from the cabinet secretary on that point.

Angela Constance: It is important to put on the record that the model provided for what was recommended in the von Prondzynski review. Throughout the process, I have been alive to the objections that many members have raised about the regulation-making powers in the bill. Therefore, with lots of consultation and discussion with all stakeholders, the Government has proposed a model for electing chairs.

It is also important to recognise that the bill is discrete and the provisions in it are high level and focused. They also seek consistency across the 18 HE institutions in Scotland. I have to disagree with some colleagues: the code of good governance does not go far enough either on the process of appointing a chair or on issues of remuneration.

On the paralysis that Liz Smith and others have mentioned, amendment 3 allows for the business of the governing body to continue. However, in legislating, it is important that we do so in a robust way that does not allow people to sidestep the process of elections. Therefore, we have to be clear that, if there are not enough candidates to have an election, the process of advertisement has to recommence.

11:00

Chic Brodie: I understand that, and if you cut any of us through the middle you would see democracy running through us. However, I still cannot understand—particularly if we want more candidates to stand for election—why it is okay for a governing body to elect over a period of a year or longer its own senior lay member or chair. Where is the attainment of democracy in that?

Angela Constance: I am sure that Mr Brodie would be the first to point out the paralysis of boards that cannot be chaired appropriately, so of course there is provision in the event of there not being a timely election. However, it is beholden on the Government and those who believe in democratically elected chairs to ensure that the legislation is robust and ensures that elections actually occur. If at first you do not succeed, you have indeed to try again.

The provisions in relation to advertising are important. We have to ensure that universities advertise widely; they must cast the net wide for candidates to have an election. The relevant criteria as laid down in the Government provisions are important, but there will be an opportunity for the committees that will be established, which will include representatives of staff and students, to take into account the needs of their individual institutions. It is important that that committee considers the skills and attributes of candidates and that, as part of that, the candidate has the trust and confidence of the board. It is imperative that we set out in legislation the role and function of that committee and the entitlement of candidates who meet the criteria to go forward to an interview and to an election.

With regard to election expenses, the provisions are aimed at ensuring that candidates, who will have a variety of means and circumstances in their personal lives, can take part. That is important and not unreasonable if we want to cast the net wide and enable diverse high-quality candidates to come forward.

Liz Smith: Has that measure been costed?

Angela Constance: As I was going to say, it will be for the individual higher education institution to decide what expenses are reasonable, proportionate, affordable and
commensurate with the role—expenses for interview, expenses incurred in carrying out the role of senior lay member or election expenses. We are most certainly not micromanaging in any regard.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Liz Smith: No.

The Convener: Sorry, Liz, but you do not have a vote. With all due respect, I say that you cannot speak for somebody else.

Mary Scanlon: I do not agree.

The Convener: Thank you, Mary.

There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

The Convener: The result of the division is: For 7, Against 2, Abstentions 0.

Amendment 5 agreed to.

Amendment 6 moved—[Angela Constance].

The Convener: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

The Convener: The result of the division is: For 6, Against 2, Abstentions 0.

Amendment 6 agreed to.

Amendment 7 moved—[Angela Constance].

The Convener: The question is, that amendment 8 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 8 agreed to.

Amendment 8 moved—[Angela Constance].

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Brodie, Chic (South Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 8 agreed to.

Amendment 9 moved—[Angela Constance].

The Convener: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
Amendment 10 moved—[Angela Constance].

The Convener: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Abstentions
Brodie, Chic (South Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 10 agreed to.

Amendment 11 moved—[Angela Constance].

The Convener: The question is, that amendment 11 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Against
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Abstentions
Brodie, Chic (South Scotland) (SNP)

The Convener: The result of the division is: For 6, Against 2, Abstentions 1.

Amendment 11 agreed to.

Section 1—Appointment as chairing member

Amendment 27 moved—[Tavish Scott].

The Convener: The question is, that amendment 27 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions
Brodie, Chic (South Scotland) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 27 disagreed to.

Amendment 28 moved—[Tavish Scott].

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

Abstentions
Brodie, Chic (South Scotland) (SNP)

The Convener: The result of the division is: For 2, Against 6, Abstentions 1.

Amendment 28 disagreed to.

Amendment 29 moved—[Tavish Scott].

The Convener: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

Tavish Scott: They were late in saying “No”.

The Convener: There was a significant pause.

There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Brodie, Chic (South Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 1. I will have to use my
casting vote, and I will vote against amendment 29.

Amendment 29 disagreed to.

Amendment 12 moved—[Angela Constance]—and agreed to.

After section 1

The Convener: Amendment 30, in the name of Liz Smith, is grouped with amendment 63.

Liz Smith: The Scottish Government’s proposal for the election of chairs risks the governing body ending up with people who want to campaign on a single issue that is at odds with the governing body’s overall policy—for example, somebody who wishes to maintain at a university a particular subject or facility that the governing body regards as academically poor or unsustainable. It also risks the governing body having great difficulty if the elected chair proves to be unfit for office, since it makes no provision for the removal of that person. Amendment 30 is designed to provide the necessary safeguard for a governing body to remove a chair who becomes unfit for office and who, more importantly, loses the trust of the governing body.

I move amendment 30.

Chic Brodie: We talked earlier about the appointments committee. I strongly agree that those who seek to appoint a chair should include as wide a range as possible of people who are affected by the talent of all the individuals in the institution. George Adam made a good point about ensuring that the institution remains effective. I would hesitate to use a phrase such as “It’s Buggins’s turn” or what have you, but the appointments process should be as rigorous as possible.

We require not only individuals’ skills and talents, but their commitment. It seems anachronistic to have rectors who cannot or will not attend regular court meetings. When we look at the introduction to the court of people with skills and talents, we must recognise that the continuous improvement of outcomes requires the robust attention of everyone, particularly those who sit on the governing body.

I do not want to go back over what we have discussed, but the suggestion in my amendment 63 is that there should be a mechanism for removing or requesting the resignation of a member of the governing body if they are found to be unable or unwilling to attend court and give an input that improves the university’s performance outcomes.

Angela Constance: I am grateful to Liz Smith and Chic Brodie for explaining the intent of amendments 30 and 63. However, the amendments are neither necessary nor desirable.

The amendments are unnecessary because HE institutions already have powers to deal with the resignation or removal of the chair and other members of the governing body, and they will most likely already have their own arrangements in place. Moreover, amendments that I moved earlier today will ensure that the process for filling vacancies for senior lay members is carried out efficiently and fairly.

11:15

As I have said, the bill’s intention is to make provisions that are high level and focused and which feature discrete measures that are aimed at providing a strengthened framework for governance across the entire sector, making it more modern, inclusive and accountable. That high-level framework is intended to work with existing provisions, meaning that the bill will enable existing arrangements covering the resignation or removal of any member of the governing body to continue.

I know that some people have called for the sort of detail that is contained in amendments 30 and 63, regarding resignation and removal, to be included in primary legislation. However, as I have said, if someone is not performing adequately, whether in an elected position or otherwise, whether in an elected position or otherwise, institutions already have the ability to deal with that.

Chic Brodie: Are you able to advise how many members of courts have been removed or asked to resign in the course of their tenure?

Angela Constance: I do not know the answer to that question. It may be a question to ask the institutions themselves. The important point is that HE institutions are free to finesse their arrangements to deal with such situations if they so wish.

I do not have anything further to add, convener. Since Mr Brodie’s amendment 63 and Ms Smith’s amendment 30 curtail the autonomy of institutions, I cannot support them, and I ask the committee to reject the amendments if they are pressed.

Liz Smith: I am confused by what the cabinet secretary has just said. What Chic Brodie said is correct, and I do not see how my amendment undermines the principle of autonomy. Indeed, it is important that we have this safeguard in place to ensure that universities have the facility to remove the chair when that person becomes unfit for office.

I return to the fact that it is crucial that there is the utmost trust between the chair and the governing body, but I do not think that that is
recognised in the bill. Chic Brodie makes a strong point in that respect. I will press amendment 30.

**The Convener:** The question is, that amendment 30 be agreed to. Are we agreed?

**Members:** No.

**The Convener:** There will be a division.

**For**
- Brodie, Chic (South Scotland) (SNP)
- Griffin, Mark (Central Scotland) (Lab)
- Pentland, John (Motherwell and Wishaw) (Lab)
- Scanlon, Mary (Highlands and Islands) (Con)
- Scott, Tavish (Highlands and Islands) (LD)

**Against**
- Adam, George (Paisley) (SNP)
- Beattie, Colin (Midlothian North and Musselburgh) (SNP)
- MacDonald, Gordon (Edinburgh Pentlands) (SNP)
- Maxwell, Stewart (West Scotland) (SNP)

**The Convener:** The result of the division is: For 5, Against 4, Abstentions 0.

**Amendment 30 agreed to.**

**The Convener:** Amendment 59, in the name of Liz Smith, is grouped with amendments 60 to 62.

**Liz Smith:** I have been working with Sandra White on the issue and have great sympathy for the comments that she has made both in the chamber and in her amendments.

I think that the entire Conservative—sorry, conservatoire; that was a slip of the tongue [*Laughter.*] I will say that again. I think that the entire Royal Conservatoire of Scotland community, which I stress includes elected staff and student governors, is opposed to the proposal to elect the chair of the board of governors through an electorate other than the board itself—for exactly the reasons that we discussed just a little while ago. The conservatoire believes that an election would be especially divisive and destructive, given its size—there are roughly 1,000 students and 40 full-time academic staff—and the disciplines on which it focuses. It believes that such a process would sow the seeds of division, and I think that it would lead to a politicisation of the role of the chair.

In terms of scale, the conservatoire believes that its current system of representative democracy is very effective and much more likely to deliver a good chair than a more widely drawn plebiscite would. The conservatoire’s board of governors includes two academic staff: one directly elected and the other nominated by the academic board. That is a ratio of one academic staff governor to 22 staff. The board also includes two student governors, which is a ratio of one student governor to 500 students and is obviously quite different from any large university.

Because of the conservatoire’s scale and culture, elected staff and student representatives can be relied on to reflect the views of colleagues and fellow students. We heard that message very strongly when the committee had the round-table discussion. Under its current arrangements, it would be inconceivable that the conservatoire’s board would appoint a chair in the face of opposition from elected student and staff governors. Its nomination committee already includes two staff and two student governors, which exceeds the requirements of the bill. Accordingly, subsection (4) of amendment 61 makes explicit the need for a chair to have the support of not only the majority of governors but the combined majority of staff and student governors within that overall majority.

The conservatoire believes that election by plebiscite would put good candidates off. The conservatoire is as much a performing arts institution as it is an HE institution. Obviously, its discrete qualities are a very important consideration, and I think that the unnecessary imposition of an election process would cause difficulties.

I move amendment 59.

**The Convener:** Do any other members wish to contribute?

**Tavish Scott:** I support the tone of the amendments in this group. My understanding is that those involved with the Royal Conservatoire in all capacities—staff, students, management and stakeholders—have made clear their opposition to the bill’s provisions applying to their institution in the way in which Liz Smith has illustrated. The conservatoire has set that out through the widest possible cross-section of its stakeholder community—a pretty decent principle, given some of our earlier considerations.

I suggest that the concerns that have been illustrated demonstrate the risks inherent in taking such a blunt instrument as the law to something as diverse and complex as our university sector. The very nature of what has been illustrated in this discussion demonstrates that. Other institutions in the HE sector have concerns and seek an exemption from all or part of the bill—the University of the Highlands and Islands in my part of Scotland is certainly one. If the minister can reassure us through later amendments that something can be done in that regard, that would clearly be helpful and important. However, Liz Smith’s amendments in this group are the right amendments for the exemption that is being sought.

**Sandra White** (Glasgow Kelvin) (SNP): I agree with what has been said about the conservatoire, which also applies in some...
respects to Glasgow School of Art, which I will speak about when we come to my amendments 48 and 49 in a later group. My amendments are based on the fact that the conservatoire and the Glasgow School of Art are small, specialist institutions that already adhere to the von Prondzynski recommendations and criteria. I have met representatives from the conservatoire and Glasgow School of Art, who feel that the governance that they have at present fits the criteria that the bill seeks to apply.

I support Liz Smith’s amendments in this group. As has been said, the conservatoire is a specialist institution with a worldwide reputation. It has trade union representatives on its governing board, as does Glasgow School of Art.

Angela Constance: I have listened carefully to Ms Smith and her colleagues and their explanation of the intent of amendments 59 to 62. However, I cannot support those amendments, principally because they seek to make specific arrangements for only one of our HE institutions, which cuts across the very heart and purpose of the bill. As we have said already today, the principal aim of the bill is to enable a framework of governance that is more modern, accountable and inclusive. We of course welcome the diversity in our HE sector; in particular, we value the contribution made by the Royal Conservatoire to our tertiary sector.

However, I have made it clear that this is a focused bill that features discrete, high-level measures that are aimed at strengthening governance across the entire sector and which apply a consistency of approach that should apply to all our institutions. We have the same ambitions for the Royal Conservatoire as we have for our other 17 institutions. I do not expect any of the 18 Scottish HE institutions to which part 1 applies to be unable to meet the bill’s requirements, particularly as institutions will be able to work towards full compliance over the transitional period during which the bill is commenced.

Amendment 61 makes it clear that this group of amendments is about retaining the ability of the Royal Conservatoire’s governing body to simply select its chairing member. That would mean that only members of that governing body would be entitled to vote, which would exempt the Royal Conservatoire from one of the bill’s core aims and provisions. For that reason and others, I ask the committee to reject Liz Smith’s amendment 59, if it is pressed, and amendments 60 to 62, if they are moved.

Liz Smith: I have listened carefully to what the cabinet secretary has said, but there is a fundamental point to consider here. She will know about the recommendation made by Ferdinand von Prondzynski all those months ago that there be separate discussions on the specialist institutions. It seems to me that those discussions have not taken place. I think that the Royal Conservatoire has made excellent recommendations about what works for it, and I do not think that any of us can criticise just how successful it has been.

Angela Constance: My understanding of the von Prondzynski review was that he said that those institutions should be included.

Liz Smith: The von Prondzynski review made it very clear that there would have to be further debate about the workings of those institutions. I have a quote from Professor von Prondzynski here, cabinet secretary, if you would like to see it after the meeting. He made it very clear that special circumstances applied to those institutions, which the review did not have time to consider. There is an important point to bear in mind here, and we should be careful with the facts.

An amendment in the name of Mr McArthur—I think that it is amendment 66—considers the overall possibility of exemptions, which brings us back to the question of the diversity of our HEIs. They are extremely diverse—their success lies in that diversity—and that is why I think that the Royal Conservatoire makes very good points. As a result, I will press amendment 59.

The Convener: The question is, that amendment 59 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 59 disagreed to.

Amendment 60 moved—[Liz Smith].

The Convener: The question is, that amendment 60 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Against

Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 60 disagreed to.

Amendment 61 moved—[Liz Smith].

The Convener: The question is, that amendment 61 be agreed to. Are we all agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against

Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 61 disagreed to.

Amendment 62 moved—[Liz Smith].

The Convener: The question is, that amendment 62 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against

Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 62 disagreed to.

Section 2—Remuneration to be payable

Amendment 31 moved—[Liz Smith].

The Convener: The question is, that amendment 31 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against

Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Brodie, Chic (South Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 4, Abstentions 1. I will have to use my casting vote again. I vote against amendment 31.

Amendment 31 disagreed to.

Amendment 13 moved—[Angela Constance]—and agreed to.

Section 3—Consultation for sections 1 and 2

Amendment 14 moved—[Angela Constance]—and agreed to.

Section 4—Composition of governing body

Amendment 15 moved—[Angela Constance]—and agreed to.

11:30

The Convener: Amendment 32, in the name of Liz Smith, is grouped with amendments 33 to 38, 16, 39, 40, 17, 41, 42, 18, 1 and 50. Please note that amendment 34 pre-empts amendments 35 and 36, and that amendment 42 pre-empts amendment 18.

Liz Smith: The amendments in my name to sections 4, 5 and 6 would protect the democratic nature of staff and student membership of governing bodies.

On the student side, the amendments would enable institutions to provide for directly elected student members, as well as or instead of nominees of the students association, to provide for an enhanced level of democracy.

Currently, the most common means of selecting student governors is for the elected sabbatical office-holders of students associations to fill roles—typically, one would be the student president, joining explicitly ex officio, and the second, by convention, would be another elected sabbatical officer. However, there are four directly elected student governors in the sector, across three institutions; any of the arrangements in that regard has a democratic element that is lacking.
from the approach of simple nomination by the students association.

On the staff side, the amendments would require all staff members of governing bodies to be elected, rather than simply nominated by local trade union leaders, who typically represent fewer than a third of staff members, to retain the capacity of academic boards or senates to elect academic staff members to governing bodies.

There is an important connection between the bodies that are responsible for institutions’ overall governance and the bodies that are responsible for institutions’ academic leadership. Currently, 51 per cent of staff governors, excepting senior management, come to the governing body from the academic board. Amendment of sections 4(1)(b) and 5(3)(b) would enable academic boards or senates to elect members who would count as elected staff for the purposes of the bill.

Amended section 4(1)(c) would give trade unions their proper place, as is the case in the University of Glasgow, in running elections to the governing body that would be open to all staff rather than just the minority of staff who have chosen to join a trade union. Without my amendments, elected members of staff of governing bodies will inevitably be displaced by trade union nominees.

Even with the removal of the requirement for alumni governors, the new governors who will be required by section 4 will leave six HEIs’ governing bodies in breach of one or both of the code’s requirements that governing bodies should have “no more than 25 members”, and “a … majority of independent members”.

For example, the addition of two union-appointed governors would leave the University of Glasgow’s court with 26 members, of whom 50 per cent would be independent. To comply with the Scottish code of good HE governance, as adopted by the Scottish Further and Higher Education Funding Council, it would be necessary to remove at least one non-independent member from the court. The bill does not specify how that would be done, but in practice the sole point of flexibility in the case of Glasgow is the cohort of staff elected to the court by the senate or academic board. That principle is very important in ensuring that there is greater democracy and accountability.

I move amendment 32.

Tavish Scott: I will speak to amendment 35 and other amendments in the group because they represent an attempt to rectify a somewhat strange and patronising assumption in the bill that characterises some staff as simply “support”, rather than being professional in their own right. I hope that the committee and the Government will support the proposed change.

Amendment 39 addresses the anomaly by which the bill gives recognised trade unions the right to nominate governing body members in institutions that do not have recognised trade unions. It is an attempt to ensure that this blunt bill does not take a one-size-fits-all approach to a sector that is as diverse as education, and that it incorporates sufficient flexibility to enable it to work as best it can to accommodate the circumstances of each institution.

In that spirit, I support the Government’s amendments 16 and 17 in relation to graduates associations.

Angela Constance: The overarching aim of section 4 is to advance the inclusivity of the governing bodies of our higher education institutions, enabling every voice on campus to be heard.

Amendment 16 removes the requirement for the inclusion of two graduate members nominated by a graduates association of the institution. While there is no doubt that a graduate of an institution is of considerable value to many governing bodies, most governing bodies will naturally attract graduates. I have carefully examined the evidence that has been provided to this committee, and I acknowledge that, for those institutions that do not currently have a formally constituted graduates association—such as the Glasgow School of Art and Glasgow Caledonian University—there is a challenge in meeting that requirement. In acknowledgement of that challenge, I seek to remove the requirement from the bill.

Amending the bill in that manner will reduce the number of statutory members of the governing body required by the bill from nine to seven. As we heard in evidence, many institutions already have individuals on their governing body who, if elected or appointed under the bill’s procedures, would fill five of the remaining seven statutory positions. As such, this amendment will also enable institutions to comply more easily with both the requirements of the bill and the Scottish code of good higher education governance, which suggests that a maximum of 25 members should be a benchmark of good practice for the size of the governing body.

Amendments 17 and 18 are consequential to amendment 16. They remove the definition of a graduate of an institution, as well as removing provision for the nominations process for graduate members. If amendment 16 is accepted, those provisions will no longer be necessary.

Amendment 1 removes the power at section 8 enabling Scottish ministers to amend, by regulations, the categories of governing body
membership that are set out in section 4(1) and the number of persons to be appointed under a particular category. I have listened and given full consideration to all the issues that have been raised by all committees in relation to this bill. I have also listened to and examined carefully the written evidence of stakeholders. Although I may not agree with their assessment that section 8 poses a risk of reclassification of higher education institutions as public bodies by the Office for National Statistics, I consider on reflection that removing that non-essential power will provide further comfort in that regard.

Amendments 32, 33 and 41, in the name of Liz Smith, seek to amend section 4. I have listened to Ms Smith’s explanation of the rationale behind her amendments. Section 4(1)(b), as introduced, requires that the membership of the governing body includes two staff members, elected by the staff of the institution from among the staff of the institution. Amendments 32 and 33 introduce an alternative option of filling those two staff positions, with one person appointed by the academic board of the institution and one person elected by the staff of the institution. I have given consideration to that.

Although I am not opposed to the membership of any governing body including members who are drawn from another important body such as the academic board, I do not consider it necessary to provide for that in this section. My amendment 16 reduces the number of members required by the bill to only seven, which means that every HE institution will remain able to fill a further 18 positions on the governing body from wherever they wish, within the confines of the code.

Amendments 32 and 33 are not necessary, but amendment 41 is simply too restrictive in its framing of the electorate for these staff positions. It would enable the governing body to choose to restrict the electorate and the pool of candidates for the election of staff member positions to members of the academic board. That would be detrimental to the inclusivity that I want to support through the bill. I therefore ask the committee to reject amendments 32, 33 and 41.

My proposals to provide for trade union nominees to be included in the membership of governing bodies are among the most far-reaching and innovative provisions in the bill, and I am proud that it is this Government that is introducing them. Amendments 34 and 42, in the name of Liz Smith, provide an alternative approach that I cannot support. I believe that trade unions deserve more than simply an administrative role. Furthermore, amendment 34 provides for no trade union involvement at all where there is no trade union officially recognised by the HE institution. However, under section 4(2)(b), all that is required for official recognition under the bill is that an HE institution

"recognises it as representative of the category of staff."

That should always happen where a trade union has members who are staff of the institution.

I thank Tavish Scott for explaining the intent behind amendments 35, 36, 40 and 50. The Scottish Government considered fully and carefully the wording to be used in respect of the categories of staff that are described throughout the bill. The terms “academic staff” and “support staff” are well understood in the sector, are used in various governance orders in relation to the post-1992 institutions and take their ordinary meanings in much the same way as the terms “teaching staff” and “non-teaching staff” do in the legislation relating to colleges.

The issues in the bill are too important for us to be debating semantics when a term is already widely understood in the sector. The support staff in our HEIs are essential to the smooth operation and good governance of those institutions. They do very important work, and the bill ensures that they too are given a voice on the governing body of HE institutions.

The bill is absolutely clear about the extent of its application, and introducing new overlapping terms and unnecessary definitions would not be helpful. To introduce the term “professional staff” would muddy the waters, as academic staff would also commonly be understood to be professional staff. However, if concerns have been raised by unions or staff on the matter, I would be happy to discuss the matter further with Tavish Scott or Liam McArthur, or indeed with others, in advance of stage 3. I therefore ask the committee to reject the amendments in Mr McArthur’s name.

Amendments 37 and 38, in the name of Liz Smith, would enable HE institutions to fill the two mandatory student positions on their governing bodies either through the appointment by nomination process already envisaged by section 4(1)(e) or by a new added election process, in which students could stand and vote.

As introduced, section 4 obliges HE institutions to have two student members on their governing body nominated by a students association of the institution, from among the students of the institution. Although I am not sure that institutions would welcome an attempt to require them to conduct more elections, Liz Smith’s commitment to creating a democratic mandate for student members is laudable. However, it does not take into account the fact that, in most cases, members of students associations who are nominated to serve on governing bodies or other bodies have already been elected to an office of the students association by their fellow students, so whoever is
nominated is already likely to have a mandate from students.

11:45

A particular difficulty with amendment 37 is that it leaves it to the discretion of the HEI whether both student places are to be nominated or elected. I am clear about and comfortable with the provisions as drafted, which leave it to students themselves to nominate members to represent their interests. However, I am glad that we agree that students’ influence on the governing body of their HEI is essential.

Amendment 38 is unnecessary. Section 6 already provides for the governing body of the HEI to make rules in accordance with which the nominations process must be conducted, including in relation to nomination by a students association under section 4(1)(e).

I ask the committee to support amendments 1, 16, 17, and 18 and to reject amendments 32 to 42 and 50 from Liz Smith and Liam McArthur, if they are pressed.

The Convener: I call Liz Smith to wind up and press or withdraw her amendment.

Liz Smith: I begin by saying how welcome it is that section 8 has been removed. It should never have been in the bill in the first place and it caused great angst to the entire sector—students and staff. I am pleased that the Government has seen sense on that and taken the section out.

The cabinet secretary said that the bill is about increasing democracy—it is. It is about increasing democracy for students but also about ensuring that no democracy is diminished. That is something that would unquestionably happen in some universities who will find that elected members of staff will no longer be able to take their positions, despite the fact that the cabinet secretary says that she is going to look at that.

The cabinet secretary said that she does not want to get bogged down in semantics. However, semantics are a key part of any bill, so it is very important to look at the semantics of the drafting. I suggest that one of the reasons why we have such difficulty over the bill is that the semantics have been so unclear.

The Convener: The question is, that amendment 32 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 32 disagreed to.

Amendment 33 moved—[Liz Smith].

The Convener: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 33 disagreed to.

Amendment 34 moved—[Liz Smith].

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 34 disagreed to.

Amendment 35 moved—[Tavish Scott].

The Convener: The question is, that amendment 35 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 35 disagreed to.

Amendment 36 moved—[Tavish Scott].

The Convener: The question is, that amendment 36 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 37 disagreed to.

Amendment 38 moved—[Liz Smith].

The Convener: The question is, that amendment 38 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 38 disagreed to.

Amendment 16 moved—[Angela Constance]—and agreed to.

Amendment 39 moved—[Tavish Scott].

The Convener: The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.
Amendment 39 disagreed to.

Amendment 17 moved—[Angela Constance]—and agreed to.

Section 4, as amended, agreed to.

Section 5—Elections to governing body

Amendment 40 moved—[Tavish Scott].

The Convener: The question is, that amendment 40 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 40 disagreed to.

Amendment 41 moved—[Liz Smith].

The Convener: The question is, that amendment 41 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 40 disagreed to.

Amendment 41 disagreed to.

Section 5 agreed to.

After section 5

Amendment 63 moved—[Chic Brodie].
Section 9—Size of academic board

The Convener: Amendment 19, in the name of Jim Eadie, is grouped with amendments 43, 44, 20, 45 to 47, 2 and 58.

Jim Eadie (Edinburgh Southern) (SNP): As one of the constituency members for the University of Edinburgh, I am pleased to speak to amendment 19.

The purpose of amendment 19 is to remove section 9 of the bill, which states:

“The academic board of a higher education institution is to consist of no more than 120 members.”

I raised this matter directly with the cabinet secretary in the Scottish Parliament on 26 November last year, and I am aware that she has listened to the arguments about removing section 9 and has indicated that she is minded to support my amendment. I welcome her willingness to consider the sector’s views.

The University of Edinburgh already has strong and inclusive governance arrangements, with its governing body incorporating staff, students, alumni and the city as well as external independent members, who bring a breadth and a balance of skills and are appointed through an open, transparent process. The university’s system of governance, which has been refined to ensure full compliance with the new Scottish code of good higher education governance that was introduced in July 2013, is working well, and it provides appropriate oversight and assurance for the university. The University of Edinburgh is also the only Scottish university that has an independent rector who is popularly elected by staff and students.

Section 9 could undermine the University of Edinburgh’s strong and inclusive governance arrangements. I do not believe that that is the intention behind the bill, but this section could reduce the university’s ability to compete effectively, would strip hundreds of members of staff of their current rights as senate members and would provide no obvious benefit to the university.

As members have stated this morning, one of the strengths of our university sector is its diversity. The one-size-fits-all approach taken in section 9 fails to take into account the different shapes and sizes of higher education institutions, and I firmly believe that it would be inappropriate for a university as large as the University of Edinburgh, which employs 13,000 staff and has 35,000 students. Taking all of that into account, I hope that the Scottish Government will support my
amendment, take on board the University of Edinburgh’s concerns and, in doing so, allow each higher education institution to determine the size of its academic board.

I move amendment 19.

**Tavish Scott:** I agree with Jim Eadie’s remarks on amendment 19, which relates to academic boards, and I particularly commend his approach to and his remarks on the code of practice. In light of our earlier debate, I would commend his support in that respect to his own Government.

You will just have to take my word for this, convener, but my understanding is that Liam McArthur’s amendments in this group are relatively minor and seek to address references to specific titles and roles that, as the bill stands, are overly uniform. In that context, I hope that the committee might consider it appropriate to support them.

Briefly, I want to welcome amendments 45 to 47, in the name of Liz Smith, which appear to put into the bill safeguards that prevent ministers from legislating on matters of internal academic governance. Surely such a principle is only sensible. I also welcome amendment 20, in the name of the minister, which also seems to take the right approach.

Finally, I welcome amendment 2, in the name of the minister, which removes what I understand to be the controversial section 13. That was never necessary; thankfully, it is on its way out, and the bill will be all the better for it.

**Angela Constance:** I thank Jim Eadie for outlining the purpose behind amendment 19, which seeks to remove the requirement on HE institutions to ensure that their academic boards comprise no more than 120 members. The Scottish Government has listened and has fully considered the issue as set out in the evidence provided to the Education and Culture Committee.

Although the Scottish Government is still of the view that each academic board needs to be of a manageable size and efficiently run, we have been persuaded that that can still be achieved by a larger academic board. On reflection, we consider that the size of an academic board should be for each individual HE institution to decide, and I am therefore content to support amendment 19.

Amendments 43 and 44 provide for additional descriptions of two of the categories of membership of an HE institution’s academic board as set out in section 10. The term “principal” is intended to identify the senior executive member of staff of a higher education institution, regardless of their job title. The term is well understood among the education sector; it is also used in the Scottish code of good higher education governance, and its meaning is clear as denoting the person who is the head of the institution. Therefore, HE institutions will be clear about the position to be covered under section 10.

Similarly, the term “head of school” is sufficiently understood in the education sector. It is explained in the explanatory notes accompanying the bill as “individuals who are the most senior academics” of the HE institution, and it is already used in provisions in the governance instruments of some HE institutions in relation to the membership of their academic boards. As a result, I do not consider the amendments necessary, and I ask the committee to reject amendments 43 and 44 in the name of Liam McArthur.

Amendment 20 follows from amendment 19, which removes the provision for a maximum number of members of an academic board. Its purpose is to ensure that, despite the requirement for students to make up 10 per cent of the membership of the academic board, no HE institution will be required to have more than 30 students on its academic board. I should also point out that any board that wishes to have more than 30 students can, of course, still do so. Student representation on academic boards and senates should be significant rather than token, and amendment 20 continues to protect and enable that aspiration. Significant student representation on the academic board of an institution would still be achieved, even if a larger academic board were not required to have more than 30 student members.

At the moment, amendment 20 will have a practical effect only on the senates of the universities of Glasgow and Edinburgh, where membership of the board currently exceeds 300. However, as I have indicated, it would still be open to those senates to have more than 30 student members if they so wished. I therefore ask members to support amendment 20.

As for amendments 45 to 47 in the name of Liz Smith, I have to say that the removal of sections 10 to 12 would have a detrimental effect. Academic boards play an important role in our HEIs, providing oversight of academic quality and the necessary co-ordination with university governing bodies to ensure that decision making at all levels is properly informed. We must ensure that academic boards are, and remain, representative of the main communities in their institution. Section 10 sets out a minimum composition of academic boards and guarantees the participation of elected staff as well as elected student members. As the Government would not want any provisions to be removed that would diminish the intent, purpose and effect of section
as introduced, I cannot support amendments 45 to 47 and ask the committee to reject them.

The purpose of amendment 2 is to remove the power in section 13, which enables Scottish ministers to amend, by regulation, the number of members on an academic board specified in section 9 and to modify the categories of membership of an academic board set out in section 10(1) and/or the number or percentage of persons to be appointed under a particular category. The Scottish Government has listened and given full consideration to all the issues that have been raised by the Finance Committee and the Education and Culture Committee, and I have also carefully examined the written evidence that has been provided by stakeholders. Although I might not agree with their assessment of the risk posed by section 13 of HEIs being reclassified by the ONS as public bodies, I consider, on reflection, that the power to amend the categories of academic board membership and the number of persons to be appointed under a particular category is not essential, and I therefore urge members to support amendment 2.

Amendment 58 in the name of Liz Smith, which seeks to restore the provision relating to the membership of senates at the ancient universities under section 5 of the Universities (Scotland) Act 1858, is not desirable as it would result in inconsistencies in the rules defining the membership of the academic boards of HEIs. As a key policy aim is to embed a level of consistency in the approach to governance across HEIs and to improve the effectiveness of academic boards and the representativeness of their decision making, I cannot support the amendment.

I ask the committee to support amendment 19 in the name of Jim Eadie and amendments 20 and 2 in my name and to reject the other amendments in the group if they are moved.

Amendment 58 in the name of Liz Smith, which seeks to restore the provision relating to the membership of senates at the ancient universities under section 5 of the Universities (Scotland) Act 1858, is not desirable as it would result in inconsistencies in the rules defining the membership of the academic boards of HEIs. As a key policy aim is to embed a level of consistency in the approach to governance across HEIs and to improve the effectiveness of academic boards and the representativeness of their decision making, I cannot support the amendment.

I ask the committee to support amendment 19 in the name of Jim Eadie and amendments 20 and 2 in my name and to reject the other amendments in the group if they are moved.

Liz Smith: At the beginning of the meeting, my colleague Mary Scanlon asked the cabinet secretary, “If there isn’t a problem, why do we need to fix anything?” I would ask exactly the same question about academic boards. Academic boards should be entirely a matter for self-regulation by autonomous institutions; indeed, I do not see why we are even contemplating legislation on the issue.

My amendments are designed to ensure that there is as much autonomy as possible. I believe that, during stage 1, Professor von Prondzynski himself made recommendations about academic boards; however, the evidence was completely lacking, and that situation has continued ever since. There is just no evidence about what is supposed to be wrong with academic boards and senates.

I have to say that I am delighted with amendment 2, which deals with the ONS situation by removing section 13. It is very good news, given that that above all else was about to destroy much of our university sector.

I support Jim Eadie’s comments about the University of Edinburgh, and I also support the amendments in the name of Liam McArthur.

The Convener: As no other members wish to contribute, I will make a short statement myself. I welcome amendment 19 in the name of Jim Eadie on the maximum size of academic boards, and I also welcome the Government’s support for that amendment, given our close questioning of witnesses about the reasoning behind the figure of 120. On behalf of the committee, I welcome the fact that Jim Eadie has lodged the amendment and the cabinet secretary’s support for it.

Jim Eadie: I welcome the constructive approach that the cabinet secretary has taken in listening to and acting upon the concerns that have been expressed by and on behalf of the University of Edinburgh. I also very much welcome committee members’ support this morning. In agreeing to remove section 9, the Government has recognised the diversity of the sector and has introduced a degree of flexibility into the bill that will be welcomed by the University of Edinburgh and the wider higher education sector in Scotland.

For those reasons, convener, I will press amendment 19.

Amendment 19 agreed to.

Section 10—Composition of academic board

Amendment 43 moved—[Tavish Scott].

The Convener: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 43 disagreed to.
Amendment 44 moved—[Tavish Scott].

The Convener: The question is, that amendment 44 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 44 disagreed to.

Amendment 20 moved—[Angela Constance]—and agreed to.

Amendment 45 moved—[Liz Smith].

The Convener: The question is, that amendment 45 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 45 disagreed to.

Section 10, as amended, agreed to.

Section 12—Validity of board’s proceedings

Amendment 47 moved—[Liz Smith].

The Convener: The question is, that amendment 47 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 47 disagreed to.

Section 12 agreed to.

Section 13—Power to modify sections 9 and 10

Amendment 2 moved—[Angela Constance]—and agreed to.

After section 13

The Convener: Amendment 48, in the name of Sandra White, is grouped with amendments 48A, 64, 65 and 49.

Sandra White: I speak as the member for the Glasgow Kelvin constituency, where the Royal Conservatoire of Scotland and Glasgow School of Art, which are world-renowned institutions, are based.

Amendment 48 is about small specialist institutions. It states:

“The Scottish Ministers may”—

I emphasise the word “may”; I specifically did not use the word “must”—

Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
“by regulations modify this Act to exclude any or all small specialist institutions from any or all of the provisions of this Act.”

It continues:

“In considering whether to make regulations under subsection (1) the Scottish Ministers must consult such persons as they consider appropriate.”

That brings me on to Liz Smith’s amendment 48A, which she will speak to. It is eminently sensible in relation to other small specialist institutions.

Amendment 49 is on the meaning of “small specialist institutions”. In a recent education debate, I raised the issue with regard to the conservatoire and Glasgow School of Art, both of which are in my constituency and are world-renowned institutions. As has been said, their boards of governors already meet the criteria. In particular, the conservatoire and Glasgow School of Art have representation from unions that apply to them, including Equity and the Educational Institute of Scotland.

On the issue that Jim Eadie brought up about section 9, the cabinet secretary was good enough to listen to the debate and to agree that there will be no limit on the size of academic boards. Jim Eadie mentioned that the University of Edinburgh has 13,000 staff and 35,000 students, whereas Glasgow School of Art has 40 staff and 1,000 students, and the figures are not dissimilar for the conservatoire. That difference shows exactly why we say that the bodies are small specialist institutions, and why my and Liz Smith’s amendments are important.

We have not yet considered small specialist institutions. I ask the cabinet secretary to consider the recommendations of von Prondzynski’s review and perhaps come back at stage 3 with something along those lines about such institutions. We must recognise how important the institutions are not only to Glasgow or my Kelvin constituency but to the whole of Scotland. They punch well above their weight and are world renowned. In fact, Glasgow School of Art is ranked 10th in the world among arts institutions.

I mentioned Jim Eadie’s point about the size of the University of Edinburgh. The same point applies to the University of Glasgow and the University of Strathclyde, which are in my constituency. There is a world of difference between those institutions and small specialist institutions such as the conservatoire and Glasgow School of Art.

I will leave it there for now, but I may speak to Liz Smith’s amendments later.

I move amendment 48.

Liz Smith: I will start with two quotations. The first is from Ferdinand von Prondzynski, who said:

“we are aware that these institutions”—

the small specialist institutions—

“may wish to have their special status recognised in particular ways, and we take the view that further consideration may need to be given to them in that context”.

The cabinet secretary’s predecessor, Michael Russell, said:

“in the case of the Small Specialist Institutions, the application of the terms of the governance Code should pay particular attention to the principles of proportionality and of relevance to the nature of the individual Institution.”

For those reasons, we must be extremely careful that we do not undermine the diversity and success of the specialist institutions. Sandra White was correct to say that they are world-leading institutions, and if we try to constrain them in a particular way just because we want centralisation of all HEIs, we will end up in considerable difficulty.

As Tavish Scott has said, the Royal Conservatoire of Scotland, Glasgow School of Art and Scotland’s Rural College are very small and it could be argued that they have approaches that are in many ways quite different—the conservatoire and GSA are artistic—from those of some of the universities. We must recognise that, because that relates to their success.

The conservatoire has a unique corporate structure. It is a company limited by guarantee, with shareholders who include its elected staff and student governors. That is evidence of the conservatoire’s commitment to transparency and accountability, and I do not think that any of us could argue that it does not have very good relationships with trade unions and with anyone who wishes to raise particular points.

We must be careful about what we are seeking to do. The Scottish Government has failed to define the problem that the bill seeks to solve and, in the case of the specialist institutions, it will end up creating great difficulty. For that reason, I will support Sandra White’s amendments and, obviously, my own.

