



SUMMARY

GuildHE is one of the two formally recognised representative bodies for Higher Education institutions in the UK. Our members span all four UK territories and cover the full diversity of the HE sector, including smaller, specialist and vocationally-focused universities and colleges, many of which specialise in subject areas which are critical for the UK's skills base, growth industries, and cultural sector. We welcome the opportunity to comment on the proposed introduction of legislation concerning governance in higher education institutions in Scotland.

Overall we welcome the Government's focus on effective and transparent university governance and representation, but we are concerned that several of the proposals in this consultation do not add anything to existing arrangements – and are liable to actually increase the risk to good governance. In places we have also indicated where there are other, in our view better, routes to achieving the Government's ambitions.

We would make the following overarching points, which are reflected in our more detailed comments on each of the consultation proposals:

- It is **not immediately clear what issues with the current system the Government is seeking to address**. The consultation document states in several places that **existing arrangements are working well**. There has also recently been a wide-ranging process to develop the Scottish Code for Good HE Governance, and good progress is currently being made across institutions on its implementation which will soon be followed by review.
- Effective and balanced university governance depends critically on the structures which underpin it. We feel strongly that **some of the proposals threaten to negatively upset that balance – at the expense of institutions and their students – while offering no clear benefits in exchange**. We have noted this below with reference to the proposals on: **privy council changes; election of Chairs; membership of governing bodies; and membership of academic boards**. While these proposals appear to be founded on the idea that more representative mechanisms are required than are currently available, it is not at all clear that their benefits would outweigh those of the mechanisms currently in operation – whereas **the proposed new legislation frequently risks creating confusion adding burden** to the governance process.
- Rather than risk destabilising the sector, we would therefore advocate **improvement through other means** – including continuous improvement, which would be appropriate given that, as the consultation concedes, current governance arrangements are largely working well.
- In particular, the **recently-developed Scottish Code for Good HE Governance is a condition of grant funding**. It has a direct bearing on governance and is a powerful lever over institutions' activities. Where further progress is required, it would be appropriate to first consider what can be achieved through the Code or through other, non-legislative means. In particular, if the Government is seeking to achieve improvements around student or staff representation, we would support other ways of achieving this.
- In places the proposals are made in a blanket fashion, **favouring consistency at the expense of diversity**. GuildHE starts from the principle that diversity in higher education institutions is a positive thing because it allows different institutions to cater for diverse

local needs and circumstances. We also note differences in the size and nature of Scotland's HE providers – which reflects and supports this diversity. This should be reflected in governance arrangements and has shaped our responses below.

Our responses to specific sections follow. We have tried to address all the consultation questions.

SECTION A – PRIVY COUNCIL

In general we feel the current mechanism for approving governance changes through the Privy Council works satisfactorily. We make the following comments on the consultation proposal:

- The efficiency gains are not clear, or certain. Were these functions to be transferred to a committee operating entirely within Scotland, it is not clear to us that this would, as the consultation document asserts, compress the timing of arrangements. Indeed, during any transition to new arrangements, there would probably be some inefficiency as the new processes bedded in.
- There is a strong risk of partisan decisions. While we appreciate that the proposal includes Parliamentary scrutiny, the proposed composition of the core committee is prone to party political influence.
- Consequently we would argue strongly for a better balance within the body which approves changes. We note that this is already present in the current Privy Council arrangements.
- Therefore we would argue that, if this proposal is taken forward, a better balance could be achieved by including some members (at least two) who were independent of the Scottish Government – and who had experience in higher education governance (or at least related areas).

Finally, in the interest of efficiency, we would add that if changes are to occur, this would be a useful opportunity to review whether there are any aspects of university governance currently overseen by Privy Council for which approval for decisions could be delegated to individual universities – most notably those which are part of everyday operations.

SECTION B – ACADEMIC FREEDOM

The current legal definition of 'academic freedom', found in the 2005 Act, states that "academic freedom includes freedom (within the law) to (a) hold and express opinion; (b) question and test established ideas and received wisdom; and (c) present controversial or unpopular points of view". The Scottish Code for Good HE Governance, which is a condition of grant funding, states that institutions' governing bodies should ensure academic freedom and compliance with relevant legislation.

