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## SPICe Briefing

# Higher Education Governance (Scotland) Bill

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The Higher Education Governance (Scotland) Bill (“the Bill”) is a government bill that was introduced in the Scottish Parliament on 16 June 2015 by Angela Constance, Cabinet Secretary for Education and Lifelong Learning. This briefing discusses the background to the Bill and the main provisions in the Bill.

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## EXECUTIVE SUMMARY

The governance of higher education institutions (HEIs) in Scotland has been the subject of policy attention since 2011 when the Scottish Government commissioned a review of higher education governance.

The von Prondzynski review was published in February 2012 (von Prondzynski, 2012). It made 17 recommendations relating to a variety of governance issues (listed in Annexe 1). Several of the recommendations have informed the provisions set out in the Higher Education Governance (Scotland) Bill ("the Bill").

The Bill was introduced by the Cabinet Secretary for Education and Lifelong Learning on 16 June 2015. Its purpose is 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” (Scottish Parliament; 2015; p1)

The Policy Memorandum states that the Bill is intended to: “enable a framework of higher education governance that is more modern, inclusive and accountable” (Scottish Parliament, 2015; p1). The aim is that this “will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose” (Scottish Parliament, 2015; p1).

The four provisions in the Bill are summarised below:

**Chairing of Governing Body:** The Bill states that the chair of an HEI’s governing body should be appointed using a process established through regulations that will be made by the Scottish Ministers. The regulations may consider: the length of the appointment as chair; the process used in selection of the chair, including criteria for selection of shortlisted candidates; and election of the successful candidate.

The Bill also states that the Scottish Ministers can, by regulation, make provision for remuneration and allowances for the chair of the governing body.

**Membership of Governing Body:** The Bill stipulates requirements for membership from within the HEI with places to be allocated as follows: a minimum of two students nominated by the student association / union; two elected staff members; one nominee from an academic trade union; one nominee from an administrative, technical or support staff trade union; and up to two alumni representatives.

**Academic Boards:** the Bill recommends that academic boards have no more than 120 members. It also includes provision on specific members of the academic board, the Principal, Heads of School, academic staff and students. There are set requirements on the minimum number of staff and students on the academic board.

**Academic Freedom** - the principle of 'academic freedom' is currently set out in Section 26 of the Further and Higher Education (Scotland) Act 2005. It places a duty on colleges and HEIs to have regard to the desirability of ensuring academic freedom for those involved in teaching, learning or research. Academic freedom includes freedom (within the law) to: hold and express opinion; question and test established ideas and received wisdom; and present controversial or unpopular points of view.

The Bill proposes changing the 2005 Act to make more explicit that academic freedom refers to: holding and expressing opinion; questioning and testing established ideas or received wisdom; developing and advancing new ideas or innovative proposals; and presenting controversial or unpopular points of view.

The Financial Memorandum does not consider there to be significant costs associated with the Bill. There are relatively low costs associated with election of staff members to the governing body, recruitment of a chair to the governing body, and on-going costs of remunerating the chair for this role. These costs are expected to be met by HEIs within existing budgets.

## BACKGROUND



Since 2011 there has been a significant focus on the governance of higher education in Scotland. To inform later discussion of the proposals in the Bill, this section considers the structures of higher education governance. It then looks at the governance arrangements at Scottish higher education institutions (HEIs). Finally, it considers the main policy and legislative developments that preceded the introduction of the Bill.

## STRUCTURES OF HIGHER EDUCATION GOVERNANCE

Higher education in OECD countries has been going through reform for a number of years. One reason for this has been the expansion of the sector, as more people enter higher education. The result has been changes in the clientele and character of higher education; with HEIs now operating in a complex organisational setting with greater demands and expectations on them (OECD, 2003).

The European Commission (EC) has highlighted the important role played by higher education in delivering high quality teaching, research and innovation. While there have been changes to the sector over a number of years, two significant European developments have contributed to the focus on governance that is occurring at both European and national level. The Bologna Declaration (1999) set out to make the European higher education system more competitive and attractive, while the EU's Lisbon Strategy (2000) sought to reform Europe's fragmented higher education systems into a more powerful and more integrated, knowledge-based economy. These policy drivers focus centrally on the economic role played by higher education institutions in response to criticism levelled at the sector by the EC for not doing enough to stimulate economic growth, social cohesion and improvement in the quality and quantity of jobs. Reform to address these criticisms involves changes to the governance of higher education (de Boer and File, 2009).

de Boer and File (2009) note that governance is not clearly defined, but essentially involves the activity that ensures that institutions operate effectively:

“It raises... questions about who decides when on what. It concerns both the internal (institutional) and external (system) governance of higher education institutions. Internal governance refers to the institutional arrangements within universities (e.g., lines of authority, decision-making processes, financing and staffing) whereas external governance refers to the institutional arrangements on the macro- or system-level (e.g., laws and decrees, funding arrangements, evaluations). Higher education governance is thus understood as the external and internal coordination of higher education and research. This coordination may have both formal and informal components.”

The governance of HEIs is an issue of concern to various stakeholders, including government, business and academics (OECD, 2003). With HEIs playing an increasingly important role in responding to demand for a skilled and educated workforce, and additional pressure to achieve greater social equity in the delivery of higher education, the role of government in governing higher education has come to the fore. Increased investment of public funding in HEIs has led to “structural pressure to change the inherited, historically rooted modes of governance” (Capano, 2011; p3).

The extent of government control over the governance of HEIs varies according to the legislation, policy measures, funding conditions and regulatory measures in place. The allocation of large sums of public money can lead to government opting to play a more central role in the governance of HEIs. This can result in tension between, on the one hand, government seeking to introduce greater control over the sector and, on the other hand, the academic community seeking to maintain autonomy over its decisions and activities (OECD, 2003).

The extent and type of control that is adopted by governments in different countries varies according to the values and practices in place, for example:

- Whether the market is seen as efficient at allocating services such as education, and whether this leads to outcomes that serve the public interest.
- The extent to which ‘new public management’<sup>1</sup> influences how public money is allocated.
- The importance placed on giving institutions autonomy to determine their own course of action without undue influence or control.
- Increasing student numbers - and corresponding increases in public funding to HEIs – raising questions about the need for greater accountability in how public money is being spent.
- The value attached to using regulatory frameworks as a mechanism to monitor and report on the actions of HEIs.
- Recognition of the global context within which HEIs operate.

(OECD, 2003, de Boer and File, 2009)

HEIs in OECD countries have significant ‘institutional autonomy’ to decide their own policies and priorities across a wide range of activity (de Boer and File, 2009), including management of the estate, setting academic structure and course content, setting staff salaries, employment and dismissal of staff, deciding on student enrolment levels and tuition fee levels. The extent of institutional autonomy varies across different activity (OECD, 2003). In Scotland, for example, institutions have significant autonomy over admissions from students domiciled in other parts of the UK and those whose domicile is outside the EU. There is also autonomy in recruitment and dismissal of staff. There are, however, controls over the numbers of Scottish and EU domiciled students that an institution can accept. There are also controls over the level of fee that can be charged to students from the rest of the UK.

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<sup>1</sup> New public management refers to the way that the public sector operates. It focuses on efficiency, customer service, and meeting strategic objectives. Service delivery is driven by incentives and market influence e.g. a focus on “value for money”.

Greater institutional autonomy does not necessarily mean less government intervention; the reality is a little more complex. In practice, an institution may be seen as having significant institutional autonomy (e.g. over academic course content) meaning that the government is not directive about the courses offered or the way that they are delivered. However, it may exercise indirect control via regulations (e.g. quality assurance measures or funding being issued conditionally on achievement of specific outcomes). Moves to greater institutional autonomy in some areas of activity have “often substituted one form of influence and control by government for another” (OECD, 2003; p.64).

## **HIGHER EDUCATION GOVERNANCE IN SCOTLAND**

Scottish HEIs are governed through a complex set of legal structures, varying by when the HEI was established. The consultation document for the Bill notes of Scottish HEIs:

“It is a sector that is steeped in history with institutions founded as far back as St Andrews in 1410, alongside the University of Highlands and Islands, which was founded in 1992. Governing the oldest of these institutions is legislation dating back as far as The Universities (Scotland) Act 1858.” (Scottish Government, 2014, p22)

With the sector having evolved over more than 600 years, different legal structures frame the governance of HEIs in Scotland. These are commonly categorised into three groups:

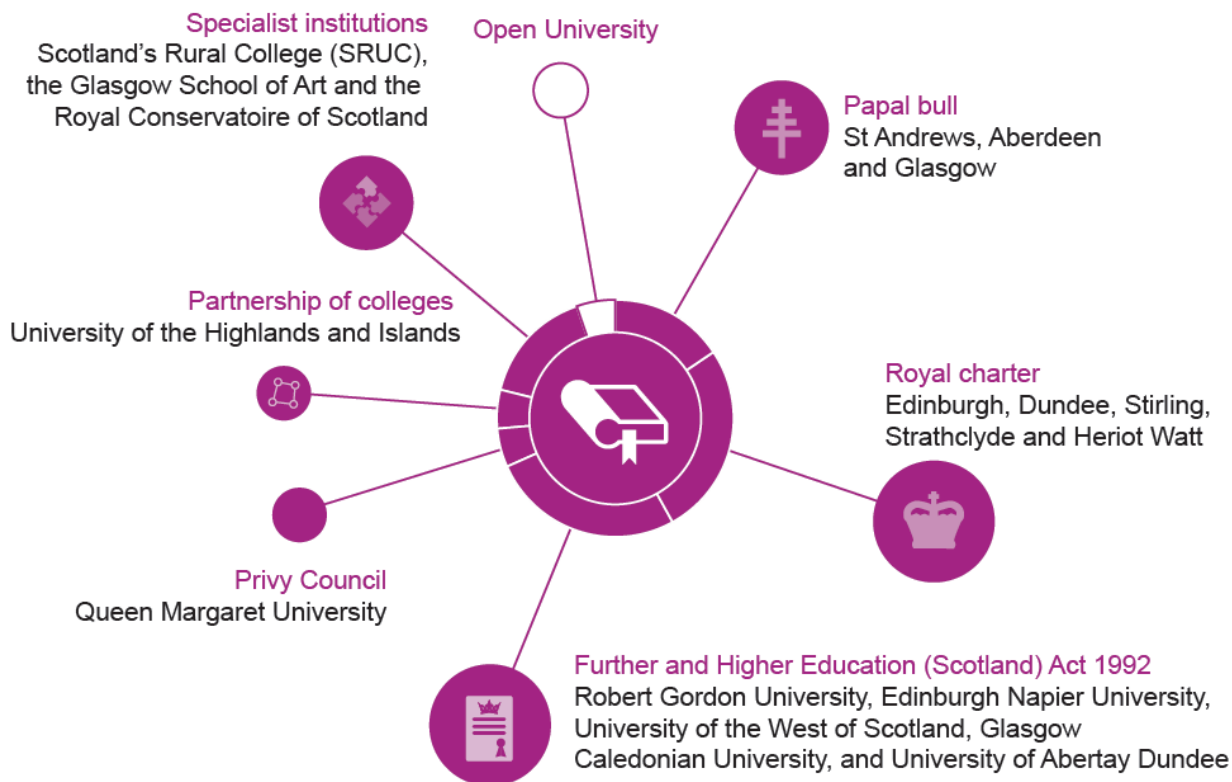
- “Ancient” universities – those established prior to the 20<sup>th</sup> century
- Chartered universities – established in the mid-20<sup>th</sup> century
- Post-1992 ‘new’ universities and ‘small specialist institutions’

The governance arrangements that have been established in law for each type are summarised at Annexe 3. A glossary of the terms used to describe governance arrangements in different types of HEI are then presented at Annexe 4.

The von Prondzynski review (2012) highlights that, legally, the picture is more complex, with six categories of HEI in Scotland (as illustrated in Figure 1).

As Figure 1 shows, the Open University also operates in Scotland. It offers higher education programmes to students across the UK, and receives funding from the Scottish Funding Council (SFC) for delivery of programmes in Scotland. As its main presence is in England, the Open University is not subject to Scottish legislation on matters of governance. That said, the Open University in Scotland does align its activities in Scotland with the Scottish Code of Good Governance; it observes both the Scottish Code and the UK Committee of University Chairs’ Code.

**Figure 1: Legal categories of HEIs in Scotland**



Source: SPICe

All Scottish HEIs have a governing body ('Court'). The function of the governing body of a Scottish HEI is defined in the Further and Higher Education (Scotland) Act 1992 as being: "responsible for management and administration of its revenue and property, and the conduct of its affairs" (Section 56). It is important to stress, however, that these governing bodies do not take on day to day management of HEIs. Day to day management and administration are carried out by the executive of the HEI, led by its senior management team. The governing body provides oversight and scrutiny of the activities of the executive while itself being responsible for high level strategic leadership.

In addition to the legal instruments that established the different HEIs in Scotland, there are other legislative measures in place. Some apply across the whole sector, while others apply only to specific institutions or to sub-sets within the sector. This makes sector-wide analysis of governance arrangements affecting Scottish HEIs 'somewhat complex' (von Prondzynski, 2012).

It is also important to note that Scottish HEIs are charitable bodies. As such, members of the HEI's governing body are expected to perform the role of charity trustees. OSCR (2011) states that trustees should ensure that all decisions made are in the interests of the charity. To operate effectively as charities, the HEIs governing body should have control and independence from outside influence. Trustees are responsible for the charity's governance and strategy and also for making sure the charity is administered effectively (OSRC, 2011).



## REVIEW OF HIGHER EDUCATION GOVERNANCE IN SCOTLAND

In June 2011, the then Cabinet Secretary for Education and Lifelong Learning, Michael Russell MSP, asked Professor Ferdinand von Prondzynski, Principal of Robert Gordon University, to chair a panel to review the governance of Scottish HEIs. The panel members, working with Professor von Prondzynski, were:

- Terry Brotherstone, STUC Nominee
- Iain Macwhirter, Rector, University of Edinburgh
- Robin Parker, President, NUS Scotland
- Alan Simpson, Chair of Court, University of Stirling

The panel was tasked with:

considering whether current institutional governance arrangements in the higher education sector in Scotland deliver an appropriate level of democratic accountability given the public funding in place; identifying and examining proposals for change that observe the benefits of an autonomous sector, while also reflecting the importance of full transparency; and the effectiveness of management and governance, the clarity of strategic purpose and its efficient implementation.

The panel published its review and recommendations in February 2012 (von Prondzynski, 2012). In his preface to the review, von Prondzynski highlights the important role played by higher education in Scotland:

“Scotland has a proud record of intellectual engagement that rivals or perhaps even exceeds that of England (and certainly now differs from it). This intellectual tradition makes higher education an important element in the development of Scotland’s society, as it is also a vital part of its success as an economy. How the system of higher education is run, therefore, is a matter of legitimate concern to all.

The story of Scottish higher education is overwhelmingly a good one. This report is not an exercise in criticism or complaint. It is an attempt to recommend how the system, at a time of important national change and renewal, can be governed to enable it to play its role as effectively as possible, and with the widest consent and support of its participants and external stakeholders.”

The review goes on to highlight how, over a range of criteria: “Scotland’s higher education institutions perform well”, including there being Scottish universities represented in the top 400 rankings, a disproportionate rate of success in attracting research funding from UK Research Councils and the provision of high quality teaching (von Prondzynski, 2012).

There were, however, concerns raised about the extent to which the university community (staff and students) is able to participate in collective self-governance, about the extent to which governing bodies ensure appropriate levels of accountability, and about a perceived bureaucratisation of management:

“It is also clear that there is substantial scope for better performance of universities in other areas – notably in developing and improving programmes for widening access (a problem

for society as a whole, but with particular implications in education)” (von Prondzynski, 2012).

The review included 17 recommendations<sup>2</sup> covering a range of themes from developing a Scottish code of good practice for higher education governance to establishing an advisory forum for higher education, chaired by the Scottish Funding Council. The full list of recommendations is provided at Annexe 1.

The Scottish Government did not publish a formal written response to the recommendations in the von Prondzynski review. However, in June 2012, the then Cabinet Secretary for Education and Lifelong Learning, Michael Russell, MSP, stated in the Scottish Parliament:

“In my previous statement to Parliament, I welcomed the recommendations of Professor von Prondzynski’s thoroughly considered review of higher education governance, and I said that I would consider the findings with the sector. Since then, I have discussed the review’s findings with a broad range of stakeholders. I will continue to do so, but I have accepted virtually all Professor von Prondzynski’s recommendations.

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. As previously announced, a bill will be introduced at the earliest opportunity, although the key issue of an underpinning statute will require a second bill, which we hope to introduce within the lifetime of this Parliament.” (Scottish Parliament, 2012)

The first piece of legislation referred to is the Post-16 Education (Scotland) Act (TSO, 2013); the second is this Bill (Scottish Parliament, 2015).

## **POST-16 EDUCATION (SCOTLAND) ACT 2013**

Two recommendations from the von Prondzynski review are of particular importance to the provisions in the post-16 Education (Scotland) Act 2013:

- Recommendation 2.3 requires the Scottish Parliament to “enact a statute” setting out the key principles of governance and management that would serve as the legal basis for the operation of HEIs.
- Recommendation 7.4 states that the Scottish Funding Council (SFC) should commission a code of good governance for higher education institutions.

Measures to respond to these recommendations are set out at section 2 of the Post-16 Education (Scotland) Act 2013:

“The Scottish Ministers may, under section 9(2) [of the Further and Higher Education (Scotland) Act 2005], impose a condition that the [Scottish Funding] Council must, when

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<sup>2</sup> One of the panel members (Alan Simpson) dissented on specific recommendations. His concerns are set out in his letter accompanying the publication of the von Prondzynski review (Simpson, 2012).

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.” (TSO, 2013; p1)

The key differences between the von Prondzynski review recommendations and the provisions at Section 2 of the 2013 Act are:

- The recommendation that the key principles of governance and management be set out in statute was replaced by a requirement that HEIs comply with “any principles” of governance that are thought to offer a model of good practice.
- The focus on establishing principles of good management and governance was replaced by a focus only on governance.
- The recommendation that the SFC lead on development of a code of good governance was replaced by a provision simply saying that SFC could impose, as a condition of funding, a requirement for HEIs to comply with recognised principals of good governance, not that the SFC has to establish or maintain a set of principles.