I move amendment 48A.
Angela Constance: I thank Sandra White and Liz Smith for explaining the intent behind amendments 48, 48A, 64, 65 and 49. Having considered the amendments carefully, I confirm that the Scottish Government does not support them.

As I have said previously, the Scottish Government intends the bill to apply equally to all 18 Scottish higher education institutions. I have been clear that the provisions in the bill are high level and focused; they feature discrete measures that are aimed at strengthening governance across the entire sector, which will make it more modern, inclusive and accountable. Moreover, I am satisfied that the existing provisions in the Further and Higher Education (Scotland) Act 2005 already have the balance right in placing duties on the Scottish Further and Higher Education Funding Council to report to Scottish ministers on higher education institutions.

I put on record my appreciation for the small specialist institutions such as the conservatoire, Glasgow School of Art and Scotland’s Rural College, and I highlight the value of the role that they play in our HE sector and in wider society. I am aware of the concerns that the conservatoire has expressed about the bill. Board members wrote to me in December to request exemption from the bill because in their “collective view, the Conservatoire’s current governance arrangements, which are unique amongst Scottish Higher Education Institutions, are already fully fit for purpose”.

That view has been expressed more than once during the bill process and by more than one institution. Although I respect any view that is offered, that does not mean that I am convinced that any of our higher education institutions should be treated differently. Consistency of application of the high-level requirements in the bill is fundamental to the bill’s progress.

It is important to put on record that the 2014 von Prondzynski report concluded that, where possible, small specialist institutions should be covered by any legislation, albeit that their special status might need to be considered. However, the range of recommendations for legislation in the original von Prondzynski report was much wider than the focused content of the bill. I therefore believe that it is reasonable to propose that the bill’s provisions are equally relevant to all 18 Scottish higher education institutions.

It is important that we debate and consider the special circumstances, but I have not as yet heard a compelling argument based on size for the conservatoire, for example, to be exempt from the election of chairs or from having seven statutory members on its governing body. I am sure that the debate will continue as we move towards stage 3. The conservatoire has met officials and is due to meet Dr Alasdair Allan imminently. It should be noted that the amendments lodged and supported by Liz Smith and Sandra White do not include the SRUC.

12:30

I expect all our 18 Scottish institutions to be able to meet the requirements of this very focused bill, which will enable every voice on campus to be heard. Many institutions, including the Royal Conservatoire and Glasgow School of Art, have already achieved a level of compliance in practice and have made progress, as Sandra White outlined. To allow those institutions an exemption would undermine the bill’s aims. I have the same aspirations for all our HE institutions and I am convinced that all our HE institutions are capable of achieving them. Therefore, I ask the committee to reject all the amendments in the group if they are pressed.

Sandra White: I thank the cabinet secretary for her comments. I admit that I am rather disappointed. Amendment 48 would apply to the conservatoire and Glasgow School of Art. I did not include the SRUC because nobody from it contacted me. If an organisation does not contact me, I cannot raise its issue.

Again, I contrast the number of staff and students in Edinburgh university with the numbers in the conservatoire and Glasgow School of Art. The cabinet secretary is aware of the issues that the conservatoire and GSA have raised. They are worried that they will not be able to implement the measures in the bill. It may cost them more money, and they may lose good people from their boards. Those are the issues that they have raised with us.

I will press my amendments.

Liz Smith: The issue comes back to democracy and the democratic processes that we all want to see. I ask the cabinet secretary what specific problems smaller specialist institutions have had that need to be resolved. I argue that the situation of smaller specialist institutions is the reverse: they are a success story and their existing governance has worked extremely well.

I press amendment 48A.

The Convener: The question is, that amendment 48A be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 48A disagreed to.

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 48 disagreed to.

Amendment 64 moved—[Liz Smith].

The Convener: The question is, that amendment 64 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

The Convener: The result of the division is: For 4, Against 5, Abstentions 0.

Amendment 64 disagreed to.

Section 14—Procedure for regulations

Amendment 21 moved—[Angela Constance]—and agreed to.

Section 15—Meaning of higher education institution

The Convener: Amendment 65, in the name of the cabinet secretary, was debated with amendment 48. I call the cabinet secretary to move it formally. [Interruption.] I apologise—amendment 65 is in the name of Liz Smith.

Liz Smith: I stress that the amendment is about the conservatoire.

I move amendment 65.

The Convener: The question is, that amendment 65 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 65 disagreed to.

The Convener: I will have words with my clerks later.

Amendment 22, in the name of the cabinet secretary, is grouped with amendment 66.

Angela Constance: The purpose of amendment 22 is to remove the power that enables the Scottish ministers, by regulations, to include a particular institution in the definition of a higher education institution for the purposes of part 1 of the bill. The Delegated Powers and Law Reform Committee suggested removing that in its report to this committee.

We have considered that and, on reflection, we consider that the power to include new institutions is not required. Our policy intention is that only fundable bodies should be covered by the new requirements in the bill. I am content that there should be no power to add bodies beyond those that will fall within the definition naturally. If any new institution is added to the list of fundable bodies, it will automatically fall within the definition of a higher education institution for the purposes of the bill.

Amendment 66 from Liam McArthur would introduce a process to enable institutions to apply to the Scottish ministers for exemptions from any...
of the provisions that are set out in part 1 of the bill. Introducing such a provision would be to the bill’s detriment, so I cannot support Mr McArthur’s amendment 66.

As I have said throughout today, a core aspect of the bill is to introduce consistency in a small number of discrete key areas of governance of our higher education institutions. Amendment 66 would undermine that by enabling the application of the bill in a manner that differed across institutions. The process that is set out would provide the Scottish ministers with a far-reaching discretion to determine which provisions of the bill should apply to which institutions, if they applied for exemptions. I do not think that ministers should have such a role.

I ask the committee to support amendment 22. For the reasons that I have given, I respectfully ask Mr Scott not to move amendment 66. If it is moved, I ask the committee to reject it.

I move amendment 22.

Tavish Scott: I support the cabinet secretary’s amendment 22, which will allow further exemptions to be made for institutions and enable more flexibility in how the bill operates in practice. In that context, it seems consistent also to support amendment 66, which is yet another attempt to ensure a degree of flexibility across the board—and not just for smaller specialist institutions, despite the very able and eloquent way in which Sandra White made the case for two very important institutions, which I argue are important not just in Glasgow but in Scotland as a whole.

Although the concerns are most pressing for the smaller institutions, there is legitimate anxiety more broadly across the sector about what might happen if the proposals in the bill do not lead to the outcomes that ministers predict. Given what we have heard today, that seems quite likely to happen. For example, if there was only one suitable or credible candidate for election as the chair of a governing body—a possibility that was subject to a fairly decent debate earlier in our proceedings—how would a university respond?

We had no answers to that question today, and I suspect that no answers will be forthcoming before the bill becomes law. However, they will be pretty forthcoming when we all end up in court over these matters. The minister—I apologise; I mean the cabinet secretary—keeps saying that this is a high-level, focused and discrete bill, but a lot of us have come to a different conclusion and think that it will mean the introduction of one-size-fits-all legislation across all aspects of higher education. That cannot be the right approach.

Amendment 66 would put in place a proportionate and transparent process that would allow decisions to be taken quickly, though not in haste. Importantly, it would mean that ministers were required not simply to decide on any exemption but to make the basis for that decision clear. It would certainly be a step forward if the basis for lots of things in the bill was made clear.

Liz Smith: I will make a short comment. I agree entirely with Tavish Scott and think that the most important point that he made was about consistency of approach. If we are introducing flexibility as a result of the cabinet secretary’s amendment 22, it is entirely logical and sensible to do exactly the same thing through Liam McArthur’s amendment. I see no reasonable argument that would suggest otherwise.

Angela Constance: First, I make it clear that amendment 22, in my name, will reduce Scottish ministers’ powers and ability to change the definition of a higher education institution. It is simply a response to the Delegated Powers and Law Reform Committee’s comments. The amendment does not do what Tavish Scott and Liz Smith suggested; it does not enable flexibility, because only the fundable body in question will be automatically included.

The process that amendment 66 proposes is pretty bureaucratic. I point out to members that, if that amendment was agreed to, there would be no limit on the number of times an institution could apply to be exempted from the bill.

Amendment 22 agreed to.

Section 15, as amended, agreed to.

Sections 16 to 18 agreed to.

After section 18

The Convener: Amendment 23, in the name of the cabinet secretary, is grouped with amendment 23A.

Angela Constance: The purpose of amendment 23 is to ensure that sabbatical officers of a students’ association of an institution are not excluded from participating fully in the governance of their institution, even if they are not technically matriculated students of the institution during their period of office.

The Scottish Government has given full consideration to this issue, and I thank Gordon MacDonald for raising it at stage 1. From the outset, our policy intention has been to ensure that all students are able to participate fully in the governance of their institution; it was never our intention to exclude sabbatical officers from provisions pertaining to the rest of the student population. Indeed, I understand that the vast majority of sabbatical officers remain as students during their term in office. However, I welcome the opportunity to clarify on the face of the bill that sabbatical officers are included, whether or not
they remain students during their term of office, as I appreciate that the situation can vary across institutions.

Amendment 23, therefore, seeks to ensure that sabbatical officers, whether or not they remain students throughout their term of office, are included in the provisions in the bill regarding appointment as a member of the committee that recruits the senior lay member; participation in the election of the senior lay member; nomination as a student member of the governing body; and election as a student member of the academic board.

Amendment 23A is a technical amendment. Subsection (2) of the new section inserted by amendment 23 would have been required only for the purpose of subsections (3) and (4) of the section inserted by amendment 4. However, Mr Maxwell’s amendment 4B—which, as I explained, I support—removed those two subsections from amendment 4.

I move amendment 23, and I ask members to support it and amendment 23A.

Amendment 23A moved—[Angela Constance]—and agreed to.

Amendment 23, as amended, agreed to.

Amendment 49 not moved.

Amendment 50 moved—[Tavish Scott].

12:45

The Convener: The question is, that amendment 50 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 66 disagreed to.

Section 19—Upholding academic freedom

The Convener: Amendment 51, in the name of Liz Smith, is grouped with amendments 52 to 57.

Liz Smith: I am still confused about and do not understand why we should be legislating in the area of academic freedom. The stage 1 report found no rationale for the Scottish Government to propose legislation in this area. Indeed, at the time there was a real concern, I think, about why we were even thinking about it. According to my information, there is no problem with academic freedom and it is not felt to be something that the Scottish Government should get involved in.

I tested out whether that was the case following several emails that came in to MSPs when it was first proposed to change the definition of academic freedom. Personally, I received 47 such emails, and I got back in touch with each of the senders, who were mostly members of staff in universities, to ask for specific examples of how academic freedom was currently constrained. I am sorry to say that only one person was able to supply an example, which was very specific to a piece of research in a particular institution.

Therefore, I am not at all sure what the bill is trying to do in this regard. My amendments in the group seek to ensure that we can respond to the committee’s concern that academic freedom should be balanced with responsibility. It must not be exercised with malice, for instance, so that under the cover of academic freedom a person makes inflammatory or gratuitously offensive remarks. Obviously, anything must be based on facts and reason. I entirely accept that unevidenced assertions by members of academic staff about things outside their professional competence should not be protected by academic freedom.
As I said, the wording in section 19 can be interpreted as constraining a governing body’s capacity to make decisions about the overall academic shape of the institution. My amendments in the group, in particular amendments 51, 52 and 54, seek to ensure that the risk of that is avoided.

I come back to the point that I do not understand why academic freedom is regarded as being a problem. When the cabinet secretary speaks to the amendments in the group, I would be interested to hear whether she feels that there are specific examples of a university in the current set-up being in some way prevented from having academic freedom.

I move amendment 51.

The Convener: I will speak to my amendment 53 and to the other amendments in the group. I think that we all agree that academic freedom is a principle on which the strength and success of our universities is founded.

I listened very carefully to what Liz Smith said, and I do not think that I agreed with an awful lot of it. However, I think that she made one point that is very important, which is that there is a balance to be struck between the rights and the responsibilities of staff and others in our HEIs. Liz Smith’s amendments and my amendments compete in this area, so she will have to accept my apology, as I cannot support her amendments because I will be supporting my own.

The key issue is balance. We must ensure that academics and teaching staff can offer their opinions freely, unfettered by consideration of, for example, the impact on their ability to seek a new appointment or to maintain their current appointment. However, we must also ensure that the right to hold and express an opinion is exercised strictly within the ambit of the law.

My amendments 53 and 55 would introduce a qualification to the duty on post-16 education bodies that is proposed in section 19(2) of the bill. Further to the evidence presented to the committee, that should satisfy some—but perhaps not all—of those who are concerned about the impact of section 19 as introduced.

Some have asked for rights around academic freedom to be extended to the student population. I think that, practically, that would be difficult to achieve. Given that the nature of the relationship between governing bodies and students is quite different from that between an institution and its staff, I do not think that that is a sensible option. Moreover, students have the right to freedom of expression under current human rights legislation, as any other person does.

With that thought in mind, I consider amendments 53 and 55 to be a proportionate response to the issues. They provide balance, and I encourage members to support my amendments.

Angela Constance: It is worth noting that a statutory definition of academic freedom exists in the Further and Higher Education (Scotland) Act 2005. It is fair to say that the Government took the opportunity presented by this bill to look to strengthen that definition. However, the bill as introduced seeks to strengthen it in a modest way, and we certainly discussed issues of academic freedom, as set out in the bill, with a range of stakeholders in the workshops that I alluded to earlier.

I am sympathetic to what Liz Smith is trying to achieve with amendment 56, but I will be crystal clear on one point: academic freedom that is enjoyed by those teaching and researching in our universities must be exercised within the law; it does not represent a free pass—so to speak—to break the law. I am also aware of the points raised by the Scottish Council for Jewish Communities in its evidence on the bill. However, I think that there may be legal difficulties in applying a subjective test, based on whether there was any malicious intent in the exercise of academic freedom, in addition to the explicit requirement to comply with the law when exercising academic freedom.

Amendments 51, 52 and 54 would alter the wording of section 19 in a way that I consider would weaken the Government’s original intention of strengthening academic freedom. The amendments would simply reinstate the provisions that currently exist in section 26(1) of the Further and Higher Education (Scotland) Act 2005. I appreciate the intention behind amendment 57 but, given the often subjective nature of opinions held or expressed, I do not think that it is realistic to expect academics to produce hard facts to support any view or opinion that they may hold or express. For the reasons given already I cannot support amendments 51, 52, 54, 56 and 57. I ask the committee to reject all the amendments put forward by Liz Smith.

Amendments 53 and 55, in the name of Stewart Maxwell, would make a minor adjustment to the duty on all post-16 education bodies to uphold the academic freedom of any of its staff who are engaged in teaching and research, and to ensure that the appointments and privileges of those persons engaged in teaching and research are not adversely affected by the exercise of their academic freedom. I am content to support amendments 53 and 55 to qualify the duty such that, in fulfilling it, a post-16 education body acts in a way that it considers to be reasonable. I make it clear that the requirement on people who are
engaged in teaching and research to exercise their academic freedom within the law is not affected.

Therefore, I support amendments 53 and 55 and urge members to support those amendments but to reject other amendments in the group if they are moved.

Liz Smith: The cabinet secretary said that there is already a definition of “academic freedom”. There is, absolutely, such a definition; what I do not understand is why we are trying to amend it. I entirely accept the convener’s point about the need for a balance between freedom and responsibility, and for that reason I will support his amendments 53 and 55. However, the convener gave the example of human rights, which are backed by law, whereas we have got into the territory of trying to legislate on academic freedom in relation to academic issues in institutions.

I say again that it is impossible to find any examples—I note that the cabinet secretary could not give me a list—of things that institutions currently cannot do in their subject areas, provided that they are not breaking the law. I just do not see where we are going on this, hence my lodging of the amendments in this group.

Section 19 is one of the sections in this bill that is not needed—although I would argue that all sections in the bill are unnecessary, because we should not be changing university governance in the first instance. There is no logical basis for section 19, so I press amendment 51.

The Convener: The question is, that amendment 51 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Steward (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 52 disagreed to.

Amendment 53 moved—[Stewart Maxwell]—and agreed to.

Amendment 54 moved—[Liz Smith].

The Convener: The question is, that amendment 54 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Steward (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 54 disagreed to.

Amendment 55 moved—[Stewart Maxwell]—and agreed to.

Amendment 56 moved—[Liz Smith].

The Convener: The question is, that amendment 56 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Steward (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 56 disagreed to.

Amendment 57 moved—[Liz Smith].

The Convenor: The question is, that amendment 57 be agreed to. Are we agreed?

Members: No.

The Convenor: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convenor: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 57 disagreed to.

Section 19, as amended, agreed to.

After section 19

13:00

The Convenor: Amendment 67, in the name of Chic Brodie, is in a group on its own.

Chic Brodie: I will be brief. This goes back to what I said at a previous meeting. When legislation is passed, we do two things. One is that we invariably set targets that mean absolutely nothing, because they are applicable only at the time when they are applied. My concern is that those who do not agree with some provisions will force the Government into setting targets, which would be nonsense.

If I may speak personally, I will say that the issue does not just apply to this bill. For example, it does not make sense to have a target for a month and then if you miss it, it is split up into four, so instead of getting battered around the head once a month, you would get battered around the head four times a month.

I am sorry that the “Scottish Code of Good Higher Education Governance” has not run its whole course. A purpose of my amendment 67 is to suggest that all parties—irrespective of whether we agree with all the bill’s provisions—allow a period of time during which the Scottish Parliament may decide that the act should be scrutinised. That scrutiny should happen a reasonable time after the act has been allowed to bed down and we can see whether there has been an improved outcome. There is a suggestion that this is perhaps not the bill in which to introduce such a measure. I argue the converse of that. There is no question, as we have heard in emails, but that the bill is contentious. That will not stop, in my opinion. As a consequence, it behoves us to ask all parties to recognise that we should allow the bill, if passed, to bed down, and that we should, after a suitable period, look at whether the objectives have been achieved, including whether the outcome of improved performance in higher education institutions has been met.

I move amendment 67.

Liz Smith: I whole-heartedly agree with Chic Brodie’s comments; post-legislative scrutiny will be required. This is a bad bill—it is bad because it has been badly drafted and it is bad because there has not been relevant consultation. I return to the cabinet secretary’s comments about semantics. Semantics is important. Unfortunately, its rules have not been adhered to in a way that allows us to interpret the bill.

I maintain that little is wrong with our university sector. Post-legislative scrutiny would be essential. I—or, rather, Mary Scanlon—will support Chic Brodie’s amendment 67.

The Convenor: That is up to Mary Scanlon—[Laughter]—but we hear what you are saying. No other member wishes to make a contribution, so I will make a short one.

I will not support amendment 67—not because I disagree with the principle of post-legislative scrutiny, which is obviously an important role for Parliament’s committees. Given the amount of work that committees do, there is a wider question about whether they have the time to undertake such activity. However, that is a question for Parliament, rather than one for this bill. I am slightly uncomfortable with the idea that committees would be instructed to carry out post-legislative scrutiny. That is a matter for committees. I do not support the idea of binding the hand of future committees; whether they consider that post-legislative scrutiny is the right thing to do is their decision to make at the appropriate time. On that basis, while accepting both the principle and that there is a question mark over post-legislative scrutiny, we should not support amendment 67, which would create what I believe would be an uncomfortable situation in binding the hands of future committees. That is why I will not support the amendment.

Angela Constance: I want to thank Chic Brodie for explaining the intent of amendment 67. I am, of course, supportive of the right of the committee—indeed, of any committee—to scrutinise any legislation or to provide a scrutiny role in any manner and on any subject it sees fit.
The Scottish Government does not support amendment 67 partly because Parliament is already enfranchised in the manner that Mr Brodie seeks to achieve. I am sure that the committee will agree that the current powers of the committee are adequate to examine the impact of the bill as enacted—or, indeed, any other legislation—at any point in the future. Therefore, in my view amendment 67 is unnecessary. Parliament does not need a statutory provision to give it permission to tell itself or its committees to carry out post-legislative scrutiny; the Parliament’s committees are perfectly able to look into all matters within their portfolios.

Mary Scanlon: Many bills that Parliament has passed have been fairly consensual, and most of us would agree that we have been able to see the purpose of and the reason for those bills. Other ministers—Labour, Lib Dem and Scottish National Party—have accepted sunset clauses, because there is a convention that legislation needs to be revisited after a period to see whether it is working. However, scrutiny of the bill has been highly adversarial and I do not think that there is a university in Scotland that is in favour of the bill. Do you not think that—if you will not consider post-legislative scrutiny for this adversarial bill—it should be revisited under a sunset clause, given the amount of criticism of it?

Angela Constance: With respect, Ms Scanlon, I say that it is not unusual for bills that are brought before Parliament to be debated in great detail and for there to be much difference of opinion on them. I am speaking to Mr Brodie’s amendment 67. It is not my role, as a minister, to tell any committee or, indeed, Parliament how to perform its role in scrutiny of a bill.

As I have outlined in response to Mr Brodie, Parliament is already enfranchised to do as it pleases, so to include such a provision could set an undesirable precedent that would imply that such action is necessary before Parliament and its committees could carry out their daily parliamentary business, as the convener suggested. I would not want to set that precedent or make that implication.

It may be of some reassurance to the committee that there will be—as discussed during earlier debates on the bill—a role for the university sector advisory forum in assessing the bill’s implementation and effectiveness. Of course, that is secondary to the role of any committee of Parliament—and, indeed, to the role of Parliament as a whole—in scrutinising as, when and how it sees fit.

Chic Brodie: I hear what the cabinet secretary says about the university sector advisory forum looking at this contentious bill. However, at the end of the day, the bill will be passed by Parliament, and my general view is that a bill of this nature should be allowed to bed down and be given the opportunity to run some of its course.

On timetables, I suggest that because of the contentious nature of the bill we will probably spend a lot of time trying to justify or not justify our comments. I am trying to assure that by saying that we should have the scrutiny at a time to be determined by the Scottish Parliament. As you rightly said, the matter is up to the committees, and petitions are referred to the committees through the public forum. Nevertheless, we have to cool the jets on the bill now—if it is passed—and allow a time for all the parties that are involved to secure improved outcomes. I therefore urge the Government to accept amendment 67.

The Convener: Are you pressing amendment 67?

Chic Brodie: Yes.

The Convener: The question is, that amendment 67 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Brodie, Chic (South Scotland) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 67 disagreed to.

Section 20—Ancillary regulations

The Convener: Amendment 68, in the name of Liam McArthur, is grouped with amendment 69. I call Tavish Scott to move amendment 68 and to speak to both amendments in the group.

Tavish Scott: I apologise to Chic Brodie for not catching the convener’s eye during the debate on the previous group. The only thing that I would add is that because the Government has lodged at stage 2 amendments that will fundamentally change the bill but have not been consulted on—as we have illustrated this morning—Mr Brodie’s observations about post-legislative scrutiny were entirely appropriate and correct.

I have—dare I say it?—a heck of a lot of sympathy for the cabinet secretary. As a former minister, I have been given the same speaking
note saying, “Don’t, for goodness’ sake, let that one go.” I must say on reflection, however, that in all the time that Mary Scanlon and I have spent in this place, I have learned that we do not do post-legislative scrutiny very well, and Chic Brodie tried to do Parliament a favour there by introducing it on a measure that may not—I take his point—be adversarial, but is certainly highly controversial. I hope that Parliament and the conveners’ group will reflect on that for the future—you are one of those learned conveners, convener.

I would like to speak briefly to Liam McArthur’s learned amendment, which I nearly understand. It is an attempt to address potential concerns of the Office of the Scottish Charity Regulator in relation to the way in which ministerial powers under subordinate legislation might be used. Initial misgivings about the impact that the bill’s provisions might have on the charitable status of universities were allayed, I understand, by OSCR. The focus turned to the more substantive and justified concerns about the real threat of Office for National Statistics recategorisation, and the minister has taken action there that are obviously welcome and good. Nevertheless, as things stand, ministers will still, through secondary legislation, have significant powers to amend the bill, which I suggest need to be constrained. Amendments 68 and 69 in Liam McArthur’s name would achieve that, so I ask the committee to consider and support them.

I move amendment 68.

Angela Constance: As a committee that regularly deals with primary legislation, you will know that the bill could, like any other, when it becomes new law give rise to a need for a range of ancillary provisions. Section 20(1) of the bill will allow Scottish ministers to make ancillary provision without further primary legislation if a need is identified or a change is considered necessary or expedient. It is necessary, proportionate and commonplace in bills to allow for such flexibility. Committee members will recall their recent consideration of the Education (Scotland) Bill, which was passed by Parliament on 2 February 2016. That bill contained a similar ancillary provision.

The power in section 20(1) is limited to the extent that it can be exercised only if it is considered necessary or expedient for the purposes of, or in connection with, provision that has been made by the bill. Therefore, regulations will have to be closely and directly linked to the substance of the bill. The power would not allow ministers to make sweeping changes that would run contrary to the underlying principles or expressed provisions of the bill. It is merely a quick fix for technical problems; it is most certainly not a free hand.

Further, if ministers were to make under section 20(1) regulations that would amend primary legislation, they would be subject to affirmative procedure and therefore subject to parliamentary approval. I am sure that committee members will agree that that allows for adequate parliamentary scrutiny of anything that may be done under the power. I therefore ask the committee to reject amendments 68 and 69 in the name of Liam McArthur, if Mr Scott presses them.

Tavish Scott: I hear the cabinet secretary’s arguments. There is always merit in that approach, but when a bill has a range of late amendments, I argue—OSCR has made the observation not in this context but in a different one—that there is great merit in restricting the role of future ministers in doing exactly as they may wish.

The situation also rather makes the case for Mr Brodie’s post-legislative scrutiny amendment 67, which was not successful this afternoon. The illustration in the minister’s argument did not include any examples of what might be necessary. I hope that a Government would embark on that route into yet further legislation—primary, secondary or otherwise—only if a committee of the Parliament had reviewed the act and suggested where there were mistakes.

13:15

The Convener: The question is, that amendment 68 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 68 disagreed to.

Amendment 69 moved—[Tavish Scott].

The Convener: The question is, that amendment 69 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
Griffin, Mark (Central Scotland) (Lab)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 7, Abstentions 0.

Amendment 69 disagreed to.
Sections 20 and 21 agreed to.

Schedule—Consequential modifications
Amendment 24 moved—[Angela Constance]—and agreed to.
Amendment 58 moved—[Liz Smith].

The Convener: The question is, that amendment 58 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Highlands and Islands) (LD)

Against
Adam, George (Paisley) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brodie, Chic (South Scotland) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Maxwell, Stewart (West Scotland) (SNP)

Abstentions
Griffin, Mark (Central Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)

The Convener: The result of the division is: For 2, Against 5, Abstentions 2.

Amendment 58 disagreed to.

Amendments 25 and 26 moved—[Angela Constance]—and agreed to.
Schedule, as amended, agreed to.
Sections 22 and 23 agreed to.
Long title agreed to.

The Convener: That ends our consideration of the bill at stage 2. I suspend the meeting briefly.

13:18
Meeting suspended.
Higher Education Governance (Scotland) Bill
[AS AMENDED AT STAGE 2]

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Higher Education Governance (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the composition of and appointment to the governing bodies and academic boards of higher education institutions; and to revise provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.

Part 1

Governance arrangements

Chapter 1

Governing bodies

Senior lay member of governing body

A1 Position of senior lay member

10

(1) The governing body of a higher education institution is to include the position of senior lay member (however the institution chooses to name the position).

(2) The senior lay member of the governing body of a higher education institution has—

(a) the duty to preside at meetings of the governing body,

(b) a deliberative and a casting vote at such meetings,

(c) responsibility for—

(i) the leadership and effectiveness of the governing body,

(ii) ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution.

15

(3) Another member of the governing body of a higher education institution may be selected by the governing body to exercise any of the functions mentioned in subsection (2) in the absence of the senior lay member or while the position is vacant.

(4) Subsections (2) and (3) are subject to section A2.

SP Bill 74A

Session 4 (2016)
A2 Interaction with role of rector

(1) Subsection (2) applies in the case of a higher education institution at which there is a rector who has functions under section 4 of the 1858 Act and section 5(5) of the 1889 Act (each of which contains provision relating to the role of the rector at an older university).

(2) Paragraphs (a) and (b) of subsection (2) of section A1 and subsection (3) of that section so far as relating to those paragraphs are of no effect in relation to the institution (but see section 5(5) of the 1889 Act (which also contains provision about who is to preside at certain meetings in the absence of the rector)).

(3) In this section—

“the 1858 Act” means the Universities (Scotland) Act 1858,

“the 1889 Act” means the Universities (Scotland) Act 1889.

A3 Relevant criteria etc.

(1) Whenever a vacancy arises in the position of senior lay member of the governing body of a higher education institution, the governing body must delegate to a committee the responsibility of—

(a) devising the relevant criteria with respect to the position,

(b) ensuring the efficiency and fairness of the process for filling the position.

(2) The relevant criteria include the skills and knowledge considered by the committee to be necessary or desirable to—

(a) exercise the functions of the senior lay member,

(b) command the trust and respect of—

(i) the other members of the governing body,

(ii) the academic board of the institution,

(iii) the staff and students of the institution.

(3) The membership of the committee must include at least one person from each of these categories—

(a) the staff of the institution,

(b) the students of the institution.

(4) Rules made by the governing body of the institution may make provision for the process for filling the position of senior lay member of the governing body (subject to sections A4 to A8).

A4 Advertisement and application

(1) A current or upcoming vacancy in the position of senior lay member of the governing body of a higher education institution is to be advertised by the governing body, including by publication—

(a) on the institution’s website, and

(b) in the print or internet version of at least one national newspaper in Scotland.
(2) The committee mentioned in section A3(1) is to ensure that the advertisement—
   (a) sets out the functions exercisable by the senior lay member of the governing body under section A1(2),
   (b) summarises the relevant criteria with respect to the position and states how more information about the relevant criteria can be obtained,
   (c) explains—
      (i) the process for filling the position,
      (ii) how the application form in relation to the position can be obtained,
      (iii) what reimbursement is offered of expenses incurred in connection with attending an interview or campaigning in an election for the position,
      (iv) what remuneration and allowances are available in connection with the holding of the position.

A5 Interview of certain applicants

(1) If—
   (a) an application for the position of senior lay member of the governing body of a higher education institution is made in the correct form in response to an advertisement under section A4(1), and
   (b) the application appears to the committee mentioned in section A3(1) to show that the applicant meets the relevant criteria with respect to the position,

the applicant must be invited to an interview conducted by the committee.

(2) If the applicant satisfies the committee at such an interview that the applicant meets the relevant criteria, the applicant is entitled to stand as a candidate in an election for the position.

(3) The governing body of the institution is to offer every applicant for the position reimbursement of reasonable expenses that are incurred by the applicant in attending such an interview.

A6 When election to be convened

(1) An election for the position of senior lay member of the governing body of a higher education institution must be convened if more than one applicant—
   (a) is entitled under section A5(2) to stand as a candidate in the election, and
   (b) confirms an intention to stand as a candidate in the election.

(2) If the number of candidates in the election subsequently falls to below two—
   (a) the election is to be postponed until the election can be held with more than one candidate standing (and the vacancy must be advertised under section A4(1) again),
   (b) the remaining candidate (if there is one) continues to be entitled to stand as a candidate in the election.
(3) The governing body of the institution is to offer every candidate in the election reimbursement of reasonable expenses that are incurred by the candidate in campaigning in the election (up to the limit per candidate that is fixed by the governing body).

A7 Election franchise and result

5 (1) These persons are entitled to vote in an election under section A6 for the position of senior lay member of the governing body of a higher education institution—
   (a) the members of the governing body,
   (b) the staff of the institution,
   (c) the students of the institution.

10 (2) No individual is entitled to cast more than one vote in the election.

(3) Each vote cast in the election carries equal weight.

(4) The election is won by the candidate who secures a simple majority of the total number of votes cast.

(5) In the event of a tie between two or more candidates for the highest number of votes cast, the election is won by whichever of them is deemed to be the winner in accordance with rules made by the governing body of the institution.

A8 Appointment and tenure

(1) The winning candidate in an election under section A6 for the position of senior lay member of the governing body of a higher education institution is to be appointed to the position by the governing body.

(2) An appointment to the position is for the period specified in rules made by the governing body, but the period of such an appointment may be extended in accordance with the rules.

(3) The position cannot be filled otherwise than by an appointment made by virtue of this section.

A9 Remuneration and conditions

(1) The governing body of a higher education institution is, on the request of a person appointed to the position of senior lay member of the governing body, to pay reasonable remuneration and allowances to the person (which are to be commensurate with the nature and amount of the work done by the person in that capacity).

(2) A person appointed to the position may not be a student of, or one of the staff of, the institution during the period of the person’s appointment.

(3) The holding by a person of the position is in all other respects subject to such terms and conditions as are specified by the governing body.

1A Resignation or removal of chairing member

(1) The chairing member of the governing body of a higher education institution may resign from office by giving written notice to the secretary of the governing body.

(2) Where notice is given under subsection (1), the resignation has effect at the end of—
(a) the period of 3 months beginning with the date of receipt of the notice by the secretary of the governing body, or
(b) such other period agreed between the chairing member and the secretary of the governing body.

(3) The chairing member of the governing body of a higher education institution may, by resolution passed by a majority of not less than two thirds of the members of the governing body, be removed from that office where the governing body considers that any of the grounds in subsection (4) are established.

(4) The grounds are that the chairing member is—
(a) unable,
(b) unwilling, or
(c) unsuitable,
to continue to perform the functions of the office, in accordance with rules to be made by the governing body.

(5) In considering for the purposes of subsection (3) whether any of the grounds in subsection (4) are established, the governing body may have regard, in particular, to—
(a) whether the chairing member has frequently failed without reasonable excuse to attend meetings of the governing body,
(b) any conduct of the chairing member that is in breach of any of the duties with which the chairing member is required to comply as a trustee under the Charities and Trustee Investment (Scotland) Act 2005,
(c) any conduct of the chairing member that is considered by the governing body to bring the higher education institution into disrepute.

(6) A chairing member of a governing body of a higher education institution who is the subject of a resolution under subsection (3) is not entitled to vote on that resolution.

(7) If a resolution to remove a chairing member of a governing body of a higher education institution is agreed to by the governing body in accordance with subsection (3), the chairing member must be given a right of appeal against the decision, in accordance with arrangements made from time to time by the nominations committee of the institution.

Membership of governing body

4 Composition of governing body

(1) The membership of the governing body of a higher education institution is to be composed of—

(a) the person appointed to the position of senior lay member by virtue of section A8,
(b) 2 persons appointed by being elected by the staff of the institution from among their own number,
(c) 1 person appointed by being nominated by a trade union, recognised in relation to the academic staff of the institution, from among the academic staff of the institution who are members of a branch of a trade union that has a connection with the institution,
(d) 1 person appointed by being nominated by a trade union, recognised in relation to the support staff of the institution, from among the support staff of the institution who are members of a branch of a trade union that has a connection with the institution,

(e) 2 persons appointed by being nominated by a students’ association of the institution from among the students of the institution,

(g) such other persons as are appointed—
   (i) by virtue of an enactment, or
   (ii) in accordance with the governing document of the institution.

(2) For the purposes of paragraphs (c) and (d) of subsection (1), a trade union is recognised in relation to a category of staff if the higher education institution—
   (a) so recognises it as described in section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992, or
   (b) otherwise recognises it as representative of the category of staff.

5 Elections to governing body

(1) This section applies in relation to an election of members to the governing body of a higher education institution for the purpose of paragraph (b) of section 4(1).

(2) The election process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—
   (a) different provision for different vacancies,
   (b) provision defining “staff” for section 4(1)(b) as—
      (i) academic staff,
      (ii) support staff, or
      (iii) all staff.

(4) Where the number of eligible candidates in a category is equal to or fewer than the number of vacancies in that category, those candidates are deemed to be elected.

5A Resignation or removal of ordinary members of governing body

(1) A person appointed, nominated or elected as a member (other than the person appointed under section 4(1)(a)) of the governing body of a higher education institution (in this section an “ordinary member”) may resign from that position by giving written notice to the chairing member of the governing body.

(2) Where notice is given under subsection (1), the resignation has effect at the end of—
   (a) the period of 1 month beginning with the date of receipt of the notice by the chairing member, or
   (b) such other period agreed between the ordinary member and the chairing member.
(3) A person appointed, nominated or elected as an ordinary member of the governing body of a higher education institution may, by resolution passed by a majority of not less than two thirds of the members of the governing body, be removed from that position where the governing body considers that any of the grounds in subsection (4) are established.

(4) The grounds are that the ordinary member is—

(a) unable,

(b) unwilling, or

(c) unsuitable,

to continue to perform the functions of the position, in accordance with rules to be made by the governing body.

(5) In considering for the purposes of subsection (3) whether any of the grounds in subsection (4) are established, the governing body may have regard, in particular, to—

(a) whether the ordinary member has frequently failed without reasonable excuse to attend meetings of the governing body,

(b) any conduct of the ordinary member that is in breach of any of the duties with which the member is required to comply as a trustee under the Charities and Trustee Investment (Scotland) Act 2005,

(c) any conduct of the ordinary member that is considered by the governing body to bring the higher education institution into disrepute.

(6) An ordinary member of a governing body of a higher education institution who is the subject of a resolution under subsection (3) is not entitled to vote on that resolution.

(7) If a resolution to remove an ordinary member of a governing body of a higher education institution is agreed to by the governing body in accordance with subsection (3), the ordinary member must be given a right of appeal against the decision, in accordance with arrangements made from time to time by the nominations committee of the institution.

6 Nominations to governing body

(1) This section applies in relation to a nomination of members to the governing body of a higher education institution for the purpose of each of paragraphs (c) to (e) of section 4(1).

(2) The nomination process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—

(a) provision specifying who may exercise the rights of nomination (whether individually or jointly),

(b) different provision for different vacancies.

(4) Before making or modifying rules under subsection (2), the governing body must consult the representatives of anyone—

(a) with a right of nomination under the proposed rules, and

(b) affected by the proposed rules or (as the case may be) modification.
7 Validity of body’s proceedings
The validity of any proceedings of the governing body is not affected by any—
(a) vacancy in membership (or category of membership),
(b) defect in the appointment of a member.

CHAPTER 2
ACADEMIC BOARDS

10 Composition of academic board
(1) The membership of the academic board of a higher education institution is to be composed of—
(a) the principal of the institution,
(b) the heads of school of the institution,
(c) persons appointed by being elected by the academic staff of the institution from among their own number,
(d) persons appointed by being elected by the students of the institution from among the students of the institution,
(e) such other persons as are appointed—
   (i) by virtue of an enactment,
   (ii) in accordance with the governing document of the institution, or
   (iii) in accordance with a decision of the governing body of the institution.
(2) The academic board is to be constituted in such a way that—
   (a) more than 50% of its members fall within subsection (1)(c) or (d),
   (b) at least 10% of its members fall within subsection (1)(d).
(3) Despite subsection (2)(b), the academic board is not required to have more than 30 members who fall within subsection (1)(d).

11 Elections to academic board
(1) This section applies in relation to an election of members to the academic board of a higher education institution for the purpose of each of paragraphs (c) and (d) of section 10(1).
(2) The election process is to be conducted in accordance with rules made by the governing body of the institution.
(3) Rules under subsection (2) may include (in particular)—
   (a) provision specifying the number of appointments to be made,
   (b) different provision for different vacancies.
(4) Where the number of eligible candidates in a category is equal to or fewer than the number of vacancies in that category, those candidates are deemed to be elected.
12 **Validity of board’s proceedings**

The validity of any proceedings of the academic board is not affected by any—

(a) vacancy in membership (or category of membership),

(b) defect in the appointment of a member.