On the basis of these arrangements, we agree with the consultation document that the current legislation "has served our institutions well". Moreover we are not aware of examples of where university staff are not free to encourage new ideas; indeed it could be argued that the "questioning and testing of established ideas and received wisdom" enshrined in the 2005 Act already covers this.

Therefore, while we do not disagree with the proposed extension of the existing definition, we would encourage further thinking on whether the existing legislation really does require extension.

If changes are to be made, we feel this is more straightforwardly done by amending the existing (2005) legislation.

SECTION C – ROLE OF PRINCIPALS

We do not agree with this proposal, because we feel it is covered by existing conditions imposed on universities. There is also no evidence of existing confusion around the title and roles of Principal.

It is therefore not clear what the proposed legislation around title would – or could – add or clarify in relation to existing arrangements.

The crucial requirement is to ensure that universities are accountable for public funds. As your consultation document points out, there is already clarity regarding accountability for public funds through the Financial Memorandum between universities and the Scottish Funding Council.

As your consultation document also points out, “the Code *requires* the governing body to adopt a Statement of Primary Responsibility which includes provisions relating to the appointment of the Principal as Chief Executive Officer” [our italics].

SECTION D – CHAIRING OF GOVERNING BODIES

We agree that a pool of candidates for the position of Chair of the governing body should be selected through an open, rigorous and transparent process, and that it should include open advertisement. We make the following observations here:

- This is already a part of the recently-developed Scottish Code for Good HE Governance, which is being introduced across the sector, and which is a condition of grant funding.
- On that basis, further legislation does not seem necessary or useful – and actually risks confusing the current arrangements which support an open and transparent process.

We also have serious concerns about the proposal to introduce an election process. We make the following observations:

- There is no guarantee that an elected Chair will improve university governance, or lead to better decision-making. The consultation document also provides no evidence that it will do so. The first concern in appointing a Chair of Governors must be to ensure effective governance and decision-making by institutions.
- If elections were introduced, one of the key ‘effectiveness benefits’ of the current system would be impossible to guarantee – namely that the governing body, because it selects the person to fill the chair (through a process which is already transparent, as mentioned above), recognises and has confidence in that individual’s ability and authority to carry out their role. This confidence and recognition is critical to the effective functioning of the governing body, and to its effective relationship with the institution. We are concerned that same could not be guaranteed under elections, while it is not clear what the counter-benefits are.
- The Scottish Code gives governing bodies the right – and the duty – to remove and replace an ineffective chair. The consultation document does not clarify or explore how that process could be squared with the electoral system.

- There is little evidence available from other areas where similar elections have been trialled – and none cited in the consultation document – that it drives up participation or engagement, or improves the diversity or quality of candidates.
- Therefore there is a strong risk that introducing an election process will add more to administrative burden than to transparency, visibility or access – thus defeating its own object.
- Much of the work of Scotland's universities and colleges has a commitment to equality and diversity (of staff and students) at its heart, and is having a real impact on diversity in higher education. We are confident that this also influences the considerations around equality and diversity which governing bodies make, including in relation to their own constitution and leadership. We would not wish to put this progress at risk – which may be the case given that the social capital which contributes to participation in voting is not evenly shared among the electorate.

Overall, we feel strongly that any benefits arising from consistency are likely to be outweighed by the drawbacks cited above.

We also have concerns about the possible negative unintended consequences of enshrining aspects of remuneration for Chairs in legislation. As with other elements of this section, we do not feel legislation is likely to lead to positive change.