The von Prondzynski review recommendation to develop a code of good higher education governance for Scottish HEIs was supported by HEIs. At the request of the Cabinet Secretary for Education and Lifelong Learning, the Committee of Scottish Chairs took the lead in developing the new code:

“I have asked the Committee of Scottish Chairs of higher education institutions to lead a group to develop a new Scottish code of good higher education governance. Membership of the committee that does that must include the voices of students, staff and the small specialist institutions” (Scottish Parliament, 2012)

The 2013 Act did not prescribe specific principles or measures that HEI’s should pursue to achieve good governance. However, in its consideration of the bill that preceded the 2013 Act, the Education and Culture Committee noted that the Scottish Code of Good HE Governance (discussed below) offered an appropriate mechanism to fulfil this requirement:

“While the Bill does not actually specify the particular principles of governance that are to be adopted by HEIs, Scottish Government officials confirmed that this code would effectively become the ‘principles of governance’ that are referred to in the Bill” (Scottish Parliament, 2013; p5).

## **SCOTTISH CODE OF GOOD HE GOVERNANCE**

To develop the Scottish Code of Good HE Governance (“the Code”), the Committee of Scottish Chairs appointed a steering group. The steering group was chaired by Lord Smith of Kelvin, with membership including representatives from the public, private and third sectors, as well as a voice for students and staff via representation from a former Rector<sup>3</sup>.

The steering group was instructed to take account of the recommendations from the von Prondzynski review, incorporating standards of good practice, identifying the separate duties

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<sup>3</sup> The list of members can be accessed [here](#)

and responsibilities of senior managers and governing bodies and considering the interrelationship between governing bodies and other institutional structures concerned with governance.

In developing the Code, the steering group consulted widely, including holding face to face meetings at each Scottish HEI and putting out an invitation to submit written evidence. At each HEI, separate meetings were held with student representatives, staff and union representatives, governors (including lay members) and members of senior management. Over 360 people participated in over 78 meetings at institutional level. In addition, meetings were held with trade unions, the Scottish Government and SFC (Committee of Scottish Chairs, 2013).

Given the important link between the development of the Code and the 2013 Act, the Education and Culture Committee, as part of its scrutiny of the bill that preceded the 2013 Act, met with members of the steering group. The Committee heard that, in gathering evidence to develop the Code, many of the von Prondzynski review proposals were not without controversy. There were also differences of opinion from stakeholders as to how some of the recommendations in the von Prondzynski review could best be implemented and what they might mean in practice (Committee of Scottish Chairs, 2013a).

After publication of an interim code in April 2013, the Code was published in July 2013 (Committee of Scottish Chairs, 2013). The Code states that the overarching purpose of HE governance is to: “promote the enduring success, integrity and probity” of the sector as a whole (Committee of Scottish Chairs, 2013; p1). This specifically entails:

- supporting its mission as an autonomous institution;
- ensuring the proper and effective use of its funds;
- promoting appropriate participation of its key constituents, including students and staff;
- guarding against potential conflicts of interest;
- maintaining and observing clear statements of authority and responsibility throughout the institution; and
- matching such authority and responsibility with accountability to key internal and external stakeholders

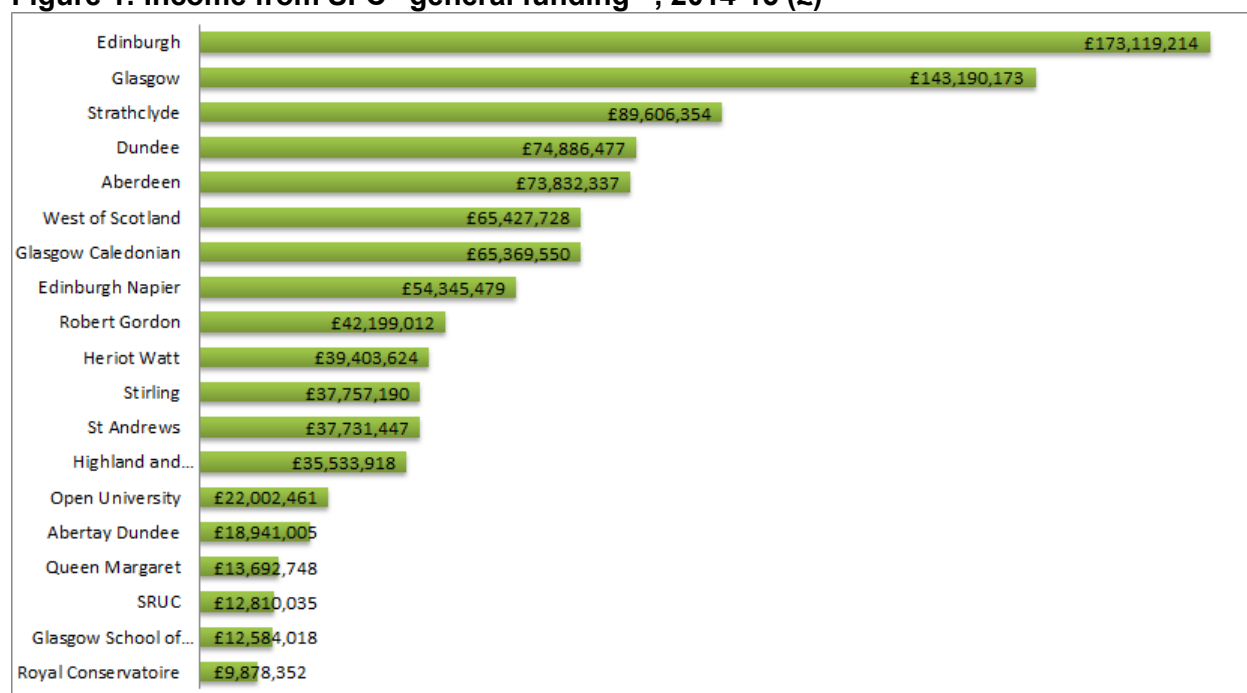
The Code states that the focus for governing bodies is “determining overall strategic direction and setting institutional values” while remaining distant from the operational management of the HEI; the latter activity being the responsibility of the senior management team.

The Code offers a set of ‘Main Principles’ along with guidelines and good practice examples to illustrate these principles. While it has no statutory basis, the SFC now requires compliance with the Code as a condition of funding.

## SFC FUNDING OF HIGHER EDUCATION INSTITUTIONS IN SCOTLAND

There are 19 higher education institutions (HEIs) in Scotland that receive Scottish Government funding (via the Scottish Funding Council) for teaching and research. As Figure 1 shows, the amount of Scottish Government funding received varies significantly between individual HEIs<sup>4</sup>.

**Figure 1: Income from SFC “general funding”<sup>5</sup>, 2014-15 (£)**



Source: Scottish Funding Council

The funds received from the SFC represent only one element of the public funding received by HEIs. Other sources of public funds include those from UK government departments, UK Research Councils and from EU bodies. Figures on the funding to Scottish HEIs from public sources, as compared with the funding received from private, charitable and other sources, is presented at Annexe 2.

Table 1 shows the proportion of each HEI’s income in 2013-14 that came from the Scottish Funding Council (SFC) teaching and research grants<sup>6</sup>. It shows significant variance between HEIs; with the SFC teaching and research grants representing 69 per cent of the income of the University of the West of Scotland and only 23 per cent of the income of Heriot Watt University.

<sup>4</sup> Figure 1 shows SFC funding for teaching and research only. Funding from other sources, e.g. tuition fee income for Scottish, UK, European or international students, other research income (e.g. Research Council or charitable funds), commercial revenue (e.g. conference facilities) and endowments are not included.

<sup>5</sup> “General funding” refers to the teaching and research funding allocated by the SFC to HEIs. It does not include strategic or capital funds.

<sup>6</sup> The figures in Table 1 are taken from HESA statistics, rather than SFC reported funding allocations as used in Figure 1. This means that: (a) figures for the Open University in Scotland are not included as HESA does not report on funding for OU broken down by UK region; and (b) the figures represent income for 2013-14 from teaching and research, they may not match with the way SFC report its’ funding, so comparison with Figure 1 should be avoided.

One of the conditions attached to the distribution of SFC teaching and research funding to HEIs is the production of outcome agreements. Outcome agreements for HEIs in 2015-16 are structured around seven priorities (Scottish Funding Council, 2015):

- Widening access
- Achieving smooth transitions from college to university
- Retaining and supporting students through to completion
- Developing highly skilled graduates ready for work
- Deliver world-class research
- Collaboration with industry for the benefit of the economy
- Reducing their carbon footprint

Universities Scotland (2015) points out that in delivery of outcome agreements, Scottish HEIs: educate 215,000 students; employ 42,000 staff; and generate £2.7 billion of annual economic impact. The sector also outperforms the rest of the UK on both research quality and impact of research in the Research Excellence Exercise in 2014 and it is in the top two or three nations for publications per researcher and citations per researcher, as well as on measures of research commercialisation.

**Table 1: Income from SFC teaching/research grant as proportion of all income, 2013-14 (£000)**

HE provider	SFC grant	Total income	% income from SFC grant
University of Aberdeen	81,534	234,921	35%
University of Abertay Dundee	20,914	36,747	57%
University of Dundee	87,619	243,087	36%
Edinburgh Napier University	56,452	112,750	50%
University of Edinburgh	204,116	780,630	26%
Glasgow Caledonian University	67,119	118,426	57%
Glasgow School of Art	14,071	29,642	47%
University of Glasgow	161,213	511,341	32%
Heriot-Watt University	43,958	191,302	23%
Queen Margaret University, Edinburgh	14,511	34,968	41%
Robert Gordon University	45,175	103,329	44%
Royal Conservatoire of Scotland	10,334	18,142	57%
University of St Andrews	42,964	193,880	22%
SRUC	22,466	84,068	27%
University of Stirling	39,742	107,744	37%
University of Strathclyde	96,769	254,377	38%
University of the Highlands and Islands	33,356	62,731	53%
University of the West of Scotland	70,054	101,526	69%
<b>Total Scotland</b>	<b>1,112,367</b>	<b>3,219,611</b>	<b>35%</b>

Source: HESA statistics

## CONSULTATION PROPOSALS

A public consultation on proposals for a Higher Education Governance Bill was issued by the Scottish Government on 7 November 2014. The consultation sought views on six proposals: “intended to build on the strengths of the sector by introducing provisions which would modernise governance arrangements” (Scottish Parliament, 2015a; p5).