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15 **Meaning of higher education institution**

(1) In this Part, “higher education institution” has the same meaning as in the Further and Higher Education (Scotland) Act 2005 except that it—

(a) includes an institution only if the institution is listed in schedule 2 (fundable bodies) to that Act,

(b) excludes The Open University.

(2) The Scottish Ministers may by regulations modify the definition in subsection (1) so as to exclude a particular institution.

(3) Regulations under subsection (2) are subject to the negative procedure.

16 **Meaning of governing document**

(1) In this Part, “governing document”—

(a) in the case of an older university, means its ordinances made under the Universities (Scotland) Acts 1858 to 1966,

(b) in the case of an institution established by royal charter, means its charters together with the statutes (if any) made under them,

(c) in the case of a designated institution—

   (i) if it is a registered company and no orders of the Privy Council are in force with respect to it, means its articles of association,

   (ii) otherwise, means the orders of the Privy Council that are in force with respect to it,

   (d) in any other case, means the instruments that establish the higher education institution or govern the composition of its governing body or academic board.

(2) In this section—

“designated institution” has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992,

“older university” is to be construed in accordance with section 16(1) of the Universities (Scotland) Act 1966,

“registered company” means a company registered under the Companies Acts as defined in section 2 of the Companies Act 2006.
Meaning of governing body

In this Part, “governing body” has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992.

Meaning of academic board

(1) In this Part, “academic board” in relation to an institution means the body which—

(a) is responsible for the overall planning, co-ordination, development and supervision of the academic work of the institution, and

(b) discharges that responsibility subject to the general control and direction of the governing body of the institution.

(2) For the avoidance of doubt, the body described by subsection (1) is the one sometimes known as the Senate, Senatus or Senatus Academicus.

References to students

In this Act, a reference to the students of a higher education institution includes all persons holding sabbatical office in a students’ association of the institution (whether or not they remain as students of the institution during their period of office).

PART 2

ACADEMIC FREEDOM

Upholding academic freedom

(1) The Further and Higher Education (Scotland) Act 2005 is amended as follows.

(2) For section 26 (academic freedom) there is substituted—

“26 Academic freedom

(1) A post-16 education body must aim to—

(a) uphold (so far as the body considers reasonable) the academic freedom of all relevant persons, and

(b) ensure (so far as the body considers reasonable) that the matters mentioned in subsection (2) are not adversely affected by the exercise of academic freedom by any relevant persons.

(2) The matters are—

(a) appointments held or sought, and

(b) entitlements or privileges enjoyed, at the post-16 education body by those relevant persons.

(3) In this section, “relevant persons” in relation to a post-16 education body means persons engaged in—

(a) teaching, or the provision of learning, at the body, or

(b) research at the body.

(4) For the purposes of this section, “academic freedom” in relation to relevant persons includes their freedom within the law to do the following things—
(a) hold and express opinions,
(b) question and test established ideas or received wisdom,
(c) develop and advance new ideas or innovative proposals,
(d) present controversial or unpopular points of view.”.

PART 3
GENERAL PROVISIONS
Ancillary and consequential

20 Ancillary regulations

(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.

(2) Regulations under this section—
   (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act (including this Act),
   (b) otherwise, are subject to the negative procedure.

21 Consequential modifications

The schedule makes consequential modifications.

Commencement and short title

22 Commencement

(1) This section and section 23 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—
   (a) appoint different days for different purposes,
   (b) include transitional, transitory or saving provision.

23 Short title

The short title of this Act is the Higher Education Governance (Scotland) Act 2016.
The Universities (Scotland) Act 1858

1 (1) The Universities (Scotland) Act 1858 is amended as follows.

(2) In section 4 (university courts to be constituted), the words “consist of the members and” are repealed.

(3) In section 5 (powers of the senatus academicus and principal)—

(a) the words from “consist of” to “discipline of the University, and” are repealed,

(b) for the words “its property” there is substituted “the University’s property”.

The Universities (Scotland) Act 1889

2 (1) The Universities (Scotland) Act 1889 is amended as follows.

(2) In section 5 (which makes provision about University Courts)—

(a) in subsection (1), the words before “Seven” are repealed,

(b) in subsection (2), the words “Chancellor or” are repealed in each place where they occur,

(c) in subsection (5), for the words “a vice-chairman elected by the Court from among all its members” there is substituted “the senior lay member”,

(d) after subsection (5) there is inserted—

“(5A) In subsection (5), “senior lay member” means the person appointed to the position by virtue of section A8 of the Higher Education Governance (Scotland) Act 2016.”.

The Universities (Scotland) Act 1966

3 (1) The Universities (Scotland) Act 1966 is amended as follows.

(2) In section 2 (constitution of university courts)—

(a) in subsection (1), after the words “Subject to the provisions of section 17 of this Act” there is inserted “and Chapter 1 of Part 1 of the 2016 Act”,

(b) subsection (6) is repealed.

(3) Section 7 (constitution of senates) is repealed.

(4) In section 11 (university staff ineligible to become rector, or assessor on court except in certain circumstances), at the end of the proviso following paragraph (b) there is inserted “or the right of a person to be appointed in accordance with section 4(1)(b) to (d) of the 2016 Act”.

(5) In section 16 (interpretation), at the beginning of the list of defined expressions in subsection (1) there is inserted—

““the 2016 Act” means the Higher Education Governance (Scotland) Act 2016;“.”.
(6) In Part I (powers exercisable by ordinance) of Schedule 2, for paragraph 4 there is substituted—

“4. To provide for—

(1) the term of office of members of the Senatus Academicus,

(2) the manner of election of members of the Senatus Academicus, except those elected in accordance with rules made under section 11(2) of the 2016 Act.”.
Higher Education Governance (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about the composition of and appointment to the governing bodies and academic boards of higher education institutions; and to revise provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.

Introduced by: Angela Constance
On: 16 June 2015
Bill type: Government Bill
HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Higher Education Governance (Scotland) Bill (which was introduced in the Scottish Parliament on 16 June 2015) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidling in the right margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. Where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

4. The Bill makes provision to improve and modernise aspects of the governance of higher education institutions (HEIs). The Bill contains provision covering four areas:

- **Appointment of the senior lay member of the governing body within an HEI:** A requirement is placed on each HEI to appoint a senior lay member of the governing body in accordance with a two stage process comprising an advertisement, application and selection stage followed by an election stage. Each HEI is also required to make payable, at the request of the senior lay member, reasonable remuneration and allowances for undertaking the role of senior lay member. In addition, provision is made about how such a senior lay member may resign or be removed from that office.

- **Membership of the governing body within an HEI:** A requirement is placed on each HEI to ensure that the membership of its governing body includes a senior lay member appointed in accordance with the process stipulated in sections A1 to A8 of the Bill; two members who are directly elected from the HEI’s staff; one member nominated by a trade union representing academic staff; one member nominated by a trade union representing support staff; and two student members nominated by a students’ association of the HEI. In addition, provision is made about how the chairing member of the governing body (which is not an expression used elsewhere
This document relates to the Higher Education Governance (Scotland) Bill as amended at Stage 2 (SP Bill 74A)

in the Bill) and an “ordinary member” of the governing body (that is every member except the senior lay member) may resign or be removed from the governing body.

- **Composition of an HEI’s academic board:** A requirement is placed on HEIs to ensure that elected members comprise more than 50% of the total membership of the academic board. Overall, at least 10% of the academic board must be made up of elected student members, subject to the rule that no more than 30 student members are required. All staff and student board members appointed under the Bill’s election process for staff and students, with the exception of any members attending ex officio, must be elected by the constituency they represent.

- **Academic freedom:** Section 26 of the Further and Higher Education (Scotland) Act 2005, which makes provision for the protection of academic freedom by post-16 education bodies, is replaced with a new section. The new section strengthens the obligation on post-16 education bodies. It requires that such bodies must aim to uphold, so far as the body considers reasonable, the academic freedom of persons engaged in teaching, the provision of learning or research at the body. It also requires that such bodies must aim to ensure, so far as the body considers reasonable, that appointments held or sought and entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of academic freedom of those engaged in teaching, the provision of learning or research at the body. The new section also expands the definition of academic freedom to include the freedom to develop and advance new ideas or innovative proposals.

5. Throughout these Explanatory Notes various terms and abbreviations are used; the most important are as follows:

- “the 1992 Act” means the Further and Higher Education (Scotland) Act 1992;
- “the 2005 Act” means the Further and Higher Education (Scotland) Act 2005;
- “academic board” means the body within the HEI which is charged with dealing with and making decisions on academic and research matters; some HEIs refer to the academic board as the Senate;
- “designated institution” means an institution designated under section 44 of the 1992 Act;
- “HEI” means an institution which is a university or designated institution (with the exception of the Open University), and which is listed in schedule 2 to the 2005 Act; these institutions are institutions based in Scotland which provide higher education within the meaning of section 38 of the 1992 Act and which are eligible for funding from the Scottish Further and Higher Education Funding Council;
- “post-16 education body” means a body listed in schedule 2 to the 2005 Act and a college that is assigned to a regional strategic body under section 7C of the 2005 Act;
COMMENTARY ON SECTIONS

6. The Bill has the following three Parts:
   - Part 1 is concerned with governance arrangements for HEIs and is separated into three chapters. The first chapter deals with appointment of a senior lay member of a governing body of an HEI and membership of that governing body more broadly. The second chapter addresses the composition of academic boards in HEIs. The third chapter deals with key definitions.
   - Part 2 replaces the statutory definition of academic freedom as set out in section 26 of the 2005 Act.
   - Part 3 addresses general provisions.

PART 1: GOVERNANCE ARRANGEMENTS

Chapter 1: Governing bodies

Senior lay member of governing body

7. Chapter 1 concerns the appointment of a senior lay member of a governing body of an HEI and membership of that governing body more broadly. Sections A1 to A8 set out the process which an HEI is required to follow when appointing a senior lay member. Section A9 concerns the remuneration of the senior lay member appointed in accordance with sections A1 to A8. Section 1A deals with the resignation or removal of the “chairing member”.

Section A1: Position of senior lay member

8. Section A1 requires the governing body of an HEI to include the position of senior lay member. The senior lay member is the individual who will have the duty to preside at meetings of the governing body; a deliberative and a casting vote at such meetings; responsibility for the leadership and effectiveness of the governing body; and responsibility for ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution. Subsection (1) clarifies that the position of senior lay member can be given any name by an HEI, and this means that an HEI could, for example, use the title senior governor, convenor, vice-convenor, chair or any other term that the HEI considers appropriate. The responsibilities ascribed to the senior lay member appointed through the process in the Bill reflect the existing role of the senior lay member in most HEIs (irrespective of the particular title used by an HEI) and encapsulate such functions as ensuring that the members of the governing body work well together. Subsection (3) provides that when the position of senior lay member is vacant or the holder of that position is absent, another member of the governing body may be selected by the governing body to exercise any of the senior lay member’s functions. Subsection (4) provides that subsections (2) and (3) – which relate to the functions of the senior lay member – are subject to section A2, which clarifies the interaction between senior lay members and rectors at those HEIs that have a rector with statutory functions under the Universities (Scotland) Acts of 1858 and 1889.
Section A2: Interaction with role of rector

9. Section A2 provides for the interaction between the senior lay member and rectors at the four ancient universities. These are the University of Glasgow, the University of Edinburgh, the University of Aberdeen and the University of St Andrews. Subsection (2) provides that paragraphs (a) and (b) of section A1(2) and section A1(3) so far as relevant in relation to those paragraphs do not apply in relation to the ancient universities. The overriding of sections A1(2)(a), A1(2)(b) and A1(3) by sections A2(1) and (2) means that the statutory functions of the rectors at the ancient universities under section 4 of the Universities (Scotland) Act 1858 and section 5(5) of the Universities (Scotland) Act 1889 are preserved. These functions of the rectors are of presiding at meetings of the governing body and having a deliberative and a casting vote at such meetings. Nevertheless, the senior lay member at an ancient university is expected to continue to participate and vote at meetings of the governing body just as the other members participate and vote.

Section A3: Relevant criteria etc.

10. Section A3 provides that, whenever a vacancy arises in the position of senior of lay member, the governing body of an HEI must delegate to a committee the responsibility of devising the relevant criteria with respect to the position, and ensuring the efficiency and fairness of the process for filling that position. The relevant criteria include the skills and knowledge considered by the committee to be necessary or desirable to exercise the functions of the senior lay member and command the trust and respect of the other members of the governing body, the academic board of the institution and the staff and students of the institution. Section A3 does not prescribe which committee these responsibilities must be delegated to nor whether it should be an existing committee or a committee convened for this specific purpose. In practice, these responsibilities may be delegated to committees similar or equivalent to the nominations committees that many HEIs have for the purpose of making appointments to the governing body. However, under sections A3 to A8, the role of such a committee will not be nomination, it will be one of oversight of the recruitment process and selection of election candidates according to whether or not the committee is satisfied that an applicant meets the relevant criteria. Subsection (3) requires that the committee must include at least one staff member and at least one student member. Subsection (4) clarifies that the governing body of an HEI can, itself, make rules to further govern the appointment process within the parameters set by sections A4 to A8.

Section A4: Advertisement and application

11. Section A4 sets out requirements in relation to advertisement of a current or upcoming vacancy in the position of senior lay member, as described in section A1. Section A4(1) obliges HEIs to advertise the vacancy by publication on the HEI’s website and in either the online or print version of at least one Scottish national newspaper. Section A4(2) requires that the committee to whom responsibility has been delegated for devising the relevant criteria with respect to the position of senior lay member must ensure that the advert includes certain things. Specifically, it must set out the functions exercisable by the senior lay member under section A1(2), summarise the relevant criteria and state how more information about those criteria can be obtained, as well as explaining the appointment process, how the application form can be obtained, what expenses can be met for attending an interview and campaigning in an election, and what remuneration and allowances are available for holding the position. Section A4(2)(a) does not require reference to functions beyond those specified in section A1(2). In the case of
the ancient universities at which there is a rector the senior lay member’s functions under paragraphs (a) and (b) of section A1(2) are subject to the preservation of the functions of the rector by section A2 as discussed above and so the terms of the advertisement will need to reflect this. In that and any other case, there is no requirement as to the level of detail that the advert must contain when explaining the matters in section A4(2)(c) and so this remains a decision for the HEI.

Section A5: Interview of certain applicants

12. Section A5 concerns the assessment of applications and applicants at interview for the position of senior lay member. Subsection (1) requires that where an application for the position of senior lay member is made in the correct form in response to the advertisement of that position and where the applicant appears from the application, in the view of the committee provided for in section A3(1), to meet the relevant criteria, the applicant must be invited to an interview conducted by the committee. This requires the committee to decide whether or not it is satisfied that an applicant appears from the application to meet the criteria that the committee has set. Subsection (2) provides that if the applicant satisfies the committee at interview that the applicant meets the relevant criteria, then the applicant is entitled to stand for election to the position. Again, it is for the committee to decide whether or not it is satisfied that an applicant has demonstrated that they meet the criteria. Subsection (3) requires the HEI to offer every applicant reimbursement of reasonable expenses incurred in attending an interview (with the HEI determining what is reasonable).

Section A6: When election to be convened

13. Subsection (1) of section A6 places a duty on each HEI to convene an election for the position of senior lay member if more than one applicant for the position is entitled to stand as a candidate in the election, in the terms described in section A5, and confirms an intention to stand as a candidate. If fewer than two candidates are entitled to stand under section A5 then there would be a subsisting vacancy and the recruitment process would have to begin again from the point of advertisement under section A4. Subsection (2) of section A6 requires an HEI that has convened such an election, where the number of candidates subsequently falls below two, to postpone the election until it can be held with more than one candidate. In such a case, the vacancy would need to be advertised again, but any subsisting candidate remains entitled to stand in that reconvened election without the need to reapply or be interviewed again. Subsection (3) requires HEI governing bodies to offer reimbursement of campaigning expenses to candidates standing for election up to a limit to be fixed by the governing body. That limit is to apply per candidate and must apply equally to every candidate.

Section A7: Election franchise and result

14. Section A7 relates to the election franchise and the election result in an election for the position of senior lay member. Section A7(1) provides that all staff and students of the HEI as well as members of the governing body will be entitled to vote in that election. The term students of the HEI is defined in section 18A. Subsections (2) and (3) provide that an individual can only cast one vote (regardless of the number of eligible voting categories into which the individual falls), with each vote cast carrying equal weight. Subsection (4) provides for a simple majority electoral system such that the election is won by the candidate who secures the highest number
of votes. Subsection (5) provides that when there is a tie for the highest number of votes cast, the winner is whoever is deemed the winner in accordance with rules made by the governing body of the HEI.

Section A8: Appointment and tenure

15. Subsection (1) of section A8 places a duty on the governing body to appoint the winning candidate in an election as determined under section A7 to the position of senior lay member. Subsection (2) provides that appointment is to be made for the period specified in rules made by the governing body. Those rules may also specify that this period can be extended, without the need for the individual to seek re-election. Subsection (3) provides that appointment under section A8 (i.e. appointment following an election under section A7) is the only way in which a senior lay member may be appointed. Should the winning candidate decline to be appointed or be unable to take up the position, there would be a subsisting vacancy and the recruitment process would have to begin again from the point of advertisement under section A4.

Section A9 Remuneration and conditions

16. Section A9 concerns the remuneration and terms and conditions of the appointment of a senior lay member. It requires the governing body of an HEI to pay reasonable remuneration and allowances to the senior lay member of the governing body on the request of the appointed senior lay member. It also makes provision about the terms and conditions of appointment of the senior lay member.

17. Subsection (1) ensures that a senior lay member can obtain on request remuneration and allowances for the functions that the senior lay member has fulfilled in relation to that position. The sum to which the senior lay member is entitled under this section is not a salary; it is remuneration and allowances for specific work actually done, and need only be paid if requested by the senior lay member. Following such a request, payment must be made by the HEI of remuneration and allowances that are reasonable and commensurate with the nature and amount of work done by the senior lay member (with the HEI determining what is reasonable).

18. The position of senior lay member is to be independent and, to that end, subsection (2) provides that the post holder must not be a staff member or student of the institution during the person’s period of appointment. Subsection (3) provides that it is for the governing body of each HEI to specify the other terms and conditions of that appointment.

Section 1A: Resignation or removal of chairing member

19. Section 1A concerns the resignation or removal of the “chairing member” of an HEI’s governing body. There is a similar provision in section 5A regarding other members of the governing body.

20. Subsection (1) provides that the chairing member of the governing body of an HEI can resign from office by giving written notice to the secretary of the governing body. Subsection (2) provides for when such resignation takes effect, which is at the end of the period of 3 months beginning with the date of receipt of the notice by the secretary of the governing body or such
other period agreed between the chairing member and the secretary. Subsections (3) and (4) allow for removal from office where at least two thirds of the members of the governing body pass a resolution because they consider that the member is unable, unwilling or unsuitable to continue to perform the functions of the office, in accordance with rules made by the governing body. Subsection (6) provides that the chairing member who is the subject of such a resolution is not entitled to vote on it. Subsection (5) sets out some of the factors to which the governing body may have particular regard to when considering whether any of the grounds for removal are established. These are whether the member has frequently failed to attend meetings of the governing body without reasonable excuse, any conduct of the member that is in breach of the member’s duties as a charity trustee, and any conduct of the member that the governing body considers brings the HEI into disrepute. Under subsection (7), the governing body must provide a right of appeal against any removal from office in accordance with rules made by the nominations committee of the HEI.

Membership of governing body

Section 4: Composition of governing body

21. Section 4 sets out the composition of the membership of an HEI’s governing body. This provision is intended to introduce greater consistency in the basic composition of the governing bodies of HEIs. Section 4(1) provides that each governing body must include the members listed below. A person cannot be appointed as a member under more than one of these categories at the same time. The required members are:

- the person appointed to the position of senior lay member by virtue of section A8 (section 4(1)(a));
- two members directly elected by the staff of the HEI from among the staff of the HEI (section 4(1)(b));
- two members nominated by trade unions; both members must be members of staff of the HEI in question and must be members of a branch of a union that has a connection with the HEI; one member is to be nominated by a trade union which is recognised by the HEI in relation to the academic staff of the HEI and one member is to be nominated by a trade union which is recognised by the HEI in relation to the support staff of the HEI (section 4(1)(c) and (d));
- two members nominated by a students’ association of the HEI (section 4(1)(e)); the student nominees must be students of the HEI which, by virtue of section 18A, includes sabbatical officers whether or not they remain as students during their period in office; and
- other persons appointed in accordance with the governing instruments of the HEI or any related enactment (section 4(1)(g)); this leaves the governing body to appoint the remaining members as it wishes, provided that this is in line with its governing instruments or any applicable legislation, for example the Universities (Scotland) Acts or individual governance orders made under section 45 of the 1992 Act.

22. Section 4(2) provides that a trade union is recognised in relation to a category of staff of an HEI if it is recognised for collective bargaining purposes by that HEI (as described in section
178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992) or if the HEI otherwise considers the trade union to be representative of the category of staff.

Section 5: Elections to governing body

23. Section 5 makes provision for the election of staff members appointed under section 4(1)(b). Section 5(2) states that the election is to be conducted according to rules made by the governing body of the HEI. Section 5(3) clarifies that the rules may make different provision for different vacancies (which means that different rules could be made by an HEI to apply to different categories of membership of the governing body if the HEI considers that to be appropriate) and may define “staff” as academic staff, support staff or all staff in order to specify the electorate and eligible candidates for a particular vacancy. Section 5(4) makes it clear that when eligible candidates are equal to or fewer than the number of staff members being sought in any category of staff, those candidates are deemed to be elected.

Section 5A: Resignation or removal of ordinary members of governing body

24. Section 5A concerns the resignation or removal of ordinary members of the governing body of an HEI. There is a similar provision in section 1A regarding the “chairing member” of the governing body.

25. Subsection (1) provides that ordinary members of the governing body of an HEI can resign from office by giving written notice to the chairing member (i.e. the senior lay member) of the governing body. Subsection (2) provides for when such resignation takes effect. Subsections (3) and (4) allow ordinary members to be removed from office, in accordance with rules made by the governing body, where at least two thirds of the members of the governing body pass a resolution on the grounds that the member is unable, unwilling or unsuitable to continue to perform the functions of the position. Subsection (6) provides that the ordinary member who is the subject of such a resolution is not entitled to vote on it. Subsection (5) sets out some of the factors to which the governing body may have particular regard to when considering whether any of the grounds for removal are established. These factors are whether the member has frequently failed to attend meetings of the governing body without reasonable excuse, any conduct of the member that is in breach of the member’s duties as a charity trustee, and any conduct of the member that the governing body considers to bring the HEI into disrepute. Under subsection (7), the governing body must provide a right of appeal against any decision to remove an ordinary member, in accordance with rules made by the nominations committee of the HEI.

Section 6: Nominations to governing body

26. Section 6 makes provision for the nomination of the members of the governing body appointed by being nominated under section 4(1)(c) to (e). Section 6(2) requires that the nomination process is conducted according to any rules on nomination made by the governing body of the HEI. The rules required under this section deal only with the nomination process. The Bill provides that the role of nominating bodies is simply to nominate but it remains open to an HEI to make provision for a more extensive role which might include the recall of nominees, subject to the provisions on removal in section 5A. Section 6(3) provides that the rules may determine who can exercise the right of nomination (for example, where there is more than one
body which meets the criteria for making a nomination under section 4) and that different provision might be made for different vacancies on the governing body.

27. Section 6(4) sets out that before making or changing any existing rules under section 6(2), the governing body must consult the representatives of anyone who has both a right of nomination under the proposed rules (section 6(4)(a)) and who is affected by the proposed new rules or by any proposed amendment to existing rules (section 6(4)(b)). Accordingly, if only part of the rules are revised, there will be no requirement to consult with bodies that have a right to make a nomination if the rules that are applicable to that body are not subject to any changes.

Section 7: Validity of body’s proceedings

28. Section 7 ensures that the validity of proceedings of the governing body of an HEI is not affected by any vacancy arising in membership or category of membership (section 7(a)). This means that, in the event of an unexpected vacancy arising, the HEI can continue to function pending the appointment of a new member under section 4. Further, this validity is not affected by any defect in the appointment of a member of the relevant governing body (section 7(b)).

Chapter 2: Academic boards

Section 10: Composition of academic board

29. Section 10(1) sets out the composition of the membership of an academic board of an HEI. Each academic board must include the following members:
   - the principal of the HEI (section 10(1)(a));
   - heads of school, who are the individuals who are the most senior academics in a particular department within an HEI (section 10(1)(b));
   - academic staff elected from among their own number (section 10(1)(c));
   - students elected from among their own number (section 10(1)(d)) which, by virtue of section 18A, includes sabbatical officers whether or not they remain as students during their period in office; and
   - other persons appointed by virtue of a related enactment (section 10(1)(e)(i)) or in accordance with the governing instruments of the HEI (section 10(1)(e)(ii)) or in accordance with a decision made by the governing body of the HEI (section 10(1)(e)(iii)).

30. Section 10(2)(a) provides that more than 50% of the membership of the academic board members must be persons elected by staff or students. Section 10(2)(b) provides that at least 10% of the membership of the academic board members must be persons elected by students.

31. Section 10(3) provides that, despite section 10(2)(b), HEIs are not obliged to elect more than 30 student members. The proportions that will be required (just over 50%, and 10%, respectively) are generally reflected in the composition of the majority of existing academic boards. Election, rather than nomination, of student members to academic boards will be new to the majority of HEIs.
Section 11: Elections to academic board

32. Section 11 makes provision for the conduct of elections of members appointed under section 10(1)(c) or (d). Section 11(2) provides that the election is to be conducted in accordance with rules made by the governing body of the HEI. Under section 11(3) the rules may determine the number of appointments to be made (paragraph (a)), and make different provision for different vacancies (paragraph (b)) (which means that the rules for the election of staff members could be different to the rules for the election of student members).

33. Section 11(4) provides that where the number of eligible candidates in one of the categories in section 10 is equal to or fewer than the number of vacancies available in that category, those candidates will be deemed to be elected.

Section 12: Validity of board’s proceedings

34. Section 12 ensures that the validity of proceedings of the academic board of an HEI is not affected by any vacancy in membership or category of membership (paragraph (a)). It further provides that this validity is not affected by any defect in the appointment of a member of the relevant academic board (paragraph (b)).

Chapter 3: Key definitions

Section 15: Meaning of higher education institution

35. Section 15(1) provides a definition of the term “higher education institution” which applies for the purposes of Part 1 of the Bill. Section 15(1) provides that the term has the same meaning as in the 2005 Act, but that it includes an institution here only if it is also listed in schedule 2 to the 2005 Act. The definition of HEI, however, explicitly excludes the Open University (subsection (1)(b)).

36. The 2005 Act definition of “higher education institution” is found in section 35(1) of that Act where it is defined as (1) a university or (2) a designated institution within the meaning of section 44(2) of the 1992 Act. In practice, the only non-universities which are currently designated under that section are:

- the Royal Conservatoire of Scotland (which was designated by SI 1992/1025 under its former name, the Royal Scottish Academy of Music and Drama),
- Glasgow School of Art (which was also designated under SI 1992/1025), and
- SRUC, or Scotland’s Rural College (which was designated by SSI 2008/177 under its former name, the Scottish Agricultural College).

37. Any institution listed in schedule 2 to the 2005 Act is a fundable post-16 education body, meaning that it is currently eligible to receive funding from the Scottish Further and Higher Education Funding Council. However, the further education colleges listed under the first italic heading in that schedule will not be caught, as they are not covered by the definition of higher education institution in section 35(1) of the 2005 Act.
38. The effect of the definition is to capture institutions which provide higher education in Scotland only if they are eligible for public funding, while excluding the Open University on the basis that it is a single institution established elsewhere and operating across multiple jurisdictions which might otherwise be made subject to conflicting governance requirements.

39. Section 15(2) provides that the Scottish Ministers may by regulations modify the definition of “higher education institution” in subsection (1). This would enable the Scottish Ministers to exclude a particular HEI (including the Open University itself) from that definition. There is no power for the Scottish Ministers to add a particular HEI, but all new HEIs will automatically be included within the definition as long as they are fundable post-16 education bodies. Section 15(3) provides that such regulations will be subject to the negative procedure.

Section 16: Meaning of governing document

40. Section 16 sets out the meaning of the term “governing document” used in Part 1 of the Bill. Section 16(1)(a) confirms that in the case of an older university this means any ordinances made under the Universities (Scotland) Acts. Under the same subsection, paragraph (b) confirms that for an HEI established by royal charter, a governing document is any of its charters and any statutes made under them (paragraph (b)).

41. Section 16(1)(c) confirms that in the case of a “designated institution”, a governing document will be any orders of the Privy Council which are in force with respect to the HEI, except where the HEI is a registered company under the Companies Acts and it has no orders of the Privy Council in force in relation to it. In such cases the governing document is the articles of association of the HEI. Section 16(2) clarifies that the term “designated institution” means an institution designated under Part II of the 1992 Act (where the definition is found in section 44).

42. Section 16(1)(d) explains that a governing document, aside from the cases set out in section 16(1)(a) to (c), means any instrument which establishes the HEI or which governs the composition of its governing body or academic board.

43. In addition to defining “designated institution”, section 16(2) provides that, “older university” is to be construed in accordance with section 16(1) of the Universities (Scotland) Act 1966. These are the University of Aberdeen, the University of Edinburgh, the University of Glasgow and the University of St. Andrews. It also provides that “registered company” means a company registered under the Companies Acts as defined in section 2 of the Companies Act 2006.

Section 17: Meaning of governing body

44. Section 17 states that, in Part 1 of the Bill, the term “governing body” has the same meaning as in Part II of the 1992 Act (where the definition is found in section 56(1)).

Section 18: Meaning of academic board

45. Section 18 states the meaning of the term “academic board” in the context of an HEI. Section 18(1)(a) and (b) explains that the term means the body of persons with responsibility for
overall planning, co-ordination, development and supervision of the academic work of the HEI but that the academic board discharges that responsibility subject to the general control and direction of the governing body of the HEI.

46. Section 18(2) clarifies that the “academic board” is also known in some HEIs as the Senate, Senatus or (and in the case of the older universities, in the Universities (Scotland) Acts) Senatus Academicus.

Section 18A: References to students

47. Section 18A provides for how the term ‘students of a higher education institution’ is to be understood for the purposes of the Bill. This section states that a reference to the students of a higher education institution includes all persons holding sabbatical office in a students’ association of the institution, whether or not they remain students of the institution during their period of office.

48. The term ‘sabbatical officer’ is generally understood in the higher education sector and is used in certain governance orders made under section 45 of the 1992 Act as well as other education legislation. Section 22 of the Education Act 1994 sets out the requirements to be observed in relation to students unions (i.e. students’ associations). Section 22(2)(f) of that Act states that “a person should not hold sabbatical union office, or paid elected union office, for more than two years in total at the establishment”.

PART 2: ACADEMIC FREEDOM

Section 19: Upholding academic freedom

49. Section 19 of the Bill substitutes a new section 26 into the 2005 Act. The new section strengthens the obligation on post-16 education bodies by providing that such bodies must aim to uphold, so far as the body considers reasonable, the academic freedom of persons engaged in teaching, the provision of learning or research at that body (section 26(1)(a)). Specifically, the new section 26(1)(b) provides that post-16 education bodies must aim to ensure, so far as the body considers reasonable, that appointments of such persons (whether held or sought) and any entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of their academic freedom. The new section 26(4) expands the current definition of academic freedom to clarify that it includes the freedom, within the law, to develop and advance new ideas or innovative proposals. This adds to the existing freedom to hold and express opinions, question and test established ideas or received wisdom, and present controversial or unpopular points of view.

PART 3: GENERAL PROVISIONS

Section 20: Ancillary regulations

50. Section 20(1) gives the Scottish Ministers the power, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Act. Section 20(2)(a) provides that these regulations will be subject to the affirmative procedure when they
add to, replace, or omit any part of the Act or any other Act. Section 20(2)(b) provides that, in all other circumstances, regulations will be subject to the negative procedure.

**Section 21: Consequential modifications**

51. Section 21 introduces a schedule to the Bill making a number of consequential amendments to, or modifications of, other enactments as a result of the Bill. Paragraph 1 of the schedule makes consequential amendments to the Universities (Scotland) Act 1858. Paragraph 2 of the schedule makes consequential amendments to the Universities (Scotland) Act 1889. Finally, paragraph 3 makes consequential amendments to the Universities (Scotland) Act 1966. The consequential amendments are necessary as a result of the Bill’s provisions on the appointment of senior lay members of governing bodies, the composition of governing bodies of HEIs and the composition of academic boards.

**Section 22: Commencement**

52. Section 22(1) brings sections 22 and 23 into force on the day after Royal Assent. Section 22(2) provides that the other provisions in the Act come into force on a day appointed by the Scottish Ministers in regulations. Section 22(3)(a) allows the Scottish Ministers by regulations made under subsection (2) to bring the other provisions of the Bill into force on different days for different purposes and section 23(3)(b) allows the Scottish Ministers to include transitional, transitory or saving provision in those regulations.
INTRODUCTION

1. As required under Rule 9.7.8B of the Parliament’s Standing Orders, this supplementary Financial Memorandum is published to accompany the Higher Education Governance (Scotland) Bill (introduced in the Scottish Parliament on 16 June 2015) as amended at Stage 2.

2. The Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Financial Memorandum published to accompany the Bill as introduced.

3. The purpose of this supplementary Financial Memorandum is to set out the expected costs associated with the new and amended provisions included in the Bill following the amendments made at Stage 2. The majority of amendments do not significantly affect the assumptions in the original Financial Memorandum. This document addresses those amendments where additional costs occur or costs are likely to be altered. Amendments agreed at Stage 2 which are not covered in this supplementary Financial Memorandum are considered not to give rise to any substantial additional costs.

4. The original Financial Memorandum that accompanied the Bill at introduction set out costs relating to the remuneration of the chair of the governing body as £3,072 per higher education institution. These costs have been increased by £12,768 per institution in this supplementary Financial Memorandum. Evidence provided at Stage 1 has informed this change. Further details are provided at paragraph 17.

STAGE 2 AMENDMENTS WITH ANTICIPATED OR POTENTIAL COST IMPLICATIONS

Senior lay member of governing body: sections A1 to 1A

5. Full provision for the appointment of an individual to the position of senior lay member of the governing body of a higher education institution (“HEI”) was inserted into the Bill at Stage 2 by amendment. New sections A1 to A8 replace the original section 1 of the Bill which conferred a power on the Scottish Ministers to set out, in regulations, the process by which a chairing member of the governing body of an HEI must be appointed.
6. Sections A1 to A8 require HEIs to appoint the senior lay member of their governing body through a two stage process of advertisement, application and selection followed by an election. These provisions require an HEI to publicly advertise the vacancy in at least one Scottish national newspaper as well as on its own website, sift applicants for interview (with the sifting to be carried out by a committee against relevant criteria that the committee has devised to reflect the skills and knowledge required to perform the role), and interview those shortlisted applicants who demonstrate that they meet the relevant criteria through the sift exercise. If the applicant satisfies the committee that they meet the relevant criteria at interview, they are then entitled to stand as a candidate for election for the position of senior lay member. The franchise for this election will be the members of the governing body, and the staff and the students of the institution.

7. Section A5(3) provides that the governing body of an HEI must offer every applicant reimbursement of reasonable expenses incurred in attending an interview for selection as a candidate in an election to the position of senior lay member. It is for the HEI to decide what is reasonable. Interview expenses were costed in the Financial Memorandum that accompanied the Bill at introduction. This was based on potential costs in respect of the regulation making power contained in section 1 at introduction. The basis of that cost has now been confirmed in section A5(3) by provision on the face of the Bill as amended at Stage 2. The level of the cost estimated in the original Financial Memorandum is unchanged; all that has changed is that it is now certain that the cost will be incurred.

8. Section A6(3) provides that candidates that are entitled to stand as a candidate for election must be offered reimbursement of reasonable expenses that are incurred in campaigning in the election. It is for the HEI to decide what is reasonable and to fix a limit per candidate which will apply equally to each candidate. Campaign expenses were costed in the Financial Memorandum that accompanied the Bill at introduction. This was based on potential costs in respect of the regulation making power contained in section 1 at introduction. The basis of that cost has now been confirmed in section A6(3) by provision on the face of the Bill as amended at Stage 2. The level of the cost estimated in the original Financial Memorandum is unchanged; all that has changed is that it is now certain that the cost will be incurred.

Remuneration and conditions

9. Full provision for the remuneration and conditions of an individual appointed to the position of senior lay member of the governing body of an HEI was inserted into the Bill at Stage 2 by amendment. New section A9 replaces the original section 2 of the Bill, which conferred a power on the Scottish Ministers to make provision, by regulations, for remuneration and allowances to be payable by an HEI to the chairing member. Section A9 provides that a senior lay member of the governing body can request, from the HEI, remuneration and allowances for the functions that senior lay member has fulfilled in relation to that position; payment must be made if the remuneration and allowances are reasonable and commensurate with the nature and amount of work done by the senior lay member. The sum to which the senior lay member is entitled under this section is not a salary; it is remuneration and allowances for specific work actually done, and need only be paid if requested by the senior lay member.
COSTS ON THE SCOTTISH ADMINISTRATION

10. The amendments agreed at Stage 2 will have no further cost or resource implications in respect of the Scottish Administration than those set out in the original Financial Memorandum.

COSTS ON LOCAL AUTHORITIES

11. There are no anticipated costs on local government arising from the amendments.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

12. The costs associated with this Bill are expected to be met from the existing resources of individual HEIs.

Election of a senior lay member to the governing body

13. The requirement for HEIs to run an election to appoint the senior lay member presents a new cost to individual institutions. This was addressed in the Financial Memorandum at introduction. However, amendment of the Bill to replace the regulation making power at section 1 with full provision now informs the Scottish Government’s consideration of the costs associated with this. Many HEIs will already operate online voting for existing elections and where an HEI already has a subscription to an online election software programme which is an unlimited annual subscription, there will be no additional cost to them (other than a small amount of time in running the programme, which is expected could be done within existing staff time).

14. In respect of instances where an HEI does not already have a subscription to an online election software programme which is an unlimited annual subscription, research carried out using publicly available information shows that for smaller institutions with an electorate of approximately 5000 voters, election software subscriptions can be purchased at a cost of approximately £2,000 per election. For larger institutions, such as those with an electorate of approximately 30,000 voters, election software subscriptions can be purchased at a cost of approximately £5,000 per election. The estimated total cost for all 18 HEIs would therefore fall between £36,000 - £90,000 per election dependent on size of the electorate. A senior lay member is normally appointed for a four year period, therefore this cost would normally arise only once every four years. However, annual subscriptions are also available and could be taken out where the institution is using similar software for other elections and the cycle of elections is such that this would be more economical.

15. This estimate of cost does not include information on the staffing and other costs to the institution of conducting the election and ensuring its probity as all HEIs are likely to have systems in place to manage the various internal elections that they already conduct. It is expected that these costs will be absorbed within existing institutional budgets.

16. Although three of the 15 written submissions to the Finance Committee during Stage 1 provided costs in respect of conducting an election, this was based on the Bill as introduced and not as amended. The University of Dundee placed the cost at £21,000
based on a recently held election which was outsourced, and the University of Aberdeen placed the cost at around £30,000. Universities Scotland placed the cost between £1,000 and £3,000 per election using electronic voting only. Based on the Universities Scotland maximum figure of £3,000 per election, the cost of running senior lay member elections might total £54,000 for all of the 18 HEIs per election, which would be met from existing budgets. For the same reason as that in paragraph 14, these estimates do not include information on the staffing and other costs to the institutions of conducting the election and ensuring its probity. As the costs provided by the sector are not attributable to the Bill as amended, the costs estimated for the election of a senior lay member are considered to be as set out at paragraph 13 above.