SECTION E – MEMBERSHIP OF GOVERNING BODIES

We do not agree with the proposals as outlined regarding membership and composition of the governing body. We make the following observations:

- Diversity in representation is enshrined in the Scottish Code, and universities also already have statutory equality and diversity duties and strive within their own missions to be more representative. We support those arrangements, but we feel that this proposal would not add anything further to them. If the intention is to encourage further progress in this area, it could more constructively be done through good practice guidance around the Code.
- Issues relating to size of institution and/or governing body. The proposed de minimus number of representatives would create balance issues on smaller governing bodies. There may be sound, efficiency-related grounds for keeping a governing body small.
- Conflict of interest. This will be an issue in relation to trade union nominations, but may also apply to other roles which would be explicitly linked to the governance role through the proposed legislation. Trade union representatives' core duty is to represent the interests of their union's members. While this duty is good and proper and already influences institutions through the appropriate channels, the duty will inevitably conflict with their responsibilities as university governors, if they are elected or in any way selected to the governing body in order to represent the union. We cannot see a way around this conflict of interest, which would be a standing problem. The explicit and simultaneous link to both the union and the university would place the individual in an untenable position with respect to both parties. It would also affect the entire governing body since, as charities, university governors bear collective or corporate responsibility for the university's activities.
- Our argument here is simply that making this explicit link between governing body membership and organisations which interact with universities (such as unions) would be extremely problematic. We do not thereby imply that union representatives cannot sit on governing bodies – indeed some may already do so.

- Finally, we would note that not all staff are union members – thus the proposal risks disenfranchising some institutional staff where they would be more confident of representation through other governors.

While we see great risks in the proposal as outlined, we strongly support the principle that students and staff should be represented in universities and should be able to influence the university's affairs. We do not think that formally enshrining that representation through membership rules would necessarily be helpful, but we would strongly support other ways of enhancing this representation. As such we note the current channels through which they play an influential and constructive role in shaping university policy, and welcome efforts for continuous improvement through those channels.

F – COMPOSITION OF AND APPOINTMENT TO ACADEMIC BOARDS

We agree that it is important to provide a clear indication that academic board/senate has an important role in setting the tone of the institution and in providing input into institutional strategy, and in providing a genuine forum for engagement. We are not aware of any institution which thinks or acts otherwise.

However, we see more risks than benefits in addressing this through legislation.

On the consultation's first proposal, there is a strong risk that introducing proposed legislation to make the academic board the "final arbiter on academic matters" would *create* confusion, rather than clarify relationships:

- The term "academic matters" is difficult to define – we note that even the consultation document does not attempt to provide a definition – and if introduced, this proposal is likely to create unhelpful difficulties within institutions.
- While our understanding is that academic boards/senates do already have important roles and responsibilities in planning and oversight of the academic work of the university, there will be areas which require both governing body and academic board to consider the best way to reach decisions. These include some matters that appear to be purely academic may well have implications for the governing body as the employer – e.g. risk management or equality and diversity or health and safety.
- Consistency for its own sake is not always the best option: in a diverse sector, it is more important that arrangements are *appropriate* to the size and nature of individual institutions, than that they are the same everywhere. It is important that, where necessary, those required to make a judgment about the appropriateness of an institution's arrangements are able to make that judgment transparently and effectively. We believe this is currently the case (e.g. QAA review). But it would be unhelpful to mandate consistency across the diverse range of institutions.

On the second proposal, we do not think it would be helpful if, as proposed, "with the exception of the Principal and the Heads of School (or equivalent) who should attend *ex officio*, all other members of the academic board should be elected by the constituency that they represent". We feel this proposal is more likely to run counter to the consultation's intention of improving good university governance and management, for the following reasons:

- Current arrangements tend to involve a mixture of elected and appointed representatives. We feel strongly that this balance is appropriate, that it has been established for the right reasons with individual institutions, and that any changes would be a matter for the academic community itself in discussion with the governing body.

- There are also some key risks in mandating an entirely elected academic board: (a) that it could exclude key individuals whose roles are critical to institutional academic policy but who are often less visible at large within the institution – e.g. registrars or heads of libraries, and (b) that involving such individuals in election processes would introduce an additional burden on them, distracting from their core activities at the expense of the smooth running of the institution and its students.

On the third proposal, GuildHE's member institutions tend to be smaller institutions, for which the proposed cap of 120 places would be meaningless. Nevertheless, on principle we feel that it would be unhelpful to adopt a single rule around size – universities vary hugely in scale, that diversity is a good thing for a healthy higher education sector, academic boards should reflect the character and composition of each institution individually, and in this respect legislating for a single rule would run counter to the consultation's overall intentions around good governance.