Proposal	Rationale
Transfer of the Privy Council’s role in relation to higher education governance to a new Scottish committee.	To enable the Scottish Government to adopt a more flexible approach than the current process for amending government instruments.
Setting out in legislation a new definition of academic freedom, more explicit than the current definition.	To remove any threat to academic freedom, so enhance the protection currently offered to academic staff.
Clarifying that the role of Principal of an HEI is chief executive officer focusing on leadership, administration and management of the HEI.	To make more transparent the responsibilities held by the Principal and embed consistency across all HEIs.
Creating a more transparent process for selection of the Chair of an HEI’s governing body. Also making the selection process more accessible via open advertisement, competitive selection and election at the final stages.	To introduce consistency between HEIs and create a more transparent appointment system.
Ensuring the membership of the governing body is fully representative.	To ensure a more inclusive environment and for increased consistency between HEIs.
Ensuring that the composition of members of the academic board is fully representative and that the board’s role as final arbiter on academic matters is recognised.	To provide academic boards with stronger purpose while giving staff and students a key role in shaping the direction of the HEI in terms of teaching and research.

## PROPOSALS NOT IN THE BILL

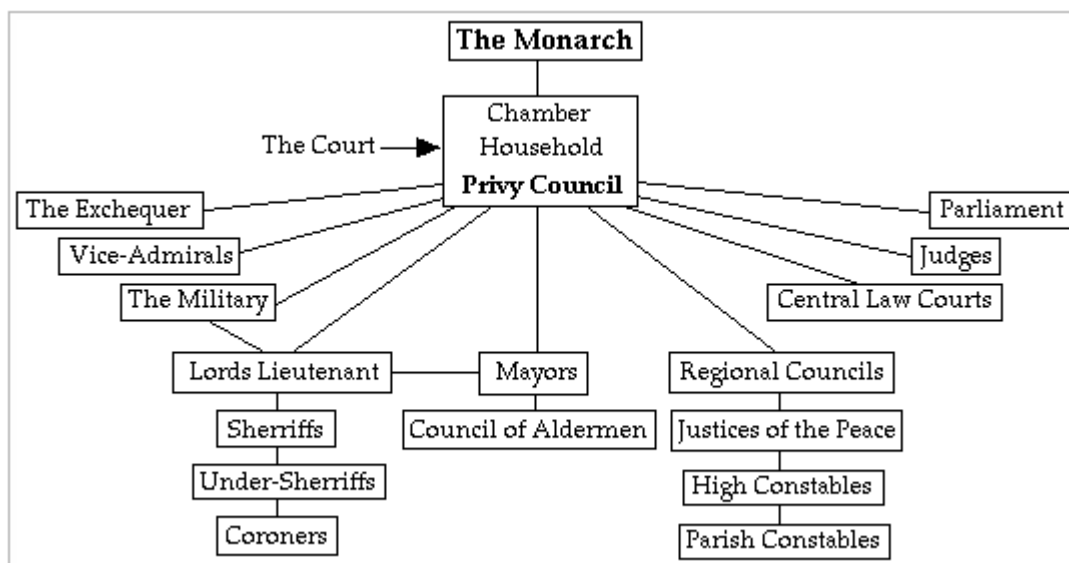
The responses to the consultation were analysed by an independent consultant (Nicolson, 2015). In the period between the consultation and the Bill being introduced, some of the proposals were either significantly revised or removed. This section considers the provisions that were removed or significantly revised prior to Bill being introduced. The next section looks in more detail at the provisions that are included in the Bill.

### The Privy Council

The Privy Council is a formal body of advisers to the Queen. Members include senior politicians and other senior public officials, as shown in Figure 2. Among its many functions, the Privy Council is responsible for advising the Queen on proposals from HEIs seeking to amend their royal charter. It has delegated authority to issue Orders in Council – the instruments of governance used to regulate the post-1992 HEIs – and to approve amendments to these. It is

also a point of application for universities that wish to make changes to the mechanisms that regulate internal governance arrangements – “ordinances” for ancient universities and “statutes” for charter universities.

**Figure 2: Privy Council membership**



Source: <http://www.deliberation.info/john-prescott-resigns-the-privy-council/>

The von Prondzynski review recognised the value of the Privy Council, but suggested: “it is probably time to replace it with a framework that is operated entirely within Scotland and is capable of functioning both expeditiously and in a way that maintains existing safeguards” (von Prondzynski, 2012; p6). The Scottish Government, in the consultation for the Bill, proposed establishing a Scottish Committee to replace the functions of the Privy Council. It was argued that a Scottish Committee could adopt a more flexible approach with this structure also potentially reducing the time taken to make amendments to governance instruments (Scottish Government, 2014).

The consultation responses on this issue were mixed. Some supported changes to the current arrangements, while others urged caution as the case for making such a significant change had not been fully made to date. On the basis of this feedback, the Scottish Government decided not to introduce measures to change the role of the Privy Council at this point. The Policy Memorandum notes that further review of the role of Privy Council in relation to higher education governance is needed before taking any legislative steps on this issue (Scottish Parliament, 2015a).

## Definition of Principal

The von Prondzynski review highlighted the varied roles played by the Principal of an HEI, including being a representative of the institution externally, a manager within the institution and taking on ceremonial tasks for the institution. All are seen as important to the delivery of the duties of Principal (von Prondzynski, 2012).

The Scottish Government consultation set out its intention to clarify and make explicit the role of Principal as the ‘Chief Executive Officer’ of the HEI. The consultation noted that the working title



of 'Principal' is well understood across the sector. However, the role should be legally constituted as Chief Executive Officer to reflect both the responsibilities of the role and to ensure consistency in understanding and practice across all HEIs (Scottish Government, 2014).

The majority of respondents to the consultation disagreed with this proposal (91%). There were two main reasons for this. The first was that bringing the legal title of the role into line with businesses is not appropriate as HEIs are not private businesses, but public institutions. The second was that there is potential for confusion if the title is changed in statute but remains unchanged in practice. Respondents argued that there was not any compelling reason for legislating on this issue (Nicolson, 2015).

The Policy Memorandum notes the concerns around this proposal. In light of these concerns, it is noted 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" (Scottish Parliament, 2015; p6). This proposal has not been carried forward in the Bill.

## **Selection of Chair**

The consultation made specific proposals about the approach to selection and election of the chair of the governing body of an HEI. The proposals included a number of requirements for how the chair should be selected, including election of the chair from a shortlist of candidates. In the consultation, the Scottish Government (2014) stated:

"Introducing a process for selecting a chair of an institution's governing body will present an opportunity to introduce consistency across the sector and create a more transparent appointment process... enabling courts/governing bodies to reach a wider pool of candidates" (p.13)

It was argued that detailed prescription as to the approach to selection of the chair is required to address inconsistencies in practice between HEIs while also attempting to widen the pool of applicants and increase transparency in the selection process (Scottish Government, 2014). Universities Scotland, in its response to the consultation, challenged this position:

"Existing, recently modernised arrangements for appointing the Chair of a governing body already meet the stated aims of the consultation. When appointing a Chair, higher education institutions employ consistent, open and effective selection procedures that give a voice to key stakeholders. These procedures are laid down in the Code of [Good HE] Governance...

The stated aims of the consultation are therefore already met by current arrangements. Legislation in this area is not necessary, nor is it appropriate in principle. Legislation on such details of the governance arrangements of autonomous charitable institutions would be highly unusual and would therefore be justified only if there were evidence of serious problems with current arrangements. Given the sector's universal adoption of the highly progressive arrangements described above, it is hard to identify any reason for current concern over the process for selecting chairs of governing bodies – and none is provided in the consultation paper" (Universities Scotland, 2015a).

## *Election of the Chair*

The analysis of consultation responses (Nicolson, 2015) notes one specific aspect of the selection proposals as being of particular concern; the proposal that the chair should be elected at the final stages of selection. Just over three quarters (78%) of those that responded to the consultation opposed the proposal that the selection process for the chair should culminate in an election by a group of representatives of key stakeholders both internal and external to the university.

Critics argued that election of the chair by anyone other than the other members of the governing body runs counter to good governance. As the chair requires the confidence of its board, and is accountable to its membership, the view of many is that the board should have the final say as to who is appointed as chair. There was also concern raised that formal election of the chair could quickly turn into: (a) a popularity contest; or (b) a highly politicised exercise that could lead to “factions and divisions within institutional groups”. These risks were thought to significantly undermine the inclusiveness of the selection process (Nicolson, 2015)

The proposal that the chair be elected was one of the von Prondzynski review recommendations. However, one of the five members of the review panel, Mr Alan Simpson, publicly stated his objection to recommendation:

“The governing body of the institution has responsibility for strategy and resources and the Chair is responsible for the leadership of the governing body. As such the Chair is answerable to the governing body and must have the full confidence of the governing body so that he or she can control the meetings effectively and represent it as necessary. In order to ensure that the Chair commands such confidence he or she must, in my view, be appointed by the governing body.

