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 2013.2 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 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. 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

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4 http://www.docs.sasg.ed.ac.uk/GaSP/Governance/RoleofRector.pdf
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