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REGIONAL BOARD REPORT

Subject: College Good Governance: Consultation	**Purpose:** **For Approval** ☐ **For Discussion** ☒ **For Information** ☐
Prepared by: Tony Jakimciw	**Date:** 20 April 2017

Purpose: To seek members views on the College Good Governance Task Group (CGGTG) recommendations in order to agree a response to this.

Executive Summary:
The Scottish Government has published a consultation document seeking views on a number of recommendations of the CGGTG with a response deadline of 17 May 2017.

The recommendations could have a significant impact on board membership, recruitment and accountability and include:

- the possibility of remuneration for chairs of assigned colleges
- the possibility of an additional two staff members to be nominated by unions
- amending appointments guidance to make provision for highly regarded candidates for which there is no immediate position
- amend guidance in order to encourage the recruitment of board members with a demonstrable ability to work well as a team
- a requirement to advertise all board vacancies on the College Development Network (CDN) website for a minimum time period
- enhance ministerial powers to:
  - suspend board members (excluding the Principal) while they carry out consideration of removal
  - Include in removal orders ex-members who were on the board when there was a board failure, thus barring them from future board membership
  - direct college boards and whether this power be only limited to circumstances where they consider a board is not governing properly
- extending existing powers of SFC to attend and address board meetings to include committee meetings
- clarify that ministerial power to suspend Board members also applies to assigned colleges.

Recommendation:
Members discuss the recommendations and identify their response to the questions posed.

Previous Committee Approvals:
N/A

For publication ☒	**For publication with redactions** ☐	**Not for publication** ☐

Signed:

Author **Principal**

GOOD COLLEGE GOVERNANCE:

CONSULTATION PAPER

April 2017

Scottish Government
Riaghaltas na h-Alba
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GOOD COLLEGE GOVERNANCE: CONSULTATION PAPER
SECTION 1: INTRODUCTION

1.1 Colleges make a vital contribution to this Government's commitment to improving the lives and employability of all Scotland's people. Their effective governance is fundamental in supporting colleges to improve the life chances of their students and the performance of businesses.

1.2 This consultation paper takes forward, the commitments given in *Good College Governance: The Report of the Education Secretary's Task Group (March 2016)*[1] to consult on a range of matters arising from the Task Group's consideration of events at a few colleges in recent years to learn lessons to minimise the risks of governance failures in the future. Further detail about the Task Group's consideration is also included in *Good College Governance: Supporting Material to the Report of the Education Secretary's Task Group (March 2016)*[2].

1.3 A key element of recent reforms to the college sector has been to make significant improvements to the accountability of boards. This includes the new transparent appointment system for college sector boards, guidance for which is set out in *College Sector Board Appointments: 2014 Ministerial Guidance* (August 2014)[3].

Consultation Paper

This consultation paper seeks comments on:

- Recommendation 1 of the Good Governance Task Group Report (Section 2)
  - better arrangements are put in place to improve board member recruitment
- Recommendation 9 of the Good Governance Task Group Report (Section 3)
  - more sanctions are considered so that a wider range of measures is available, if necessary
- equality impact (Section 4)

1.4 A list of consultees is at **Annex A**.

1.5 Consultation is an essential part of the policy making process. It gives us the opportunity to receive your opinion and expertise on a proposed area of work. You can find all Scottish Government forthcoming, open and closed consultations online at https://consult.scotland.gov.uk/

[1] http://www.gov.scot/Resource/0049/00497229.pdf
[2] http://www.gov.scot/Resource/0049/00497230.pdf
[3] http://www.gov.scot/Topics/Education/post16reform/hefegovernance/CollegeSectorBoardAppointments2014

1.6 Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post. After a consultation is closed we publish all responses where we have been given permission to do so.

1.7 Responses are analysed and used as part of the policy making process, along with a range of other available information and evidence. Responses to this consultation will help to inform possible changes to legislation.

Deadline

1.8 **The consultation was published on 18 April 2017 and closes at midnight on 17 May 2017.**

How to Respond

1.9 You can respond to this consultation online, by email, or by post.

Respond Online

1.10 To respond online please use the Scottish Government's Consultation Hub. You can save and return to your response at any time while the consultation is open. But please ensure that your response is submitted before the consultation closes at midnight on **17 May 2017**. You will automatically be emailed a copy of your response after you submit it.

1.11 If you choose this method you will be directed to complete the Respondent Information Form. The Respondent Information Form lets us know how you wish your response to be handled, and in particular whether you are happy for your response to be made public.