An election for the Chair of the governing body as proposed in the [von Prondzynski review] report is, in my view, flawed. If there were to be an election, there would a danger that the different candidates would prepare manifestos which could promote divisiveness in the institution and a politicisation of the process” (Simpson, 2012).

The result of this feedback is that much of the detail on the approach to selection that was set out in the consultation has not been brought forward in the Bill:

“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.” (Scottish Parliament, 2015a; p8)

## **Academic Board as Final Arbiter on Academic Matters**

While the governing body is recognised as having overall responsibility for strategy, resources and the estate of an HEI, responsibility for academic matters (including curriculum content and student assessment) rests with the academic board<sup>7</sup>. Given the existence of these two

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<sup>7</sup> In some HEIs, the academic board is referred to as the “Senate” while in others it is the “Academic Council”.

governance structures, the von Prondzynski review highlighted potential for difficulties to arise between them:

“The binary structure of governance can potentially lead to a lack of coherence between the strategic planning of resources, which is the remit of the governing body, and the academic planning which is the remit of academic board” (von Prondzynski, 2012; p19)

The review noted the vital role played by the academic board in setting the “academic tone” of the HEI through, among other things, providing academic input to the wider strategic focus of the HEI. The academic board was recognised as providing a forum for staff to actively engage in the governance of the HEI through the exercise of their academic freedom; providing a necessary critical voice to the governing body. In light of this governance role, the von Prondzynski review recommended that the academic board should be formally constituted as the final arbiter on academic matters (Recommendation 5.1).

This recommendation was carried forward to the proposals in the consultation. Of the responses to the consultation, a small majority (57%) agreed with the proposal to make the academic board the final arbiter on academic matters. However, for those that disagreed, there was concern that introducing this proposal could be seen as in conflict with effective governance. For example, it is the governing body that is answerable to the SFC on teaching quality issues and research; it is the governing body that is ultimately responsible for the financial decisions of the HEI, including those relating to programme content and curriculum development.

The Policy Memorandum notes that the Universities (Scotland) Acts mean that decisions taken by the academic board (the senate) of ancient universities are subject to review by the governing body (the Court). Further, as all the HEIs covered by the Bill are registered charities, it is the members of the governing body that are the trustees subject to the duties under the Charities and Trustee Investment (Scotland) Act 2005. While charity trustees can delegate their functions, they cannot delegate their responsibilities. So while academic boards have responsibility for supervision and regulation of academic matters, they are still subject to the control of the governing body. Given these issues, the Scottish Government did not pursue this proposal (Scottish Parliament, 2015a).

## **Statement on Academic Freedom**

The final theme that was proposed through the consultation and not carried through to the Bill relates to one of the recommendations on academic freedom that was made in the von Prondzynski review. Recommendation 2.4 states:

“Scottish universities and higher education institutions should adopt a similar approach... each institution should adopt, through appropriate internal processes, and present to the SFC, a statement on its implementation of the statutory protection of academic freedom.”

The consultation proposed that HEIs adopt a statement showing how the statutory protection of academic freedom is being implemented, with this statement to be presented to the SFC as a condition of grant. The view was that this would enhance the profile of academic freedom as important both to the academic community and wider society (Scottish Government, 2014).

Those responding to the consultation had mixed views on whether legislation should require HEIs to present a statement to the SFC on implementation of academic freedom as a condition of grant. Supporters felt that this would more deeply embed the concept of academic freedom into the mind-set and structures of institutions. Opponents argued that the Code and the SFC Financial Memorandum already ensure that this is done (Nicolson, 2015).

The Policy Memorandum explains why this proposal has not been carried forward to the Bill:

“After further consideration... it was concluded that the Bill should not require HEIs to adopt a statement... It was considered that this 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” (Scottish Parliament, 2015a; p6)

## **THE HIGHER EDUCATION GOVERNANCE (SCOTLAND) BILL**

The Higher Education Governance (Scotland) Bill seeks 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” (Scottish Parliament; 2015; p1)

The Policy Memorandum states that the Bill is intended to: “enable a framework of higher education governance that is more modern, inclusive and accountable” (Scottish Parliament, 2015; p1). The aim is that this “will strengthen existing governance in the higher education sector in Scotland, ensuring it remains fit for purpose” (Scottish Parliament, 2015; p1).

The provisions set out in the Bill differ from those proposed in the consultation document. The proposals not taken forward were discussed earlier. In this section, attention turns to the provisions set out in the Bill, including revisions and additions that were not considered in the consultation.

### **CHAIRING OF GOVERNING BODY**

#### *Appointment of the Chair*

As was noted previously, a number of respondents to the consultation raised concern about the need for the process of selecting a chair to be set out in legislation; with particular concern about the proposal that the chair be elected “by a balanced and representative electorate” (Scottish Government, 2014; p13).

Concerns focused on the Scottish Ministers being seen to play such an instrumental role in how chairs to governing bodies of HEIs are appointed. The approach being proposed in the consultation was thought to risk infringing on the institutional autonomy of the HEI and, as such, be detrimental to the operation of the governing body (Nicolson, 2015). Questions have also

been raised about how the election of the chair of the governing body sits alongside the election of rectors<sup>8</sup> at “ancient” universities (Herald, 2015).

The detailed proposals in the consultation have not been carried forward to the Bill. Rather, the Bill simply states that the chair of an HEI’s governing body is to be appointed using a process that will be established through regulations to be made by the Scottish Ministers. The regulations may include provision relating to the length of the appointment as chair, the process used in selection of the chair, including criteria for selection of shortlisted candidates and election of the successful candidate (Section 1).

The details as to the content and timeline for introduction of these regulations are not currently available. This lack of detail and the implications of this approach have been raised by Universities Scotland as significant concerns:

“These ministerial powers to alter various elements of HE governance by means of regulations are entirely new [i.e. there is no precedent for this approach and they were not included in the consultation] and constitute significant change to the relationship between the government and the sector. Both this erosion of autonomy in itself and its possible consequences in the future are matters of very significant concern to us and our members” (Universities Scotland, 2015)

### *Remuneration of the Chair*

In line with proposals in the consultation, the Bill (Section 2) states that the Scottish Ministers can, by regulation, make provision for remuneration and allowances to be offered to the chair of the governing body. The regulations may also stipulate that remuneration for reasonable expenses should be offered to those applying for the position of chair when taking part in selection activity. The regulations on remuneration may, among other things, include provisions that establish limits on amounts to be paid or specific circumstances in which payment “must be offered” (Section 2). The Financial Memorandum to the Bill sets out estimated costs associated with remuneration of the chair for their role in chairing meetings.

The von Prondzynski review, by majority, recommended that the chair should receive “some form of reasonable remuneration”. The panel highlighted the benefits remuneration could offer by opening up the position to a wider field of candidates (who may not be able to perform the role without some form of payment for their time) while also recognising the commitment involved. The proposal was that a competitive stipend should be offered to attract ‘the best candidate’ (von Prondzynski, 2012). Mr Alan Simpson dissented from the other panellists on this recommendation. He has written publicly to say:

“I do not agree that all Chairs of governing bodies should receive remuneration.

The question of payment for members of governing bodies was not a question that was raised in the consultation document so we did not have evidence from the consultees to inform our deliberations. My personal belief is that there is a strong public service ethos

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<sup>8</sup> At the universities of Aberdeen, St Andrews, Glasgow, Dundee and Edinburgh the rector is elected by the student body (at Edinburgh by students and staff) to preside at Court (the governing body). The rector’s role is to represent the voice of students to senior management.

among those who serve on governing bodies and this is to be welcomed and encouraged. Part of this ethos is reflected in the fact that members of governing bodies including the Chair are, almost always, unpaid and the lack of remuneration helps to confirm their independence.

I recognise that there may be occasions when a potential Chair may be deterred from undertaking the role because of the lack of remuneration and in such cases an institution should be able to make an appropriate reward.” (Simpson, 2012)

Some consultation respondents raised similar concerns about legislating on the remuneration of the chair. As well as reiterating the importance of performing a public service, there was a view that remuneration could influence which candidates apply (Nicolson, 2015). The consultation responses also highlighted support for the remuneration of the chair, but do not see any need for this to be set out in legislation. As the Code includes principles on remuneration of members of the governing body, it is not clear why a statutory intervention is required (Universities Scotland, 2015).

The Policy Memorandum states that this provision is intended to “set a minimum level of openness, transparency and consistency across all HEIs” (Scottish Parliament, 2015a; p9); while payment is intended to recognise the work carried out by the chair “given the chairing member’s responsibilities” (Scottish Parliament, 2015a; p10).

#### *Consultation on Proposed Regulations*

This section of the Bill also includes a requirement – as part of the process of making regulations on the approach to appointment of the chair – to consult HEIs and others considered relevant. The Policy Memorandum suggests that the latter group could include those representing the interests of staff, students, trade unions and alumni, as well as a wider range of relevant stakeholders (Scottish Parliament, 2015a).