17. The requirement for HEIs to offer every candidate in the election reasonable campaigning expenses presents a new cost to institutions. It is for the HEI to decide what is reasonable. This was addressed in the Financial Memorandum at introduction. However, amendment of the Bill to replace the regulation making power at section 1 with full provision now informs the Scottish Government’s consideration of the costs associated with this. It is considered that the maximum cost of election campaign costs would be broadly equivalent to the cost of electing a rector within the ancient universities. The University of Aberdeen provides detailed guidance on the process of electing a rector and specifies the maximum permitted campaigning costs. During the rectoral election process at the University of Aberdeen, candidates and their proposers are limited to spending £500 in connection with promoting that candidate’s campaign. This includes expenditure on items such as posters, leaflets, advertisements and websites. The University of Aberdeen subsequently reimburses expenditure of up to £300, subject to receipts being provided. Candidates may personally contribute or obtain sponsorship of up to a further £200. The cost of reimbursing candidates to campaign for election is, therefore, estimated at an upper limit of £500 per candidate; however, it is for each HEI to fix a limit that it considers reasonable. It is assumed that this cost would be met in its entirety from the existing budgets of HEIs.

**Remuneration of the senior lay member**

18. The Bill as amended at Stage 2 requires that HEIs provide, upon request, reasonable remuneration and allowances to the senior lay member of the governing body commensurate with the nature and amount of work done in fulfilling the functions of office. The sum to which the senior lay member is entitled under this section is not a salary; it is remuneration and allowances for specific work actually done, and need only be paid if requested by the senior lay member. The original Financial Memorandum that accompanied the Bill at introduction sets out these remuneration costs for a chair in fulfilling the functions of that post. Those functions are the same as that of the senior lay member provided for in the Bill following Stage 2. The original assumptions were that a governing body of an institution would meet on average between four and six times per academic year. This focuses on chairing meetings of the court. Other duties carried out by senior lay members will vary by institution. However, further evidence gathered from individual HEI financial accounts show that senior lay members are linked to between six and 18 court and committee meetings per year, although these meetings do not necessarily

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last full days. Allowing for some preparation time for these meetings, it is considered reasonable to estimate that the senior lay member may spend a total of 30 full days carrying out the specific duties of chairing the governing body, attending subcommittee meetings and preparing for both.

19. As per the original Financial Memorandum, for illustrative purposes the Scottish Government has used the Public Sector Pay Policy for Senior Appointments Technical Guidance 2015/16 to estimate a maximum daily fee rate of £528. Attributing this to all HEIs would suggest a cost of £15,840 per annum per individual institution which when multiplied by the 18 HEIs affected by this provision would equate to a total approximate cost across all 18 HEIs of £285,120 per annum. This figure is considered a maximum as it is unlikely that all senior lay members will request the remuneration available for carrying out the duties of this post. In those HEIs where senior lay members already receive remuneration, the cost for those HEIs will not necessarily increase. These costs are expressed in the table below:

Table 1 - Assumed annual cost to HEIs for remuneration of senior lay member

<table>
<thead>
<tr>
<th>Assumed Daily Rate</th>
<th>Average number of remunerated days per year</th>
<th>Assumed total cost per institution per year</th>
<th>Assumed cost per 18 institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Remuneration of reasonable expenses</td>
<td>£528</td>
<td>30</td>
<td>£15,840</td>
</tr>
</tbody>
</table>

20. Further information provided to the Finance Committee by the sector suggests that the senior lay member will spend between 35-60 days carrying out the duties associated with their post with most of the evidence estimating the senior lay member spends around one day per week carrying out these duties. As per the original Financial Memorandum, for illustrative purposes using the Public Sector Pay Policy for Senior Appointments Technical Guidance 2015/16 to estimate a maximum daily fee rate of £528. Attributing this to all HEIs would suggest a cost of between £18,480 and £31,680 per annum per individual institution which when multiplied by the 18 HEIs affected by this provision would equate to a total approximate cost of between £332,640 and £570,240 per annum. However, this estimate includes wider functions than those associated with the minimum requirements of the Bill.

21. For the purposes of compliance with duties in the Bill, the costs associated with remuneration are in relation to the time spent carrying out the core functions of the position of senior lay member: chairing meetings of the governing body, attending subcommittees and preparing for these meetings. It does not include other discretionary functions carried out by the senior lay member. This is why the estimate is based on 30 days rather than a higher figure.

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Amendments to governing documents

22. In order to comply with the Bill, when enacted, HEIs will require to amend their governing instruments in order to align with this primary legislation. These adjustments will be made over a transitional period of around four years. The typical resource cost associated with consideration of subsequent amendments to HEIs’ governing documents was not indicated in the original Financial Memorandum that accompanied the Bill at introduction. Of the 15 responses provided to the Finance Committee, 10 provided some form of evidence in relation to the staff time taken to update the HEIs’ governing documents. Of the 10, whilst agreeing that there would be a staff time/resource cost associated with carrying out this work, seven provided no estimate of costs.

23. The University of St Andrews estimated a one off cost of at least £50,000 whilst the University of Edinburgh estimated a one off cost of £79,500. Universities Scotland indicates that the precise impact is difficult to estimate, but estimates that one full-time member of staff for one year would be required per HEI. Exact costs would depend on the grade of the member of staff at each HEI, the number of individual changes required at each HEI and the manner in which the HEI chooses to implement the changes - for example making one detailed update or amending existing documents individually over the course of the full transitional period. In addition, this cost will also be influenced by the existing governance arrangements in each institution and how compliant an HEI already is with the requirements of the Bill. It is therefore not possible to estimate this cost.
PURPOSE

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.10 of the Parliament’s Standing Orders and aims to assist the Delegated Powers and Law Reform Committee in its consideration of the Higher Education Governance (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The memorandum supplements the Delegated Powers Memorandum for the Bill as introduced.

2. The contents of the memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION REVISED AT STAGE 2

3. The amended delegated powers provisions in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of parliamentary procedure has been considered appropriate.

Chapter 3: Key definitions

Section 15 – Meaning of higher education institution

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Negative
Revised or new power: Revised

Provision

4. On introduction, section 15 provided the Scottish Ministers with a power to modify, by regulations, the definition of “higher education institution” in section 15(1). This definition applies to Part 1 of the Bill only. The modification power would have allowed the Scottish Ministers to include a particular HEI in the definition or exclude a particular HEI from that definition.
5. However, the Delegated Powers and Law Reform Committee asked why it was necessary to take a power to include a higher education institution in the definition, since the definition will already catch all universities and designated institutions (other than the Open University) which may receive funding from the Scottish Further and Higher Education Funding Council. Any new institutions will be included automatically by virtue of being included in schedule 2 (fundable bodies) to the Further and Higher Education (Scotland) Act 2005. The Scottish Government agreed that the power to include new institutions beyond fundable bodies is not required since the policy intention is that only fundable bodies should be covered by the requirements in Part 1 of the Bill. As such, an amendment was made at Stage 2 to amend the power so that it can only be used to exclude institutions from the definition of “higher education institution”.

**Reason for taking power**

6. The policy intention is that all publicly funded higher education institutions (“HEIs”) should be subject to the provisions in Part 1 of the Bill. However, the policy intention is also that an HEI operating in more than one jurisdiction (which is primarily based and governed elsewhere) should, even where publicly funded, be excluded from the definition in order to avoid a single institution potentially being made subject to conflicting requirements in different jurisdictions. The definition in section 15(1) achieves this aim. The power to amend the definition of “higher education institution” enables the Scottish Ministers to exclude a particular HEI from the definition of “higher education institution” in the event of changed circumstances which result in the institution needing to be excluded (for example, if another cross-border HEI similar to the Open University begins operating in Scotland and receives public funding).

**Choice of procedure**

7. These regulations are subject to the negative procedure by virtue of section 15(3). This is considered to be appropriate on the basis that section 15(2) now empowers the Scottish Ministers only to exclude a particular HEI from the definition, and also does not permit them to give the term an entirely new meaning. The limited way that the regulation making power is framed in section 15(2) means that any regulations which are laid will be of a straightforward nature; they would merely name a particular institution and state that it is excluded. Accordingly, it is thought that the negative procedure allows sufficient Parliamentary scrutiny of any modification of the definition of an HEI and is, therefore, appropriate.

**PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION REMOVED AT STAGE 2**

8. The Committee will wish to note that the following regulation making powers were removed by amendment at Stage 2.
Part 1 of the Bill

Chapter 1: Governing Bodies

Section 1 – Appointment as chairing member

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

9. The power to set out in regulations the process by which an HEI must appoint the chairing member of its governing body has been removed. This process has now been set out in primary legislation on the face of the Bill and is subject to full parliamentary scrutiny.

10. The Delegated Powers and Law Reform Committee asked the Scottish Government to consider whether it would be more appropriate for the key provisions as to the appointment of chairing members to be set out on the face of the Bill and therefore be made subject to full parliamentary scrutiny.

11. In light of this as well as evidence presented to the Education and Culture Committee and lengthy dialogue with stakeholders, the Scottish Government brought forward amendments at Stage 2 to make full provision on the face of the Bill for the appointment and election of the senior lay member on the governing body of all HEIs.

Section 2 – Remuneration to be payable

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

12. The power to set out in regulations provision for remuneration and allowances to be payable to the chairing member of the governing body of an HEI has been removed. This provision has now been set out in primary legislation on the face of the Bill and is subject to full parliamentary scrutiny.

13. The Delegated Powers and Law Reform Committee asked the Scottish Government to consider whether it would be more appropriate for the key provisions on remuneration for chairing members to be set out on the face of the Bill and therefore be made subject to full parliamentary scrutiny.

14. The Scottish Government gave full consideration to the issues and evidence raised by all committees in respect of this provision and brought forward amendments at Stage 2 to make full provision on the face of the Bill to pay the senior lay member of the governing body reasonable remuneration and allowances upon request by that person. As well as reasonable, the remuneration and allowances must be commensurate with the nature and amount of the work done by that person as the senior lay member.
Section 8 – Power to modify section 4

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

15. The power to modify, by regulations, the categories of governing body members and the number of persons to be appointed under a particular category in section 4 (composition of governing body) has been removed. No alternative provision has been made in its place.

16. Despite regulations under this section being subject to affirmative procedure, section 8, along with section 13, attracted criticism during Stage 1 which focussed largely on the potential reclassification of HEIs as public sector bodies by the Office of National Statistics (“ONS”).

17. The Stage 1 Report of the Education and Culture Committee considered this issue and “the various sections of the Bill that would grant Scottish Ministers the powers to make future regulations about governing bodies and the academic board”. The Report recommended that “all reasonable measures should be taken to minimise any risk of reclassification” and welcomed “the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions”.

18. Having given the matter careful consideration it was concluded that, while the Scottish Government does not believe that section 8 would increase the risk of reclassification, the removal of section 8 is necessary to respond to the strong concerns expressed by stakeholders about potential action by ONS.

Chapter 2: Academic Boards

Section 13 – Power to modify sections 9 and 10

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative

19. The regulation making power to allow a change to be made to the number of members of the academic board specified in section 9 (size of academic board) has been removed in consequence of the removal of section 9. The regulation making power to allow a change to be made to the categories of academic board members and the number and percentage of persons to be appointed under a particular category in section 10 (composition of academic board) has also been removed. No alternative provision has been made in its place.

20. Despite regulations under this section being subject to affirmative procedure, section 13, along with section 8, attracted criticism during Stage 1 which focussed largely on the potential reclassification of HEIs as public sector bodies by ONS.
21. The Stage 1 Report of the Education and Culture Committee considered this issue and “the various sections of the Bill that would grant Scottish Ministers the powers to make future regulations about governing bodies and the academic board”. The Report recommended that “all reasonable measures should be taken to minimise any risk of reclassification” and welcomed “the Cabinet Secretary’s commitment to considering amending or removing the relevant provisions”.

22. Having given the matter careful consideration it was concluded that, while the Scottish Government does not believe that section 13 would increase the risk of reclassification, the removal of section 13 is necessary to respond to the strong concerns expressed by stakeholders about potential action by ONS.
Delegated Powers and Law Reform Committee

Higher Education Governance (Scotland) Bill as amended at Stage 2
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<td>Delegated Powers Provisions</td>
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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

a. any—
   i. subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
   ii. [deleted]
   iii. pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

b. proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

c. general questions relating to powers to make subordinate legislation;

d. whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

e. any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

h. any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

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Scottish Labour

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Stewart Stevenson
Scottish National Party
Introduction

1. At its meeting on 8 March 2016 the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Higher Education Governance (Scotland) Bill as amended at Stage 2 ("the Bill")\(^1\). The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.

2. The Bill was introduced on 16 June 2015 by the Cabinet Secretary for Education and Lifelong Learning. The Bill makes provision in relation to senior lay members of governing bodies of higher education institutions ("HEIs") and the composition of and appointment to governing bodies and academic boards of HEIs; and on the academic freedom of persons engaged in teaching or research at post-16 education bodies.

3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill\(^2\).

4. The Committee previously reported on the delegated powers provisions in this Bill at Stage 1 in its 59th report of 2015\(^3\).
Delegated Powers Provisions

5. The Committee considered the new or substantially amended delegated powers provisions in the Bill after Stage 2.

6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the one revised delegated powers provision listed below, and that it is content with the parliamentary procedure to which it is subject:

   - Section 15 – Meaning of higher education institution

7. The Committee also reports that it is content with the fact that the following regulation making powers were removed by amendment at Stage 2:

   - Section 1 – Appointment as chairing member
   - Section 2 – Remuneration to be payable
   - Section 8 – Power to modify section 4
   - Section 13 – Power to modify sections 9 and 10

8. The Committee therefore reports that it is content with the revised delegated powers provision in the Bill as amended at Stage 2.
Higher Education Governance (Scotland) Bill as amended at Stage 2, 20th Report, 2016 (Session 4)

Delegated Powers and Law Reform Committee
Higher Education Governance (Scotland) Bill as amended at Stage 2, 20th Report, 2016 (Session 4)

1 Higher Education Governance (Scotland) Bill as amended at Stage 2 (SP Bill 74A, Session 4 (2016)) is available here: http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/SPBill74AS042016.pdf [accessed March 2016]

2 Higher Education Governance (Scotland) Bill, Supplementary Delegated Powers Memorandum (SP Bill 74A-DPM, Session 4 (2016)) is available here: http://www.scottish.parliament.uk/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/SPBill74ADPMS042016.pdf [accessed March 2016]

Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections A1 to 23
Long Title
Schedule

Amendments marked * are new (including manuscript amendments) or have been altered.

Section A1

Chic Brodie

27 In section A1, page 1, line 11, at beginning insert <Except where there is a rector with the functions referred to in section A2(1).>

Chic Brodie

28 In section A1, page 1, line 14, after <body> insert <when issues of policy affecting the institution are being considered>

Chic Brodie

29 In section A1, page 1, line 15, after <meetings> insert <in relation to such matters>

Liz Smith
Supported by: Liam McArthur

1 In section A1, page 1, leave out lines 18 and 19 and insert <subject to such functions of the senior lay member as are provided for by virtue of any enactment or in accordance with the governing document of the institution.>

Chic Brodie

30 In section A1, page 1, line 23, after <are> insert <subject to section (Co-chair of governing body).>

(5) Subsection (3) is>

Section A2

Chic Brodie

31 In section A2, page 2, line 6, leave out from beginning to second <to> in line 7 and insert <The rector has the functions described in section A1(2) in relation to the governing body of>

Section A3

Chic Brodie

32 In section A3, page 2, line 15, after <committee> insert <appointed by it>
Liz Smith

2 In section A3, page 2, line 18, at end insert—

<having regard to any principles which appear to the Scottish Further and Higher Education Funding Council to constitute good practice in relation to higher education institutions in accordance with section 9A of the Further and Higher Education (Scotland) Act 2005.>

Chic Brodie

33 In section A3, page 2, line 19, after first <the> insert <availability,>

Chic Brodie

34 In section A3, page 2, line 25, at end insert—

<( ) The committee is to consist of no more than 6 members.>

Clare Adamson

35 In section A3, page 2, line 25, at end insert—

<( ) Each time the process for filling the position is undertaken, the committee must make publically available a report indicating by way of overview (and without disclosing individual identities or confidential information)—

(a) the number of applicants for the position,

(b) so far as consent to disclosure has been received by the committee from the applicants, the characteristics listed in section 149(7) of the Equality Act 2010 with respect to—

(i) the applicants,

(ii) the applicants invited to an interview for the position,

(iii) the applicants entitled to stand as candidates in an election for the position following such an interview.>

Liz Smith

3 In section A3, page 2, line 28, leave out <of the institution> and insert <members of the governing body>

Liz Smith

4 In section A3, page 2, line 29, leave out <students of the institution> and insert <student members of the governing body>

Angela Constance

11 In section A3, page 2, line 30, leave out <make provision for> and insert <contain provision about>
Section A4

Gordon MacDonald
36 In section A4, page 2, line 35, leave out from <by> to end of line 38 and insert <widely by the governing body, in a manner suitable for bringing the vacancy to the attention of a broad range of persons.>

Liam McArthur
12* In section A4, page 2, line 36, leave out from <including> to end of line 38 and insert <as the governing body sees fit, having regard to principles which appear to the Scottish Further and Higher Education Funding Council to constitute good practice in relation to higher education institutions in accordance with section 9A of the Further and Higher Education (Scotland) Act 2005.>

Chic Brodie
37 In section A4, page 2, line 37, at end insert—

<(  ) through appropriate media outlets considered to be particularly relevant to students and staff of the institution, and>

Liam McArthur
13 In section A4, page 3, leave out lines 6 to 12

Chic Brodie
38 In section A4, page 3, leave out line 8

Angela Constance
14 In section A4, page 3, line 9, leave out <what> and insert <that>

Angela Constance
15 In section A4, page 3, line 11, leave out <what> and insert <that>

Section A5

Liam McArthur
16 In section A5, page 3, line 20, leave <applicant must> and insert <application will be considered further by the committee in terms of how well the applicant meets the relevant criteria, together with other additional relevant information contained in the application and, having considered all of the applications made in accordance with subsection (1)(a), the committee will produce a shortlist of candidates to>

Liam McArthur
17 In section A5, page 3, line 21, leave out from beginning to <is> in line 22 and insert—

<(  ) At such interviews the committee is to assess—

(a) how well each of the shortlisted applicants performs at interview,

(b) the overall suitability of the applicants to hold the position.>
Having completed interviews of all applicants, the committee is to produce a list of those applicants who are

Section A6

Angela Constance

18 In section A6, page 3, line 29, leave out <convened> and insert <arranged by the governing body>

Liz Smith
Supported by: Liam McArthur

5 In section A6, page 3, line 29, leave out <convened> and insert <held>

Liz Smith
Supported by: Liam McArthur

6 In section A6, page 3, line 29, leave out <more than> and insert <at least>

Liz Smith
Supported by: Liam McArthur

7 In section A6, page 3, line 32, leave out subsection (2)

Liz Smith
Supported by: Liam McArthur

8 In section A6, page 4, line 1, leave out from <is> to <the> in line 2 and insert <may make such rules as it sees fit concerning the procedures and conduct of an election for the position of senior lay member, including rules about the institution’s contribution to expenses that are incurred by any>

Section A7

Chic Brodie

39 In section A7, page 4, line 10, leave out subsections (2) to (5) and insert—

<( ) An election under section A6 is to be conducted on the basis of a single transferable vote system, to be specified by the governing body of the institution after consulting the Electoral Reform Society.>

Liam McArthur

19 In section A7, page 4, line 11, leave out subsections (3) to (5) and insert—

<( ) A vote under subsection (1) is a vote by a person with membership of a body listed in paragraph (a), (b) or (c) of subsection (1) to elect a person or persons to vote on behalf of that body in an election under section A6 for the position of senior lay member of the governing body of a higher education institution.

( ) Rules for the operation of the election and qualification for membership of the bodies listed in paragraphs (a), (b) and (c) of subsection (1) are to be made by the governing body of the institution.>
Section A9

Angela Constance

20 In section A9, page 4, line 28, leave out <reasonable remuneration and allowances to the person> and insert <such remuneration and allowances to the person as the governing body considers to be reasonable>

Angela Constance

21 In section A9, page 4, line 30, leave out <that capacity> and insert <the capacity as senior lay member>

Liz Smith
Supported by: Liam McArthur

9 Leave out section A9 and insert—

<Payment of remuneration and allowances to senior lay member>

(1) The governing body of a higher education institution may make such arrangements for the institution to pay remuneration or allowances to the senior lay member of that governing body as it sees fit.

(2) Any remuneration or allowances paid to the senior lay member are to be determined by the governing body of the institution, having regard to any principles which appear to the Scottish Further and Higher Education Funding Council to constitute good practice in relation to higher education institutions in accordance with section 9A of the Further and Higher Education (Scotland) Act 2005.

(3) The senior lay member is not entitled to vote in respect of any decision of the governing body under subsection (1) or any determination by it under subsection (2).>

Section 1A

Angela Constance

22 Leave out section 1A

After section 1A

Chic Brodie

40 After section 1A, insert—

<Co-chair of governing body>

Co-chair of governing body

(1) The members of the governing body of a higher education institutions are to elect one of their members as a co-chair of the governing body (the “elected co-chair”).

(2) The elected co-chair has—

(a) the duty to preside at meetings of the governing body when it is considering matters other than those to be presided over by the senior lay member (or, as the case may be, rector),

(b) a deliberative and casting vote at such meetings in relation to such matters,
(c) joint responsibility with the senior lay member (or, as the case may be, rector) for—

(i) the leadership and effectiveness of the governing body,

(ii) ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution.

(3) In the absence of the senior lay member (or, as the case may be, rector), the elected co-chair has the functions described in paragraphs (a) and (b) of section A1(2).

(4) Another member of the governing body of a higher education institution may be selected by the governing body to exercise any of the functions mentioned in subsection (2) in the absence of the elected co-chair or while the position is vacant.

(5) The governing body of a higher education institution may—

(a) conduct an election for the position of elected co-chair in such manner as it sees fit, and

(b) apply, with such modifications as it sees fit, any of the other provisions of sections A8, A9 and 1A in respect of the position of elected co-chair.

Section 4

George Adam
41 In section 4, page 5, line 38, leave out<br>, recognised in relation to the academic staff of the institution.>

George Adam
42 In section 4, page 6, line 1, leave out<br>, recognised in relation to the support staff of the institution.>

Mark Griffin
43 In section 4, page 6, line 9, at end insert—

<\( \) Where the governing body of a higher education institution establishes a remuneration committee, the membership of that committee must include at least one member of the governing body appointed by virtue of each of paragraphs (c), (d) and (e) of subsection (1).>.

George Adam
44 In section 4, page 6, line 10, leave out from<br>is to <institution> in line 11 and insert<br>nominating a person from among a category of staff must be one that>

George Adam
45 In section 4, page 6, line 12, leave out<br>so recognises it> and insert<br>is recognised by the institution in relation to the category of staff,>

George Adam
46 In section 4, page 6, line 14, leave out<br>recognises it as> and insert<br>appears to the institution to be>
George Adam
47 In section 4, page 6, line 14, after <staff> insert <, having regard to all relevant factors>

Cara Hilton
48 In section 4, page 6, line 14, at end insert—
   <( ) The governing body of a higher education institution must ensure that the number of
   women appointed to the governing body is at least 40 per cent of the membership of the
   governing body.>

Section 5A

Angela Constance
23 Leave out section 5A

After section 6

Angela Constance
24 After section 6, insert—
   <Resignation and removal
   (1) Rules made by the governing body of a higher education institution may contain
       provision about the procedure for the resignation or removal of—
       (a) the person appointed to the position of senior lay member of the governing body,
       (b) the other persons within the membership of the governing body.
   (2) Provision as to removal is to (in particular)—
       (a) prescribe grounds for removal, for example—
           (i) inability to exercise the senior lay member’s functions or (as the case may
               be) the functions of membership generally,
           (ii) misconduct (whether or not in the capacity as member),
       (b) ensure that removal can be effected only by a resolution based on the grounds and
           passed by a specified majority of the members of the governing body,
       (c) allow the person who is the subject of the resolution, if the resolution is so passed,
           to seek a review in order to have the resolution reconsidered or quashed.
   (3) For the purpose of subsection (2)(b)—
       (a) a specified majority may be a majority of any particular size,
       (b) the person who is the subject of the resolution does not count in any calculation
           arising (and the person is not eligible to vote on the resolution).
   (4) Provision under subsection (1)(a) need not be the same as provision under subsection
       (1)(b).>
After section 7

Alison Johnstone

49 After section 7, insert—

<Functions of remuneration committee

Functions of remuneration committee

Where the governing body of a higher education institution establishes a remuneration committee, in exercising its functions the committee must have regard to—

(a) pay settlements agreed through the New Joint Negotiating Committee for Higher Education Staff,

(b) the desirability of reducing the ratio between the remuneration of the highest paid and lowest paid employee within the institution, and

(c) the overall financial situation of the institution.>

After section 18A

Liam McArthur

25 After section 18A, insert—

<CHAPTER

Exemptions from provisions of Part 1

Exemptions from provisions of Part 1

(1) If a higher education institution considers that it cannot reasonably comply with any provision of this Part, it must apply in writing to the Scottish Ministers requesting an exemption in respect of that provision.

(2) Where the Scottish Ministers receive an application under subsection (1) they must—

(a) within 2 months of receiving the application, determine whether to grant the exemption,

(b) give notice of their determination in writing to the higher education institution.

(3) Where the determination of the Scottish Ministers is to grant the exemption, notice under subsection (2)(b) must set out—

(a) the extent to which and duration for which the institution need not comply with a provision,

(b) such other conditions as the Scottish Ministers consider appropriate.>

Schedule

Liz Smith

10 In the schedule, page 12, line 9, leave out from <“consist> to end of line 10 and insert <the beginning of the section to “provided;” are repealed.>
Higher Education Governance (Scotland) Bill

Groupings of Amendments for Stage 3

This document provides procedural information which will assist in preparing for and following proceedings on the above Bill. The information provided is as follows:

- the list of groupings (that is, the order in which amendments will be debated). Any procedural points relevant to each group are noted;
- the text of amendments to be debated on the day of Stage 3 consideration, set out in the order in which they will be debated. THIS LIST DOES NOT REPLACE THE MARSHALLED LIST, WHICH SETS OUT THE AMENDMENTS IN THE ORDER IN WHICH THEY WILL BE DISPOSED OF.

Groupings of amendments

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Role of rector
27, 31

Group 2: Role of chairing member and co-chair
28, 29, 1, 30, 40

Group 3: Functions and membership of committee determining relevant criteria
32, 2, 33, 34, 35, 3, 4, 11

Debate to end no later than 1 hour after proceedings begin

Group 4: Senior lay member: advertisement of position
36, 12, 37, 13, 38, 14, 15

Notes on amendments in this group
Amendment 36 pre-empted amendments 12 and 37
Amendment 12 pre-empted amendment 37
Amendment 13 pre-empted amendments 38, 14 and 15

Group 5: Senior lay member: interview of applicants
16, 17
Group 6: Senior lay member: election to position
18, 5, 6, 7, 8, 39, 19

Notes on amendments in this group
Amendments 18 and 5 are direct alternatives
Amendment 39 pre-empts amendment 19

Debate to end no later than 1 hour and 50 minutes after proceedings begin

Group 7: Senior lay member: remuneration
20, 21, 9

Group 8: Resignation and removal of chairing member and ordinary members of governing body
22, 23, 24

Group 9: Composition of governing body: trade union involvement
41, 42, 44, 45, 46, 47

Debate to end no later than 2 hours and 25 minutes after proceedings begin

Group 10: Remuneration committee
43, 49

Group 11: Specified percentage of women appointed to the governing body
48

Group 12: Exemptions from Part 1
25

Group 13: Powers of the senatus academicus and principal
10

Debate to end no later than 3 hours after proceedings begin
EXTRACT FROM THE MINUTES OF PROCEEDINGS

Vol. 5, No. 88 Session 4

Meeting of the Parliament

Tuesday 8 March 2016

Note: (DT) signifies a decision taken at Decision Time.

Business Motion: Joe FitzPatrick, on behalf of the Parliamentary Bureau, moved S4M-15839—That the Parliament agrees that, during stage 3 of the Higher Education Governance (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limit indicated, that time limit being calculated from when the stage begins and excluding any periods when other business is under consideration or when a meeting of the Parliament is suspended (other than a suspension following the first division in the stage being called) or otherwise not in progress:

Groups 1 to 3: 1 hour
Groups 4 to 6: 1 hour and 50 minutes
Groups 7 to 9: 2 hours and 25 minutes
Groups 10 to 13: 3 hours.

The motion was agreed to.

Higher Education Governance (Scotland) Bill - Stage 3: The Bill was considered at Stage 3.

The following amendments were agreed to (without division): 33, 35, 11, 36, 14, 15, 18, 20, 21, 22, 41, 42, 44, 45, 46, 47, 23, and 24.

The following amendments were disagreed to (by division)—

27 (For 20, Against 91, Abstentions 0)
28 (For 17, Against 94, Abstentions 0)
29 (For 19, Against 94, Abstentions 0)
1 (For 19, Against 93, Abstentions 0)
30 (For 19, Against 94, Abstentions 0)
31 (For 18, Against 92, Abstentions 0)
2 (For 21, Against 91, Abstentions 0)
3 (For 17, Against 95, Abstentions 0)
4 (For 17, Against 95, Abstentions 0)
13 (For 23, Against 89, Abstentions 0)
16 (For 17, Against 95, Abstentions 0)
5 (For 19, Against 93, Abstentions 0)
6 (For 18, Against 94, Abstentions 0)
7 (For 18, Against 93, Abstentions 0)
Amendment 32 was moved and, with the agreement of the Parliament, withdrawn.

The following amendments were not moved: 34, 38, 17 and 8.

The following amendments were pre-empted: 12 and 37.

The Deputy Presiding Officer extended the fourth time-limit under Rule 9.8.4A(c).

Higher Education Governance (Scotland) Bill - Stage 3: The Cabinet Secretary for Education and Lifelong Learning (Angela Constance) moved S4M-15838—That the Parliament agrees that the Higher Education Governance (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 92, Against 17, Abstentions 0).
The Deputy Presiding Officer (Elaine Smith):
The next item of business is stage 3 proceedings on the Higher Education Governance (Scotland) Bill. In dealing with the amendments, members should have the bill as amended at stage 2—that is, SP bill 74A—the marshalled list and the groupings. The division bell will sound and proceedings will be suspended for five minutes for the first division of the proceedings. The period of voting for the first division will then be 30 seconds. Thereafter, I will allow a voting period of one minute for the first division after a debate.

Members should now refer to the marshalled list of amendments.

Section A1—Position of senior lay member

The Deputy Presiding Officer: Group 1 is on the role of the rector. Amendment 27, in the name of Chic Brodie, is grouped with amendment 31.

Chic Brodie (South Scotland) (SNP): The bill, which I hope will receive full scrutiny after some years of enactment, has as its base democratic accountability. The purpose of amendments 27 and 31 is simple: it is to underpin that and to make the important role and function of the rector equivalent to the role and function of the proposed senior lay member.

I fully accept and acknowledge the historic relevance of our ancient universities. I was lucky enough to attend one—the University of St Andrews—and was later privileged to be appointed a lay member of its court. I also accept and acknowledge the major contribution and significance of the ancients, which are globally recognised, and the role played by many if not all rectors, past and present. However, we cannot set about rightly demanding the overall democratic accountability that we seek—which requires the consistent application of a recruitment process and so on across a sector that faces an increasingly globally competitive future—but agree to disregard a perception of elitism in the sector.

Part of that perception would be curtailed by my amendments 27 and 31, together with other amendments. The amendments are designed to ensure that rectors and senior lay members, or whatever they are called, play a consistent, active and immediate, rather than remote, role in the post to which they have been elected. The franchises for rectors would be broadened to include all staff
as well as the student franchise, to which I will return with future amendments.

I move amendment 27.

Liz Smith (Mid Scotland and Fife) (Con): Mr Brodie has outlined today and at stage 2 that there are, at present, clear divisions and clear lines of responsibility between the senior lay governor and the rector in the five institutions that have a rector. He is correct that clarity of purpose is essential for good governance.

The fact that the bill will create an overlapping franchise and, therefore, overlapping responsibilities is a serious issue that the Scottish Government must surely recognise. Notwithstanding our political differences on the matter, I hope that the Scottish Government can see fit, even at this late stage, to undo what is a muddle. There is a significant difference between opposing an element of the bill for policy reasons and opposing that element because it creates confusion, which is exactly what has happened here.

I emphasise strongly that the task that is before us at stage 3 is to address the bill’s practical implications, rather than the principles, and ensure that what we vote for at decision time is both workable and acceptable to the diverse institutions that make up our HE sector. We owe them that, at the very least—a point that Mr Brodie has made. That point was recognised fully at stage 2 by SNP members Sandra White, Jim Eadie, George Adam and Chic Brodie, not least because, as they reported, they had been lobbied by the various institutions in their constituencies. It is also apparent that Labour and the Green Party agree with the point, too.

It is essential that a governing body is chaired by the person whom that body has the greatest confidence in, as confidence is a principle of good governance in any institution, never mind a university. There must be absolute clarity of purpose. We are therefore happy to support Mr Brodie’s amendments 27 and 31.

Liam McArthur (Orkney Islands) (LD): During stage 1 evidence, the cabinet secretary made it clear to the Education and Culture Committee that it was not the Government’s intention, through the bill, to affect the role of the rector at the five institutions where such a role exists. It was always difficult to see how that could be achieved and, sadly, after the amendments that were passed at stage 2 on elected chairs, it is now beyond the cabinet secretary’s ability to honour that commitment. That is a source of regret. However, the priority at this stage must be to provide what clarity we can to the respective roles of rector and senior lay governor.

There is still too much of an overlap and duplication, as Liz Smith said, which is giving rise to the potential for confusion and even conflict. The concern is not confined to Opposition members. Chic Brodie deserves credit for his work in the committee to highlight the problems and, more important, for his efforts to help dig the cabinet secretary out of the hole that she has dug for herself.

The amendments might not entirely address the problem, but that is hardly Mr Brodie’s fault. Rightly, he seeks to properly distinguish the respective roles and ensure that anyone who chairs a governing body has the confidence and support of that body’s members. On that basis, I am happy to confirm our support for amendments 27 and 31.

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): I thank Mr Brodie for his explanation of amendments 27 and 31. As he set out, amendment 27 would remove the requirement for the universities of Glasgow, Edinburgh, Aberdeen and St Andrews to include the position of senior lay member in their governing bodies, and amendment 31 would amend section A2(2) to give the rector all the functions of the senior lay member that are set out in that section.

Section A2(2) says that certain provisions that relate to the senior lay member have no effect in relation to institutions that have a rector with the functions that are set out in section A2(1)—namely, the universities of Glasgow, Edinburgh, Aberdeen and St Andrews. Those provisions are, first, the provisions that relate to the duty of the senior lay member to preside at meetings of the governing body and to have a deliberative and a casting vote at such meetings and, secondly, the provision that allows another member of the governing body of a higher education institution to be selected in the absence of the senior lay member or while the position is vacant. In those institutions, those duties are always exercised by the rector, and the purpose of section A2(2) is to preserve the current statutory functions of the rector in those ancient institutions.

Amendment 31 seeks to give additional functions to rectors in the ancient universities. If the amendment were agreed to, the rector would continue to have the functions of presiding at meetings of the governing body and having a deliberative and a casting vote at meetings. However, crucially, the functions that the bill as amended reserves for the senior lay member—the responsibility for the leadership and effectiveness of the governing body and for ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution—would be given to rectors in the
ancient universities, which would be a substantial change in the rector’s role.

That is what amendments 27 and 31 would do in isolation. As we progress to consider the amendments in group 2, it will become clear that amendments 27 and 31 are also part of a wider group of amendments that provide for a new position—that of the elected co-chair—in all 18 higher education institutions. The elected co-chair would share certain responsibilities with rectors in the ancient institutions and with senior lay members in the other 14 HEIs. I do not consider that, either in isolation or combined with Mr Brodie’s amendments in group 2, amendments 27 and 31 would benefit the bill or the institutions.

Liz Smith: The cabinet secretary has said many times that the diversity of the higher education sector is crucial. That is one of the reasons why we have different positions. Is she really comfortable with a bill that has overlapping franchises for the senior positions in question and in which there are not clear lines of responsibility on who will carry out which role?

Angela Constance: I am concerned that Mr Brodie’s amendments would confuse the role of rector and that of co-chair and would confuse the role of co-chair and that of senior lay member. In doing so, they would move the balance of power, given that the co-chair is elected only by the governing body. With respect, I think that what Mr Brodie has proposed would provide far less clarity than what the Government has proposed.

Chic Brodie: We have not reached the detailed discussion of the further proposals that are attached to my amendments. If the Government proceeds with its proposal, it will unquestionably be a recipe for conflict, because of the existence of two franchises and the lack of clarity on who will do what, which will change because of the potential conflict.

I hear what the cabinet secretary says about amendments 27 and 31, but I hope that further clarity will be provided when we come to my other amendments. Does the cabinet secretary agree that the franchise confusion will result in diminishing performance from the institutions that are affected? It is time to have consistency across the higher education sector.

Angela Constance: With respect, I do not believe that what Mr Brodie proposes would lead to any consistency. What the Government seeks to do in the bill is to reflect the Scottish code of good higher education governance, which makes clear the differences between the role of senior lay member and that of rector, and the Government has reflected those differences in the bill.

Liz Smith: The code of good governance is being reviewed. Would it have been sensible to await the results of that review before proposing the changes in the bill?

Angela Constance: No. It is important that the code of governance is reviewed as appropriate, but the bill is high level and discrete in its proposition, and I refute the suggestion that there is any franchise confusion. I believe that staff, students and the wider electorate on campus are well able to understand the difference between the rector and the senior lay member.

Annabel Goldie (West Scotland) (Con): Will the cabinet secretary give way?

Angela Constance: Not just now.

A key principle of the bill is to enable an approach to governance that is based on greater transparency, accountability and inclusivity to support continuous improvement in the operation of our higher education institutions and, crucially, create a consistent approach to governance matters for all our institutions. Providing for the election of a senior lay member on the governing body of each Scottish HEI is key to making those principles real. The role of senior lay member is a powerful one that is central to the governance of the institution, so the senior lay member must be elected by a franchise of staff, students and members of the governing body.

Removing the requirement for senior lay members in the ancient institutions would not be transparent or inclusive, as it would remove the right of staff to take part in that decision-making process, except in the University of Edinburgh, where the rector is elected by staff and students.

15:30

Annabel Goldie: I seem to be one of the few members of this Parliament who have served on a university court. I am listening with care to what the cabinet secretary is saying, but I have to tell her that I am unclear about how an elected rector with an accountable mandate to voters in the institution and an elected senior lay member with an accountable mandate to other voters in the institution will reconcile their views if they disagree about an issue. I am also unclear as to where the rest of the governing body is to take leadership from. I am deeply concerned that that question remains unanswered at stage 3.

Angela Constance: I say with the greatest respect to Ms Goldie that the questions are not unanswered. No one needs to be a member of a university governing body to understand the issues or to have an interest in the wellbeing of institutions. What will happen is what happens now, which is that the ancient universities decide how the roles of the rector and the senior lay
member dovetail. Those roles are well differentiated in the code of governance.

In all four ancient universities, what Mr Brodie proposes would fully transfer the senior lay member's duties to the rector, which would result in the rector having substantially enhanced functions in the governing body, such that that body would have no ability to undertake any form of selection prior to the election of the rector. That would give those institutions different governance arrangements from all others and create inconsistency.

We have worked hard to maintain and preserve the current role of rectors, but it has never been the bill's aim to give them additional functions. Taken in the round with Mr Brodie's amendments 28, 29, 30 and 40, amendments 27 and 31 seek to introduce a co-chair model for the chairing of the governing bodies of all our HEIs. I will address that in greater detail as we move on to group 2, but I can say here and now that I do not consider that that model would be of benefit to the bill or our institutions.

