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 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 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 origative ‘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 it 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 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.

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