## **MEMBERSHIP OF GOVERNING BODY**

#### *Composition of the Governing Body*

The requirement to stipulate specific categories of member, and numbers within specific categories, was the subject of discussion prior to the Bill’s introduction. For example, Principles 9-11 in the Code (Committee of Scottish Chairs, 2013) set out a number of requirements relating to recruitment and membership of the governing body:

- Ensuring a balance of skills and experience among members so that the governing body can meet its responsibilities and “ensure stakeholder confidence” (Principle 9).
- Making public an evaluation of the skills, attributes and experience required of members to inform recruitment of independent members (Principle 9)
- Having regard to applicable law, establishing goals and policies to ensure balance among its independent members in relation to equality and diversity, with regular review of its performance against those goals and policies (Principle 9)
- A clear majority of independent members (those who are external and independent of the institution) (Principle 10)

- No more than 25 members on the governing body (Principle 10)
- Appointment of the chair and others that are appointed by the governing body to be managed by a nominations committee – including one staff member and one student member from the governing body (Principle 11)
- Production of written descriptions of the role and capabilities sought from those applying for a place on the governing body (Principle 11)
- In the selection of a new chair, production of a full job specification (to be consulted on with staff and students before finalised), including a description of the attributes and skills required, an assessment of the time commitment expected and the need for availability at unexpected times (Principle 11)
- Wide publicising of any appointments available, both within and beyond the HEI, and through this encouraging diversity in membership (Principle 11)

While membership of governing bodies varies between individual institutions, all include staff, students and independent/external members as well as the Principal or Director of the HEI. Some also have alumni, local councillors and, as noted previously, five HEIs have a Rector who is elected to preside at Court (see glossary at Annexe 4). The Code of Good HE Governance, One Year into Implementation (Committee of Scottish Chairs, 2014), notes that: “University governance starts from a highly inclusive base, with the membership of governing bodies reflecting a wide range of stakeholders” (p.1).

### *Trade Union Membership*

While the Code considers a range of membership requirements, the Bill (Section 4) focuses specifically on representation from those internal to the HEI, notably:

- a minimum of two students nominated by the student association / union;
- two elected staff members;
- one nominee from an academic trade union;
- one nominee from administrative, technical or support staff trade union; and
- one or two alumni representatives.

The consultation on the Bill stated that further measures are needed to ensure that members of the governing body are representative of its internal stakeholders. This proposal is intended to “help to create a more inclusive environment within the institution”; leading to greater consistency of approach across all HEIs (Scottish Government, 2014; p16).

Analysis of consultation responses indicates that a majority (67%) of respondents were not in favour of this proposal (Nicolson, 2015). The main concern was the stipulation that trade union members are represented on the governing body. This was seen as sitting at odds with effective governance, for two main reasons:

- Trade union representatives would, in that role, be representing the interests of the trade union that nominated them, rather than working in the interests of the HEI as a whole. “This would be contrary to good governance, which requires that all members... act in the best interests of the University rather than of a constituency” (University Court, University of Glasgow, cited in Nicolson, 2015).

- Having places reserved for members of staff that are in a trade union runs counter to the principles of equality and inclusivity said to be important to the purpose of stipulating internal membership (Nicolson, 2015)

There have been no changes to this proposal between the consultation and the Bill. In response to the concerns about trade union membership, the Policy Memorandum states:

“...as members of the governing body (and, as such, 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” (Scottish Parliament, 2015a; p11)

With approximately 27 per cent of university staff being members of a trade union (Universities Scotland, 2015a), the establishment of a statutory requirement for trade union representation, as well as staff representation, on the governing body remains unclear; and is seen by some consultation respondents as “undemocratic” (Abertay University, cited in Nicolson, 2015).

The Bill states that the process of selecting internal members involves election (for staff members) or nomination from among their own number (for trade union, student and alumni members) (Scottish Parliament, 2015). The details of the approach to election and nomination are set out in Sections 5 and 6 respectively. The Policy Memorandum highlights that it is only the selection of members that is provided for in the Bill; full terms of appointment are not considered. Rather, members’ terms and conditions “are to be determined by the governing body in accordance with the HEIs governing documents” (Scottish Parliament, 2015a; p12).

#### *Additional Provisions on Membership of Governing Body*

This part of the Bill also stipulates that:

- The proceedings of the governing body are not to be affected by any vacancy in membership or “defect in the appointment of a member” (Section 7).
- The Scottish Ministers, through regulations, can modify the categories of membership of the governing body and the number of people that are appointed under a particular category (Section 8).

In line with the concerns raised about the approach to appointment of the chair of the governing body, Universities Scotland cites concern about the use of regulations to develop legislation in this area. The provision at Section 8 allowing the Scottish Ministers, through regulations, to modify the category of membership and the number of people appointed, is, it is argued, another example of an “entirely new” approach (i.e. there not being any precedent of this approach being used and no consultation on this proposal prior to the Bill being introduced) (Universities Scotland, 2015)

## **ACADEMIC BOARDS**

Recommendation 5.1 of the von Prondzynski review states:

“Apart from the Principal and the heads of School (or equivalent) who should attend *ex officio*, all other members should be elected by the constituency that they represent, and



elected members should form a majority of the total membership. In establishing the membership of the academic board, due regard should be given to the principles of equality, and the need for the body to be representative. This includes a requirement to ensure that there is significant (rather than token) student representation. Overall, academic boards should not normally have more than 120 members”.

The Scottish Government accepted this recommendation, setting out its proposals to implement these suggestions in its consultation on the Bill. The responses to the consultation highlighted mixed views on legislating in this area:

- The election of members to the academic board was supported by trade unions and students as offering increased transparency and accountability. However, critics of this proposal noted that some less visible groups could be overlooked (e.g. librarians). It was also suggested that for some groups, taking part in election activity would involve using limited resources that could be better spent on other activity.
- Views were split on whether there should be a cap of 120 members on academic boards. Supporters cited the potential risk to functionality for a very large board, while those not supporting this proposal stated that: (a) there was no clear rationale for stipulating a maximum board size; and (b) individual HEIs should be able to stipulate the size of its academic board based on its own structures and needs. (Nicolson, 2015)

Both proposals are included in the Bill. While Section 9 stipulates a maximum of 120 members of an academic board, Section 10 lists the composition of the academic board as including:

- The Principal of the HEI
- Heads of School
- Academic staff, elected by their peers
- Students, elected by their peers

Other people can also be appointed through an enactment, in accordance with governing documents of the HEI or by decision of the governing body of the HEI (Section 10).

The Bill states that 50 per cent of academic board members should be academic staff or students, with at least 10 per cent to be students. In effect this means that, where an academic board has 120 members, there would need to be more than 60 academic staff or students on the board, with at least 12 of this number to be students. The process for election of academic staff and students to the academic board is to be decided by rules made by the governing body of the HEI (Section 11).

Similar to the provisions for governing body membership, the Bill states:

- The proceedings of the academic board are not to be affected by any vacancy in membership or “defect in the appointment of a member” (Section 12).
- The Scottish Ministers, through regulations, can modify the number of members of the academic board (setting either a maximum or minimum number), the number or percentage of members appointed under a particular category, or the categories of membership (Section 13).

## ACADEMIC FREEDOM

### *Current Definition*

The principle of ‘academic freedom’ as it applies to post-16 education bodies in Scotland is set out in Section 26 of the Further and Higher Education (Scotland) Act 2005. The 2005 Act places a duty on colleges and HEIs to have regard to the desirability of ensuring academic freedom for those involved in teaching, learning or research in relation to their appointment, or any entitlement or privilege they may enjoy. The 2005 Act states that academic freedom includes freedom (within the law) to: hold and express opinion; question and test established ideas and received wisdom; and present controversial or unpopular points of view.

Unlike other provisions in the Bill, which only apply to HEIs, the protection of academic freedom for those involved in teaching or research applies to staff in all post-16 education bodies (i.e. both HEIs and colleges). The Open University in Scotland is also subject to this provision, as a post-16 education body operating in Scotland.

### *von Prondzynski Review*

A recommendation on changes to the protection of academic freedom was first made in the von Prondzynski review:

“A definition of academic freedom should be incorporated in the statute governing higher education, based on the definition contained in Ireland’s Universities Act 1997, and applying to all ‘relevant persons’ as under the existing 2005 Act.

Scottish universities and higher education institutions should adopt a similar approach and that each institution should adopt through appropriate internal processes, and present to the SFC, a statement on its implementation of the statutory protection of academic freedom.” (Recommendation 2.4)

Section 14 of Ireland’s Universities Act 1997 says:

“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” (von Prondzynski 2012; p7)

In recommending a change to the definition of academic freedom, drawing on that used by Irish universities, the von Prondzynski review panel did not highlight any problems with the current definition of academic freedom as set out in the 2005 Act. Rather, the view was that the Irish Universities Act definition expresses “slightly more comprehensively” the full significance of academic freedom (von Prondzynski 2012).

### *Consultation Proposal*

In the consultation preceding the introduction of the Bill, it was noted that the current definition of academic freedom has “served our institutions well”, but that a change was needed:

“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” (Scottish Government, 2014; p10).

Those responding to the consultation held mixed views as to whether a new definition of academic freedom is required. Supporters agreed with the position offered by the Government, that it would encourage diversity of opinion. Some of those that disagreed noted that the current provisions already allow academics to explore new ideas. It was also argued that there is no evidence that there is a problem with the current definition, so it is not clear why a change is needed (Nicolson, 2015).