For the reasons that I have described, I cannot support amendments 27 and 31. If Mr Brodie presses amendment 27 and moves amendment 31, I ask members to reject them.

**Chic Brodie:** I am even more confused now about what the senior lay member will do vis-à-vis what the rector will do in the ancient universities. Who will speak for the students? There will be absolute confusion in the determination of the functions that will be exercised by the rector and by the senior lay member. Through my amendments, I am trying to eradicate any possibility of confusion, so that the students and the wider franchise of the staff, who will have to be involved, would know clearly who represented them as their elected representative on the university body.

The cabinet secretary says that what the bill proposes will create greater transparency, but I suggest that it will do the very opposite, because we will not be clear about who is making what decisions and in what context. I cannot accept that, so I will press amendment 27.

**The Deputy Presiding Officer:** The question is, that amendment 27 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division. As this is the first division, I suspend the meeting for five minutes.

15:33

*Meeting suspended.*

15:38

**On resuming—**

**The Deputy Presiding Officer:** We will now proceed with the division on amendment 27.

**For**

Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Easttrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
Mcnnes, Alston (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

**Against**

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alleeen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Connance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
or he is called to reflect the views, aspirations and needs of their electorate when chairing the governing body on matters of policy. The chair, who would be elected by the governing body, would have responsibility for administration, finance and operations matters when chairing the governing body. I will return to that when we discuss amendment 40.

On the elected determination of the role of rector, senior lay member or whatever the person is called, my contention is that whoever fills that position should chair the governing body when issues of policy that affect the institution are to be discussed. The guarantee of the wider franchise would support them in that role when steering matters of policy through the governing body. Amendments 28 and 29 together propose that prospectus.

It is also my contention that, for day-to-day administration, finance and operations matters, the governing body should elect one of its own, who could be an elected member, a staff member or a student member, to be the co-chair.

The amendments would provide a supportive partnership that enables discussion between the co-chairs with their respective responsibilities—between the senior lay member or rector with responsibility for policy, supported by the wider franchise, and the elected chair of the governing body, supported by that body. That combination balances the clear authority to provide guidance and direction to the principals of the institutions on clearly defined matters and areas of operation and policy.

It is paradoxical that section A1(3) of the bill as it stands promotes the possibility of appointing a temporary member of the governing body to an elected position in the absence of the senior lay member or rector while the position is vacant. The co-chair proposal largely negates that need, although provision is made in amendment 40, to which we will come.

Sections A8, A9 and 1A, on appointment, remuneration and resignation and removal, will be equally applied with respect to the position of the elected co-chair of the governing body.

I move amendment 28.

Liz Smith: My amendment 1 is a very simple amendment that is intended to make it clear that the list of duties that is set out in section A1(2) is not in any way an exhaustive list of functions that would be carried out by the senior lay member, who, through the general statutes of their institution, may carry out many other roles. I return to the issue of respecting the diversity of any institution. The amendment would also remove section A1(2)(c)(ii), because the responsibility in it

The Deputy Presiding Officer: The result of the division is: For 20, Against 91, Abstentions 0.

Amendment 27 disagreed to.

The Deputy Presiding Officer: Group 2 is on the role of the chairing member and the co-chair. Amendment 28, in the name of Chic Brodie, is grouped with amendments 29, 1, 30 and 40.

Chic Brodie: All my amendments in the group reflect the proposed roles of the chairing members, which I referred to earlier, and of the co-chairs, and embrace the changes that were proposed in amendments 27 and 31.

Amendment 28 would reflect the responsibility of the senior lay member, rector or whatever she
belongs to the governing body on a corporate basis, not to its individual chair.

We are happy to support Mr Brodie’s amendments in the group.

Liam McArthur: My comments on Chic Brodie’s previous amendments apply equally in this instance. I will not repeat myself; we will support the amendments in this group as well.

On Liz Smith’s amendment 1, we will have an opportunity to discuss the diversity in our HE sector in detail later. That diversity is a feature within as well as across the different institutions. We wish to see that diversity reflected in the way in which our universities are governed, but there are real risks in adopting legislation that is overly prescriptive and detailed. A one-size-fits-all approach is not appropriate, and we should look to build in flexibility where we can.

In essence, that is what amendment 1 aims to do. It does not try to second-guess to the nth degree every aspect of the role to be performed by the senior lay member of a governing body; it recognises that each institution will vary and therefore the functions of the senior lay member may vary accordingly. Moreover, ensuring that there is a proper balance of authority between the governing body and the principal of an institution is a corporate responsibility of the governing body as a whole. It cannot be personalised to apply to the rector or the senior lay member alone. In that respect, amendment 1 better reflects what happens and what should continue to happen.

15:45

Angela Constance: I will deal with amendments 28 to 30 and 40 from Chic Brodie and amendment 1 from Liz Smith.

The role of senior lay member of the governing body is central to the bill’s ambitions to ensure that every voice in the higher education community is heard and to enable an approach to governance that is based on greater transparency, accountability and inclusivity, supports continuous improvement in the operation of our higher education institutions and creates consistency across institutions to underpin governance arrangements.

We have heard from Mr Brodie on his amendments 27 and 31. Those amendments, combined with amendments 28 to 30 and 40, which he has just described, would have a substantial impact on the role of the senior lay member and would disempower that central and powerful role. They would also introduce the position of elected co-chair. Together, the amendments would provide that the senior lay member would have a duty to preside at meetings of the governing body only

“when issues of policy affecting the institution are being considered”,

and that they would have a deliberative and casting vote at such meetings, again only

“when issues of policy affecting the institution are being considered”.

We have no definition of “issues of policy”, so it is not clear what exactly is envisaged for the role of the senior lay member in the new model.

On all other matters, duties would fall to the co-chair, who would be elected in a manner to be determined by the governing body. That would enable the governing body to simply appoint the co-chair without opening out the electorate any wider than its own membership.

Liz Smith: Is it not the case that there is considerable confusion in the bill over the roles of the rector and the chair? That is the reason why we have a considerable problem.

Angela Constance: No, we do not have a “considerable problem”. As I have said to Liz Smith and other colleagues, the difference between the role of the rector and that of the senior lay member is laid out clearly in the Scottish code of good higher education governance, which is reflected in the Government’s approach throughout the bill. The defining difference between Liz Smith’s position and that of the Government on the co-chair is as set out by Mr Brodie. He believes that the co-chair should be one of the governing body’s members; I do not accept that approach. The senior lay member should be elected by staff and students, as well as the governing body.

To return to Mr Brodie’s amendments, the senior lay member’s responsibility for the leadership and effectiveness of the governing body, and for ensuring an appropriate balance of authority between the governing body and the principal of the institution, would become a joint responsibility, shared with the co-chair.

The combination of the amendments would enable governing bodies in many respects to retain the status quo, whereby the balance of power in the governing body of the institution would sit with a member appointed by the governing body. The senior lay member, where such a role existed, would have limited powers and responsibilities. That would fundamentally go against the bill’s core aims. It would diminish the impact of the bill, undermine our ambition to achieve consistency and create a two-tier system.

I urge members to reject amendments 28 to 30 and 40.
Moving on to amendment 1 from Ms Smith, having considered it carefully, I cannot support the amendment. Section A1(2)(c) of the bill as amended sets out the senior lay member’s functions, which are intended to reflect existing practice. Responsibility for the appropriate balance of authority between the governing body and the principal of the institution is a widely recognised key function of a chairing member of a governing body; indeed, that is recognised in the Scottish code of good higher education governance.

Liz Smith: Is it not the case that the 18 higher education institutions have very different structures? The whole point of the bill is to allow them to have that diversity, so that what are, because of the individual institutions’ statutes, different roles can be carried out.

Angela Constance: As has been said a few times, the bill acknowledges the diversity of our institutions, which should be valued. However, we want a high level of consistency across the sector when it comes to good governance.

Where Liz Smith and I fundamentally disagree is that she wishes to reduce the powerful and influential role of the senior lay member—which, in my view, should be an elected position—to that of a quasi rector. She wishes to downgrade the role of senior lay member, which is not in keeping with the bill or the Government’s position.

Amendment 1 seeks to remove a central function from the senior lay member, as I have indicated. In doing so, it removes one of the clear distinctions between the role of senior lay member and that of rector. Amendment 1 also qualifies the senior lay member’s responsibility for the leadership and effectiveness of the governing body by making it

“subject to such functions of the senior lay member as are provided for by virtue of any enactment or in accordance with the governing document of the institution.”

That means that the governing body would be able to make its own rules about the functions of the senior lay member, even allowing it to remove from the senior lay member responsibility for the leadership and effectiveness of the governing body. As I have said, that responsibility is widely recognised as a key function of the chairing member—it is recognised in the code as the main role of the chair of a governing body. The amendment could allow the governing body to render the role of the senior lay member meaningless.

As with the amendments lodged by Mr Brodie, Liz Smith’s amendment limits the powers and responsibilities of the senior lay member and enables the functions of that powerful role to be passed on to a member of the governing body who is appointed by the governing body. It undermines the aim of creating a consistent approach to governance within institutions and enables the status quo to be retained. I therefore cannot support amendment 1. If Mr Brodie presses amendments 28 to 30 and 40, and Ms Smith presses amendment 1, I urge members to reject them.

Chic Brodie: Words such as “diversity”, “consistency”, “accountability” and “flexibility” have been thrown around. The proposals in my amendments are to simplify the rationale. It is quite wrong—and I never suggested—that the senior lay member or rector, or whatever they are called, who is elected by the staff and students, should be disenfranchised or disempowered simply because they go from co-chairing to sitting in the body of the court. I said that they would be co-chairing and would be responsible for all policy matters, which provides a bulwark against any idea that they might be removed at the whim of the governing body, which would recognise the role of that person in its constitution. The co-chair, elected by the body, would handle day-to-day administration, finance and operation matters. That quite clear division would actually allow them to work together across the body corporate of the university.

Either I did not explain myself clearly enough or we seem to be hell bent on delivering what is in the bill without looking at the consequences and at the points of conflict that will arise. I ask the question again: who speaks for the students?

The Deputy Presiding Officer (John Scott): Do you wish to press or withdraw amendment 28?

Chic Brodie: I am pressing it.

The Deputy Presiding Officer: The question is, that amendment 28 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Buchan, John (South Scotland) (Con)
Cassidy, Margaret (North East Scotland) (Con)
Doherty, Linda (North East Scotland) (Con)
Fraser, Richard (Highlands and Islands) (LD)
Hewison, Allan (North East Scotland) (LD)
Hilton, Patricia (South Scotland) (LD)
 Mandalay, Michael (Mid Scotland and Fife) (LD)
McKay, Anthony (Lothian) (LD)
McKay, John (Highlands and Islands) (LD)
McLachlan, Susan (North East Scotland) (LD)
Mitchell, Iain (Lothian) (LD)
Rice, Sylvia (Central Scotland) (LD)
Scullion, John (South Scotland) (LD)
Scott, Mary (North East Scotland) (LD)
Stewart, John (North East Scotland) (LD)
Stewart, Mark (Highlands and Islands) (LD)
Swift, Donald (Lothian) (LD)
Wilson, Marie (Central Scotland) (LD)
Amendment 29 moved—[Chic Brodie].

The Deputy Presiding Officer: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Blackford, Arol (Edinburgh Leith) (SNP)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

The Deputy Presiding Officer: The result of the division is: For 17, Against 94, Abstentions 0.

Amendment 28 disagreed to.

Amendment 29 moved—[Chic Brodie].

The Deputy Presiding Officer: The question is, that amendment 29 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
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<td>Skye, Lochaber and Badenoch (SNP)</td>
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<td>Urquhart, Jean</td>
<td>Highlands and Islands (Ind)</td>
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<td>Watt, Maureen</td>
<td>Aberdeen South and North Kincardine (SNP)</td>
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<td>Wheelhouse, Paul</td>
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<td>White, Sandra</td>
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<td>Wilson, John</td>
<td>Central Scotland (Ind)</td>
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<tr>
<td>Yousaf, Humza</td>
<td>Glasgow (SNP)</td>
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The Deputy Presiding Officer: The result of the division is: For 19, Against 94, Abstentions 0.

Amendment 29 disagreed to.

The Deputy Presiding Officer: The question is, that amendment 1 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

- Brown, Gavin (Lothian) (Con)
- Buchanan, Cameron (Lothian) (Con)
- Carlaw, Jackson (West Scotland) (Con)
- Davidson, Ruth (Glasgow) (Con)
- Ferguson, Alex (Galloway and West Dumfries) (Con)
- Fraser, Murdo (Mid Scotland and Fife) (Con)
- Goldie, Annabel (West Scotland) (Con)
- Hume, Jim (South Scotland) (LD)
- Johnston, Alex (North East Scotland) (Con)
- Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
- McAlpine, Joan (South Scotland) (SNP)
- McArthur, Liam (Orkney Island) (LD)
- McInnes, Alison (North East Scotland) (LD)
- Milne, Nanette (North East Scotland) (Con)
- Mitchell, Margaret (Central Scotland) (Con)
- Rennie, Willie (Mid Scotland and Fife) (LD)
- Scanlon, Mary (Highlands and Islands) (Con)
- Scott, Tavish (Shetland Islands) (LD)
- Smith, Liz (Mid Scotland and Fife) (Con)

Against

- Adam, George (Paisley) (SNP)
- Adamson, Clare (Central Scotland) (SNP)
- Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
- Allard, Christian (North East Scotland) (SNP)
- Baker, Claire (Mid Scotland and Fife) (Lab)
- Beamish, Claudia (South Scotland) (Lab)
- Beattie, Colin (Midlothian North and Musselburgh) (SNP)
- Biagi, Marco (Edinburgh Central) (SNP)
- Boyack, Sarah (Lothian) (Lab)
- Brennan, Lesley (North East Scotland) (Lab)
- Brown, Keith (Clackmannanshire and Dunblane) (SNP)
- Burgess, Margaret (Cunninghame South) (SNP)
- Campbell, Aileen (Clydesdale) (SNP)
- Campbell, Roderick (North East Fife) (SNP)
- Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
- Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
- Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graeme, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Macdowall, Alexander (Ayr) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
Mcleod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (SNP)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Murray, Elaine (Dumfrieshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (Ind)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 19, Against 93, Abstentions 0. Amendment 1 disagreed to. Amendment 30 moved—[Chic Brodie].

The Deputy Presiding Officer: The question is, that amendment 30 be agreed to. Are we agreed? Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Buchanan, Cameron (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biac, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Amendment 30 disagreed to.

Section A2—Interaction with role of rector

Amendment 31 moved—[Chic Brodie].

The Deputy Presiding Officer: The question is, that amendment 31 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (Lab)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffee, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Pertshire South and Kinross—
shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eddie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
functions and membership of committee
determining relevant criteria. Amendment 32, in the name of Chic Brodie, is grouped with amendments 2, 33 to 35, 3, 4 and 11.

**Chic Brodie:** In order to secure a robust basis for the election, I believe that the committee that designs the process and criteria for the appointment and ultimate support of the governing body in which the senior lay member—or rector, or whatever they are to be called—plays a pivotal part as leader and co-chair, must be “appointed by it”, as a delegated authority of the governing body.

The aim is also, as is proposed in amendment 33, to ensure the availability of the elected senior lay member or rector. It is critical that, in response to the demands of the electorate, that person’s availability is propagated and reflects the aspirations of those who elected him or her. We in this chamber would get short shrift if we told our electors that we could not pursue their interests or reflect their input because we were ensconced in Moscow, for example.

Amendment 34 suggests that the committee should be limited in size and should include members of the wider electorate, hence the proposal that there be only six members.

I move amendment 32.

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16:00

**Liz Smith:** Amendment 2, in my name, is designed to place responsibility for the details of the role of the nominations committee where it should be, which is within the “Scottish Code for Good Higher Education Governance”, which is due to be reviewed very shortly—indeed, it is a pity that the Scottish Government could not have permitted that review to be concluded before it embarked upon this aspect of the bill.

Amendments 3 and 4 are designed to ensure that there is absolute clarity that staff and student members of the nominations committee should also be members of the governing body.

I am happy to support Mr Brodie’s amendments 32 and 33, but I am not comfortable with amendment 34, on the basis that I think that we must respect, once again, the diversity of the sector, in which the average number of nominations committee members is greater than six.

I am happy to accept the cabinet secretary’s amendment 11.

**Clare Adamson** (Central Scotland) (SNP): I am pleased to be able to speak to amendment 35, which is in my name, especially on international women’s day, on which we celebrate equality, diversity and fairness.
Amendment 35 would require the committee that is tasked with recruiting candidates for the position of senior lay member to report publicly on that process. Specifically, the report should state the number of candidates who have applied, and it should include information about the protected characteristics of those candidates, as listed in section 149(7) of the Equality Act 2010:

“age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.”

Amendment 35 also makes it clear that those details should be included in the report only when the applicant allows them to be included. That is in line with good employment practice and would ensure that all candidates have control over information that might be released about them. Moreover, the amendment would ensure that data protection law is explicitly applied so that there would be no doubt that individuals cannot be identified or have confidential information that can be matched to them shared publicly. Those are important safeguards for anyone who would put themselves forward to be considered for the role of senior lay member.

I note and welcome the support of the National Union of Students Scotland and the University and College Union for amendment 35. The UCU has suggested that the report could be made public before elections are held. It could, of course, also be made public after an election, thereby providing an audit of the process and a demonstration of what had worked well and what might be done differently in the future. The amendment is deliberately silent on that in order to give governing bodies and their recruitment committees the maximum flexibility to determine what might best suit their circumstances in an appointment process.

The provisions in amendment 35 encapsulate a number of the key principles and values that underpin the bill. I believe fundamentally that we should encourage greater diversity among the people who chair our higher education institutions. Although significant progress has been made in appointing more women chairs, only four years ago, no women were chairing any of our HE institutions. Our universities should seek to mirror in their governance not just the demographics of our society, but the demographics of their communities. Requiring recruitment committees to report publicly on their success or otherwise in attracting a diverse pool of candidates, on how many reach the interview stage and on the election itself, will focus minds and ensure that they do their very best to be seen to be inclusive in their approach to the whole process. That level of transparency and accountability is absolutely appropriate.

Finally, the requirement to report publicly will apply to all institutions, which will ensure consistency across the sector. If it also indirectly encourages those who are involved in recruitment processes to be mindful of the importance of attracting as wide and diverse a pool of candidates as possible to the role of senior lay member, so that universities have vibrant and dynamic elections for those vital positions, that can only be a good thing.

Angela Constance: Amendments 32, 33 and 34, in the name of Chic Brodie, would make small but potentially impactful changes to section A3 of the bill, which requires the governing body of a higher education institution to delegate certain duties to a committee, including developing the relevant criteria for the position of senior lay member.

In attempting to limit to six the membership of the committee that is to be tasked with selecting candidates for election as senior lay member, amendment 34 impinges on the ability of higher education institutions to select the appropriate number of members to meet their interests for selection of a senior lay member. It would unnecessarily and unhelpfully constrain institutions. Therefore, I cannot support it.

Amendment 32 would make it explicit that the committee must be appointed by the governing body. Nothing in the bill prohibits governing bodies from appointing the members of the committee and that function is currently implied. The amendment is therefore not required.

With reference to Mr Brodie’s amendment 33, the criteria that are listed in section A3 were not intended to be exhaustive. Principles in the “Scottish Code for Good Higher Education Governance” already cover availability of the chair and will continue to do so. Also, HEIs could include a requirement about availability in the criteria for the position of senior lay member, should they wish to do so. However, the Scottish Government would not object to availability being referred to on the face of the bill as part of the relevant criteria and is content to support amendment 33. I therefore ask Mr Brodie not to move his amendments 32 or 34, and other members to reject them, if he does.

I turn to amendment 35, in the name of Clare Adamson, which provides for a publicly available statistical report, prepared by the committee and relevant to the various stages of the appointment process, which focuses on equalities information, where consent has been received from the applicant to disclose that information. I agree with Clare Adamson’s argument that HEIs should, in the interests of transparency and accountability, disclose protected characteristics of applicants as long as they have the consent of the individual
applicants to do so. I therefore support amendment 35 and encourage members to do so, too.

I understand that there are different opinions about when the report should be published—prior to an election or after the entire appointment process has ended. That should be a matter for each HEI to decide and it is the sort of issue that the new mandatory student, staff and union members on all governing bodies can influence.

I do not believe that amendments 2, 3 and 4 in the name of Liz Smith are necessary. Section A3 already obliges HEIs, when a vacancy for a senior lay member arises, to delegate responsibility for the recruitment process to a committee that features at least one student and one staff member drawn from the institution.

Amendment 2 would introduce a requirement for HEIs to have regard to the code of good governance in their delegation to a committee of responsibility for ensuring fairness and efficiency in the process of filling the position of senior lay member. That is unnecessary because HEIs must already, as part of the terms and conditions of funding, comply with the code.

Amendments 3 and 4 would require staff and student members of the committee to be drawn from the governing body membership. They are unnecessary because HEIs already have the power to select the members of the committee from the members of the governing body and do not need to be compelled to do so. The amendments would narrow the autonomy of institutions and restrict their ability to carry out functions. I am sure that Liz Smith would agree that that would be unhelpful. I therefore ask her not to move her amendments, and other members to reject them if she does.

I turn finally to amendment 11, in my name, which is a minor technical amendment to ensure consistency between the wording in section A3 and the wording in the rest of the bill, if amendment 24 is accepted.

I urge members to support amendments 11, 33 and 35 and, for the reasons that I have given, to reject amendments 2, 3, 4, 32 and 34.

Liam McArthur: It is widely recognised that for our universities to be genuinely world class they must be transparent, representative and accountable in how they are governed. How that is achieved may be the subject of some debate, but it is, ultimately, an objective that we all share. In that respect, I am happy to support amendment 35 in the name of Clare Adamson, which seeks to accord with the intentions behind the equality duty and with the benefits that come with greater transparency.

Similarly, I am supportive of Liz Smith’s amendments 2 to 4. I still have misgivings about the Government’s determination to use legislation to achieve its objectives. Amendment 2 would sensibly leave responsibility for defining the role of nominations committees in the code of good governance.

Amendments 3 and 4 would reasonably require that staff and student members of nominations committees should also be members of the governing body. That would achieve the aim of ensuring appropriate staff and student representation in the process, while also ensuring that the place of the governing body is respected.

I am supportive of the other amendments in the group, but with one exception. I am not clear what would be gained by restricting membership of nominations committees to six members. I am concerned that that requirement would go against the grain of encouraging diversity in the sector.

Chic Brodie: On the basis of what the cabinet secretary has said, and in the hope of securing a robust system for election and appointment, I will not press amendment 32, nor will I move amendment 34.

Amendment 32, by agreement, withdrawn.

Amendment 2 moved—[Liz Smith].

The Deputy Presiding Officer: The question is, that amendment 2 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (SNP)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Nicola (Glasgow Southside) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
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Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 21, Against 91, Abstentions 0.
Amendment 2 disagreed to.
Amendment 33 moved—[Chic Brodie]—and agreed to.
Amendment 34 not moved.
Amendment 35 moved—[Clare Adamson]—and agreed to.
Amendment 3 moved—[Liz Smith].

The Deputy Presiding Officer: The question is, that amendment 3 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker,克莱尔 (Mid Scotland and Fife) (Lab)
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Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
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Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dorman, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
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Fabiani, Linda (East Kilbride) (SNP)
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Mason, John (Glasgow Shettleston) (SNP)
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Torrance, David (Kirkcaldy) (SNP)
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Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (Ind)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 17, Against 95, Abstentions 0.

Amendment 3 disagreed to.

Amendment 4 moved—[Liz Smith.]

16:15

The Deputy Presiding Officer: The question is, that amendment 4 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
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**The Deputy Presiding Officer:** The result of the division is: For 17, Against 95, Abstentions 0.

Amendment 4 disagreed to.

Amendment 11 moved—[Angela Constance]—and agreed to.

**Section A4—Advertisement and application**

The Deputy Presiding Officer: Group 4 is on senior lay member: advertisement of position. Amendment 36, in the name of Gordon MacDonald, is grouped with amendments 12, 37, 13, 38, 14 and 15. If amendment 36 is agreed to, I cannot call amendments 12 and 37, as they will have been pre-empted. If amendment 12 is agreed to, I cannot call amendment 37, as it will have been pre-empted. If amendment 13 is agreed to, I cannot call amendments 38, 14 and 15, as they will have been pre-empted.

Gordon MacDonald (Edinburgh Pentlands) (SNP): As an MSP who represents two universities—Heriot-Watt and Napier—and who has a significant number of students in his constituency, I am pleased to move my amendment 36. It concerns the advertising of a vacancy for the position of senior lay member of the governing body of a higher education institution. The amendment removes the requirements that are currently in the bill at sections A4(1)(a) and A4(1)(b)—that the vacancy must be advertised on the institution’s website and in the print and online versions of at least one national newspaper in Scotland—and inserts a new, less detailed and less prescriptive requirement, which is simply that the vacancy is to be advertised widely in a manner that will bring it to the attention of a broad range of people. It will ensure that the advertisement for the vacancy is circulated widely and in a manner that is suitable to bring it to the attention of a broad range of people, while also allowing institutions to advertise a vacancy as they see fit within those parameters.

Although the aim of the bill is to create a consistent approach to governance, it is also important to create room for manoeuvre, which is in keeping with our higher education institutions’ autonomy and the fact that they have differing local and academic circumstances, which they may wish to consider when taking forward their duty to advertise.

I move amendment 36.
Liam McArthur: I referred earlier to the overly prescriptive and dogmatic approach that the Government has taken on aspects of the bill. Nowhere has that been more in evidence than in the proposed arrangements for advertising and interviewing applicants for the position of senior lay member of the governing body. Ministers have proposed a system that is micromanaged to the nth degree. The level of detail is wholly disproportionate and betrays an unjustified lack of trust or confidence in our universities.

Amendments 12 and 13 in my name would remove most of that wholly unnecessary interference and prescription. Instead, the advertisement and application process would be required to comply with good governance principles of transparency and inclusivity. The Scottish Further and Higher Education Funding Council would have a role in determining the good governance, which would satisfy ministers’ desire for some level of external oversight. The alternative is that ministers are left to determine what is an operational matter for universities—and that is unhealthy.

Finally, with regard to the other amendments in the group, I welcome the cabinet secretary’s amendments 14 and 15, which move us in the right direction. Similarly, I welcome the amendments from Gordon MacDonald and Chic Brodie, who seem to be seeking an outcome that is much the same as the one that I am pursuing—namely, an inclusive but not overly prescriptive process.

My preference, however, particularly given that Gordon MacDonald’s amendment pre-empts my own, would be for Parliament to adopt a clear approach through amendments 12 and 13. Those provisions have the advantage of being linked to good governance, over which the funding council would have sight. I believe that such an approach would deliver the transparency and inclusiveness that we are seeking to achieve.

Chic Brodie: My amendment 37 was designed to secure and underpin the wider franchise of staff and students in particular, but I am happy to support Gordon MacDonald’s amendment 36, and I will not move my own amendment.

With regard to my amendment 38, I confess that I do not know why an application form for a very senior position would be necessary, particularly given that the bill has already delegated to an appointed committee “The relevant criteria”, to “include the skills and knowledge” and, in my view, the availability, that the committee considers “to be necessary or desirable”.

I would have thought that any serious applicant for a very senior position in the education hierarchy would simply address those aspects in a letter. I would also expect a very full due diligence process to be carried out for such a serious application for a very senior position before interviews even took place. Liam McArthur’s amendment deserves serious consideration in that respect.

Angela Constance: I am grateful to Gordon MacDonald for outlining the purpose of amendment 36. I have continued to listen to stakeholders and have given the matter full consideration. I am persuaded that the requirement to advertise could be more general, as long as the vacancy is advertised widely and reaches a broad range of people. I am therefore content to support Gordon MacDonald’s amendment 36.

However, I consider that, apart from my amendments 14 and 15, the other proposed amendments to section A4 would impact significantly and negatively on the provision’s aim to improve the accessibility of the role of senior lay member to a potentially wider pool of candidates, thereby ensuring a more consistently transparent and fair recruitment process across the sector for the appointment of senior lay members.

I do not believe that amendments 12 and 13 in the name of Liam McArthur are necessary. Amendment 12 would introduce a requirement for higher education institutions to have regard to the code of good higher education governance, which they are already required to do as a condition of their funding. The limiting of the requirement to advertise to “within and outside” the institution is too permissive and could potentially limit the reach of that requirement.

It should be noted that the code can currently be revised without the approval of the Scottish Parliament. Any reference to the code in the bill would, therefore, allow the application of the bill to develop in ways that the Parliament has not sanctioned and will not be able to scrutinise—for example, through secondary legislation.

Liam McArthur: I hear the concerns that the cabinet secretary has expressed regarding the potential approach that universities could take. However, in light of the legislation that is before us, does not she think that it is inconceivable that universities, not least because of the pressure that they would come under from staff and student representatives, would extend the net as widely as possible in searching for potential applicants?

Angela Constance: Given Liz Smith’s earlier remark that the purpose of stage 3 consideration of legislation is about focusing on workability, and
as I outlined earlier, I feel and fear that the amendments in the name of Liam McArthur are too permissive and would not achieve the broader requirement for a fair process that aims to widen the scope of the potential candidates whom we are trying to reach.

I am somewhat surprised, given that Mr McArthur tends to be very focused on and interested in the role of Parliament in scrutiny, that, although his proposals are connected with the code of good governance as is practised, he wants to insert reference to the code in legislation, which would mean that Parliament would not have a role in scrutinising it at a future date.

The provisions on advertisement and applications in section A4, as inserted in the bill at stage 2, seek to ensure a clear and level playing field for all applicants. For example, a single application form means that all applicants are obliged to present evidence of their suitability in the same way.

I do not share the view of some members that the provisions are overly prescriptive. There is no requirement on the level of detail that the advert must contain when explaining the matters in section A4(2)(c); decisions about that rightly remain with the HEI. The matters that the bill requires an advert to explain set basic parameters to ensure transparency and fairness in the recruitment process. The principles that underpin the bill are the enhancement of inclusion, participation, transparency and consistency in governance arrangements in our higher education institutions. Unfortunately, none of Mr McArthur’s amendments would meet those principles. For that reason, I ask Mr McArthur, with respect, not to press his amendments, and I ask members to reject them if he moves them.

Amendments 37 and 38 in the name of Chic Brodie would introduce a requirement for institutions to advertise through media outlets that are “particularly relevant to students and staff” and remove the requirement for the advert to include details about how the application form for the position can be obtained. It is important that applicants know that they must apply in a specific way so that all applicants are obliged to present evidence of their suitability in the same way. That will ensure a level playing field. If the vacancy is advertised widely and brought to the attention of a broader range of people, part of the intention of Chic Brodie’s amendment 37 can be more appropriately met through Gordon MacDonald’s amendment 36.

Amendments 14 and 15 are minor technical amendments to sections A4(2)(c)(iii) and (iv). The provisions oblige HEIs to explain in any advertisement that reimbursement or remuneration is offered to cover expenses that are linked to attending an interview, campaigning in an election, or carrying out the functions of the senior lay member position. Advertising the availability of such payment will encourage a broader pool of candidates to apply for the position of senior lay member at Scottish HEIs. That can only be good for the diversity and range of skills and knowledge in HEI governing bodies. The purpose of the minor amendments is to provide clarity that it is the availability of reimbursement or remuneration that should be set out in the advertisement rather than a monetary value.

I will move amendments 14 and 15 at the appropriate time and ask members to support them, as well as supporting amendment 36 in Gordon MacDonald’s name. I ask members to reject the other amendments in the group if they are pressed.

Liz Smith: I am willing to accept amendment 36 in the name of Gordon MacDonald because it removes some of the overly prescriptive nature of the advertisement procedure. The fact that the Scottish Government is willing to support that amendment tells the story that it was originally far too prescriptive. The amendment is true to the principle of ensuring that there is as wide a pool of applicants as possible without any micromanagement.

Liam McArthur’s amendments 12 and 13 pursue that principle to a much greater degree. I welcome that because it will ensure that the application process is completely compliant with the code of good governance when it comes to transparency and inclusivity. It will also allow an important role for the Scottish funding council, which is, after all, the responsible broker between the Scottish Government and each institution.

I was happy to support Mr Brodie’s amendment 38, even if I believe that amendments 12, 13 and 36 will probably work a bit better. I cannot support amendment 37 because it would create complications. I will support amendments 14 and 15 because they seek to reduce the ridiculous overspecification of some aspects of the advertisement process.

Mary Scanlon (Highlands and Islands) (Con): I was the committee member who raised the concerns about telling our world-class universities that they had to advertise on the internet and that they had to tell people where to get an application form, so I thought that it was important and appropriate for me to welcome Gordon MacDonald’s and Liam McArthur’s amendments. The amendments will reduce the prescriptive content that I was amazed to see in the bill.
Given that telling our universities how to advertise was not in the committee’s stage 1 report, was not mentioned by any member of the Parliament at stage 1 and was never raised as an issue at any time during stage 1, who did the Government consult prior to including the measures in the bill at stage 2 and who did it consult following that in bringing forward the amendments today, which are welcome and which water down the specifications?

16:30

The Deputy Presiding Officer: Cabinet secretary, do you wish to add anything?

Angela Constance: I simply say that this is a listening Government. We listen to all members and stakeholders.

Gordon MacDonald: As I set out, my amendment 36 seeks to enable a compromise and a less exacting requirement that still meets the aims of the bill of ensuring that the position of senior lay member is advertised in a manner that enables the advertising to reach a broad range of people. We heard from Liam McArthur and Chic Brodie about their amendments 12 and 37 respectively, which offer their alternative approaches. Liam McArthur’s amendment would require institutions to advertise the vacancy in a manner that they see fit, having regard to the Scottish code of good higher education governance, and Chic Brodie’s would require institutions to advertise in media outlets that are “particularly relevant to students and staff”.

I welcome Chic Brodie’s intention not to move amendment 37 and I ask Liam McArthur not to move amendment 12. If it is moved, I ask members to reject it and to support my amendment 36.

Amendment 36 agreed to.

The Deputy Presiding Officer: I remind members that, if amendment 13 is agreed to, I cannot call amendments 38, 14 and 15, because of pre-emption.

Amendment 13 moved—[Liam McArthur].

The Deputy Presiding Officer: The question is, that amendment 13 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, John (Etrrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Mline, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Alileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Rosanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dundermine) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Although no one should be unreasonably excluded, a meaningful process of sifting candidates is not unreasonable; indeed, many would argue that it is necessary and in the interests of the universities and the candidates themselves. I presume that that is why Professor von Prondzynski appeared to favour such an approach.

Amendments 16 and 17 depart from what currently appears to be, in essence, a tick-box exercise. They would instead allow nominations committees to assess how well each prospective candidate meets the requirements of the demanding role of chair. We have already taken steps to ensure that the nominations committee itself is representative and that it acts in a transparent manner. We can therefore feel reasonably confident that, in exercising discretion, the committee will do so in a way that reflects the widest possible interests of students, staff and the university as a whole.

The sift process would allow the committee to consider all relevant information that is contained in an application before drawing up a shortlist for interview. Those who are invited to interview would then be assessed as to their suitability to hold the position of chair, allowing members of the nominations committee an opportunity to determine whether or not a given candidate is likely to be committed to the strategic interests of the university.

The concern at present is that the bill leaves nomination committees with no ability to respond appropriately to an application from a single-issue candidate. However important such an issue might be and however legitimate it may be to see that issue debated, it is questionable whether having a chair elected on the basis of a single issue would be and however legitimate it may be to see that issue debated, it is questionable whether having a chair elected on the basis of a single issue would likely to be committed to the strategic interests of the university.

On that basis, I ask Parliament to support these important amendments, and I move amendment 16.

Liz Smith: I am grateful to Mr McArthur for outlining the purpose of amendments 16 and 17. Both amendments seek to give the committee that selects candidates to stand for election increased vetting powers beyond its being satisfied that an applicant meets the criteria that the committee has set.

The point of the democratic process that is provided for in the bill is that, beyond meeting...
those criteria, any further qualitative judgment on the candidates should properly be for the electorate. The fact that the committee devises the criteria according to what it considers necessary or desirable to exercise the functions of the senior lay member and command the trust and respect of the staff and students, the academic board and the governing body means that the committee sets the competence bar for candidates and already has a certain amount of discretion in assessing whether or not applicants cross that bar.

Section A5 already requires the assessing committee to be satisfied that the candidate meets the relevant criteria for the position of senior lay member. All candidates should be assessed fairly against the same criteria and not, as Mr McArthur suggests in amendment 16,

“together with other ... relevant information contained within the application”.

Nothing should be relevant other than whether the candidate appears in their application to meet the criteria for the position and further satisfies the committee at interview that they do so. Any further qualitative judgment should rightly be for the electorate of the students, staff and members of the governing body.

In short, the bill provides for a recruitment process that stands up against modern standards for a fair and transparent recruitment exercise. It ensures that credible and competent candidates are presented to the electorate and that it is the electorate that can make the final determination as to the strongest of the candidates.

Mr McArthur’s amendments 16 and 17 are unnecessary because of the role that the committee already has in determining the relevant criteria and assessing candidates against those criteria. More worrying, the amendments are undesirable because they seek to undermine the democratic process for the appointment of a senior lay member that is at the heart of the bill.

Quite simply, the committee should not be able to arbitrarily vet who stands in the election if a candidate can otherwise satisfy the committee that they meet the criteria that the committee has set. Therefore, I strongly urge members to reject amendments 16 and 17.

Liam McArthur: I thank Liz Smith and the cabinet secretary for their contributions.

I listened with interest, in particular, to what Angela Constance had to say. She is right in that the nominations committee can set the competence criteria for candidates, and it is absolutely right that candidates should be judged fairly, but I do not think that providing the nominations committee with an opportunity to sift applications more thoroughly than is presently the case in the bill would undermine that. Indeed, it is arguable that the democratisation process could already be said to have been undermined by what we have put in place in relation to rectors and senior lay members.

I think that the modest provisions that amendments 16 and 17 propose would provide an additional safeguard without undermining the democratisation process that is under way. Therefore, I press amendment 16.

The Deputy Presiding Officer: The question is, that amendment 16 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
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Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Amendment 16 disagreed to.
Amendment 17 not moved.

Section A6—When election to be convened

The Deputy Presiding Officer: Group 6 is on the election of the senior lay member. Amendment 18, in the name of the cabinet secretary, is grouped with amendments 5 to 8, 39 and 19.

I draw members’ attention to the note on the groupings. Amendments 18 and 5 are direct alternatives, which means that I can call both amendments. If amendment 18 is agreed to, the Parliament can still decide whether to agree to amendment 5. If it did so, amendment 5 would replace amendment 18. I also point out that, if amendment 39 is agreed to, I will not be able to call amendment 19, because of pre-emption. I hope that that is clear.

Angela Constance: Amendment 18 provides for a minor but important finessing of section A6(1) of the bill, which compels an HEI to arrange an election for the position of senior lay member.

Amendment 18 seeks to make it explicit in statute that it is for the governing body of the HEI to arrange the election for the position of senior lay member. It is clear that that is what section A6(1) intends and implies, but it is important to make that absolutely clear. Therefore, I ask members to support amendment 18.

I turn to Liz Smith’s amendments 5, 6 and 7. They would have a negative impact on the process for the appointment of the senior lay member. Amendment 5 is unnecessary, and my amendment 18 makes fuller provision in this area by also making it clear that it is the duty of the governing body to arrange an election.

Section A6 provides that an institution is required to organise an election for the position of senior lay member of the governing body if, after interview, more than one candidate is entitled to stand and confirms their intention to do so.