Other Ways to Respond

1.12 If you prefer you can also submit a written response in hard copy to:

Fiona Macdonald
Colleges, Young Workforce and SFC Sponsorship Division
Scottish Government
6th Floor, Atlantic Quay
150 Broomielaw
Glasgow G2 8LU

Or, by email to FEMailbox@gov.scot

1.13 If you would like to submit your response by email or by post, please ensure that you complete the Respondent Information Form provided at **Annex B** and attach it alongside your response. The Respondent Information Form lets us know how you wish your response to be handled, and in particular whether you are happy for your response to be made public.

Next Steps

1.14 After the consultation has closed we will analyse all the responses received and use your feedback to help inform the development of the draft Diversity on Public Boards (Scotland) Bill. Where permission has been given, we will make all responses available to the public at https://consult.scotland.gov.uk/. The responses to the consultation and analysis will be published in Spring 2017.

Enquiries and complaints

1.15 If you have a query about the consultation process, or a complaint about how this consultation has been conducted you can send your query by email to Julia.McAteer@gov.scot, or by hard copy to:

Julia McAteer
Colleges, Young Workforce and SFC Sponsorship Division
6th Floor, Atlantic Quay
150 Broomielaw
Glasgow G2 8LU

References in this consultation paper

- "the 1992 Act" is the Further and Higher Education (Scotland) Act 1992.
- "the 2005 Act" is the Further and Higher Education (Scotland) Act 2005.

References to Acts are to the Acts as amended, including by the Post-16 Education (Scotland) Act 2013 ("the 2013 Act").

- An "incorporated college" is a college with a board of management under Part 1 of the 1992 Act.
- A "regional college board" is the board of management of an incorporated college designated by order under section 7A(1) of the 2005 Act as a regional college.
- A "regional strategic body" is a body listed in schedule 2A to the 2005 Act. The functions of a regional strategic body include appointing the chair and non-executive board members of assigned incorporated colleges.
- A "Regional Board" is a type of regional strategic body that is listed in Part 1 of schedule 2A to the 2005 Act. Unlike any other regional strategic body, the constitution of a Regional Board is set out in the 2005 Act.
- An "assigned incorporated college board" is the board of management of an incorporated college assigned to a regional strategic body by order under section 7C(1) of the 2005 Act.
- A "college sector board" is a board of either an incorporated college or a Regional Board.
- A "non-executive board member" is a member who is not the chair and who

does not otherwise hold a specific position on the board[4].

Section 2 - Good Governance Task Group Recommendation 1: better arrangements are put in place to improve board member recruitment
Remuneration of Assigned College Chairs

Recommendation 1(b) of Task Group report

Scottish Ministers will consult on

i) whether assigned college chairs should be remunerated

QUESTION 1: Should the Scottish Ministers have powers to determine a rate of remuneration for the chairs of assigned, incorporated colleges?

2.1 Regional college chairs are remunerated, however, the chairs of assigned colleges are not. This results in the chairs of some of Scotland's largest colleges not being remunerated. The time commitment required of all college chairs are significant. There are twenty incorporated colleges, of which eleven are regional colleges.

2.2 Legislation provides that the Scottish Ministers set the rate of remuneration[5] of regional college chairs, the terms and conditions of appointment of regional college chairs[6] and the maximum number of days to be paid (up to two days per week). There are three daily rates[7] for regional chairs depending on the size of the college. If the legislation were to be amended in relation to remuneration of assigned college chairs, Scottish Government would separately determine the relevant daily rate for assigned college chairs. The maximum time commitment to be remunerated would be for the relevant regional strategic body to determine, as this would be a matter set out in the terms of appointment determined by the regional strategic body[8].

2.3 This change would apply to incorporated colleges - those colleges that are governed by college legislation (i.e. the 1992 Act). .

Financial Assumptions

2.4 Assuming all nine assigned colleges had the middle daily rate (£265) and a maximum weekly time commitment of up to 1.5 days per week overall, the cost of this would be 52x1.5x265 = £20,670 per college, i.e. £186,030 in total. Like the other institutions, the costs of remunerating the chair would be borne by the institution.

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[4] i.e. is not a student or staff member; and in the case of a college board, is not the principal; and in the case of a Regional Board, is not the chair of an assigned college. In relation to the board of New College Lanarkshire the term also excludes the principal, chair and two staff members of South Lanarkshire College who are also members of the New College Lanarkshire board.
[5] Section 12(4A) of the 1992 Act.
[6] Paragraph 5(1)(a) of Schedule 2 to the 1992 Act.
[7] £200, £265 and £330.
[8] Paragraph 5(1)(c) of Schedule 2 to the 1992 Act.

Trade Union Nominees on Incorporated College Boards

Recommendation 1(b) of Task Group report

Scottish Ministers will consult on

ii) whether trade union nominees should join incorporated college boards and the future of elected staff members

QUESTION 2: Should legislation require two trade union nominees from recognised main unions for (1) teaching and (2) non-teaching staff to be members of a board of an incorporated college and Regional Board?