### *A New Definition of Academic Freedom*

The Bill proposes changing the 2005 Act to make more explicit that academic freedom refers to: holding and expressing opinion; questioning and testing established ideas or received wisdom; developing and advancing new ideas or innovative proposals; and presenting controversial or unpopular points of view (Scottish Parliament, 2015). The Policy Memorandum notes that the definition of academic freedom at Section 26 of the 2005 Act does not necessarily exclude the freedom to develop and advance new ideas and innovative proposals. Rather, the policy aim is to expand the current definition and strengthen the protection of academic freedom. This change is intended to ensure that the protection of academic freedom in the future is “more comprehensive and transparent” (Scottish Parliament, 2015a; p.15).

A key difference between the Bill and the Irish Universities Act 1997 is the absence of reference to any protection of academics from disadvantage or less favourable treatment by the institution for exercising this academic freedom. It is also not clear whether there have been incidents where academics have had their academic freedom limited, so requiring a new definition to ensure this right is protected.

## **FINANCIAL IMPLICATIONS**

The Financial Memorandum accompanying the Bill (Scottish Government, 2015b) sets out the estimated cost implications of the Bill. Three areas are identified as having cost implications for HEIs. All relate to costs attached to membership of the governing body. Table 2 summarises the estimated costs presented in the Financial Memorandum. These reflect estimated costs over a four year period (the standard tenure for governance body membership).

**Table 2: Estimated costs associated with the Bill, for a four year period**

<b>Cost</b>	<b>Individual HEI</b>	<b>All HEIs</b>
Election of staff members	£2,000	£36,000
Recruitment of chair	£8,000	£144,000
Remuneration for chair	£12,288	£221,184

Source: Scottish Government (2015b)

## **Election of Staff Members**

The Financial Memorandum (FM) notes that the requirement on each HEI to hold an election for two staff members is new so HEIs may need to set up new procedures to pursue this activity. As HEIs already hold elections for staff to participate in the academic board (with the costs of this met within HEI budgets), the FM states:

“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” (Scottish Parliament, 2015b; p19)

Where staff candidates are allowed to campaign for their seat on the governing body board, the estimated cost is approximately £500 per candidate. The FM suggests that, in practice, it is likely that a lower price cap for this activity will be imposed by HEIs “given that the position is not that of the chairing member”. It estimates, if four candidates are reimbursed at £500 each, the cost to the individual HEI would be £2,000 - or £36,000 for all 18 HEIs affected by this provision. These costs are expected to be met by HEIs within their existing budget.

## **Recruitment of Chair**

The £8,000 for an individual HEI is based on the following calculations:

- Costs of staff time in recruitment activity, e.g. processing applications and organising shortlisting activity - £3,000 per institution
- Advertising of the post of chair - £2,000 per institution (maximum)
- Election of the chair - £1,000 per institution (£500 per candidate/2 candidates)
- Interview expenses - £2,000 per institution (£500 per candidate/4 candidates)

It is assumed that this activity would only be required once every four years. The £8,000 estimated for each HEI results in a total cost of £144,000 for all 18 HEIs. These costs are expected to be met by HEIs within their existing budget.

## **Remuneration of the Chair**

The largest area of estimated cost is the remuneration offered to the chair of the governing body. The figures given in the Financial Memorandum are based on payment to the chair for participating in formal meetings, with an estimate of four to six formal meetings a year. The Scottish Government has estimated a maximum daily fee rate of £512 for this activity.

Assuming that there are six meetings a year, with the chair receiving £512 for each meeting, the cost to each HEI would be £3,072 each year. Over a four year period this would mean an estimated maximum cost of £12,228 for each HEI. Across all 18 HEIs, the cost would be £55,296 per year, or a total of £221,184 for the four year tenure of the post.

As elsewhere, these costs are expected to be paid by the HEI out of its current budget. The Financial Memorandum suggests that these estimates represent a maximum likely cost as “it is unlikely that all chairs will request the remuneration available for taking the position.” Further, where the current chair already receives remuneration for this role, costs to the HEI will not necessarily increase (Scottish Parliament, 2015b).

## Responses to the Financial Memorandum

An article in the Herald on 1 August 2015 suggests that the estimated cost of remunerating the chair as presented in the Financial Memorandum is a significant underestimate (Denholm, 2015). As only formal meetings are considered in the cost estimate, there is no account taken of the actual time the chair spends in that role. A more realistic estimate is suggested at 50 days per year (Denholm, 2015).

If this larger time commitment was subject to payment, it would mean an annual cost for each individual HEI of £25,600, or £102,400 over the four year tenure period. The figure for the sector as a whole would be £460,800 per annum or £1,843,200 over the four year tenure period.

The respondents to the Finance Committee's call for evidence on the financial implications of the Bill highlight concern from within the sector that the changes proposed in the Bill, specifically the regulation making powers, would risk the sector being reclassified as an arm of central government, so subject to the same accounting principles as other public bodies. The Committee of Scottish Chairs states in its submission:

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 (Committee of Scottish Chairs, 2015)

The University of Glasgow further highlights in its submission that, if reclassified, this could remove the incentive for HEIs to engage in entrepreneurial activity and put at risk the significant investment that goes into infrastructure development plans, which rely on revenue surpluses, borrowing and philanthropic support (University of Glasgow, 2015).

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## **ANNEXE 1: RECOMMENDATIONS FROM THE REPORT OF THE REVIEW OF HIGHER EDUCATION GOVERNANCE IN SCOTLAND**

### **2.2 The role of the Privy Council**

The existing jurisdiction of the Privy Council in relation to universities and higher education institutions should be transferred to a committee comprising the First Minister of Scotland, the Lord Advocate and the Lord President of the Court of Session, subject to parliamentary scrutiny.

### **2.3 A New Statute of the Scottish Parliament**

The Scottish Parliament should enact a statute for Scotland's higher education sector setting out the key principles of governance and management and serving as the legal basis for the continued establishment of all recognised higher education institutions.

Under the new statute, the designation 'university' should be reserved to independent public bodies accredited in Scotland under legislation for these purposes.

### **2.4 Academic Freedom and Institutional Autonomy**

A definition of academic freedom should be incorporated in the statute governing higher education, based on the definition contained in Ireland's Universities Act 1997, and applying to all 'relevant persons' as under the existing 2005 Act.

Scottish universities and higher education institutions should adopt a similar approach and that each institution should adopt through appropriate internal processes, and present to the SFC, a statement on its implementation of the statutory protection of academic freedom.

### **2.5. The Role of Governance**

Governing bodies should be required to demonstrate that their deliberations and decisions appropriately observe the four objectives the panel has set out for university governance, and they should regularly review their own performance against these.

The fundamental principle of a collaborative approach wherever appropriate should be enshrined in the Scottish university system through making the fostering of collaboration between universities a task for the Scottish Funding Council.

### **2.8 Advisory Forum**

A Scottish Higher Education Forum should be established, convened by the Scottish Funding Council and chaired by the Cabinet Secretary for Education and Lifelong Learning, which would meet on fixed dates at least once a year.

### **2.9 The Relationship with Further Education**

All Scottish universities should not only include responsibilities to their region, alongside their national and international objectives, in their mission statements, but also seek ways to engage proactively, for the benefit of students and the Scottish education system as a whole, with further education institutions and any new governance structures that may be put in place.



### **3.1 Appointment and Role of Principals**

The heads of Scottish higher education institutions should be described as the 'chief officer', and that the job title should continue to be 'Principal'.

There should be widened participation in the process for appointing Principals, and core to this approach should be the reform of the way in which of appointment panels are set up and operate.

The appraisal of Principals should involve external governing body members, staff and students.

### **3.2 Remuneration of Principals and Senior Management**

Further percentage increases beyond those awarded to staff in general should not take place until existing processes have been reviewed and, if appropriate, amended.

Universities should ensure that any payments that may be perceived as bonuses are either abolished or at least transparently awarded and brought into line with the scale of 'contribution payments' available to on-scale staff.

Remuneration committees should include staff and student members. The work of the committee should be transparent, and in particular, the basis upon which pay is calculated should be published. While the Framework Agreement, determining pay scales for university staff up to the grade of professor, is a UK matter, the Scottish Government should investigate whether it might be extended north of the border to include all staff including Principals. There should be a standard format for reporting senior officer pay, and the SFC should publish these figures annually.

The SFC should investigate how the principles of the Hutton Report are being or should be applied to universities in Scotland.

## **4. Role, Composition and Appointment of Governing Bodies**

Meetings of governing bodies should normally be held in public unless the matters under consideration are deemed to be of a confidential or commercially sensitive nature; these exceptional matters should be established through clear guidelines.

### **4.1 Chairing of Governing Bodies**

The chair of the governing body should be elected, thus reflecting the democratic ideal of Scottish higher education (*recommended by four panel members, one member dissented*).

The chair should receive some form of reasonable remuneration (*recommended by four panel members, one member dissented*).

### **4.2 Membership of Governing Bodies**

Positions on governing bodies for lay or external members should be advertised externally and all appointments should be handled by the nominations committee of the governing body. Each governing body should be so constituted that the lay or external members have a majority of the total membership.

There should be a minimum of two students on the governing body, nominated by the students' association/union, one of whom should be the President of the Students' Association and at least one of whom should be a woman. There should be at least two directly elected staff members. In addition, there should be one member nominated by academic and related unions and one by administrative, technical or support staff unions. The existing system of academic board representatives (called 'Senate assessors' in some universities) should also be continued. Governing bodies should also have up to two alumni representatives.

The existing practice in some universities of having 'Chancellor's assessors' should be discontinued

Each governing body should be required to ensure (over a specified transition period) that at least 40 per cent of the membership is female. Each governing body should also ensure that the membership reflects the principles of equality and diversity more generally, reflecting the diversity of the wider society.