16:45

I am confident that provisions elsewhere in the bill will result in a wide range of suitable candidates not only presenting themselves but making it through to the election stage. However, should that for any reason not be achieved, sections A6(1) and A6(2)(a) and (b) make provision to ensure that an election for the position of senior lay member will not be held with only one candidate standing. In that way, the bill ensures a real and meaningful election in keeping with the bill’s overall aim to establish an open, transparent and more democratic appointment process across all HEIs for the role of senior lay member.
Amendments 6 and 7 from Liz Smith would remove that provision and enable elections involving one candidate to be held, with no meaningful vote for staff, students or the members of the governing body. For that reason, I cannot support those amendments. The electorate must be presented with a choice, or the election could become a coronation of a pre-selected candidate. I therefore urge members to protect the democratic ideals of the bill and reject amendments 5, 6 and 7 from Liz Smith.

Amendment 8, also lodged by Liz Smith, is unhelpful as it seeks to limit and, in effect, water down the requirement on institutions to meet campaign expenses. Unlike section A6, Liz Smith’s proposed provision would not require an HEI to reimburse reasonable campaign expenses; rather, it would provide for the status quo, which is that HEIs can provide campaign expenses if they wish. There is a risk that, should an institution refuse to meet campaign expenses, that would put off those who cannot afford to run an election campaign from standing. However, I am absolutely clear that my intention in the bill is to achieve a broader pool of potential senior lay member candidates and that income and wealth should not be pre-determiners of that process. I therefore cannot support amendment 8 and ask members to reject it.

With regard to Mr Brodie’s amendment 39, I know that Mr Brodie highlighted his view at stage 2 that if proportional representation was suitable for elections to this Parliament, elections for the senior lay member of the governing body of a higher education institution should operate similarly. I have some sympathy with his view but cannot support amendment 39. Rectorial elections, relevant to the appointment of one person rather than a representative body, are not conducted in that way, and I do not support the introduction of the single transferable vote for senior lay member elections. A simple majority system is more proportionate to a focused campus election of that sort, which may have a relatively small number of candidates.

Obliging HEIs to conduct elections via a single transferable vote system without having the option to consider any other form of proportional representation would impose a greater administrative and financial cost on our institutions. Further, I understand that although NUS Scotland is sympathetic to amendment 39, it does not support it. If the member had been keen to explore the matter at stage 2, that might have allowed some time to examine the case with stakeholders. However, in the current context, I ask the member not to move amendment 39. If he does, I ask that members do not support it.

Liam McArthur’s amendment 19 seeks to remove what I consider to be the fundamental right of each student, staff member and governing body member to cast a vote of equal weight in the election of the senior lay member and to introduce a process that would enable institutions to make rules to establish an electoral college for voting in that election. Quite simply, the introduction of an electoral college would cut across the core intention to democratise the process for electing senior lay members to chair university governing bodies.

It has been central to the narrative of the bill that I see a real benefit in enabling every voice on campus to be heard. Section A7 of the bill, as inserted at stage 2, enables a system in which each vote cast in the election carries equal weight and the election is won by the candidate who secures a simple majority of the total number of votes cast. An electoral college would have enabled institutions to apply whatever weighting they chose to each of the three constituencies of staff, students and members of the governing body. They could have given the members of the governing body 80 per cent weighting, staff 10 per cent and students 10 per cent. It would have been open to each institution to establish that for themselves.

A key policy aim of the bill, as I have said already, is to enable every voice on campus to be heard. That would not be achieved by an electoral college that resulted in some voices on campus being more equal than others. I want all voices to be equal and, in particular, I want to make sure that the voices of staff and students can actually be heard in the election process. I therefore cannot support amendment 19 and I ask that members reject it. I ask members to support amendment 18.

I move amendment 18.

**Liz Smith:** I believe that my amendment 5 is a preferable alternative to amendment 18 from a semantic perspective. I do not disagree with the principle of what the cabinet secretary is trying to do, but I think that amendment 5 expresses it better.

Amendment 6 is designed to enable an election to occur in a circumstance where there is only one candidate. That circumstance might not be desirable, but it is highly possible, so we have to take it seriously.

Amendment 7 is designed to counter the problem that would be left by the bill that would mean that any university could be left without a chair for a significant time and therefore encounter the unwelcome instability that would follow. It is extremely important for the sake of our institutions that we avoid that situation.
Amendment 8 is intended to replace existing provisions with a section that requires an election to be held to select which of the candidates for election who are identified through the previous section should be chosen as the senior lay member.

The amendments remove the requirement for there to be multiple candidates before an appointment can be made and they make it clear that the governing body is responsible for the running of the election. I add that the Conservatives are happy to support amendment 19 but not amendment 39.

**Chic Brodie:** I was not sure whether I had misheard the cabinet secretary when she said that I should perhaps have consulted more after stage 2. I am afraid that I have consulted quite widely—I am not sure that that has been reflected elsewhere—my consultation being weighed down by experience.

It is right for the institution to seek the election of a senior lay member. Section A7(5) states:

“In the event of a tie between two or more candidates for the highest number of votes cast, the election is won by whichever of them is deemed to be the winner”.

There can be nothing worse than an election such as one consisting of three candidates, let us say with a franchise of 1,000 electors, with the winner getting 400 votes and the other two getting 300 votes each, combining to make 600. In that situation, we would send a senior lay member to the governing body with less than 50 per cent support from the electorate that he or she sought to get support from. That would hardly give the elected member a strong voice in the governing body. I suggest that my amendment 39 be agreed to.

**Liam McArthur:** I confirm my support for the amendments in the group except for amendment 39, but that is solely due to the pre-emption.

My amendment 19 is perhaps a little more complex, but its aim is to ensure that there is greater fairness in the way in which chairs are elected. Whether the system that is used for electing senior lay members is the single transferable vote system or first past the post, numbers matter, and in that respect it seems inevitable that the views of students will be better reflected than those of staff. When we consider that most students will leave the university once their course is complete, unlike staff, whose career at a university may last significantly longer, that seems anomalous.

My amendment 19 seeks to balance the votes of students, staff and the governing body in any contest by introducing an electoral college arrangement. The cabinet secretary says that she wants everyone’s voice to be heard on campus, but surely even she can see that some voices will be heard more loudly than others as a result. How the college system would work in practice could quite reasonably be left to individual institutions to determine, again reflecting the diversity within the sector.

Although the approach could, as I said, be slightly more complex to operate, its benefit is the mandate that it would give the senior lay member. She or he could legitimately argue that their success represented a fair reflection of the views of all stakeholders within the university.

Like Chic Brodie, I have to say that the accusation from the cabinet secretary about a lack of consultation, given what we have seen at stage 3 in relation to the provisions on elected chairs and rectors, is somewhat staggering.

I ask the Parliament to support my amendment 19.

**Angela Constance:** I have listened to the explanations that Liz Smith, Chic Brodie and Liam McArthur have given of their amendments, and I remain convinced that they are unnecessary or undesirable. Amendment 5 is unnecessary, as my amendment 18 makes fuller provision in that area by also making it clear that it is the duty of the governing body to arrange an election.

Liz Smith’s amendments 6 and 7 would enable elections that involve one candidate with no meaningful vote for staff, students or the members of the governing body. The electorate must be presented with a choice, not an installation. Therefore, I urge members to protect the democratic ideals of the bill and reject Liz Smith’s amendments 5 to 7.

Similarly, Liz Smith’s amendment 8 is undesirable, as it seeks to dilute a power and responsibility that is important in enabling a broader and more diverse pool of potential senior lay member candidates.

**Liz Smith:** Will the cabinet secretary list the members and stakeholders with whom she consulted on that section of the bill?

**Angela Constance:** Let me put things in perhaps a very undiplomatic way. I have consulted on the bill until I am blue in the face. My officials have been involved in extensive discussions with a range of stakeholders, and the Government and I made extensive efforts to co-design propositions between stage 1 and stage 2. Irrespective of what people’s views of the bill are, I utterly reject and refute the claim that there has been a lack of meaningful dialogue about it. That is quite simply not true.

To follow on from my point before Ms Smith’s intervention, it is important to return to the current position. What Ms Smith proposes would be a
retrograde step, so I will not support amendment 8 and I ask members to reject it.

I listened to everything that Mr Brodie said about amendment 39 but, on balance, a simple majority system is more suitable for the election of a senior lay member across 18 HEIs. Therefore, although I am sympathetic in general terms, I ask members not to support amendment 39.

Liam McArthur’s amendment 19 could deny students and staff the right to cast a vote of equal weight in the election of the senior lay member, which is quite simply not acceptable. Mr McArthur seemed to touch on the notion that students are somewhat transient, as they may study for only three or four years, but what group other than students has such a major interest in their institution’s good governance and its being well run? It is imperative that, whether a person is a member of staff, a student or, indeed, a member of the governing body, their vote has equal weight to that of everyone else.

Liam McArthur: Will the cabinet secretary take an intervention?

Angela Constance: I am just finishing.

The bill is about inclusivity and achieving clear parity of esteem for the entire campus community, so I cannot support amendment 19, and I ask members to reject it.

Amendment 5 agreed to.

Amendment 5 moved—[Liz Smith].

The Deputy Presiding Officer (Elaine Smith): The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (Mid Scotland and Fife) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adams, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Edie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
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Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
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MacAskill, Kenny (Edinburgh Eastern) (SNP)
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Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
The Deputy Presiding Officer: The result of the division is: For 19, Against 93, Abstentions 0.

Amendment 5 disagreed to.

Amendment 6 moved—[Liz Smith].

17:00

The Deputy Presiding Officer: The question is, that amendment 6 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (Mid Scotland and Fife) (SNP)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Macleod, John (Caithness, Sutherland and Ross) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beattie, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
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Keir, Colin (Edinburgh Western) (SNP)
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McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)

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The Deputy Presiding Officer: The result of the division is: For 18, Against 93, Abstentions 0.

Amendment 7 disagreed to.

Amendment 8 not moved.

Section A7—Election franchise and result

Amendment 39 moved—[Chic Brodie].

The Deputy Presiding Officer: I remind members that, if amendment 39 is agreed to, I cannot call amendment 19 as there would be a pre-emption.

The question is, that amendment 39 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brodie, Chic (South Scotland) (SNP)
Finnie, John (Highlands and Islands) (Ind)
Harvie, Patrick (Glasgow) (Green)
Johnstone, Alison (Lothian) (Green)
Wilson, John (Central Scotland) (Ind)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biaig, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (Lab)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McManus, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeen West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Barfleuch and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeenshire Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Amendment 19 disagreed to.

The Deputy Presiding Officer: The question is, that amendment 19 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Harvie, Patrick (Glasgow) (Green)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Lamont, John (Etrrict, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
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Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
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Campbell, Roderick (North East Fife) (SNP)
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Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
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Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)

The Deputy Presiding Officer: The result of the division is: For 5, Against 107, Abstentions 0.

Amendment 19 disagreed to.
Section A9—Remuneration and conditions

The Deputy Presiding Officer: Group 7 is on senior lay member remuneration. Amendment 20, in the name of the cabinet secretary, is grouped with amendments 21 and 9.

Angela Constance: Amendment 20 is a minor amendment to section A9(1), which ensures that the senior lay member of the governing body can request and will be paid reasonable remuneration and allowances from the HEI, commensurate with the work that is done in carrying out that office’s functions.

It has been suggested that, as the provision says that HEIs must pay reasonable remuneration in response to a request from the senior lay member, it could be misinterpreted as allowing the senior lay member to dictate in their request what is reasonable. Although I do not agree with that interpretation, I have listened to stakeholders and lodged this minor amendment to make it absolutely clear that it is for the governing body of an HEI to decide what is reasonable remuneration and allowances for the work that the senior lay member carries out.

Amendment 21 is a minor technical amendment to section A9(1) that is consequential on amendment 20. Amendment 21 will simply add the clarity, following the addition of text by amendment 20, that reasonable remuneration and allowances are to be paid if they are commensurate with the work that a person does in their capacity as the senior lay member.

Amendment 9 is substantially the same as an amendment that Liz Smith lodged at stage 2. I did not consider such an amendment to be necessary then and it is still not necessary now. Amendment 9 would provide for a power that already exists. HEIs can currently provide remuneration if they wish. Compliance with the code of good HE governance is also expected, and I see no reason why that would not continue.

As I have said, section A9 ensures that a senior lay member, or chair, of the governing body can request and will be paid reasonable remuneration, commensurate with the responsibilities of carrying out that office’s functions. That is not akin to a salary or unlimited payment, but it is right for a senior lay member, on request, to be paid reasonable remuneration and allowances for the work that they have undertaken. It is also a duty on HEIs to make such payments when that is reasonable. In recognition of the important work that the senior lay member does, I do not think that many HEIs would object to that, and I am clear that it will encourage a broader pool of candidates to apply for the position of senior lay member at HEIs, which can only be good for the diversity and range of skills and knowledge in HEI governing bodies.

In removing subsections (2) and (3) of section A9, amendment 9 would remove the safeguard in the bill that the senior lay member is to be independent, rather than a student or member of university staff, and it would remove the provision that ensures that HEIs remain able to control the terms and conditions of the senior lay member position. I therefore cannot support amendment 9, which merely describes discretion that HEIs already have, and I ask members to reject it but to support amendments 20 and 21, in my name, which bring clarity to the existing provision.

I move amendment 20.

Liz Smith: The Conservatives will support amendments 20 and 21 on the ground that they place responsibility for remuneration with the governing body. Amendment 9 would require decisions about the remuneration of chairs to be made in accordance with current and evolving best practice, as set out in the code of good governance—something that Universities Scotland is rightly concerned about.

We saw serious misunderstanding in the bill’s early stages about exactly what chairs do. Indeed, the myth pertained that they only have to turn up for six meetings a year, claim expenses and chair the agenda when, in reality, the situation is completely different. Compliance with the code allows for payment that is based on compensation for additional costs incurred or income forgone by the senior lay member or payment to the senior lay member’s employer in compensation for their time.

Liam McArthur: The amendments in the group offer an opportunity to address another problem that the Government created through its approach at stage 2. To give credit where it is due, the cabinet secretary appears to have recognised that her earlier proposals on remuneration and allowances for elected chairs were not workable, and amendments 20 and 21 are certainly an improvement.

That said, the approach that Liz Smith’s amendment 9 sets out is preferable. It would leave the decisions to be determined by each institution’s governing body, in line with what the funding council considers to be the principles of good practice across the sector. The NUS makes a fair point in arguing that, without some form of appropriate remuneration, we run the risk of making the post of elected chair the preserve of those who are financially secure. Nevertheless, the more discretion we can leave open for governing bodies of universities to decide the most appropriate arrangements for their institutions and for the individuals who take on the role, the better.
Angela Constance: I am grateful to Mr McArthur and Ms Smith for their support for amendments 20 and 21. I reiterate my objection to amendment 9, in the name of Liz Smith, for all the reasons that I gave earlier, and I ask members to reject amendment 9 but to support amendments 20 and 21.

Amendment 20 agreed to.

Amendment 21 moved—[Angela Constance]—and agreed to.

Amendment 9 moved—[Liz Smith].

The Deputy Presiding Officer: The question is, that amendment 9 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Brown, Gavin (Lothian) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Humé, Jim (South Scotland) (LD)
McArthur, Liam (Orkney Islands) (LD)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against

Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kelly, James (Rutherglen) (Lab)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Peterson, Gill (Clydebank and Milngavie) (SNP)
Pentland, John (Motherwell and Wishaw) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Simpson, Dr Richard (Mid Scotland and Fife) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeen Central) (SNP)
Sturgeon, Nicola (Glasgow Southside) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (Ind)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 13, Against 92, Abstentions 0.

Amendment 9 disagreed to.
Section 1A—Resignation or removal of chairing member

The Deputy Presiding Officer: That brings us to group 8, which is on the resignation and removal of the chairing member and ordinary members of a governing body. Amendment 22, in the name of the cabinet secretary, is grouped with amendments 23 and 24.

Angela Constance: During any bill process, it is important that ministers listen to members' views, particularly when they are expressed by supporting amendments at stage 2. Sections 1A and 5A were introduced at stage 2 through amendments from Liz Smith and Chic Brodie respectively. At stage 2, I did not agree that those provisions were necessary or desirable, but committee members across the parliamentary groups clearly thought otherwise, and I have listened to them. Therefore, I am not seeking to remove those provisions from the bill in their entirety but, through amendment 24, I will introduce a new provision based on sections 1A and 5A that is workable in the context of the bill as amended at stage 2.

Amendment 24 provides for a similar safeguard to that which sections 1A and 5A introduced, without impinging on the powers that higher education institutions have to manage the resignation of or to remove any member of the governing body, including the chair. HEIs can already manage the removal or resignation of governing body members, and they do so through their own governing instruments.

Broadly, the process for the resignation or removal of the senior lay member and any other member of the governing body of an institution should be left largely to the universities—as autonomous institutions—to determine. Sections 1A and 5A impinge on the autonomy of HEIs in an unacceptable way by prescribing detail including notice periods and who notice must be given to. That is an unnecessary and unhelpful level of prescription, and amendment 24 will introduce measures that provide for a more proportionate response.

Amendment 24 provides a statutory safeguard whereby an elected senior lay member and any other member— including the newly elected and nominated members of the governing body—may resign or be removed, as can currently be done in relation to a chair or any other member. I hope that that assures Ms Smith and Mr Brodie that the intent of their amendments—what was being pursued through sections 1A and 5A—is being carried forward through amendment 24. I hope that I have also provided wider assurance to members, and to the HE sector, that the bill seeks to take a light-touch approach to the detail of governance matters when that is warranted.

As a consequence of the new provision that amendment 24 will insert, sections 1A and 5A, which were added at stage 2, will be superseded. As such, I seek to remove them through amendments 22 and 23. I encourage members to support amendments 22 to 24.

I move amendment 22.

Amendment 22 agreed to.

After section 1A

Amendment 40 moved—[Chic Brodie].

17:15

The Deputy Presiding Officer: The question is, that amendment 40 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Torrance, David (Kirkcaldy) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (Ind)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 19, Against 91, Abstentions 0.
Amendment 40 disagreed to.

Section 4—Composition of governing body

The Deputy Presiding Officer: The next group is on the composition of the governing body and trade union involvement. Amendment 41, in the name of George Adam, is grouped with amendments 42 and 44 to 47.

George Adam (Paisley) (SNP): I am pleased to speak to amendments 41, 42 and 44 to 47. As with much else in life, these rather innocuous-looking technical changes have the potential to have a much larger impact. Such was the storm and fury over practically every aspect of the bill during its earlier stages that, between stages 2 and 3, I spent some time looking for potential loopholes and unintended consequences in its provisions. That might suggest that I need to get out more, Presiding Officer, and you might be correct if you came to that conclusion. However, it was time well spent, because I found unintended consequences that pertain to the provisions on trade union representation and the rights of trade unions to nominate two members to institutions' governing bodies.

I welcome those provisions. It is clear to me that, as the cabinet secretary has made clear, trade unions and their members have a role to play in the governance of our higher education institutions, particularly if we are to ensure that every voice on campus is heard. Trade unions and their members have at heart not just their own interests but the wider wellbeing of the agencies, organisations and institutions that employ their members. However, I understand that section 4 as drafted says that, if an institution does not recognise a trade union that has members in that institution, that trade union will not be able to nominate members to sit on the governing body. That would be an unhelpful outcome.

The bigger concern for me is that, at some point, an institution might decide to derecognise a trade union in order to prevent the nomination of members to its governing body. In all honesty, I cannot imagine that any of our existing institutions would wish to thwart the objectives of the legislation in such a way. However, legislation must be future proofed where it can be, to prevent such unintended and extremely unhelpful consequences.

The amendments aim to shut that door before anyone is minded to prise it open. They seek to make it clearer that, if an institution has staff who are members of a trade union that that institution has not recognised, the institution cannot argue that there is no trade union for the purposes of...
nominating trade union members to the governing
cbody under sections 4(1)(c) and 4(1)(d). By
removing the requirement for recognition in
section 4(2), as amendment 45 would, we would
ensure that all trade union members can have a
representative on a governing body.

Amendments 46 and 47 would make clearer the
definition of a trade union for the purposes of the
bill.

The amendments seek to give the fullest
possible effect to the spirit, intent and purpose of
the bill, and I hope that members will support
them.

I move amendment 41.

Angela Constance: I thank Mr Adam for
explaining the intent of amendments 41, 42 and 44
to 47. I have been clear that I am committed,
through the bill, to enabling every voice on
campus to be heard. As part of that, I have
ensured that trade unions are entitled to nominate
two members to the governing bodies of all HEIs.

The inclusion of union members on the
governing body of each HEI was a core
recommendation of the 2012 review. I have been
clear throughout the bill process that that is a very
important provision. The amendments, as
described by Mr Adam, represent a technical
clarification, and I welcome the closure of the
potential loophole that he identified.

It is important that all unions are considered in
relation to such positions and that all union
members have a say. Mr Adam’s amendments
help to achieve that aim. For that reason, I ask
members to support amendments 41, 42 and 44 to
47.

George Adam: I am not a paranoid individual,
but I believe that we must ensure that there is no
temptation for individuals to abuse the situation.
That is why I will press amendment 41.

Amendment 41 agreed to.

Amendment 42 moved—[George Adam]—and
agreed to.

The Deputy Presiding Officer: Group 10 is on
remuneration committees. Amendment 43, in the
name of Mark Griffin, is grouped with amendment
49.

Mark Griffin (Central Scotland) (Lab): I will
speak to amendment 43, in my name, and speak
in support of amendment 49, in the name of Alison
Johnstone.

Amendment 43 seeks to ensure that trade union
and student association nominees sit on a
university’s remuneration committee. Labour
supports the principle of the bill, which is to ensure
greater transparency and representation in
university decision making. That principle should
be reflected in the processes that lead to the
governing body taking decisions. In view of that,
students and staff representatives should sit on
sub-governing body committees, such as
remuneration committees.

Decisions made in the governing body have
often gone through a lengthy process in order that
advice can be given and recommendations made
to the board. In order to ensure that our
universities remain transparent and accountable at
every level, it is important that their two main
stakeholders—staff and students—are key
participants in all decision-making bodies.

In autumn last year, UCU Scotland submitted a
freedom of information request to all Scottish
institutions to ask for the details of their principals’
remuneration and how it was set up. Two
institutions did not respond, two used exemptions
not to supply the information requested, and six
redacted the remuneration committee minutes or
other related information. More than half of higher
education institutions, therefore, were not fully
transparent about principals’ pay. We believe that
that is not acceptable for bodies that spend more
than £1 billion of public money annually. It is time
that we had more transparency on the issue.

The Government should pay heed to recent
scandals on pay and packages that have affected
the further education sector, and support the
amendment. If staff and student representatives
were full members on remuneration committees, it
would result in greater diversity and a greater
balance of opinions among stakeholders. That
was recommended by the Hutton review of fair
pay, which found that, at 15.35:1, university
principals have the highest pay ratio in the entire
public sector.

Follow-up research by NUS Scotland found that,
in Scotland, the ratio goes up to 16:1. There are
88 individuals in Scottish universities who earn
more than the First Minister; there is only one
university principal who earns less than that. It is
clear from those figures, and given the backdrop
of tight financial circumstances across the public
sector, that the higher education sector needs to
take strong action and to be more accountable on
senior pay.

Our amendment 43, combined with Alison
Johnstone’s amendment 49, which has our
support, provides for measures that we believe will
help curtail unreasonable management pay
increases and will keep pay more in line with that
of those at the bottom of the pay scale. I hope that
members will support us on this issue.

I move amendment 43.

Alison Johnstone (Lothian) (Green): Amendment 49 is designed to allow universities to
set senior pay in a fairer, more equitable manner. It could work in tandem with Mark Griffin’s amendment 43, which I support.

Principals’ pay has hit the headlines many times. Last year, people at the top end of the pay scale in universities received pay increases of 8 per cent, 13 per cent and even 15 per cent. At the same time, staff had to take industrial action—and they therefore lost pay—to get a 2 per cent increase. Others were pushed into insecure zero-hours contracts.

UCU has described that pay inequality in its briefing today as “ludicrous” and as being “more reminiscent of pre-crash investment banking than public service institutions”.

NUS Scotland reports in its briefing—as my colleague Mark Griffin has highlighted—that university principals have the highest pay ratio in the entire public sector and that the ratio in Scotland is even higher than the UK average.

After years of pay restraint in the public sector, people find such vast levels of wage inequality harder and harder to stomach. There are concerns over the arbitrary nature of pay rises and, as has been highlighted, the lack of transparency. Each and every member of staff plays a part in the success that is recognised in our universities. However, as NUS president Gordon Maloney has highlighted, figures show that just 17 people earned more than £4 million between them.

Amendment 49 would help to link the decisions on principals and senior managers to pay for lecturing staff. It recognises the need to bring down the wage ratios in universities, and it would require remuneration committees to “have regard to ... the desirability of reducing the ratio between the remuneration of the highest paid and lowest paid employee within the institution”.

Remuneration committees should of course also have regard to the overall financial health of the institution.

The list that I have provided is non-exhaustive. Committees would be free to consider anything else that they deemed relevant or important to their decisions. I hope that the cabinet secretary can respond positively on the issue. We will of course work with any and all parties who support our aim.

There is a clear case for acting now. It is time to legislate to ensure that future pay rises for principals are in step with wider pay increases.

**Liz Smith:** We cannot support either amendment 43 or amendment 49, on the basis that we do not feel that there has been sufficient consultation with all the stakeholders about how the measures would work in practice. We will therefore not be supporting either of the amendments in the group.

**Angela Constance:** I thank both Mr Griffin and Ms Johnstone for their substantial contributions this afternoon and for their explanations of the intentions behind their respective amendments. I want to make clear my considerable sympathy for the intent of their proposals.

It is of course disappointing that there continues to be a considerable gender pay gap in many of our institutions, particularly in more senior roles. We have all been shocked to see double-figure percentage increases in some remuneration packages for principals in the last year, with what would appear to be little consideration more generally of applying increases in principals’ pay that broadly reflect recent comparable public sector pay settlements.

17:30

That said, HE institutions are autonomous, not public bodies. Although it is the Government’s view that every HEI employee deserves fair pay and conditions, it is for each autonomous HEI to ensure that pay and conditions are fair and justifiable for every employee, up to and including the principal.

Although I think that there are discussions to be had with the sector to encourage it to do more around these issues, it is not for the Scottish ministers to intervene statutorily in how pay and conditions are set by autonomous bodies. It may well be appropriate for the forthcoming review of the code of good HE governance to consider and address the important issues of inclusivity and transparency in the setting of pay and conditions in our HEIs, including who sits on remuneration committees.

We are, of course, also limited in what we can do under the terms of the Scotland Act 1998, which reserves employment rights and duties and industrial relations. We consider Alison Johnstone’s amendment 49 to be outwith legislative competence and, for that reason alone, I cannot support it.

**Patrick Harvie (Glasgow) (Green):** The minister said that the Government cannot accept amendment 49 for the reason of competence alone. Is it the Government’s explicit view that the policy objective should be achieved? If it is, how should it be achieved, if not by this means?

**Angela Constance:** I would hope that Patrick Harvie would accept that the intention and the policy objective of everything that this Government has done on this matter and across a portfolio of interests—
Iain Gray (East Lothian) (Lab): Will the cabinet secretary give way?

Angela Constance: I am still answering Mr Harvie, if Iain Gray does not mind.

We have a strong track record on endeavours to close the pay gap and on the living wage and equal pay. It is with regret that, with the powers that we have and even with the additional powers that we are getting, we are not able to accept Alison Johnstone’s amendment 49. As I have already said, it is for that reason alone that I cannot accept it.

Iain Gray: Is it not the case that, if amendment 49 was not competent for reason of reservation, it would not have been accepted by the chamber desk?

Angela Constance: No. I asked that very question myself, and it is not the case.

There are some issues with Mark Griffin’s amendment 43, which I will come to. Before I do that, I make it clear that the bill aims to establish consistent yet discrete provisions on the overarching governance of institutions to improve transparency, inclusion and accountability more generally.

Jenny Marra (North East Scotland) (Lab): Will the cabinet secretary give way?

Angela Constance: Let me finish this point, please.

By making provision in this bill for an elected senior lay member and mandatory elected staff members as well as student and trade union members nominated by representative bodies on our institutions’ governing bodies, those bodies will have wider and more diverse representation.

[Interuption.]

The Deputy Presiding Officer: Order, please. Can we have some quiet in the chamber?

Angela Constance: That will allow for wider and more diverse representation of the whole community of the institution on all the committees set up by a governing body to carry out and oversee particular functions.

I am now happy to give way to Jenny Marra.

Jenny Marra: Has the cabinet secretary taken legal advice on the regulation of principals’ pay?

Angela Constance: Jenny Marra has been a member long enough to know the protocols and conventions on what Governments say or do not say on taking legal advice. However, I am confident that the Government is on strong legal footing on this matter, in terms of our understanding of what currently we can and cannot do.

The influence that Mark Griffin’s amendment 43 seeks to secure for trade union and student members over pay and conditions is already catered for by the bill, but in a way that recognises the autonomy of higher education institutions. I am unclear on the intention behind the fact that amendment 43 makes no provision for inclusion of the new mandatory staff members on HEI governing bodies, some of whom will be in a union, although some will not.

Amendment 43 runs the risk of producing an unintended consequence. The amendment supposes that HEIs will always form remuneration committees, and indeed such committees currently feature in the code. However, there is no fixed statutory requirement in that respect, nor does the amendment oblige HEIs to form such committees. HEIs might in such cases give the task of setting pay and conditions to another committee, thereby potentially avoiding the scope of amendment 43 altogether.

Although I empathise with the effect that the two amendments seek to achieve, I cannot support Alison Johnstone’s amendment 49, because it is outwith the Parliament’s legislative competence, and I cannot support Mark Griffin’s amendment 43, because it steps beyond what we consider proportionate in terms of governance arrangements for autonomous bodies. In addition, I have indicated clearly what I believe to be the real risk of an unintended consequence. However, I hope that the forthcoming review of the code of good governance will explore the issue thoroughly. I urge members to reject both amendments.

Mark Griffin: Amendment 43 in my name and amendment 49 in the name of Alison Johnstone are both supported by UCU and NUS Scotland. My amendment would not give the Government any legislative control over pay and conditions for management. It simply asks for staff and student representatives to be on the remuneration committee where such a committee exists.

Senior management pay was an issue that was raised in initial evidence to the committee, and it seems to have been missed by the Government. With a pay ratio of 16:1, the gap between those at the top and those at the bottom of the pay scale in our higher education sector is the widest in the public sector in Scotland. That issue should be addressed when we are talking about the governance of higher education institutions.

I think that having staff and student reps on the remuneration committee would begin to address the issue, and it would give those committees a balance, with a cross-section of opinion from across the whole university campus. It would include the views of staff who are having to strike and fight for much lower pay rises than those received by people at the top. I ask members to
support the amendment in my name, and I press amendment 43.

The Deputy Presiding Officer: The question is, that amendment 43 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Chisholm, Stewart (Cumbernauld and Kilsyth) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Murray, Elaine (Dumfrieshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Biagi, Marco (Glasgow) (SNP)
Brennan, Lesley (North East Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, John (Ettrick, Roxburgh and Berwickshire) (Con)
Lochhead, Richard (Moreay) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Matheson, Michelle (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKeevie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
Millan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmon, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 30, Against 80, Abstentions 0.

Amendment 43 disagreed to.

Amendments 44 to 47 moved—[George Adam]—and agreed to.

The Deputy Presiding Officer: Group 11 is on the specified percentage of women who are appointed to the governing body. Amendment 48, in the name of Cara Hilton, is the only amendment in the group.
Cara Hilton (Dunfermline) (Lab): Today is international women’s day. Amendment 48 is aimed at ensuring that women in our universities have fair representation on their governing bodies. Women make up more than half the student and staff populations in our universities, but only 35 per cent of governing board members are female. The Higher Education Governance (Scotland) Bill is aimed at increasing transparency, democracy and accountability, but it will not do that if it does not tackle diversity. Amendment 48 would set a minimum 40 per cent quota for women on university boards.

Chic Brodie: I ask this question on an important day, but quotas, like targets, are false gods. Today on “Good Morning Scotland”, the leader of Scottish Women in Business said that we should create a flexible work pattern and a level playing field across all family and business factors. If the governing body is made up of 10 people, should not their election be based on merit?

Members: Come on!

The Deputy Presiding Officer: Order, please.

Chic Brodie: Let me finish. Why would we deny 60 per cent of women if they are the best candidates?

Cara Hilton: I am quite stunned by Chic Brodie’s intervention. When I look at, for example, the Westminster Parliament and see that it is full of men, I do not think that they are there on merit. I am glad that we in Scotland take a more progressive view and are backing the 50:50 campaign. That is why I lodged amendment 48.

I welcome the progress that has been made in recent years, because the record has been poor. I have no doubt that the improvements that have been secured have a lot to do with scrutiny of the sector. However, women remain underrepresented in positions of leadership in our universities; 65 per cent of Scotland’s universities’ governing boards are men and, in four institutions, more than 70 per cent are men. [Interruption.]

The Deputy Presiding Officer: Order, please. There is far too much chat going on in the chamber.

Cara Hilton: As recently as 2010, just one in four governing board members was a woman and I do not accept the case that has been argued by members such as Chic Brodie that it is because women are not able to do the job. Plenty of women are well able to take on those roles.

Universities in Scotland have accepted that higher education governance has faced a serious problem with gender imbalance. From the figures that we see today, it is clear that much more needs to be done to ensure real equality for women in the university sector.

On wider diversity—perhaps this is more worrying—a freedom of information request from NUS Scotland found that only 40 per cent of institutions have set targets for increasing equality and diversity on their governing bodies, and that only 30 per cent are issuing regular progress reports on equality targets. Those targets are requirements in the “Scottish Code for Good Higher Education Governance”, and the figures show that voluntary self-regulation has so far failed to deliver success in the sector.

If we are going to put safeguards in place to ensure that there is no return to the old days, we have to act now to ensure that women have fair representation. Our universities should be at the forefront of advancing equality. Today, on international women’s day, we have the opportunity to act by backing my amendment 48, which would ensure that governance of our universities reflects our society, and that women are fairly and properly represented.

I move amendment 48.

Liam McArthur: I understand the motivation behind amendment 48, but writing into the bill the intention as suggested could be problematic. As Cara Hilton will be aware, the make-up of governing bodies is arrived at by various means. Members are nominated and elected by a range of different interests including staff, students, trade unions and academic board members. Given that, it is difficult to see how the governing body as a whole could give effect to the proposal, desirable as it undoubtedly is.

That said, the governing bodies should be representative of the wider university community, so I would expect those who nominate and elect members to take that into consideration. Strides have been taken in that direction in recent years, but they must be continued and stepped up.

Although I am not able to support Cara Hilton’s amendment 48, it has served a useful purpose in allowing Parliament to reiterate the importance that it attaches to achieving greater gender balance on governing bodies.

17:45

Liz Smith: Cara Hilton has slightly misunderstood the effects that her amendment 48 might have. A governing body would not be in a position to control the issue, since a wide range of its members are elected and nominated by groups including staff, students, trade unions and academic board members. Therefore, in order to secure a 40 per cent quota of women in the membership of the governing body, limitations would have to be imposed on specific elections for those groups. It would be hugely complex, if not impossible, to ensure that the final quota...
breakdown could be agreed on without upsetting the democratic right of the different groups to nominate the persons whom they think best fit the job.

In any case, there is not really much of a problem. I think that eight of our higher education institutions now have female chairs.

Angela Constance: I thank Cara Hilton for her contribution. She is right that our universities should be at the forefront of tackling inequality within and outwith the institutions. The Government has made a clear and unequivocal commitment to requiring public boards to have 50:50 representation by 2020. Labour shares our aspiration to have gender equality in all areas of public life, so I am sympathetic to the intention behind Cara Hilton’s amendment 48. However, as things stand, the amendment falls outwith the legislative competence of the Parliament, because equal opportunities is currently reserved.

As others did, I welcomed the commitment that Universities Scotland made last April to work with its members to achieve 40 per cent representation by women among the lay members on all university governing bodies. Clearly, some institutions are embracing that commitment more enthusiastically than others. Although I welcome the rapid change that some have made in their representation, I urge those that currently have a much lower percentage of women on their courts to consider what more they must do to make progress.

Much as I might wish to underpin that voluntary intent with appropriate legislation on the gender make-up of university governing bodies, for as long as wider equal opportunities powers remain substantially reserved, I cannot support Cara Hilton’s amendment 48.

Jenny Marra: How does the Scottish Government’s position on amendment 48 fit with Nicola Sturgeon’s commitment to 50:50 gender equality on public bodies?

Angela Constance: In case Ms Marra cannot hear because she is sitting up the back, I point out to her that, unfortunately, Ms Hilton’s amendment 48 falls outwith the legislative competence of the Parliament, because equal opportunities is currently a reserved matter. [Interruption.]

The Deputy Presiding Officer: Order.

Angela Constance: Of course, Ms Marra and her colleagues campaigned for equal opportunities to remain reserved during the referendum in 2014. If Scotland had voted yes, we would already have the powers that she now seems to think we should have. [Interruption.]

The Deputy Presiding Officer: Order, please. There is far too much noise in the chamber.

Angela Constance: On a more consensual note, the new legislative competence that the Scottish Parliament is set to gain under the Scotland Bill will provide the next Scottish Government and Parliament with the opportunity to return to the matter. I am sure that Cara Hilton joins me in looking forward to that.

Cara Hilton: I am disappointed that the cabinet secretary will not support my amendment 48. I am not convinced at all by her argument that we do not have the power to act. [Interruption.]

The Deputy Presiding Officer: Order.

Cara Hilton: I would like guidance from you, Presiding Officer, on whether it is within the competence of the Scottish Parliament to act on the issue.

The Deputy Presiding Officer: Ms Hilton, I am sorry, but I did not hear you because of the noise. Could you please repeat your point?

Cara Hilton: I am not convinced by the cabinet secretary’s argument that it is outwith the powers of the Scottish Parliament to act on the matter. I would appreciate your guidance, as Presiding Officer, on whether we have competence to act on the issue.

The Deputy Presiding Officer: Those matters are for Parliament to debate and decide on. Please carry on with your summing up.

Cara Hilton: The purpose of my amendment 48 is to ensure that women have fair representation on governing bodies. If members support that principle, they should back my amendment.

Johann Lamont (Glasgow Pollok) (Lab): On a point of order, Presiding Officer. Can you clarify whether, if an amendment is deemed to be competent to be debated, that means that it is competent to be passed?

The Deputy Presiding Officer: The legislative competence of an amendment is not a criterion for its admissibility. It can be admitted and Parliament can then debate the matter and take a decision on it. That is quite clear.

The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For

Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fae, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
McArdle, Gordon (Greenock and Inverclyde) (Lab)
Murray, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kincross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing,ergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Bob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Louchhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
Macaskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Mather, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Meline, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 29, Against 80, Abstentions 0. Amendment 48 disagreed to.

Section 5A—Resignation or removal of ordinary members of governing body

Amendment 23 moved—[Angela Constance]—and agreed to.

After section 6

Amendment 24 moved—[Angela Constance]—and agreed to.

After section 7

Amendment 49 moved—[Alison Johnstone].

The Deputy Presiding Officer: The question is, that amendment 49 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)

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Finnie, John (Highlands and Islands) (Ind)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Smith, Drew (Glasgow) (Lab)
Stewart, David (Highlands and Islands) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Beatrice, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Gavin (Lothian) (Con)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunningham South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Carlaw, Jackson (West Scotland) (Con)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Davidson, Ruth (Glasgow) (Con)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fergusson, Alex (Galloway and West Dumfries) (Con)
FitzPatrick, Joe (Dundee City West) (SNP)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Goldie, Annabel (West Scotland) (Con)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hume, Jim (South Scotland) (LD)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alex (North East Scotland) (Con)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lochhead, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
McArthur, Liam (Orkney Islands) (LD)
McDonald, Mark (Aberdeen Donside) (SNP)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Milne, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Rennie, Willie (Mid Scotland and Fife) (LD)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeenshire East) (SNP)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinson, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 30, Against 80, Abstentions 0.