QUESTION 3: If so, should the nominees (1) be in addition to elected staff members (without any change to student member numbers); (2) be in addition to elected staff members (with an increase in student member numbers); or (3) replace elected staff members.

2.5 Since the incorporation of colleges in April 1993, incorporated college boards have been required to include a teaching staff member elected by teaching staff and a non-teaching staff member elected by non-teaching staff. This in contrast to recent legislation[9], which will at the latest from 2020, require the governing body of a higher education institution to include

a) two elected staff members;
b) one staff member nominated by the main recognised academic staff union; and
c) one staff member nominated by the main recognised support staff union.

2.6 Requiring two trade union nominees to join college boards would mean the minimum size of a board minimum must increase. At present, a regional college board must between 15-18 members[10] and an incorporated assigned college board must have between 13-18 members[11]. The provisions ensure that the chair and non-executives always form a majority of the members of a board[12]. Simply adding two trade union nominees would breach this. It could also mean half or more of members receive remuneration from the board[13], which would be an issue given incorporated colleges are charities.

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9 Section 10(1) of the Higher Education Governance (Scotland) Act 2016
10 Paragraph 3(1) of Schedule 2 to the 1992 Act.
11 Paragraph 3A(1) of Schedule 2 to the 1992 Act.
12 For a regional college those remunerated would be: chair, principal, two elected staff members, potentially two student members (if sabbaticals remunerated by college), and two staff trade union nominees, i.e. 8. Therefore the board minimum would have to be 17 to ensure a majority of non-remunerated members. The board minimum would also be 17 for an assigned incorporated college board, if legislation also required the remuneration of the college chair.
13 Section 67(3)(c) of the Charities and Trustee Investment (Scotland) Act 2005 requires that not more than half of the trustees of a charity are remunerated.

2.7 At present there generally is parity in the number of staff members (two) and student members (two). Requiring two further staff members nominated by trade unions would remove this parity.

2.8 One way to avoid increasing the size of the board would be to replace the elected staff members by trade union nominees.

2.9 As members of a college board (and, as such, as charity trustees), any trade union representative (as with all other members of a college board) would be required to act in the best interests of the college, as opposed to any individual constituency which nominated or elected them. However, there would be a role for such a representative to be the staff voice in decision-making.

2.10 Another are to consider is the impact any change would have on the board of New College Lanarkshire (NCL). The Lanarkshire Colleges Order 2014[14] provides that the NCL board has 19-22 members. This due to the NCL board having four staff members (2 NCL staff members and 2 South Lanarkshire College Board staff members). . Having teaching and non-teaching staff from both colleges would mean an additional four trade union nominees.

Options	Board size – Regional	Board size - Assigned[15]	Board size – New College Lanarkshire
1. No change	15-18	13-18	19-22
2. Two trade union nominees in addition to elected staff members	17-20	17-20	25-28[16] [if 4 TU nominees]
3. Two additional trade union nominees and total of four student members	21-24	21-24	29-32 [if 4 TU nominees]
4. Two trade union nominees to replace two elected staff members	15-18	13-18	19-22

2.11 The composition of the membership of a Regional Board[17] is similar to that of a regional college in that it requires two elected staff members (elected by relevant staff from assigned colleges). The Scottish Government would seek to mirror the spirit of any relevant changes to college legislation in the legislation for Regional Boards.

[14] S.S.I. 2014/250 http://www.legislation.gov.uk/ssi/2014/250/article/5/made
[15] Changes assume chair is remunerated.
[16] Issue here would be to ensure a majority of chair/non-exec had always formed a majority given the NCL board includes two college principals, two student board members and eight staff members (four elected; 4 nominated), i.e. 12, so 13 others needs to form a majority. No issues in terms half or more being remunerated as a number would be remunerated by South Lanarkshire College and not New College Lanarkshire directly.
[17] Paragraph 3(2) of schedule 2B to the 2005 Act.

Ministers' powers to issue guidance on appointments

2.12 Ministers have powers under paragraph 3C(1) of Schedule 2 to the 1992 Act to issue guidance, following consultation, to regional college boards and regional strategic bodies in relation to appointments to regional college boards and assigned incorporated college boards.

2.13 Regional college boards and regional strategic bodies must have regard to such guidance when appointing or extending the appointment of board members.

2.14 Ministers also have powers under paragraph 3(6) of schedule 2B to the 2005 Act to issue guidance, following consultation, to Regional Boards in relation to appointments to those boards. Regional Boards must have regard to such guidance when appointing non-executive board members or extending the appointment of board members.