Governing bodies should be required to draw up and make public a skills and values matrix for the membership of the governing body, which would inform the recruitment of independent members of the governing body. The membership of the governing body should be regularly evaluated against this matrix.

Expenses available to those who sit on the governing body should include any wages lost as a result of attending meetings.

Senior managers other than the Principal should not be governing body members and should not be in attendance at governing body meetings, except for specific agenda items at which their individual participation is considered necessary, and for those agenda items only.

#### **4.4 Training**

All universities should be required to ensure that governors – including external governors, staff governors and student governors – are fully briefed and trained, and their knowledge should be refreshed regularly in appropriate programmes. Each governing body should be required to report annually on the details of training made available to and availed of by governors.

#### **5.1 Composition of the Academic Board and Appointment of Members**

In line with existing legislation applying to the ancient universities, the academic board should be the final arbiter on academic matters.

Apart from the Principal and the heads of School (or equivalent) who should attend ex officio, all other members should be elected by the constituency that they represent, and elected members should form a majority of the total membership. In establishing the membership of the academic board, due regard should be given to the principles of equality, and the need for the body to be representative. This includes a requirement to ensure that there is significant (rather than token) student representation. Overall, academic boards should not normally have more than 120 members.

## **7.1 Whistleblowing**

All universities should maintain a whistleblowing policy, and this should be under the overall control of the governing body. Such a policy must include a clear process a person, whether a member of the university or not, wishing to make a complaint can access, and it should be proactively publicised.

## **7.2 Evidence Base**

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.

## **7.3 Avoiding Bureaucratisation**

The Scottish Funding Council should undertake a review of the bureaucratic and administrative demands currently made of higher education institutions from all government and public agency sources, with a view to rationalising these and thereby promoting more transparent and efficient regulation and governance.

## **7.4 Code of Good Governance**

The Scottish Funding Council should commission the drafting of a Code of Good Governance for higher education institutions.

## ANNEXE 2: MAIN SOURCES OF FUNDING PROVIDED TO SCOTTISH HIGHER EDUCATION INSTITUTIONS IN 2013-14 (£000)

	Public sector grants and fees(Scotland, UK and EU)	Private sector (non-EU fees, fees, industry, IP, endowments)	Charities (UK, EU, non-EU)	Other income	Total income	% of total income from public sector
University of Aberdeen	160,049	46,606	10,505	17,761	234,921	68%
University of Abertay Dundee	30,979	3,073	183	2,512	36,747	84%
University of Dundee	160,512	35,061	29,576	17,938	243,087	66%
Edinburgh Napier University	80,077	26,752	289	5,632	112,750	71%
University of Edinburgh	449,708	181,815	48,240	100,867	780,630	58%
Glasgow Caledonian University	93,016	17,931	748	6,731	118,426	79%
Glasgow School of Art	19,169	7,443	5	3,025	29,642	65%
University of Glasgow	294,007	123,380	42,238	51,716	511,341	57%
Heriot-Watt University	92,861	81,070	1,252	16,119	191,302	49%
Queen Margaret University, Edinburgh	25,424	8,181	369	994	34,968	73%
Robert Gordon University	69,296	28,327	191	5,515	103,329	67%
Royal Conservatoire of Scotland	12,948	3,871	3	1,320	18,142	71%
University of St Andrews	93,295	76,490	5,424	18,671	193,880	48%
SRUC	48,540	5,499	0	30,029	84,068	58%
University of Stirling	66,017	27,239	914	13,574	107,744	61%
University of Strathclyde	168,156	60,953	3,657	21,611	254,377	66%
University of the Highlands and Islands	55,543	5,117	465	1,606	62,731	89%
University of the West of Scotland	91,235	8,055	394	1,842	101,526	90%
<b>Total Scotland</b>	<b>2,010,832</b>	<b>746,863</b>	<b>144,453</b>	<b>317,463</b>	<b>3,219,611</b>	<b>62%</b>

Source: provided by Scottish Government (from HESA *Finance Plus*)

## ANNEXE 3: GOVERNANCE ARRANGEMENTS AT SCOTTISH HIGHER EDUCATION INSTITUTIONS

**Ancient Universities:** The ‘ancient universities’ (Aberdeen, Edinburgh, Glasgow and St Andrews) are subject to the Universities (Scotland) Acts of 1858, 1889, 1922, 1932 and 1966. These Acts make provision for the main statutory bodies and officers: the Court, the Senate (Academic Board), the General Council; the Chancellor, the Principal and Vice Chancellor, and the Rector, and set out the powers and duties of those statutory bodies, as well as specifying their composition.

Governance is regulated by resolutions, made by the university, which do not require Privy Council approval and ordinances, which do require the approval of Privy Council. The Universities (Scotland) Act 1966 (“the 1966 Act”) sets out the procedure for making resolutions and makes provision for the University Courts to exercise, by resolution, a wide range of powers, including the institution of new degrees and degree regulations. Ordinances are required mainly for Court constitutional matters.

**Chartered Universities:** The ‘chartered universities’, (Dundee, Heriot-Watt, Stirling, Strathclyde and the Open University in Scotland) were established in the 1960s through Royal Charter. Each university’s charter sets out the powers and functions of the university as well as identifying the key officers and committees within the university’s structure. It sets the general framework under which the universities are governed through statutes, made by the University Court but subject to Privy Council approval, as well as ordinances and regulations that are not subject to Privy Council approval. The Charter defines the objects, powers, officers, teaching, research and examining body and includes such fundamental powers as those of awarding degrees. The university’s statutes prescribe details concerning the members and officers of the university, the membership and functions of statutory bodies (including Court and Academic Board), and other miscellaneous provisions.

**Post-1992 Universities/Small Specialist Institutions:** The ‘new’ universities, (Abertay, Glasgow Caledonian, Edinburgh Napier, Robert Gordon, Queen Margaret Edinburgh, Highlands and Islands, and West of Scotland), were designated as universities under the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”). The constitutional governance arrangements for the ‘new universities’ and the other higher education institutions, commonly known as the small specialist institutions, variously draw on a mixture of the 1992 Act, the Companies Acts and other legislation. In most cases governance arrangements are set out in a statutory order of the Privy Council made under section 45 of the 1992 Act. The ‘small specialist institutions’ are Glasgow School of Art, Royal Conservatoire of Scotland and Scotland’s Rural College (SRUC).

In addition to the instruments that established them, Scotland’s higher education institutions are also subject to various pieces of legislation, some of which apply across the whole sector, while others apply only to specific institutions or to sub-sets within the sector. For example, the Scottish Public Services Ombudsman Act 2002, which legislates for complaints handling, relates to all institutions across the sector.

While the legislative and constitutional arrangements vary, universities are all independent corporate institutions with charitable status and with a governing body that is responsible for the overall direction and strategy of the institution, and is accountable, alongside the Principal, for its resources.

**General Governance Structures:** Responsibility for governance within universities normally rests with the university court and the academic board. The court and academic board establish committees to assist them in their work.

Source: Scottish Government (2014)

## ANNEXE 4: GLOSSARY OF TERMS

**Academic Board:** has responsibility for academic matters (including curriculum content and student assessment). In some universities the academic board is called the 'Senate' and in others, the 'Academic Council'; currently chaired by the Principal.

**Academic Council:** see “Academic Board”

**Board of Governors:** see “Court”

**Chancellor:** the titular head of the University who is elected to the post by the General Council (all graduates and established academic staff).

**Chancellor Assessor:** appointed by the Chancellor to represent him/her on Court.

**Court:** The governing body of most Scottish universities is called the 'court'. The governing body appoints the Principal. Governing bodies tend to be quite large, ranging from 17 to 28 members, and include representatives of staff and students. External or 'lay' members, who often form a majority of the total membership, are appointed by the governing body (or its nominations committee). In all Scottish HEIs the Principal is a member (but not the chair) of the governing body.

**Governing body:** see “Court”

**Papal Bulls:** documents issued by the Pope, these are the instruments which founded the 'ancient' universities. The name is derived from the lead seal (bulla) traditionally affixed to such documents.

**Principal:** The Principal is effectively the chief executive of the HEI. In ancient universities, she/he is appointed by the Court as president of the Senate. The full title of the Principal at ancient universities is 'Principal and Vice Chancellor' - the latter is a subsidiary title enabling the Principal to grant degrees in the absence of the Chancellor (in accordance with section 2 of the 1858 Act). Beyond that the title Vice-Chancellor, like Chancellor, is titular only.

**Privy Council:** the Queen's own council. There are around 600 council members who advise the Queen in carrying out her duties.

**Rector:** At the universities of Aberdeen, St Andrews, Glasgow, Edinburgh and Dundee the rector is elected by the student body (at University of Edinburgh the rector is elected by students and staff) to preside at Court. The rector's role is to represent the voice of students to senior management.

**Royal Charter:** A royal charter is a way of incorporating a body; turning it from a collection of individuals into a single legal entity. Royal charters were at one time the only means of incorporating a body, but there are now other means (becoming a registered company, for example), so the grant of new Charter is comparatively rare. New grants of royal charters are these days reserved for eminent professional bodies or charities which have a solid record of achievement and are financially sound.

**Senate:** see “Academic Board”

Source: Scottish Government (2014) with additions

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## RELATED BRIEFINGS

[SB13-05 Post-16 Education \(Scotland\) Bill 1.264KB pdf](#)

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