Amendment 49 disagreed to.

After section 18A

The Deputy Presiding Officer: That brings us to group 12, which is on exemptions from part 1. Amendment 25, in the name of Liam McArthur, is the only amendment in the group.

Liam McArthur: At various stages, I have referred to the diversity as well as the quality of our university sector. During our consideration of the bill, we have heard ample evidence of both and pleas to avoid doing anything that would undermine either. The poster child for that has perhaps been the Royal Conservatoire of Scotland, whose staff, students, management and stakeholders have all made abundantly clear their outright opposition to the bill applying to their institution.

No one can seriously dispute the uniqueness of what the conservatoire does, how it is set up and the expectations that are placed on it. That was set out in the letters that the Education and Culture Committee received from the widest possible cross-section of the conservatoire’s stakeholder community, which expressed...
By way of illustration, in a letter this week to Dr Allan, the principal of the conservatoire, Professor Jeffrey Sharkey, stated:

"An election for a Chair will be especially divisive, disruptive and diversionary given our scale ... and our disciplinary focus. Elections will sow the seeds of division and will politicise the role of Chair."

Given that the election of chairs is now embedded in the bill, the only option left for addressing those concerns is to allow for the conservatoire to be removed from the application of the bill’s provisions.

I pay tribute to Sandra White for the efforts that she has made in articulating that case, which she has done on behalf not solely of the conservatoire but of Glasgow School of Art. She has argued forcefully on behalf of both institutions and has highlighted the extent and range of ways in which both institutions are unique and are ill suited to the statutory approach that ministers favour.

Although Scotland’s Rural College has been mentioned less frequently in dispatches than its more artistic counterparts, its claim for an exemption is arguably no less strong. In truth, the most sensible approach at this late stage is to leave open the opportunity for each institution to make its case to ministers for exemption. It would then be for ministers to decide whether that was justified in whole or in part.

The only way in which that could be done would be through the more general exemption that my amendment 25 proposes, rather than the institution-specific approach that Sandra White and others took—quite reasonably—at stage 2. Other universities may well believe that they have a case for partial exemption from certain provisions. For example, in the past Jim Eadie has made a pressing case on behalf of the University of Edinburgh. The more general approach that I propose would have the benefit of allowing such arguments to be considered more fully and would leave the ultimate decision with ministers.

That said, given that the conservatoire has been the cause célèbre on the issue, I will leave the final word with Professor Sharkey, who said:

“The problem that this Bill seeks to solve in relation to the Conservatoire has not been articulated. Given the opposition of the entire Conservatoire community to the Bill, the risks and costs associated with its implementation, and in the absence of any clear benefits that might outweigh those risks and costs, we believe that the Conservatoire should be excluded from its scope.”

I look forward to the contributions of members on all sides of the chamber.

I move amendment 25.

The Deputy Presiding Officer: Four members wish to speak, so I ask for remarks to be kept as brief as possible.

Liz Smith: Amendment 25, which I have much pleasure in supporting, is important. I return to the comments that I made at the start of proceedings. Notwithstanding the differences of opinion that we have about the politics of the bill, it is essential that we make it properly workable and that we respect the wide diversity of our institutions. After all, that is one of their most redeeming and successful features, which—in words, at least—the Scottish Government is always keen to maintain.

Respecting the differences between institutions is crucial if we are to allow our institutions to flourish and to stay ahead of the game when it comes to international competition, and it can be done without prejudicing any other aspects of the Scottish Government’s intention. That is clear from the voices on the SNP back benches—Mr McArthur mentioned Sandra White, who I hope will contribute to the debate on amendment 25—and in the Labour Party and the Green Party. I ask the Scottish Government to think about the issue extremely carefully. SNP back benchers are not given to moving against the Scottish Government’s policy intention, but on this occasion they have done so on practical grounds.

Some of the practical differences that we are talking about are simple. For example, the Royal Conservatoire of Scotland is a company limited by guarantee and has shareholders, so it is a quite different institution from many others. Like Glasgow School of Art and Scotland’s Rural College, the conservatoire makes the case for its small-size specialist nature, which is very different from that of other universities.

The conservatoire also makes the point that it must compete against Scottish and UK performing arts companies and that, in doing so, it is very dependent on attracting international staff. It warns in blunt terms that the entire conservatoire community, including the Educational Institute of Scotland, believes that the bill will be detrimental to the conservatoire, as do the leaders of Scotland’s national companies. I would have thought that that was a compelling case. I again draw the cabinet secretary’s attention to the fact that both Ferdinand von Prondzynski and her predecessor, Mike Russell, said that such specialist institutions would almost certainly need to have their special circumstances fully recognised.

The cabinet secretary maintained at stage 2 that such exemptions would cut across the very heart
and purpose of the bill, but in fact the opposite is true. Treating the different constitutions of institutions in different ways is not a weakness but a strength, and it reflects the rich diversity on which those institutions have built their successful reputations.

For those reasons, we whole-heartedly support amendment 25, which seeks to establish a new section that would introduce flexibility for institutions that, because of size or some other factor, are unable for practical—I stress the word “practical”—rather than political reasons to comply with any of the provisions that are contained in part 1.

18:00

**Sandra White (Glasgow Kelvin) (SNP):** As I represent a constituency with three fantastic universities, colleges and the specialised institutions of Glasgow School of Art and the Royal Conservatoire of Scotland, I have taken a great interest in the bill. I thank colleagues from all political parties for their support of the amendment that I moved at stage 2 on the specialised institutions, but I have concerns about amendment 25.

**Members:** Oh.

**The Deputy Presiding Officer:** Order, please.

**Sandra White:** If members will please just listen, I will explain my concerns. The conservatoire has been referred to with regard to amendment 25, but the amendment would open up exemptions from part 1 to all higher education institutions, which is what concerns me.

I thought that it was eminently sensible that specialised higher education institutions such as Glasgow School of Art and the Royal Conservatoire should be exempt. However, I am very much concerned that amendment 25 would mean that all higher education institutions could apply for exemptions. They could claim that they could not reasonably comply with any aspect of part 1. I am really concerned that all higher education institutions could claim to the Scottish Government that they could not comply with the provisions that we have just been speaking about on staff, trade union and student representation.

Perhaps Liam McArthur, in summing up, will alleviate some of my concerns. It would be a mistake to open up exemptions from part 1 to all higher education institutions, as amendment 25 proposes, and I cannot support that.

My main concern when I lodged my stage 2 amendment was about the smaller institutions. I got support for that position and I thank the members who supported it. Given what we have said about trade union, staff and student representation, the thought of all higher education institutions applying for exemptions is a worry for me, and I think that it would be a worry for everyone.

**Iain Gray:** I support Mr McArthur’s amendment 25 for the same reasons as we supported a slightly different amendment at stage 2. Labour supports the bill, although the cabinet secretary has not always made it easy for us to do so and has certainly not made it easy for us to love the bill.

It is no secret that we have had concerns about the process whereby we have arrived at the bill’s final stage and form. In particular, there is an issue about a small number of higher education institutions—most notably the Royal Conservatoire and Glasgow School of Art, which in giving evidence to the committee made the strong case that they are different in scale and in governance. That issue has not really been addressed; rather, it has been dismissed. It was certainly dismissed in the stage 2 consideration of the bill.

Amendment 25 gives ministers another opportunity to consider some of the arguments that were made at stage 2. I am not as certain as Mr McArthur sounded that any particular institution should be completely and permanently exempted from the bill’s provisions. However, amendment 25 would allow for consideration of exemption from some elements, which seems flexible and helpful. Amendment 25 could allow for concerns to be addressed in the future, and for that reason we support it.

I do not share Sandra White’s concerns about amendment 25. If all higher education institutions vexatiously applied for exemption, ministers would give them pretty short shrift, particularly if they had no particular argument that had not already been presented during the progress of the bill. I therefore do not share Ms White’s fear, and we will support Mr McArthur’s amendment 25.

**Patrick Harvie (Glasgow) (Green):** I am grateful for the chance to say a few words in support of amendment 25, which has been brought to us in an extremely reasonable form. It is about as reasonable an amendment as I can imagine.

Like others, I have had representations from institutions including the Royal Conservatoire of Scotland and Glasgow School of Art. I think that all of us, whatever view we will ultimately take on the amendment, recognise the distinctive value that those institutions provide to the higher education landscape in Scotland. If those representations had come only from the senior management of those institutions, I would have had a lot less sympathy, but they seem to reflect the clear and settled view not only of the senior management...
but, as has been said, of the teaching unions and the student bodies.

There is no great danger of what Sandra White suggests—a heap of spurious applications being made—if the amendment is agreed to. If such applications were made, the Government would be entitled to reject them all by return of post. The amendment would not even require the Government, in turning down an application for exemption, to set out any detailed reasons. It would give the Government discretion over the duration and extent of any exemption.

The amendment is about as reasonable an amendment as we could have to recognise the distinctive circumstances of specific institutions.

Sandra White: Will the member take an intervention?

Patrick Harvie: I will if there is time.

The Deputy Presiding Officer: Very briefly, please.

Sandra White: The member mentioned representations, but Universities Scotland, which represents all the universities, has also sent us emails asking us to support amendment 25. I fear that what I mentioned will happen. I just want to confirm that the member has had that representation as well.

Patrick Harvie: I think that I would trust Universities Scotland to recognise the distinctive situation that some institutions are in, but I say again that, even if spurious applications came in from every university in Scotland, the Scottish Government would be entitled to turn them down on the day that it received them without even setting out detailed reasons.

Amendment 25 is about as reasonable an amendment as we could have to allow some discretion, and I hope that members will consider supporting it while we all continue to support the principles of the bill.

The Deputy Presiding Officer: We are now a bit pushed for time.

Angela Constance: I thank Mr McArthur for outlining the purpose of amendment 25. It is substantially the same as an amendment that Tavish Scott moved on Mr McArthur’s behalf at stage 2, and I stand by the view that I expressed then. The introduction of such a provision would be to the detriment of the bill’s overarching aims, so I cannot support Mr McArthur’s amendment.

Liz Smith: Will the cabinet secretary spell out how the amendment would be to the detriment of the bill’s aims?

Angela Constance: I hope that that is what my remarks will do.

As Liz Smith knows, the bill aims to introduce a high level of consistency across the sector in a small number of discrete but key areas of governance of our higher education institutions. Amendment 25 would undermine that objective by enabling any institution to seek exemption from the application of any of the bill’s measures on any grounds simply by stating that it “cannot reasonably comply with” any aspect of the bill. The amendment could result in differing application of the bill’s provisions across institutions and it suggests a highly subjective test from within the institution about when it “cannot reasonably comply”.

Liz Smith: The cabinet secretary has said all along that the most important thing is to ensure that we have diversity in our sector, to allow it to continue to have its success. Surely it is logical to allow that diversity when it comes to amendment 25.

Angela Constance: I would have thought that Ms Smith, more than most, would understand the issue about consistency. If amendment 25 had been a Government amendment, it would have been widely criticised—and rightly so—for giving powers to ministers outwith the scrutiny of Parliament. It contains a detailed and prescriptive process, yet throughout the passage of the bill we have heard members such as Ms Smith complaining about undue meddling and bureaucracy.

The point that Sandra White made is important. Under the proposal, there would be no limit on the number of times that an institution might apply for an exemption. The amendment is poorly drafted.

Drew Smith (Glasgow) (Lab): Will the cabinet secretary take an intervention?

Angela Constance: Maybe later.

I stand by my view that, if such a provision was incorporated in the bill and any application for an exemption was successful, that would fatally undermine the bill’s aim to create a consistent approach to governance. It should also be noted that the amendment would allow the Scottish ministers to disapply provisions of the bill in relation to particular institutions without any scrutiny from the Parliament, as I indicated. That is contrary to the other amendments that Mr McArthur has lodged, and it would not be appropriate to let legislation develop in that way.

I assure Mr McArthur that I have given the fullest consideration to amendment 25 to determine whether it would be appropriate, but I simply cannot foresee any circumstance in which any of our institutions could not reasonably comply with any of the measures in the bill that makes the need for that provision compelling. I expect all our 18 HEIs to be able to meet the provisions of this
focused bill and enable every voice on campus to be heard. Amendment 25 carries the real risk that those voices—the voices of staff in elections, union members on governing bodies and students across a range of democratic decision-making processes on campus—would not be heard.

I have the same aspirations for each and every one of our higher education institutions in Scotland, and I am convinced that all of them are more than capable of achieving those aspirations. Indeed, many institutions, including the small specialist institutions such as the Royal Conservatoire of Scotland, have already achieved a level of compliance in practice.

Should Parliament pass the bill, we will of course continue to engage with the Royal Conservatoire of Scotland, Glasgow School of Art and Scotland’s Rural College to discuss the implementation of the bill’s provisions. Discussions will be aimed at identifying the transitional arrangements that could be put in place to help small specialist institutions to fully comply with the bill’s high-level provisions in due course.

For all the reasons that I have set out, I respectfully ask Mr McArthur not to press amendment 25. If it is pressed, I ask members to reject it.

**Liam McArthur:** I thank all members who contributed to the debate on the amendment, and particularly those who support it. The cabinet secretary talked about amendment 25 somehow posing a threat to the need to have the voice of students and staff heard. The voice of staff and students at the Royal Conservatoire of Scotland, Glasgow School of Art and Scotland’s Rural College is being ignored through the process. As Patrick Harvie rightly said, if the case were being made simply by the senior management of those institutions, it would be received rather differently than it has been.

The cabinet secretary talked about the importance of consistency. That is correct up to a point but, as Liz Smith rightly pointed out, the diversity of the sector is not its weakness but its strength. The cabinet secretary undertook to the Education and Culture Committee and the Parliament to safeguard that strength through the process.

To some extent, Iain Gray gave the winding-up speech to Sandra White’s contribution. Sandra White led the charge in relation to the Royal Conservatoire of Scotland—I have put that on the record. The fact that she is backing down from that position simply because she thinks that the amendment is broadly cast is not at all appropriate.

Amendment 25 would allow the opportunity for institutions to make their case, which ministers would then consider. As Patrick Harvie said, if the applications were vexatious, they would be returned in the post. The conservatoire has put forward a pretty compelling case. To be reassured by the cabinet secretary that, at some point after we pass the bill, discussions will begin with it and GSA about the bill’s implementation will be of cold comfort to them.

The amendment is reasonable. It is not often that Patrick Harvie refers to me or my motions as “extremely reasonable”—that may be lifted for a leaflet in due course. Nevertheless, the amendment is reasonable. It tries to make good an undertaking that the cabinet secretary and the Government gave us at the beginning of the process and to salvage something from the bill to reflect and protect the diversity of our university sector.

I press amendment 25.

**The Deputy Presiding Officer:** The question is, that amendment 25 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division.

**For**

Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Davidson, Ruth (Glasgow) (Con)
Dugdale, Kezia (Lothian) (Lab)
Fee, Mary (West Scotland) (Lab)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hilton, Cara (Dunfermline) (Lab)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Johnstone, Alison (Lothian) (Green)
Kelly, James (Rutherglen) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mallie, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
McInnes, Alison (North East Scotland) (LD)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
Mile, Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Murray, Elaine (Dumfriesshire) (Lab)
Pearson, Graeme (South Scotland) (Lab)
Pentland, John (Motherwell and Wishaw) (Lab)
Rennie, Willie (Mid Scotland and Fife) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Drew (Glasgow) (Lab)
Smith, Liz (Mid Scotland and Fife) (Con)
Stewart, David (Highlands and Islands) (Lab)
Urquhart, Jean (Highlands and Islands) (Ind)
Wilson, John (Central Scotland) (Ind)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-Eileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Campbell, Roderick (North East Fife) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Graham, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Leach, Richard (Moray) (SNP)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMillan, Stuart (West Scotland) (SNP)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gill (Clydebank and Milngavie) (SNP)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Salmond, Alex (Aberdeen East) (SNP)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)

Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 48, Against 62, Abstentions 0.
Amendment 25 disagreed to.

Schedule—Consequential modifications

I move amendment 10.

Angela Constance: I thank Liz Smith for her explanation of the intent behind amendment 10.

The provisions in section 5 of the 1858 act are subject to further provisions in the Universities (Scotland) Act 1889, which make it clear that the university court has overall control of the revenue and property of the HEI. I believe that HEIs will continue to interpret the statutory provisions on the role of the academic board or senate as they currently do. I do not support the amendment and would urge members to reject it if it is pressed.

The Deputy Presiding Officer (John Scott): I call Liz Smith to wind up and press or withdraw her amendment.

Liz Smith: I have nothing further to say, but I press my amendment.
The Deputy Presiding Officer: The question is, that amendment 10 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Brown, Gavin (Lothian) (Con)
Carlaw, Jackson (West Scotland) (Con)
Davidson, Ruth (Glasgow) (Con)
Fergusson, Alex (Galloway and West Dumfries) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Goldie, Annabel (West Scotland) (Con)
Hume, Jim (South Scotland) (LD)
Johnstone, Alex (North East Scotland) (Con)
Kelly, James (Rutherglen) (Lab)
McArthur, Liam (Orkney Islands) (LD)
McGrigor, Jamie (Highlands and Islands) (Con)
Mclean, Alison (Highlands and Islands) (Con)
Scott, Tavish (Shetland Islands) (LD)
Smith, Liz (Mid Scotland and Fife) (Con)

Against
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Brodie, Chic (South Scotland) (SNP)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coghey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Crawford, Bruce (Stirling) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness and Nairn) (SNP)
Fabian, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffin, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
Hilton, Cara (Dunfermline) (Lab)
Hyslop, Fiona (Linlithgow) (SNP)
Ingram, Adam (Carrick, Cumnock and Doon Valley) (SNP)
Johnstone, Alison (Lothian) (Green)
Keir, Colin (Edinburgh Western) (SNP)
Kidd, Bill (Glasgow Anniesland) (SNP)
Lamont, Johann (Glasgow Pollok) (Lab)
Lyle, Richard (Central Scotland) (SNP)
MacAskill, Kenny (Edinburgh Eastern) (SNP)
MacDonald, Angus (Falkirk East) (SNP)
MacDonald, Gordon (Edinburgh Pentlands) (SNP)
Macdonald, Lewis (North East Scotland) (Lab)
Macintosh, Ken (Eastwood) (Lab)
Mackay, Derek (Renfrewshire North and West) (SNP)
MacKenzie, Mike (Highlands and Islands) (SNP)
Malik, Hanzala (Glasgow) (Lab)
Marra, Jenny (North East Scotland) (Lab)
Mason, John (Glasgow Shettleston) (SNP)
Matheson, Michael (Falkirk West) (SNP)
Maxwell, Stewart (West Scotland) (SNP)
McAlpine, Joan (South Scotland) (SNP)
McDonald, Mark (Aberdeen Donside) (SNP)
McKelvie, Christina (Hamilton, Larkhall and Stonehouse) (SNP)
McLeod, Fiona (Strathkelvin and Bearsden) (SNP)
McMahon, Michael (Uddingston and Bellshill) (Lab)
McMahon, Siobhan (Central Scotland) (Lab)
McMillan, Stuart (West Scotland) (SNP)
McNeil, Duncan (Greenock and Inverclyde) (Lab)
Murray, Elaine (Dumfriesshire) (Lab)
Neil, Alex (Airdrie and Shotts) (SNP)
Paterson, Gil (Clydebank and Milngavie) (SNP)
Pearson, Graeme (South Scotland) (Lab)
Robertson, Dennis (Aberdeenshire West) (SNP)
Robison, Shona (Dundee City East) (SNP)
Russell, Michael (Argyll and Bute) (SNP)
Smith, Drew (Glasgow) (Lab)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Stevenson, Stewart (Banffshire and Buchan Coast) (SNP)
Stewart, David (Highlands and Islands) (Lab)
Stewart, Kevin (Aberdeen Central) (SNP)
Swinney, John (Perthshire North) (SNP)
Thompson, Dave (Skye, Lochaber and Badenoch) (SNP)
Torrance, David (Kirkcaldy) (SNP)
Urquhart, Jean (Highlands and Islands) (Ind)
Watt, Maureen (Aberdeen South and North Kincardine) (SNP)
Wheelhouse, Paul (South Scotland) (SNP)
White, Sandra (Glasgow Kelvin) (SNP)
Wilson, John (Central Scotland) (Ind)
Yousaf, Humza (Glasgow) (SNP)

The Deputy Presiding Officer: The result of the division is: For 18, Against 89, Abstentions 0.

Amendment 10 disagreed to.

The Deputy Presiding Officer: That ends consideration of the amendments.
Higher Education Governance (Scotland) Bill

The Deputy Presiding Officer (John Scott): The next item is a debate on motion S4M-15838, in the name of Angela Constance, on the Higher Education Governance (Scotland) Bill.

I call the cabinet secretary to speak to and move the motion.

18:19

The Cabinet Secretary for Education and Lifelong Learning (Angela Constance): For the purposes of rule 9.11 of the standing orders, I wish to advise the Parliament that Her Majesty, having been informed of the purport of the Higher Education Governance (Scotland) Bill, has consented to place her prerogative and interests, so far as they are affected by the bill, at the disposal of the Parliament for the purposes of the bill.

I am pleased to be able to present the Higher Education Governance (Scotland) Bill at stage 3 and to seek Parliament’s support for it. The bill enables key principles and values to underpin governance in our higher education institutions—transparency, democracy, inclusion, participation and accountability. The bill is in step with a modern Scotland where participation in democratic processes must be nurtured and encouraged.

No one with even passing knowledge of the bill can have failed to notice the often vigorous debate on its provisions, but I have listened carefully and consistently to all the views offered. Indeed, a range of constructive ideas has influenced alteration of the bill as introduced and amended at stages 2 and 3.

I have been, and remain, surprised at the level of opposition to the bill from some. It is important to remember that the bill’s origins flow from a substantial review of higher education governance in Scotland led by the principal of Robert Gordon University, Professor Ferdinand von Prondzynski, and it is also important that we all pause and reflect on the purpose of the bill and its intended benefits.

First, staff and students will get a say in future in who the best person is to lead the institution that they study and work in. With the election of a powerful chair, or senior lay member, in every institution, greater transparency and inclusivity will be introduced to the appointment process for that pivotal role.

The process between stage 1 and stage 2 of the bill was intended to give everyone with an interest in its measures the opportunity to co-design the detail of how that should work in practice. That applied particularly to the role of chair. I listened carefully to a wide range of views on that issue before agreeing that having some form of selection would enhance the election part of the process.

Annabel Goldie (West Scotland) (Con): The cabinet secretary advocates a raison d’être for her bill, particularly in relation to what she considers to be the role of the chair. Is she aware of the following definition? It comes from the European Institute of Business Administration:

“A good chair knows who she works for and is ultimately accountable to the organisation of which board she leads. Not its stakeholders—shareowners, customers, employees, executives, but the institution itself.”

How does that definition reconcile with the form of governance proposed in the bill?

Angela Constance: Miss Goldie has raised that issue before at previous debates in Parliament, and that is a point on which I differ from her. I think that a higher education institution is something far broader than a business, and it is important that the chair or senior lay person is accountable to the governing body but also to that wider community of staff and students.

We talked about the selection process earlier, and that is one of the reasons why I have included in the bill measures that afford institutions the ability to select candidates for election, so that they can demonstrate their ability to drive the further success of our higher education institutions.

I have also listened carefully to concerns about how the new senior lay member might impact on the traditional role of rector. It was never the intention of the Government to abolish the role in those institutions that have a rector, despite the vigorous attempts by some to portray the bill’s measures as such, so at stage 2 I also ensured that measures were included to protect the statutory and historical role of the rector in our ancient universities.

Rectors and senior lay members on the governing bodies of HEIs currently play different but complementary roles. This bill does not change that. With both the roles elected in future, it will be the responsibility of each autonomous institution to ensure that the campus electorate is clear on the dovetail that exists between the two roles. Some stakeholders have raised concerns that students and staff in institutions will be confused about those roles and about what they are voting for, but I have complete faith that students and staff will have little difficulty in working that out.

Next, the bill aims to ensure that the composition of each governing body is
representative of the entire campus community. With a majority of lay members, staff members, student members and union members, a fair and balanced blend is created. The bill also ensures that academic boards or senates will feature a majority of elected staff and students, and adequate student representation in particular is very important.

I believe that the bill features a definition of academic freedom that protects the rights of staff while giving institutions a key role in assessing the reasonableness of any expression of academic freedom. That is an important balance, because academic freedom cannot be construed as a licence to break the law.

It is a fact that higher education institutions are autonomous, but in a tough financial settlement the Scottish Government has identified over £1 billion of direct grant investment in Scotland’s higher education sector, which will be delivered next year. Ensuring that access to higher education is free, teaching is of a high quality and research is supported to enable our institutions to contribute to our economic strategy is a price that is well worth paying when it comes to our overall aims of creating a fairer Scotland and a more prosperous economy.

As a society and a Government, we are entitled to expect higher education institutions to adhere to the highest standards of governance, and to be ambitious in seeking ways to continuously improve. Excellence is not a given, so I hope and expect that all of our institutions will embrace the changes that this bill introduces.

At its heart, the bill is about ensuring that all voices on campus are heard, are equal, and are empowered to contribute to decision making. We have heard before—and may hear again from some members today—about how bad an idea campus elections are, and about how talented people will be put off from applying for the post of elected chair or senior lay member. When I was preparing for today’s debate, I was reminded of the 1865 rectorial election at the University of Edinburgh, at which Thomas Carlyle faced up to Benjamin Disraeli. I am sure that members will hear about how bad an idea it was before—and may hear again from some members today—about how bad an idea campus elections are, and about how talented people will be put off from applying for the post of elected chair or senior lay member. When I was preparing for today's debate, I was reminded of the 1865 rectorial election at the University of Edinburgh, at which Thomas Carlyle faced up to Benjamin Disraeli. I am sure that members will agree that that was a shortlist that was not lacking in talent.

Thomas Carlyle won that election and gave an inaugural address to the students of the university on 2 April 1866, almost 150 years ago. Of course, there were no women in attendance, as women were not admitted to Scottish universities until 1892. However, I can still whole-heartedly agree with the view that Carlyle expressed in that address that

“universities have, and will continue to have, an indispensable value in society”.

That observation stands the test of time, but the nature of higher education institutions has changed, along with the expectations that students, staff and the public beyond the campus have for them.

This bill represents another step on the journey for our higher education institutions, which continue to be world leaders in teaching and research. It embraces the contributions of all in the campus community to ensure growth, prosperity and greater equality in future. I commend the bill to the Parliament, and I hope that members will support its passage at stage 3.

I move,

That the Parliament agrees that the Higher Education Governance (Scotland) Bill be passed.

The Deputy Presiding Officer: I call Iain Gray. We are quite tight for time, so Mr Gray has seven minutes.

18:29

Iain Gray (East Lothian) (Lab): In all the different stages of the bill, it is important that we recognise that, whatever our views on the merits or demerits of the bill, it is good that we have been debating universities, their governance and their importance to Scotland.

Universities are central not just to our education system, but to our culture and our history, firstly, of course, as institutions in which students study, and they are highly successful in that regard. During the debates around the bill, many colleagues have pointed out that we have five universities in the top 200 in the world, which is more top universities per head than any other country—we should be proud of that.

Students seem to feel that universities in Scotland are doing the right things, too, since student satisfaction surveys show Scottish universities doing better than universities are doing in the rest of the United Kingdom. Our universities seem to be doing a good job in turning out students who are ready and prepared for future life, since students from Scottish universities have higher average starting salaries than those from other universities in the UK. A higher proportion of them also find their way into graduate-level jobs—not all of them do so, but our universities certainly do well in that regard.

Of course, our universities are also centres of excellence with regard to research. In the days of the referendum debates, it was a commonplace observation that we punched well above our weight in accessing UK-wide research resources—around 15 per cent of those resources in some years, which is far more than our population share. Further, we are one of the
world’s leading countries when it comes to publishing peer-reviewed research papers.

Finally, universities are a critical and central part of our economy, firstly through their own investment, as they employ more than 38,000 people. We need only walk around the south side of Edinburgh to see just how much the University of Edinburgh is investing in construction around its estate. Secondly, they are important with regard to the work that they do with companies—and the work that they do to start up companies—to try to turn some of that great research work into good business, too. Indeed, Scottish universities account for some 28 per cent of spin-out companies in the UK—again, we punch well above our weight.

Of course, universities are also part of our history and our traditions, including our democratic tradition. It was in the 1960s that George Davie coined the phrase, “the democratic intellect”, but he was talking about the history and traditions of our universities, particularly the ancients, where the link between society and its intellectual leaders was important. Internally, our higher education institutions see themselves very much as communities involving academics, students and other staff.

Perhaps that democratic tradition is best symbolised by the rectors in our ancient universities. The cabinet secretary referred to that, but I am not sure that she picked the best example when she picked Thomas Carlyle, who was, of course, notoriously opposed to democracy in almost any form, and was a precursor of fascism. She might have been better to reach back to the first rector of the University of Edinburgh, who was William Gladstone, a well-known democrat. Nevertheless, the post of rector is an important democratic institution that is unique to Scotland’s universities.

We have supported the principles of this bill throughout its passage, because we believe that we need to revisit and modernise those democratic principles that we have found in our universities. We agreed with the Government that the voluntary code that had been created had not proven to be satisfactory. Although the higher education institutions argued that it was enough, examples such as the one that my colleague, Mark Griffin, referred to earlier—with the University and College Union trying to find out how principals’ pay had been derived and discovering not transparency but a refusal to co-operate and a redaction of the proceedings of remuneration committees—demonstrated that the voluntary code was not enough. We accepted the Government’s view that we had to go further, so we have supported the bill.

However, as I said earlier, it has not always been easy to support the bill, which has not been without its problems. When it first arrived with us, it was full of ministerial powers and discretion, although ministers said that they did not want those powers. That caused two problems: the potential loss of autonomy for the institutions, and the potential recategorisation of the universities as public bodies, which would have hurt their finances. It was kind of ironic that, towards the end of consideration of amendments, the cabinet secretary steadfastly fought against Mr McArthur’s reimposition of a modest amount of ministerial discretion when it came to applications for exemptions, because, originally, the bill was little more than that.

In fairness, that has been sorted by, for example, the complete removal of several sections of the bill and the provision of more clarity on the format of the elections that will be required for chair. More consensus in reaching that point would have been nice. Throughout the passage of the bill, the cabinet secretary has depended less on the dialectic of debate and, instead, has dug herself into a series of ditches from which she has defended herself. It has not been an ideal legislative process, although, in our view, it has got us to a bill that encompasses the principles that we said at the beginning that we would support—the election of chairs of court in higher education institutions, and proper and guaranteed representation for students and for staff and their representatives. For that reason, we will support the bill this evening.

18:36

Liz Smith (Mid Scotland and Fife) (Con): It will be no surprise that we do not support the bill. Not only do we continue to believe that there is absolutely no need for it, given the Scottish Government’s complete inability to provide evidence for its rationale, but we believe that several measures that it will put in place will actually diminish rather than enhance democratic principles and reduce the effectiveness of university governance in some institutions.

The cabinet secretary repeatedly says that the bill is about making the “framework of governance ... more modern, accountable and inclusive”—[Official Report, Education and Culture Committee, 9 February 2016; c 16.]

but she has persistently failed to produce the necessary evidence about what is so wrong with the existing system.

In particular, we object to the straitjacket into which the Scottish Government is attempting to place university governance, thereby failing to acknowledge that diversity is one of the sector’s
greatest strengths. The dismissive approach towards our small, specialist institutions—which, incidentally, happen to be some of our very best—is disturbing and reflects an inability on the part of the cabinet secretary to understand the factors that have delivered the academic excellence of those institutions. That is not a good thing, and it is little wonder that some of those institutions have been so angry.

On some issues, the cabinet secretary has not paid attention to the concerns that were raised by Ferdinand von Prondzynski and her predecessor, Mike Russell, both of whom were the architects of this unfortunate bill but who at least understood the need for special circumstances in order to preserve diversity in the institutions.

When the bill was first mooted, the Scottish Government made it clear that its only intention was to make some minor amendments to legislation to allow transparency when it came to the governance and management of universities, and their accountability for large sums of public money. Interestingly, and perhaps tellingly, universities have approximately another 500 or so lines of accountability to non-Scottish Government organisations, none of which have had any issues with university governance. I would suggest that that lays bare the farce that the bill has become.

Annabel Goldie: On the issue of the model of governance, as proposed by the bill, I have, in vain, asked the Scottish Government to give me an example of where that model can be found anywhere in the world. Silence prevails. Can the member help me? Is she aware of the existence of such a model of governance anywhere in the world?

Liz Smith: I am afraid that I cannot help Annabel Goldie, because we have not had an answer to that question. It remains in the mists of time. I really do not understand where the Government is getting the information from. It is very disturbing. The other stakeholders do not seem to have a problem with governance, and I question again why the bill was considered necessary.

Let us be generous. If we are to accept that some changes were required, we would hope that they could be made with clarity and rational thinking. However, that is far from the case. Indeed, I feel very sorry for our universities, which will undoubtedly be faced with additional constitutional and administrative burdens, all because of the Scottish Government’s meddling. In some cases, the bill will diminish rather than enhance universities’ democratic accountability. That is very sad, not least because those universities are some of our finest institutions in Scotland. The last thing they want to be bothered about just now is having to worry about an unnecessary bill, when there are many other things that they want to get on with—leading the field on an international basis, in knowledge exchange and in research and development. I think we can all feel pretty sorry for them.

Overall, the approach that has been taken has displayed a degree of ignorance about what makes a university good. It has undermined the crucial trust that exists between a chair and the board and how that underpins policy making. I accept entirely what Annabel Goldie has been saying about that throughout the afternoon. The bill dilutes that trust, not least because there remains an overlapping electorate for chairs and rectors, with the result that it is hard to see where the responsibility really lies. That is never a good thing in any institution.

I am disappointed and, in some ways, very saddened by the approach that the Scottish Government has taken. I think that I can echo the feelings of every institution across the land when it comes to what has happened with regard to the bill. They have lobbied very reasonably and very often. It has all fallen on deaf ears. That is deeply regrettable, and I hope that the Scottish Government will consider the matter again and bring the legislation back to the Parliament in the next session.

18:41

Stewart Maxwell (West Scotland) (SNP): For a relatively modest piece of proposed legislation, the Higher Education Governance (Scotland) Bill has generated considerable comment. Members of the Education and Culture Committee have certainly heard a number of concerns, some of them justified, others not.

It is important to remember what lies at the heart of the bill: the ambition to democratise, modernise and bring greater transparency to our higher education institutions. It is about making Scotland’s world-class universities even better, by ensuring that they adhere to the highest standards of governance.

It is for that reason that the Education and Culture Committee’s stage 1 report recommended supporting the general principles of the bill. Indeed, the committee’s report was informed by a range of views from across the sector, and it was clear at stage 1 that, although the bill’s overall aims were worth while, more clarity was needed on a range of issues.

I am therefore pleased that the Scottish Government listened carefully to the concerns that were raised in the report and took steps to amend the bill accordingly. The cabinet secretary worked to address concerns about the possible unintended consequences of the bill, and the
reclassification issue has been a good example of that. In response to the stage 1 report, the Scottish Government said that it had considered the risk to HEIs of being reclassified as public bodies, and it subsequently amended the bill at stage 2 to minimise the risk of reclassification by the Office for National Statistics.

Another criticism that was levelled at the bill, which was reflected in the committee's stage 1 report, was the apparent risk to the role of rectors at the ancient universities. Again, the Scottish Government responded positively to those concerns. I was pleased to introduce amendments at stage 2—along with the cabinet secretary—that I believe protect the statutory rights and responsibilities of rectors and ensure that their position is complementary to that of the senior lay member.

As the cabinet secretary has said, it was never the Government's intention to diminish the role of rector; in fact, the work of the rectors at Scotland's ancient universities is viewed very positively, and it is hoped that the extension of the elected chair model will benefit all of Scotland's HEIs.

The remuneration of chairs was another key issue that was raised at stage 1, with a call for further clarity on the need for introducing a statutory power to set the level of remuneration. The cabinet secretary sought to build a consensus among stakeholders and supported amendments to ensure reasonable remuneration for elected chairs, while removing the requirement to have ministerial powers in that area. That is a welcome step, and I note that the National Union of Students Scotland has highlighted it as an important aspect of widening access to the role of elected chair.

When considering the bill, it is worth remembering that its proposals are underpinned by the recommendations that were put forward by Professor von Prondzynski, following his 2012 review of higher education governance, which gathered evidence from a range of experts based in Scotland, the rest of the UK, Europe and beyond.

The bill is not about the Government taking control of universities; rather, it is about ensuring that every voice on campus is given the chance to be heard. It is about ensuring that students and staff—the lifeblood of our higher education institutions—are placed at the very heart of the decision-making process.

It is to be welcomed that the introduction of the Higher Education Governance (Scotland) Bill has sparked debate on a range of issues facing HEIs, including equality, diversity and senior pay levels, an issue on which research published by the University and College Union has shone light in recent weeks. Those are undoubtedly important matters, and I would expect further examination of them during the next session of Parliament.

I believe that strengthening the democratic processes at our universities is a good thing. I look forward to the bill, if it is passed, ensuring that Scotland's higher education sector continues to go from strength to strength.

18:45

John Pentland (Motherwell and Wishaw) (Lab): As we have heard, the passage of the bill has not been a great advert for the Scottish Government's competence and grasp of educational matters, but then again, what is? Matters that should have been thrashed out in co-operation with institutions' staff and students have been pushed through, despite frequent opposition over reasonable concerns. In particular, there was significant apprehension about the impact of changes that could adversely affect institutions' financial status. The institutions were not easily mollified by Scottish National Party reassurances, particularly given the Scottish Government's track record of such reassurances turning into expensive mistakes. Doubts remain about some aspects of the bill, and dissatisfied parties abound, who will be looking for outcomes that give substance to such doubts.

Despite the messy management of its passage, at the heart of the bill lies a good intention, which is to create more democratic, diverse and accountable governing bodies that operate with greater openness and transparency. A primary objective in the process, which has been supported by Scottish Labour in amendments that it lodged, was to ensure that the operation of the governing bodies is opened up to staff and students and clearly works for their benefit. Where such representation existed, we wished to ensure that powers that were already in the hands of staff and students were not undermined.

The role of elected chairs should strengthen transparency and democracy in universities. The bill as it was initially drafted neglected the role of the rector and gave rise to strong criticism from the universities that have rectors elected to chair their university courts and to represent students and, in one case, staff and students.

Stage 2 amendments made provision for election of the senior lay member position and for retention of an elected rector in the four institutions where the rector has the right to chair the court. For many, that was second best to having a rector who is elected by all staff and students, who chairs the court and who has full leadership responsibilities. Although it was not the preferred option, it has been accepted as a compromise that
will work. For the other institutions, the provisions are a major step forward in representation and have been welcomed even by those who have concerns about the final shape of that representation.

There is no doubt that there have been problems in our higher education institutions—what the University and College Union calls “a disconnect” between principals and senior management on the one hand, and staff and students on the other. The bill should go some way towards bridging that disconnect.

With some much-needed changes that took on board major concerns, the Scottish Government has somehow managed to muddle through and retain a bill that is worth supporting—or is, at the very least, passable. Of course, it was too much to hope that the Government would have improved it further by accepting all our amendments. Our amendments today included Mark Griffin’s amendment 43, which would have extended staff and student representation to relevant sub-committees of the governing body, and Cara Hilton’s amendment 48, which would have strengthened diversity and fair representation. The bill is weaker and poorer as a result of their rejection.