2.15 Following consultation, we issued Ministerial guidance in August 2014 to underpin a new transparent appointment system to:

a) enhance public accountability;
b) have boards that are properly equipped to perform the role asked of them to achieve positive outcomes;
c) encourage participation from a wide and representative group of individuals; and
d) generate greater confidence in college governance arrangements.

2.16 The Task Group included two recommendations for Ministers to consult on amending the appointments guidance. The recommendations relate to consulting on provision in the guidance for highly regarded candidates for which there is no immediate position as well as for encouragement of the recruitment of board members with demonstrable ability to work well as a team.

2.17 Like the guidance issued in August 2014, any amended guidance following this consultation would be issued under paragraph 3C(1) of Schedule 2 to the 1992 Act and paragraph 3(6) of schedule 2B to the 2005 Actby the Scottish Ministers to:

- regional college boards in relation to the appointment of non-executive board members to those boards;
- Regional Boards[18] in relation to the appointment of non-executive board members to those boards; and
- regional strategic bodies in relation to the appointment of the chair and non-executive board members of assigned incorporated college boards.

Highly regarded candidates for which there is no immediate position as a non-executive board member

Recommendation 1(b) of Task Group report

Scottish Ministers will consult on

iii) amending appointments guidance to make provision for highly regarded candidates for which there is no immediate position

QUESTION 4: Should provision be made for highly regarded candidates for which there is no immediate position to be appointed without further open recruitment, along the lines proposed?

2.18 It has been put to us that the guidance should be more flexible by recognising that an open recruitment process may identify otherwise suitable candidates for which there is no immediate position. And that there should be a mechanism by which they can join a board without necessarily going through a further open recruitment process for non-executive board members. In line with the recommendation of the Task Group, we propose the following addition to the Ministerial guidance to facilitate this.

Regional College Boards

2.19 After paragraph 3.26, insert the following:

'Highly regarded candidates for which there is no immediate position'

3.26A A regional college board may decide not to follow the open recruitment process outlined in paragraph 3.25 if there is a suitable person able to be appointed who has been identified by the board as a highly regarded candidate within the previous 12 months.

3.26B A highly regarded candidate may be identified by the board following an open recruitment process outlined in paragraph 3.25 as a result of:

- a particularly strong pool of candidates to fill too few vacancies; or
- their skills, experience etc. not matching the particular needs of a vacancy, but the board envisage that the candidate would be well suited to another vacancy potentially arising within 12 months.

3.26C If a person is so identified, they should be informed that any potential future appointment for which they are suited would still require to be made by the board with the approval of its chair and the Scottish Ministers. The

college must also avoid suggesting that the board is fettering its ability to follow an open recruitment process for any future vacancy. This is something the board may still want to do, having considered, for example, equality issues.

3.26D The relevant committee should consider:

a) the suitability of a highly regarded candidate for any particular vacancy;
b) any equality issues that might arise from their appointment; and
c) whether in the circumstances it would be appropriate to recommend to the board their appointment without a further open recruitment process.

3.26E If the board and its chair judge that the person is suitable and want Scottish Ministers to approve such an appointment, Ministers require information set out in paragraph 3.39. Also, the independent person involved in the open recruitment process that identified the person as a highly regarded candidate, should provide the statement outlined in paragraph 3.40. Such a request is not exceptional and therefore does not require the prior notice outlined in paragraph 3.41.

<u>Regional Boards</u>

2.20 After paragraph 4.26, insert the following:

'Highly regarded candidates for which there is no immediate position'

4.26A A Regional Board may decide not to follow the open recruitment process outlined in paragraph 4.25 if there is a suitable person able to be appointed who has been identified by the board as a highly regarded candidate within the previous 12 months.

4.26B A highly regarded candidate may be identified by the Regional Board following an open recruitment process outlined in paragraph 4.25 as a result of:

- a particularly strong pool of candidates to fill too few vacancies; or
- their skills, experience etc. not matching the particular needs of a vacancy, but the board envisage that the candidate would be well suited to another vacancy potentially arising within 12 months.

4.26C If a person is so identified, they should be informed that any potential future appointment for which they are suited would still require to be made by the board with the approval of its chair and Scottish Ministers. The Regional Board must also avoid suggesting that the board is fettering its ability to follow an open recruitment process for any future vacancy. This is something the board may still want to do, having considered, for example, equality issues.

4.26D The relevant committee of the Regional Board should consider:

a) the suitability of a highly regarded candidate for any particular vacancy;

b) any equality issues that might arise from their appointment; and
c) whether in the circumstances it would be appropriate to recommend to the board their appointment without a further open recruitment process.

4.26E If the Regional Board and its chair judge that the person is suitable and want Scottish Ministers to approve such an appointment, the independent person involved in the open recruitment process that identified the person as a highly regarded candidate, should provide the statement outlined in paragraph 4.36. Such a request is not exceptional and therefore does not require the prior notice outlined in paragraph 4.37.

Assigned Incorporated College Boards

2.21 After paragraph 5.27, insert the following:

'Highly regarded candidates for which there is no immediate position'

5.27A A regional strategic body may decide not to follow the open recruitment process outlined in paragraph 5.26 if there is a suitable person able to be appointed as a non-executive member who has been identified by the regional strategic body as a highly regarded candidate within the previous 12 months.

5.27B A highly regarded candidate may be identified by the regional strategic body following an open recruitment process outlined in paragraph 5.26 as a result of:

- a particularly strong pool of candidates to fill too few vacancies; or
- their skills, experience etc. not matching the particular needs of a vacancy, but the regional strategic body envisage that the candidate would be well suited to another vacancy potentially arising within 12 months.

5.27C If a person is so identified, they should be informed that any potential future appointment for which they are suited would still require to be made by the regional strategic body. The regional strategic body must also avoid suggesting that it is fettering its ability to follow an open recruitment process for any future vacancy. This is something the regional strategic body may still want to do, having considered, for example, equality issues.

5.27D The relevant committee should consider:

a) the suitability of a highly regarded candidate for any particular vacancy;
b) any equality issues that might arise from their appointment; and
c) whether in the circumstances it would be appropriate to recommend to the regional strategic body their appointment without a further open recruitment process."

Recruitment of board members with demonstrable ability to work well as a team

Recommendation 1(b) of Task Group report

Scottish Ministers will consult on

iii) amending appointments guidance to make provision …. to encourage the recruitment of board members with demonstrable ability to work well as a team.

QUESTION 5 Should provision be made in relation to a proven ability to work well as a team?

Regional College Boards/Regional Boards/Assigned Incorporated Boards

Proposed Changes to Appointments Guidance

2.22 Insert before each subparagraph 3) in paragraph 3.20, paragraph 4.18 and paragraph 5.24:

‘2A) has proven an ability to work well as a team.

And’

Regional Boards: appointment of assigned incorporated college chair

Insert a new subparagraph after 5.22(3)(b):

‘(aa) an ability to work well as a team;’.

Advertising

Recommendation 1 (a)(ii) of Task Group report

Appointing bodies should advertise all board vacancies on CDN website (this may encourage more from college sector to consider applying).

QUESTION 6 Should appointing bodies advertise all board vacancies on CDN website?

2.23 It has also separately been put to us that it would be desirable for the guidance to include a minimum period for advertising positions to ensure such advertising was meaningful by giving sufficient time for people to put in an application.

Regional College Boards/Regional Boards/Assigned Incorporated College Boards

2.24 In paragraph 3.25(3) and paragraph 4.25(3) and paragraph 5.26(4) at end of each paragraph add

'and the College Development Network website. The closing date for applications should be at least two weeks from the date of advertising.'

and include a footnote after 'College Development Network website' http://www.scotlandscolleges.ac.uk/about-us/about-college-development-network/college-sector-vacancies/" the chair)."

Section 3 - Good Governance Task Group Recommendation 9: more sanctions are considered so that a wider range of measures is available, if necessary

Possible sanctions

Recommendation 9(a) of Task Group report

Scottish Ministers will consult on

i) Ministerial powers

i. to suspend any or all board members (except the principal) when considering a removal order

ii. bar people from college boards, even if they have since left the board

iii. to direct colleges in the face of a board not governing appropriately.

ii) requiring co-operation of assigned colleges in SFC reviews. Meantime, this should be given effect through the Financial Memorandum mechanisms.

iii) SFC's powers to attend and address meetings in failing to meet criteria to be publicly funded.

iv) SFC and regional strategic body powers to attend and address meetings relevant committee meetings.

v) extending the powers of the Auditor General for Scotland to conduct economy, efficiency and effectiveness examinations so that all publicly funded colleges can be subject to such examinations.

vi) clarifying that the powers of an appointing body's powers includes a power to suspend, in line with other appointments.

3.1 In its supporting material report the Task Group, explained:

Different mechanisms are in place to ensure accountability of boards and of individual board members. We consider that much more could be done with better use of existing powers – and we make recommendations on this, including in relation to SFC taking a more pro-active approach. However, it has become evident from recent governance failures that a wider range of sanctions and powers should be available to tackle any emerging problems. The very existence of enhanced sanctions/powers should help to 'focus minds' on ensuring that proper governance is always followed. However, it is important that relevant bodies have appropriate sanctions/powers to handle matters effectively.

3.2 The Task Group's review of powers and sanctions is at Annex B of its supporting material report.

Ministerial powers

Suspend any or all board members (except the principal) when considering a removal order

QUESTION 7: Should Ministers have powers to suspend any or all board members (except the principal) in circumstances where they consider this appropriate while they carry out further consideration as to whether a removal order is warranted?