18:48

Liam McArthur (Orkney Islands) (LD): Our university sector is genuinely world class, but that does not mean that our universities cannot be improved. Adapting to changing needs, expectations and circumstances is the only way to protect and enhance standards and reputation.

In our HE sector we have something to celebrate, value and respect. One of the sector’s great strengths, of course, is its differences: from the variety of institutions to the diversity of staff and student populations. It is absolutely right, therefore, that governance of our universities properly and transparently reflects that diversity. That means giving an effective voice to students and staff in the decisions that affect their institutions, which will ensure that governing bodies look, sound and act like those whom they represent.

How that is achieved is a legitimate question, and it is territory in which politicians should tread with care, but “care” has not been the Government’s watchword. From the outset, the Government has not been clear about what the problem is that ministers are trying to fix. Little evidence has been produced to justify the approach or to explain which international comparators we are trying to emulate. Ultimately, the Government has been unable to explain how the bill will make our university sector better.

Proposals have been unveiled—often with little or no consultation—only to be withdrawn or heavily amended once the full implications have been spelled out. That has left universities in collective despair, and that applies not only to principals, rectors and chairs of court but to others, too. Liam King, who is president of the students’ representative council at the University of Glasgow, captured the frustration that is felt by many when he said:

“I am perplexed ... as to how the Scottish Government has managed to botch this Bill so profoundly. From inadvertent clauses that risked turning Scotland’s universities into public bodies to utter ignorance of [the] relationship between the role of Rector and role of ‘chair’ of court. This Bill has been an unmitigated disaster”.

He went on to conclude that the process “has been ramshackle and embarrassing, and ultimately threatens to undermine a proud Scottish tradition, democracy in Scotland’s universities, and good governance”.

Fortunately, the cabinet secretary backed down from her game of chicken with the Office for National Statistics over the threat of financially disastrous university reclassification. However, a mess has still been made, notably in the confusion that has been created by the overlapping roles and mandates of rectors and elected senior lay members. That has been the case despite solemn promises by the minister not to meddle, and despite the committee convener’s efforts to salvage the situation.

Even then, it may have been possible to limit the damage if only the Government had accepted my amendment on exemptions, which would have enabled the Royal Conservatoire of Scotland, Glasgow School of Art and other institutions that have a strong case to be exempted from provisions in the bill to have that case heard and, where appropriate, respected. That would have been in keeping with the diversity of the sector.

Stewart Maxwell: Will the member give way?

Liam McArthur: I do not really have time, I am afraid.

All the evidence shows that the best-performing universities worldwide are those that exercise the greatest level of responsible autonomy. Universities should be accountable and transparent, and they should reflect the diversity of the communities that they serve. How that is best achieved, however, should not be second-guessed by ministers using the blunt instrument of legislation.

Given the complete absence of any evidence for why legislation is needed, and the potential for the bill to hinder rather than help our world-class universities, I cannot support it at decision time this evening.
George Adam (Paisley) (SNP): As I said in speaking to my amendments at stage 3, practically every single part of the bill has caused storm and fury. During stage 1, we discussed potential ONS reclassification and concerns about whether the bill provided for too much ministerial control. The cabinet secretary listened to the debate and came back at stage 2 with amendments to remove those elements from the bill. However, the storm and fury continued in relation to other issues in the sector.

I was led to believe in my interactions with the sector itself that it wanted the issues of ministerial control and potential ONS reclassification dealt with at stage 2. When those issues were addressed, that should have enabled us to see a way forward and to work together to progress the bill. However, we ended up in a situation in which other issues continued to arise.

I am first and foremost a back-bench MSP representing my constituency. I went to see Craig Mahoney, the principal of the University of the West of Scotland in my constituency. For the first half-hour of our discussion, we effectively went through the academic argument that has been going on between Universities Scotland and the Government for the past six months. Eventually, however, we talked about how UWS could move forward as a modern institution, how the bill could make a difference and how the university could manage the new structure.

At that point, I believed—I am not putting words into the principal’s mouth—that we had reached a better place than we had been before. What we need to do in considering the bill today is sit back and say, “Right. How will this work practically in the real world rather than here in the chamber?”

During the Education and Culture Committee’s evidence sessions, many positive things were said about our world-renowned university sector. The very spirit of the bill was to ensure democratisation, that the full campus should be represented, and that everyone would work together to make that better. As I said at stage 1, Mary Senior of UCU said:

“No one is questioning that Scottish universities are good—they are good. What we are saying is that they could be so much better if staff, students and trade unions were fully involved in how they operate.”—[Official Report, Education and Culture Committee, 6 October 2015; c 11.]

That is what the bill is all about; it is its heart and soul. We are giving opportunity to the full community. Little as I like to say it, not every idea that I have is the best in the world. However, when we work as a group, we have others with us who have better ideas. That is the ideology that we are talking about just now. We are modernising institutions and bringing them into the 21st century, which is the most important part of the bill.

We have to be mindful that those organisations are getting £3 billion: £1 billion is from the Scottish Government, £1 billion is from the United Kingdom Government, and research and commercial activities make up the other £1 billion. Two thirds of the universities’ budget comes from the public purse and we have to find a way of accounting for that.

Liz Smith: Will the member take an intervention?

George Adam: Unfortunately, I have only about 10 seconds left.

I believe in the bill; it is a way forward for our higher education institutions. I want to work with them to see how we can move on from here.

18:56

Cara Hilton (Dunfermline) (Lab): I am pleased to speak in this evening’s stage 3 debate on the Higher Education Governance (Scotland) Bill.

The bill is by no means perfect, and it would have been enhanced greatly if many of the amendments that we discussed this afternoon had been passed. However, the bill provides a real opportunity to improve and strengthen the democracy, transparency and accountability of Scotland’s vital university sector.

We know the contribution that our universities make to the academic, economic, social and cultural life of our nation, and the support that they provide to keeping tens of thousands of people in work across Scotland. However, there is no doubt that they could benefit from being more open and accountable. I therefore welcome the opportunities that the bill provides to address current shortfalls in university governance and to improve accountability and transparency in decision-making structures.

Liz Smith: Given what the member has just said, can she tell me why it took two hours and two minutes for Labour to make its first contribution this afternoon?

Cara Hilton: I confess that I am a wee bit confused by that intervention so I will pass.

The bill will give staff, students and trade unions a real voice and a real say in the future of the universities in which they learn, teach and work. It is only right that public institutions that receive millions of pounds from the taxpayer every year are run in a way that is open, democratic and transparent. As I said during the stage 1 debate, when we look at some of the issues that have hit the headlines recently, such as job losses and
senior management pay, it is easy to see why that is necessary.

The decisions that governing boards make would undoubtedly be better if they better reflected the diversity of the student and staff populations but, right now, 65 per cent of governing board members are men, while women and other groups continue to be seriously underrepresented.

Research published today by the University and College Union—“Holding down women’s pay”—shows that four Scottish universities are paying their female employees at significantly lower rates than they pay men. At the University of the Highlands and Islands, female lecturers are paid £18,000 a year less than their male colleagues. At the University of St Andrews in Fife, women lecturers are paid £8,699 a year less than their male counterparts. It is outrageous that, almost 50 years after the Equal Pay Act 1970, such staggering pay inequality still exists in Scotland’s universities. Once more, that highlights why improving transparency and accountability in the sector is so important.

In that respect, I am disappointed that the cabinet secretary opposed my amendment to introduce quotas on university boards. It is unacceptable that, while women make up more than half the student and staff population, only a third of governing board members are women. Although we have seen progress, the fact remains that there is much more to do to achieve gender parity in our universities.

This is a real missed opportunity, and the Government’s approach on it seems out of step with the commitments of the cabinet secretary and the First Minister to support the 50:50 campaign. Having more women on the governing boards of universities would not in itself address the pay gap that was set out in the report that I mentioned, but I am confident that it would lead to more urgency in addressing the situation.

I am disappointed, too, that the Scottish Government did not accept Alison Johnstone’s and Mark Griffin’s amendments on regulating pay for senior managers. Greater scrutiny alone is not enough to tackle the unreasonable pay increases that we have seen at the top of the scale. It cannot be right that university principals on three-figure salaries are taking inflation-busting pay increases while their staff are told to accept less than inflation, year in, year out, and are forced to take strike action just to get a basic 2 per cent increase.

The Higher Education Governance (Scotland) Bill is not perfect and could have been improved in many ways. However, for all its flaws, it provides a greater chance to improve university governance for the better. I hope that, if the bill is passed, it will make a real difference to university students and staff. I hope, too, that we can revisit the debate in the next session of Parliament so that we can take real steps to tackle the issues of diversity in Scotland’s universities and ensure that they are governed better in future.

**The Deputy Presiding Officer:** We move to the closing speeches.

19:00

**Mary Scanlon (Highlands and Islands) (Con):** It has been quite a long day. When the cabinet secretary mentioned Thomas Carlyle, I thought that I would look up one or two quotes on my iPad. He said:

> “the cheerful man will do more in the same time, will do it better, will preserve it longer, than the sad or sullen.”

I liked that one. I also liked the quote where he said:

> “All great peoples are conservative.”

So there we are.

**Angela Constance:** Will Mrs Scanlon give way?

**Mary Scanlon:** Of course.

**Angela Constance:** I just wondered whether she had a quote about cheerful women.

**Mary Scanlon:** The cabinet secretary is very knowledgeable about the time that Thomas Carlyle was writing, so she will know that we can assume that what he said applied to men and women. There are enough of us today to take on his comments.

This is my last stage 3 debate. After this will come my last members’ business speech, in Cara Hilton’s members’ business debate, and tomorrow I will make my last speech in the Parliament. I wish that I could be more consensual in this final stage 3 debate.

**Stewart Maxwell:** Go on.

**Mary Scanlon:** I would like to, but I just cannot.

Since 1999, the Parliament has passed significant legislation on issues such as mental health and smoking in public places. Across the political divide, we have often disagreed on the policy approach to addressing problems through
legislation, but this is the first time since 1999 that I have found legislation looking for a problem. The cabinet secretary said earlier that she was “surprised at the level of opposition to the bill from some”.

I have to correct her and say that it was not just some universities; it was every single higher education institution in the whole of Scotland. It is also incredible that the Government’s justification for the bill is that it consulted one man—Professor von Prondzynski. He certainly has a lot to answer for.

As others have said, the code of governance is to be reviewed this year. There is no doubt that progress has been made. Universities Scotland has said that the code has already delivered nearly 400 positive changes, with 72 per cent of universities having two or more student governors and 94 per cent having two or more staff governors. In August this year, we will have 50:50 gender balance for chair positions in Scottish universities, when another woman takes up a place. The 50:50 is happening.

I hope that in the future, when politics students look at this legislation, they do not use the bill as a shining example of what we do. The fact is that, on the face of the bill at stage 2, there was a duty on the universities to advertise on the internet. Thankfully, it has been removed today, but I am quite embarrassed that someone came up with the idea of telling our world-class universities that they have to advertise on the internet. Also on the face of the bill, in primary legislation—it is all there in nice, bright purple—the universities are told to tell people where to get their application forms. It is a little bit embarrassing.

Presiding Officer, I see that you are indicating I should wind up—I have probably done enough winding up. In concluding, I thank my colleague Liz Smith, who has worked extensively across the sector, consulting and putting forward points of concern for higher education in Scotland.

19:05

Mark Griffin (Central Scotland) (Lab): As Iain Gray set out at the beginning of the debate, Labour supports the general principles of the bill. The bill has the laudable aims of ensuring that the structure of governance of our universities continues to develop and adapt to maintain the first-class university provision in which we should all take pride.

From the start of the process, we have offered our support in particular for the inclusion of trade union and student representatives on governing bodies as a democratisation of higher education institutions’ governing bodies. We believe that that is central to ensuring that we meet our aims of greater transparency and accountability in the sector.

All parties and all members who have spoken in the chamber today have recognised the importance of the higher education sector to Scotland’s economy and our international standing. We should be listening to the sector’s views and responding to its concerns. The value that we place on our higher education system is part of our cultural DNA. We extol the virtues of our historic and new universities, and it is with great pride that we talk about our contribution to the world—not just in educating our own young people, but in the world-leading research and dynamic entrepreneurship that are recognised across the globe. It is in that context that we must view the bill.

That context has seen our universities continue to succeed in an increasingly competitive international climate, and we must be cautious in attempting to improve the way in which our institutions operate. We should avoid diminishing or restricting the freedom that has contributed to their success.

Scottish higher education has a long history of having staff and students at the heart of its mechanisms of governance. Staff and students are full members of the university’s governing body, the court, in every institution. According to Universities Scotland, 94 per cent of institutions have two or more staff members on their courts and 72 per cent have two or more student members of court. We all recognise that the approach that we must take should seek to build on that record rather than suggest that there is a problem with university governance that requires a top-down overhaul.

What the Government presented, throughout the various stages of the bill, has caused the process to be unnecessarily difficult. The cabinet secretary said that she was surprised at the level of opposition, and I am surprised at how difficult it was for us to support the bill as it was drafted, given our support for its general principles. I think that bad drafting, ministerial overreach and, at times, genuine incompetence have put unhelpful pressure on the coalition of support that has existed for the bill.

I am pleased that the cabinet secretary has recognised many of the drafting mistakes and that the committee was able to help to rectify them. The issue of ONS reclassification, the clash with the role of the rector and the incoherence of the Government’s role in managing our universities have all been overcome. Nevertheless, I am disappointed that we have not chosen to further strengthen and improve the bill at stage 3.
We supported the representation of staff and students on the remuneration committee. In light of the Government's failure to get to grips with pay and conditions packages in our colleges, it would seem that it is content to allow other public bodies to set their own terms. We felt that having those at the top and bottom ends of the pay scale deciding on pay increases for senior management could have been a crucial check on excessive pay, and we are disappointed that the Government has chosen to reject that approach.

The cabinet secretary is to be commended for accepting that mistakes have been made and that there have been issues with the drafting, and for listening to the committee, the sector and voices in the Parliament, but the repercussions of the Government getting it wrong on higher education governance are so serious that we will be watching carefully. The implementation of good ideas has never been the Government's strong point—curriculum for excellence is a case in point—which is why we will be scrutinising every detail as the policy moves forward in practice.

Despite a bad start and the rocky road that the bill has been on to get this far, we must ensure that our world-class universities are supported with the freedom and the framework that will allow them to continue to provide the first-class education and groundbreaking research for which they are revered. That is why we will support the bill.

19:11

Angela Constance: I thank members for today's stage 3 debate and record my thanks to the Education and Culture Committee. Unlike Mary Scanlon, I will not embarrass its convener, Stewart Maxwell. I also pay tribute to all our stakeholders, including the NUS, the UCU and Universities Scotland.

Mark Griffin and Iain Gray said that the bill has not been without its problems; there have, of course, been a few twists and turns and a few bumps on the road on the journey that we have taken, but that means that the final destination is to be appreciated all the more. I thank Iain Gray for his opening remarks. I say to Mark Griffin that had he lodged at stage 2 some of the amendments that he lodged at stage 3, they could have been developed, so he might want to reflect on that.

I was not surprised to hear that Liz Smith, Baroness Goldie and Mary Scanlon will oppose the bill to the bitter end—it is their democratic right to do so. They have been very active participants in the debate on the bill and have pursued their views with tenacity. The reality is that I could have turned water into wine and would still have failed to persuade some Conservative members of the merits of the bill, but I had hoped for some acknowledgement of how far we have travelled through inclusion in the bill of measures that address the widest possible range of views from people who have interests.

In its briefing, NUS Scotland said that although it remains unconvinced of the need for any attempt to shortlist candidates, it recognises that the proposed model seeks to find a compromise among stakeholders, and it has been very supportive of the Scottish Government's attempts to find a compromise. I flag that up to John Pentland in particular, in order to make the point that we have tried very hard to achieve a level of consensus, particularly in advance of the final stages of the bill. From the word go, extensive efforts were made to communicate and to engage with everyone who has an interest.

There have been a lot of very valuable and informed contributions throughout the course of this afternoon. Both Cara Hilton and Alison Johnstone made very powerful contributions acknowledging that universities have to be at the forefront of tackling inequality both within and outwith those institutions. However, I have to say to Cara Hilton in particular that if a matter is outwith the legal competence of the Scottish Parliament, there is indeed a limit to those often-debated ministerial powers.

I want to emphasise how much support the bill actually has. We have to remember that there is a wider university community beyond principals and chairs of court, important though their opinions are. Many HEI staff and students and other stakeholders, including MSPs, signalled their appetite for change and for the modernisation of governance structures. I am grateful to them all for their forbearance and for their solidarity in support for the bill throughout its passage. We have, in the closing debate, touched on the statutory and historical role of rector and how it has been protected. I want to pay tribute to Catherine Stihler. Although we have not always agreed on every detail, she has made a very worthy contribution to the debate and has sought to make her contributions constructively and meaningfully.

It is important to look to the future, although Liam McArthur seemed to be determined in his speech to revisit past debates. However, I am going to resist the temptation to point out some of his efforts to introduce "blunt" legislation, some of which I consider to have been rather illiberal, at times. It is important that we now set aside our differences of opinion and collaborate to make the bill's provisions work in the long-term interests of our institutions and the HE sector. Universities and other HE institutions play a vital role in the well-being of our society and economy, and I have
made it clear throughout the bill’s progress that their autonomy is something that we all value and want to maintain.

This Government continues to make a substantial public investment in higher education because our institutions are high-quality organisations that contribute hugely to our ambitions to be a fairer Scotland with a more prosperous economy. However, we know that time stands still for no one. Our institutions are good, but now is the time to refine governance arrangements to maintain the excellence for which they are renowned. Any institution that exists as part of a nation’s fabric must move with the times and ensure that it remains capable of contributing to how the nation wishes to develop its culture and values. In 21st century Scotland, there is an appetite for greater participation in the democratic processes that affect our lives and futures, and for people who have a stake in the future of their communities to have a say. The bill ensures that that will happen in relation to the HE sector.

I encourage our higher education institutions to focus on the positives that the bill will introduce. Fundamentally, the bill is about modernisation—focused, discrete and targeted modernisation that will help to create stronger unity of purpose and a sense of community on campuses. The bill seeks to strengthen the wellbeing of our universities by ensuring that more responsibility for governance, success and excellence is taken by more of those who have a direct interest in those outcomes. In short, the bill seeks to ensure that all voices on campus are heard.

For anyone who is still reluctant to embrace the changes that the bill introduces, I will finish with a quotation from Socrates that I hope everyone will heed:

“The secret of change is to focus all of your energy, not on fighting the old, but on building the new.”
The next question is, that motion S4M-15838, in the name of Angela Constance, on the Higher Education Governance (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, George (Paisley) (SNP)
Adamson, Clare (Central Scotland) (SNP)
Allan, Dr Alasdair (Na h-àileanan an Iar) (SNP)
Allard, Christian (North East Scotland) (SNP)
Baker, Claire (Mid Scotland and Fife) (Lab)
Beamish, Claudia (South Scotland) (Lab)
Beattie, Colin (Midlothian North and Musselburgh) (SNP)
Biagi, Marco (Edinburgh Central) (SNP)
Boyack, Sarah (Lothian) (Lab)
Brennan, Lesley (North East Scotland) (Lab)
Brown, Keith (Clackmannanshire and Dunblane) (SNP)
Burgess, Margaret (Cunninghame South) (SNP)
Campbell, Aileen (Clydesdale) (SNP)
Chisholm, Malcolm (Edinburgh Northern and Leith) (Lab)
Coffey, Willie (Kilmarnock and Irvine Valley) (SNP)
Constance, Angela (Almond Valley) (SNP)
Cunningham, Roseanna (Perthshire South and Kinross-shire) (SNP)
Dey, Graeme (Angus South) (SNP)
Don, Nigel (Angus North and Mearns) (SNP)
Doris, Bob (Glasgow) (SNP)
Dornan, James (Glasgow Cathcart) (SNP)
Dugdale, Kezia (Lothian) (Lab)
Eadie, Jim (Edinburgh Southern) (SNP)
Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Fabiani, Linda (East Kilbride) (SNP)
Fee, Mary (West Scotland) (Lab)
Findlay, Neil (Lothian) (Lab)
Finnie, John (Highlands and Islands) (Ind)
FitzPatrick, Joe (Dundee City West) (SNP)
Gibson, Kenneth (Cunninghame North) (SNP)
Gibson, Rob (Caithness, Sutherland and Ross) (SNP)
Grahame, Christine (Midlothian South, Tweeddale and Lauderdale) (SNP)
Grant, Rhoda (Highlands and Islands) (Lab)
Gray, Iain (East Lothian) (Lab)
Griffith, Mark (Central Scotland) (Lab)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Renfrewshire South) (Lab)
Hepburn, Jamie (Cumbernauld and Kilsyth) (SNP)
The Presiding Officer: The result of the division is: For 92, Against 17, Abstentions 0.

Motion agreed to,

That the Parliament agrees that the Higher Education Governance (Scotland) Bill be passed.

The Presiding Officer: The Higher Education Governance (Scotland) Bill is passed. [Applause.]
Higher Education Governance (Scotland) Bill
[AS PASSED]

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Higher Education Governance (Scotland) Bill

[AS PASSED]

An Act of the Scottish Parliament to make provision about the composition of and appointment to the governing bodies and academic boards of higher education institutions; and to revise provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.

**Part 1**

**Governance arrangements**

**Chapter 1**

**Governing bodies**

Senior lay member of governing body

**A1 Position of senior lay member**

(1) The governing body of a higher education institution is to include the position of senior lay member (however the institution chooses to name the position).

(2) The senior lay member of the governing body of a higher education institution has—

(a) the duty to preside at meetings of the governing body,

(b) a deliberative and a casting vote at such meetings,

(c) responsibility for—

(i) the leadership and effectiveness of the governing body,

(ii) ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution.

(3) Another member of the governing body of a higher education institution may be selected by the governing body to exercise any of the functions mentioned in subsection (2) in the absence of the senior lay member or while the position is vacant.

(4) Subsections (2) and (3) are subject to section A2.
A2 Interaction with role of rector

(1) Subsection (2) applies in the case of a higher education institution at which there is a rector who has functions under section 4 of the 1858 Act and section 5(5) of the 1889 Act (each of which contains provision relating to the role of the rector at an older university).

(2) Paragraphs (a) and (b) of subsection (2) of section A1 and subsection (3) of that section so far as relating to those paragraphs are of no effect in relation to the institution (but see section 5(5) of the 1889 Act (which also contains provision about who is to preside at certain meetings in the absence of the rector)).

(3) In this section—

“the 1858 Act” means the Universities (Scotland) Act 1858,
“the 1889 Act” means the Universities (Scotland) Act 1889.

A3 Relevant criteria and process

(1) Whenever a vacancy arises in the position of senior lay member of the governing body of a higher education institution, the governing body must delegate to a committee the responsibility of—

(a) devising the relevant criteria with respect to the position,

(b) ensuring the efficiency and fairness of the process for filling the position.

(2) The relevant criteria include the availability, skills and knowledge considered by the committee to be necessary or desirable to—

(a) exercise the functions of the senior lay member,

(b) command the trust and respect of—

(i) the other members of the governing body,

(ii) the academic board of the institution,

(iii) the staff and students of the institution.

(2A) Each time the process for filling the position is undertaken, the committee must make publicly available a report indicating by way of overview (and without disclosing individual identities or confidential information)—

(a) the number of applicants for the position,

(b) so far as consent to disclosure has been received by the committee from the applicants, the characteristics listed in section 149(7) of the Equality Act 2010 with respect to—

(i) the applicants,

(ii) the applicants invited to an interview for the position,

(iii) the applicants entitled to stand as candidates in an election for the position following such an interview.

(3) The membership of the committee must include at least one person from each of these categories—

(a) the staff of the institution,
Higher Education Governance (Scotland) Bill
Part I—Governance arrangements
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(b) the students of the institution.

(4) Rules made by the governing body of the institution may contain provision about the process for filling the position of senior lay member of the governing body (subject to sections A4 to A8).

A4 Advertisement and application

(1) A current or upcoming vacancy in the position of senior lay member of the governing body of a higher education institution is to be advertised widely by the governing body, in a manner suitable for bringing the vacancy to the attention of a broad range of persons.

(2) The committee mentioned in section A3(1) is to ensure that the advertisement—

(a) sets out the functions exercisable by the senior lay member of the governing body under section A1(2),

(b) summarises the relevant criteria with respect to the position and states how more information about the relevant criteria can be obtained,

(c) explains—

(i) the process for filling the position,

(ii) how the application form in relation to the position can be obtained,

(iii) that reimbursement is offered of expenses incurred in connection with attending an interview or campaigning in an election for the position,

(iv) that remuneration and allowances are available in connection with the holding of the position.

A5 Interview of certain applicants

(1) If—

(a) an application for the position of senior lay member of the governing body of a higher education institution is made in the correct form in response to an advertisement under section A4(1), and

(b) the application appears to the committee mentioned in section A3(1) to show that the applicant meets the relevant criteria with respect to the position,

the applicant must be invited to an interview conducted by the committee.

(2) If the applicant satisfies the committee at such an interview that the applicant meets the relevant criteria, the applicant is entitled to stand as a candidate in an election for the position.

(3) The governing body of the institution is to offer every applicant for the position reimbursement of reasonable expenses that are incurred by the applicant in attending such an interview.

A6 When election to be arranged

(1) An election for the position of senior lay member of the governing body of a higher education institution must be arranged by the governing body if more than one applicant—
(a) is entitled under section A5(2) to stand as a candidate in the election, and
(b) confirms an intention to stand as a candidate in the election.

(2) If the number of candidates in the election subsequently falls to below two—
(a) the election is to be postponed until the election can be held with more than one
(candidate standing (and the vacancy must be advertised under section A4(1)
again),
(b) the remaining candidate (if there is one) continues to be entitled to stand as a
candidate in the election.

(3) The governing body of the institution is to offer every candidate in the election
reimbursement of reasonable expenses that are incurred by the candidate in campaigning
in the election (up to the limit per candidate that is fixed by the governing body).

**A7  Election franchise and result**

(1) These persons are entitled to vote in an election under section A6 for the position of
senior lay member of the governing body of a higher education institution—
(a) the members of the governing body,
(b) the staff of the institution,
(c) the students of the institution.

(2) No individual is entitled to cast more than one vote in the election.

(3) Each vote cast in the election carries equal weight.

(4) The election is won by the candidate who secures a simple majority of the total number
of votes cast.

(5) In the event of a tie between two or more candidates for the highest number of votes
cast, the election is won by whichever of them is deemed to be the winner in accordance
with rules made by the governing body of the institution.

**A8  Appointment and tenure**

(1) The winning candidate in an election under section A6 for the position of senior lay
member of the governing body of a higher education institution is to be appointed to the
position by the governing body.

(2) An appointment to the position is for the period specified in rules made by the
governing body, but the period of such an appointment may be extended in accordance
with the rules.

(3) The position cannot be filled otherwise than by an appointment made by virtue of this
section.

**A9  Remuneration and conditions**

(1) The governing body of a higher education institution is, on the request of a person
appointed to the position of senior lay member of the governing body, to pay such
remuneration and allowances to the person as the governing body considers to be
reasonable (which are to be commensurate with the nature and amount of the work done
by the person in the capacity as senior lay member).
A person appointed to the position may not be a student of, or one of the staff of, the institution during the period of the person’s appointment.

The holding by a person of the position is in all other respects subject to such terms and conditions as are specified by the governing body.

**Membership of governing body**

**4 Composition of governing body**

(1) The membership of the governing body of a higher education institution is to be composed of—

(a) the person appointed to the position of senior lay member by virtue of section A8,

(b) 2 persons appointed by being elected by the staff of the institution from among their own number,

(c) 1 person appointed by being nominated by a trade union from among the academic staff of the institution who are members of a branch of a trade union that has a connection with the institution,

(d) 1 person appointed by being nominated by a trade union from among the support staff of the institution who are members of a branch of a trade union that has a connection with the institution,

(e) 2 persons appointed by being nominated by a students’ association of the institution from among the students of the institution,

(g) such other persons as are appointed—

(i) by virtue of an enactment, or

(ii) in accordance with the governing document of the institution.

(2) For the purposes of paragraphs (c) and (d) of subsection (1), a trade union nominating a person from among a category of staff must be one that—

(a) is recognised by the institution in relation to the category of staff, as described in section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) otherwise appears to the institution to be representative of the category of staff, having regard to all relevant factors.

**5 Elections to governing body**

(1) This section applies in relation to an election of members to the governing body of a higher education institution for the purpose of paragraph (b) of section 4(1).

(2) The election process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—

(a) different provision for different vacancies,

(b) provision defining “staff” for section 4(1)(b) as—

(i) academic staff,
(ii) support staff, or
(iii) all staff.

(4) Where the number of eligible candidates in a category is equal to or fewer than the number of vacancies in that category, those candidates are deemed to be elected.

6 Nominations to governing body

(1) This section applies in relation to a nomination of members to the governing body of a higher education institution for the purpose of each of paragraphs (c) to (e) of section 4(1).

(2) The nomination process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—
   (a) provision specifying who may exercise the rights of nomination (whether individually or jointly),
   (b) different provision for different vacancies.

(4) Before making or modifying rules under subsection (2), the governing body must consult the representatives of anyone—
   (a) with a right of nomination under the proposed rules, and
   (b) affected by the proposed rules or (as the case may be) modification.

6A Resignation and removal

(1) Rules made by the governing body of a higher education institution may contain provision about the procedure for the resignation or removal of—
   (a) the person appointed to the position of senior lay member of the governing body,
   (b) the other persons within the membership of the governing body.

(2) Provision as to removal is to (in particular)—
   (a) prescribe grounds for removal, for example—
      (i) inability to exercise the senior lay member’s functions or (as the case may be) the functions of membership generally,
      (ii) misconduct (whether or not in the capacity as member),
   (b) ensure that removal can be effected only by a resolution based on the grounds and passed by a specified majority of the members of the governing body,
   (c) allow the person who is the subject of the resolution, if the resolution is so passed, to seek a review in order to have the resolution reconsidered or quashed.

(3) For the purpose of subsection (2)(b)—
   (a) a specified majority may be a majority of any particular size,
   (b) the person who is the subject of the resolution does not count in any calculation arising (and the person is not eligible to vote on the resolution).

(4) Provision under subsection (1)(a) need not be the same as provision under subsection (1)(b).
Chapter 2 — Academic boards

Validity of body’s proceedings

The validity of any proceedings of the governing body is not affected by any—

(a) vacancy in membership (or category of membership),
(b) defect in the appointment of a member.

Chapter 2

Academic boards

Composition of academic board

(1) The membership of the academic board of a higher education institution is to be composed of—

(a) the principal of the institution,
(b) the heads of school of the institution,
(c) persons appointed by being elected by the academic staff of the institution from among their own number,
(d) persons appointed by being elected by the students of the institution from among the students of the institution,
(e) such other persons as are appointed—
   (i) by virtue of an enactment,
   (ii) in accordance with the governing document of the institution, or
   (iii) in accordance with a decision of the governing body of the institution.

(2) The academic board is to be constituted in such a way that—

(a) more than 50% of its members fall within subsection (1)(c) or (d),
(b) at least 10% of its members fall within subsection (1)(d).

(3) Despite subsection (2)(b), the academic board is not required to have more than 30 members who fall within subsection (1)(d).

Elections to academic board

(1) This section applies in relation to an election of members to the academic board of a higher education institution for the purpose of each of paragraphs (c) and (d) of section 10(1).

(2) The election process is to be conducted in accordance with rules made by the governing body of the institution.

(3) Rules under subsection (2) may include (in particular)—

(a) provision specifying the number of appointments to be made,
(b) different provision for different vacancies.

(4) Where the number of eligible candidates in a category is equal to or fewer than the number of vacancies in that category, those candidates are deemed to be elected.
12 **Validity of board’s proceedings**

The validity of any proceedings of the academic board is not affected by any—

(a) vacancy in membership (or category of membership),

(b) defect in the appointment of a member.

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**CHAPTER 3**

**KEY DEFINITIONS**

15 **Meaning of higher education institution**

(1) In this Part, “higher education institution” has the same meaning as in the Further and Higher Education (Scotland) Act 2005 except that it—

(a) includes an institution only if the institution is listed in schedule 2 (fundable bodies) to that Act,

(b) excludes The Open University.

(2) The Scottish Ministers may by regulations modify the definition in subsection (1) so as to exclude a particular institution.

(3) Regulations under subsection (2) are subject to the negative procedure.

16 **Meaning of governing document**

(1) In this Part, “governing document”—

(a) in the case of an older university, means its ordinances made under the Universities (Scotland) Acts 1858 to 1966,

(b) in the case of an institution established by royal charter, means its charters together with the statutes (if any) made under them,

(c) in the case of a designated institution—

(i) if it is a registered company and no orders of the Privy Council are in force with respect to it, means its articles of association,

(ii) otherwise, means the orders of the Privy Council that are in force with respect to it,

(d) in any other case, means the instruments that establish the higher education institution or govern the composition of its governing body or academic board.

(2) In this section—

“designated institution” has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992,

“older university” is to be construed in accordance with section 16(1) of the Universities (Scotland) Act 1966,

“registered company” means a company registered under the Companies Acts as defined in section 2 of the Companies Act 2006.
17 Meaning of governing body

In this Part, “governing body” has the same meaning as in Part II of the Further and Higher Education (Scotland) Act 1992.

18 Meaning of academic board

(1) In this Part, “academic board” in relation to an institution means the body which—

(a) is responsible for the overall planning, co-ordination, development and supervision of the academic work of the institution, and

(b) discharges that responsibility subject to the general control and direction of the governing body of the institution.

(2) For the avoidance of doubt, the body described by subsection (1) is the one sometimes known as the Senate, Senatus or Senatus Academicus.

18A References to students

In this Act, a reference to the students of a higher education institution includes all persons holding sabbatical office in a students’ association of the institution (whether or not they remain as students of the institution during their period of office).

PART 2

ACADEMIC FREEDOM

19 Upholding academic freedom

(1) The Further and Higher Education (Scotland) Act 2005 is amended as follows.

(2) For section 26 (academic freedom) there is substituted—

“A 26 Academic freedom

(1) A post-16 education body must aim to—

(a) uphold (so far as the body considers reasonable) the academic freedom of all relevant persons, and

(b) ensure (so far as the body considers reasonable) that the matters mentioned in subsection (2) are not adversely affected by the exercise of academic freedom by any relevant persons.

(2) The matters are—

(a) appointments held or sought, and

(b) entitlements or privileges enjoyed,

at the post-16 education body by those relevant persons.

(3) In this section, “relevant persons” in relation to a post-16 education body means persons engaged in—

(a) teaching, or the provision of learning, at the body, or

(b) research at the body.

(4) For the purposes of this section, “academic freedom” in relation to relevant persons includes their freedom within the law to do the following things—
(a) hold and express opinions,
(b) question and test established ideas or received wisdom,
(c) develop and advance new ideas or innovative proposals,
(d) present controversial or unpopular points of view.”.

5

PART 3
GENERAL PROVISIONS

Ancillary and consequential

20 Ancillary regulations
(1) The Scottish Ministers may by regulations make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with this Act.
(2) Regulations under this section—
   (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act (including this Act),
   (b) otherwise, are subject to the negative procedure.

21 Consequential modifications
The schedule makes consequential modifications.

Commencement and short title

22 Commencement
(1) This section and section 23 come into force on the day after Royal Assent.
(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
(3) Regulations under subsection (2) may—
   (a) appoint different days for different purposes,
   (b) include transitional, transitory or saving provision.

23 Short title
The short title of this Act is the Higher Education Governance (Scotland) Act 2016.
SCHEDULE
(introduced by section 21)

CONSEQUENTIAL MODIFICATIONS

The Universities (Scotland) Act 1858

1 (1) The Universities (Scotland) Act 1858 is amended as follows.

(2) In section 4 (university courts to be constituted), the words “consist of the members and” are repealed.

(3) In section 5 (powers of the senatus academicus and principal)—

(a) the words from “consist of” to “discipline of the University, and” are repealed,

(b) for the words “its property” there is substituted “the University’s property”.

The Universities (Scotland) Act 1889

2 (1) The Universities (Scotland) Act 1889 is amended as follows.

(2) In section 5 (which makes provision about University Courts)—

(a) in subsection (1), the words before “Seven” are repealed,

(b) in subsection (2), the words “Chancellor or” are repealed in each place where they occur,

(c) in subsection (5), for the words “a vice-chairman elected by the Court from among all its members” there is substituted “the senior lay member”,

(d) after subsection (5) there is inserted—

“(5A) In subsection (5), “senior lay member” means the person appointed to the position by virtue of section A8 of the Higher Education Governance (Scotland) Act 2016.”.

The Universities (Scotland) Act 1966

3 (1) The Universities (Scotland) Act 1966 is amended as follows.

(2) In section 2 (constitution of university courts)—

(a) in subsection (1), after the words “Subject to the provisions of section 17 of this Act” there is inserted “and Chapter 1 of Part 1 of the 2016 Act”,

(b) subsection (6) is repealed.

(3) Section 7 (constitution of senates) is repealed.

(4) In section 11 (university staff ineligible to become rector, or assessor on court except in certain circumstances), at the end of the proviso following paragraph (b) there is inserted “or the right of a person to be appointed in accordance with section 4(1)(b) to (d) of the 2016 Act”.

(5) In section 16 (interpretation), at the beginning of the list of defined expressions in subsection (1) there is inserted—

“‘the 2016 Act’ means the Higher Education Governance (Scotland) Act 2016;”.

The Universities (Scotland) Act 1858

1 (1) The Universities (Scotland) Act 1858 is amended as follows.

(2) In section 4 (university courts to be constituted), the words “consist of the members and” are repealed.

(3) In section 5 (powers of the senatus academicus and principal)—

(a) the words from “consist of” to “discipline of the University, and” are repealed,

(b) for the words “its property” there is substituted “the University’s property”.

The Universities (Scotland) Act 1889

2 (1) The Universities (Scotland) Act 1889 is amended as follows.

(2) In section 5 (which makes provision about University Courts)—

(a) in subsection (1), the words before “Seven” are repealed,

(b) in subsection (2), the words “Chancellor or” are repealed in each place where they occur,

(c) in subsection (5), for the words “a vice-chairman elected by the Court from among all its members” there is substituted “the senior lay member”,

(d) after subsection (5) there is inserted—

“(5A) In subsection (5), “senior lay member” means the person appointed to the position by virtue of section A8 of the Higher Education Governance (Scotland) Act 2016.”.

The Universities (Scotland) Act 1966

3 (1) The Universities (Scotland) Act 1966 is amended as follows.

(2) In section 2 (constitution of university courts)—

(a) in subsection (1), after the words “Subject to the provisions of section 17 of this Act” there is inserted “and Chapter 1 of Part 1 of the 2016 Act”,

(b) subsection (6) is repealed.

(3) Section 7 (constitution of senates) is repealed.

(4) In section 11 (university staff ineligible to become rector, or assessor on court except in certain circumstances), at the end of the proviso following paragraph (b) there is inserted “or the right of a person to be appointed in accordance with section 4(1)(b) to (d) of the 2016 Act”.

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(5) In section 16 (interpretation), at the beginning of the list of defined expressions in subsection (1) there is inserted—

“‘the 2016 Act’ means the Higher Education Governance (Scotland) Act 2016;”.
(6) In Part I (powers exercisable by ordinance) of Schedule 2, for paragraph 4 there is substituted—

“4. To provide for—

(1) the term of office of members of the Senatus Academicus,

(2) the manner of election of members of the Senatus Academicus, except those elected in accordance with rules made under section 11(2) of the 2016 Act.”.
Higher Education Governance (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision about the composition of and appointment to the governing bodies and academic boards of higher education institutions; and to revise provision about the academic freedom of various persons carrying out activities at higher education and certain other institutions.

Introduced by: Angela Constance
On: 16 June 2015
Bill type: Government Bill