3.3 Scottish Ministers currently have powers to remove by order any or all board members of an incorporated college board (except the principal) for board failure[19]. Board failure includes a serious breach or repeated breaches of terms and conditions of grant. It therefore includes non-compliance with the Scottish Public Finance Manual (SPFM), Financial Memorandum and Governance Code as compliance with them is a term and condition of grant. Board failure also includes failure to provide an appropriate standard of education or to discharge their duties properly as well as mismanagement of their financial or other affairs. The power of removal can also be used if Scottish Ministers are informed that a college no longer meets the criteria set out in section 7(2) of the 2005 Act for receipt of public funding. Scottish Ministers used their power to remove members from the Glasgow Clyde College Board in October 2015. Ministers have similar powers to remove members from a Regional Board[20]. Removed members are disqualified from appointment to the board of an incorporated college, a Regional Board and the Scottish Further and Higher Education Funding Council (SFC).

3.4 At Glasgow Clyde College, the College itself had powers, which the former chair exercised, to suspend the college principal while an investigation was carried out. Ministers generally have no such powers to suspend college board members that they are considering whether to remove by order from a board because of board failure. Under the current legislation in relation to college boards, if Scottish Ministers were to consider whether to remove board members by order, the board members would continue to be responsible for governing the college while Ministers investigated the circumstances.

3.5 Depending on the circumstances, it may not always be appropriate for board members to remain in office while Ministers investigate.

Bar people from boards, even if they have since left the board

QUESTION 8: Should Ministers have power, when making a removal order, to include someone who has since left the board but was a member during the period for which Ministers consider there was board failure with the effect that the person is disqualified from any other boards?

[19] Ministers' powers are set out in section 24 of the 1992 Act.
[20] Ministers' powers are set out in section 23Q of the 2005 Act.

3.6 The disqualification on appointment to the board of an incorporated college, a Regional Board and the SFC only applies where board members are removed from office by an order made by Ministers under the 1992 Act or the 2005 Act. So if a board member were to vacate office or resign from office before a removal order is made or comes into force, they would not be barred from such office as a consequence of that order. That board member may also have been equally responsible for the board failure as any members that Ministers ultimately determine to remove by order and arguably that member who had already left the board should then also be disqualified from future appointment to a college sector board.

Power to direct colleges in the face of a board not governing appropriately

QUESTION 9: Should Ministers have powers to direct (a) incorporated colleges and (b) Regional Boards?

QUESTION 10: If Ministers were to have such powers (1) should they be limited to circumstances where they consider a board is not governing appropriately? (2) should Ministers' powers be (a) in addition or (b) instead of the current power of direction that vests with regional strategic bodies?

3.7 When colleges were incorporated in 1993, Ministers had a wider power [21] to give boards of management directions of a general or specific character with regard to the discharge of the board's functions and the board was required to follow such directions. Ministers had this power until it was removed in 2006 [22] as a means of colleges retaining their charitable status without being made exempt from the Ministerial control aspect of the charity test. Despite this, the Office of the Scottish Charity Regulator (OSCR) gave a very clear sign in 2007 that the constitutions of incorporated colleges continued not to meet the requirements of charitable status as Ministers still had other powers to direct or otherwise control their activities. In 2008 Ministers (by now a different administration following an election the previous year) decided that the other Ministerial controls should be kept. The part of the test requiring that charities are not directed or controlled by Ministers was then disapplied in relation to colleges to ensure that they did not fail the charity test because of Ministerial controls[23]. It is proposed that Ministers should have a power to direct colleges when they consider that a college board is not governing appropriately, so this would be a narrower power than the previous power in the 1992 Act.

3.8 Given that incorporated colleges are now exempt from the Ministerial controls aspect of the charity test, Ministers could have a power of direction without this affecting the colleges' charitable status as this part of the test would continue not to apply to colleges.

3.9 Two other things have changed in the intervening period:

[21] Section 21 of the 1992 Act.
[22] Further and Higher Education (Scotland) Act 1992 Modification Order 2006
[23] Charity Test (Specified Bodies) (Scotland) Order 2008

1) Incorporated colleges are now classified as public bodies for the purposes of the Office of National Statistics. One consequence of this is that incorporated colleges are now required to comply with the Scottish Public Finance Manual, as a term and condition of grant. They are therefore more clearly public bodies for which Ministers have a direct interest.

2) As a result of changes introduced by the 2013 Act, regional strategic bodies have a power of direction in relation to incorporated colleges assigned to them. So a power of direction already exists in relation to nine of the twenty incorporated colleges. One potential use of such power by a regional strategic body could be to require an assigned incorporated college board to take action college board members may consider, in their role as charity trustees, is not in the best interests of the college as a charity (whether or not they see the action as in the best interests of the region overall). The college board would be required to comply with any direction from the regional strategic body and board members would not be in breach of their trustee duties in terms of the Charities and Trustee Investment (Scotland) Act 2005 .[24] Any Ministerial power could be in addition to the direction-making powers of regional strategic bodies. It could also potentially replace them. If regional strategic bodies were to lose their power of direction, given it is proposed the Ministers' powers would be narrower, Ministerial direction could not be used to ensure regional interests are met in the way described here.

3.10 It should also be noted that OSCR has a power to issue directions to require colleges that are charities to stop taking an action in specific circumstances.

3.11 Where there is financial mismanagement at a college or regional strategic body, Ministers have powers to direct the SFC to provide financial support to it. This could involve requiring the SFC to require a regional strategic body to provide financial support to an assigned college[25].

3.12 Ministers' powers in relation to incorporated colleges are generally similar to their powers in relation to Regional Boards. Ministers have for example powers to remove board members from an incorporated college and a Regional Board.

3.13 Powers of direction are generally viewed as an ultimate deterrent: their utility largely deriving from the fact they exist and that bodies will modify their behaviour as a result. It is possible that the existence of such a power might have previously focussed minds in relation to matters such as severance, as such a power might have provided a means for Ministers to have stepped in decisively to ensure that decisions were made appropriately. It is possible that limiting the use of any direction-making power to a board, that in Ministers' view is not governing appropriately, may in practice mean that the power cannot be used with the speed that may, when necessary, be required.

[24] See the Scottish Government letter at http://www.parliament.scot/S4_EducationandCultureCommittee/Bills/Scottish_Government_letter_to_John_Henderson_Colleges_Scotland_6_March_2013.pdf for a fuller explanation.
[25] Section 25 of the 2005 Act.

3.14 As public bodies, it could be viewed as right and proper that ultimately the democratic will of Ministers can be asserted where it is absolutely necessary to do so, not least as this may protect the reputation of the sector more generally in the face of a board not governing appropriately

Requiring co-operation of assigned colleges in SFC reviews

QUESTION 11: Should assigned colleges be required by legislation to co-operate with a SFC review under section 7C(7) of the 2005 Act?

3.15 There is a range of criteria that must be met for a college or university to remain eligible in principle to be publicly funded. The criteria are set out in section 7(2) of the 2005 Act. It is for the SFC to consider whether every college has suitable provision to meet the criteria set out in section 7(2). It has this role whether or not it or a regional strategic body funds a college.[26]

3.16 The SFC has used its powers once under section 7C(7) of the 2005 Act to review whether a college continued to meet the 7(2) criteria. However, the college was still funded by the SFC at the time of the review. And it has raised the question as to whether co-operation with the review may be more difficult to obtain in relation to a college which is not directly funded by the SFC. Given the legislation enables the SFC to carry out a review of an assigned college whether or not the SFC directly funds it, there should be no doubt that the College should be required to co-operate fully with such a review. The Task Group recommended that, as an interim measure, a requirement should be placed on an assigned college through the Financial Memorandum process (i.e. it should be a condition of grant to co-operate with such a review), and that longer-term this could be a legislative requirement.

SFC powers to attend and address meetings
SFC and regional strategic body powers to attend and address relevant committee meetings

QUESTION 12: Should SFC have powers to attend and address meetings if it has concerns about an assigned college's ability to meet the criteria set out in section 7(2) of the 2005 Act?

QUESTION 13: Should the existing powers of the SFC and regional strategic bodies to attend and address meetings of a governing body be extended to include relevant committee meetings?

3.17 A member of the SFC Board has a right to attend and address a meeting of a college board or regional strategic body if SFC is concerned about the financial

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26 An "incorporated college" is a college with a board of management under Part 1 of the 1992 Act.

A "regional college board" is the board of management of an incorporated college designated by order under section 7A(1) of the 2005 Act as a regional college.

A "regional strategic body" is a body listed in schedule 2A to the 2005 Act. The functions of a regional strategic body include appointing the chair and non-executive board members of assigned incorporated colleges.

An "assigned incorporated college board" is the board of management of an incorporated college assigned to a regional strategic body by order under section 7C(1) of the 2005 Act.

support it provides to that college or regional strategic body[27]. Regional strategic bodies have a similar right to attend and address college board meetings in relation to financial support which they provide to their assigned colleges[28].

3.18 Going forward, it is possible that the SFC may have concerns about whether an assigned college (i.e. not directly funded by it) still has suitable provision to meet the criteria set out in section 7(2) of the 2005 Act.

3.19 It is also conceivable that the SFC and/or regional strategic body may wish to address a meeting of a committee set up by either a college board or a regional strategic body because of its concerns. At the moment there are no powers to attend or address committee meetings.

Role of Auditor General for Scotland: economy, efficiency and effectiveness examinations

QUESTION 14: Should the powers of the Auditor General for Scotland to conduct economy, efficiency and effectiveness examinations be extended to include all relevant non-incorporated colleges?

3.20 The Auditor Scotland for Scotland (AGS) is responsible for auditing the accounts of incorporated colleges and Regional Boards[29]. The AGS also has powers to conduct economy, efficiency and effectiveness examinations of incorporated colleges, higher education institutions and the three regional strategic bodies[30]. The Accounts Commission for Scotland has similar powers in relation to local authorities, which include the two local authority run colleges (Orkney and Shetland Colleges).

3.21 However, the AGS currently has no such power in relation to three non-incorporated colleges[31] that receive public funds directly from either the SFC or a regional strategic body. The Task Group found this is incongruous.

Powers of persons to appoint board members to suspend those board members

QUESTION 15: Should legislation be clear that the power of a person or body to appoint college board members includes a power to suspend any board member that they have appointed?

3.22 As a result of section 5 of the Interpretation and Legislative Reform (Scotland) Act 2010, powers in an Act of the Scottish Parliament to appoint a person, expressly include a power to suspend them. Therefore it is clear that Ministers' powers to appoint someone to a Regional Board include a power to suspend them, as that power is contained in the 2005 Act which is an Act of the Scottish Parliament. However, most college sector appointments are made under the 1992 Act. This Act

[27] Section 16 of the 2005 Act.
[28] Section 23J of the 2005 Act.
[29] One Regional Board has been established – the Glasgow Colleges' Regional Board.
[30] as one is an incorporated college, one is a Regional College and one is a higher education institution.
[31] Newbattle Abbey College, Sabhal Mòr Ostaig and West Highland College UHI.

is not an Act of the Scottish Parliament, so it is less evident that the power of a person or body to appoint college board members under the 1992 Act includes a power subsequently to suspend a board member whom that person or body has appointed. Assigned incorporated colleges board include a chair appointed by the regional strategic body and non-executive board members appointed by the regional strategic body.

3.23 The Task Group considered there to be no reason why the powers should be different in this regard: college sector appointments should be in line with other appointments made under Scottish legislation.

SECTION 4: EQUALITY IMPACT

QUESTION 16: We should welcome comments on whether the matters covered in the consultation paper raise any equalities issues that require to be addressed with respect to age, disability, gender reassignment, pregnancy and maternity, ethnicity, religion or belief, sex or sexual orientation.

4.1 Given that the appointment of a highly regarded candidate may in certain circumstances have an adverse effect on a board's gender balance, the proposed supplementary guidance makes clear that their appointment should not be automatic as equality issues must still be considered.

ANNEX A

CONSULTEES

All post-16 education bodies that are colleges – principals and chairs
All regional strategic bodies
All local authorities – chief executives
All University of the Highlands and Islands academic partners
All students' associations of post-16 education bodies that are colleges
Association of Scottish Chambers of Commerce
Capability Scotland
Community Learning and Development Standards Council for Scotland
Close the Gap
Colleges Development Network
Colleges Scotland
Commissioner for Ethical Standards in Public Life in Scotland
Confederation of British Industry Scotland
Convention of Scottish Local Authorities
Education and Culture Committee
Educational Institute of Scotland
Engender
Equality and Human Rights Commission
Equality Challenge Unit
Equality Network
Federation of Small Businesses
GMB
Independent Living
Highlands and Islands Enterprise
Inclusion Scotland
Institute of Directors
Linking Education and Disability Scotland
National Union of Students Scotland
Office of the Scottish Charity Regulator
Scottish Council for Development and Industry
Scottish Council for Voluntary Organisations
Scottish Disability Equality Forum
Scottish Enterprise
Scottish Funding Council
Scottish Trades Union Congress
Scottish Qualifications Authority
Scottish Women's Convention
Scottish Youth Parliament
Sector Skills Alliance Scotland
Skills Development Scotland
Society of Local Authority Chief Executives and Senior Managers
UNISON
Unite the Union
Universities Scotland
Volunteer Development Scotland
Young Enterprise Scotland

ANNEX B

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Respondent Information Form

Please note this form **must** be completed and returned with your response.

Are you responding as an individual or an organisation?

☐ Individual

☐ Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

☐ Publish response with name

☐ Publish response only (without name)

☐ Do not publish response

Information for organisations:

The option 'Publish response only (without name) is available for individual respondents only If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

☐ Yes

☐ No

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Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78652-932-9 (web only)

Published by The Scottish Government, April 2017

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS264550 (04/17)