



The Governance
Institute

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Ms F Macdonald
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Via email

Dear Ms MacDonald,

Good College Governance: Consultation Paper

On behalf of ICSA: The Governance Institute I am pleased to provide feedback on the consultation on good college governance.

ICSA: The Governance Institute is the professional body for governance. We have members in all sectors and are required by our Royal Charter to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With 125 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and governance. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. Our members' wealth of expertise and experience of academic institutions, and their detailed understanding of education, charity and company legislation, regulation and governance, has informed our submission.



Specific questions

Q1. Should the Scottish Ministers have powers to determine a rate of remuneration for the chairs of assigned, incorporated colleges?

It is accepted that being chair of any organisation can be an onerous duty and take up more time than generally anticipated before performing the role. It is one reason why remuneration may be seen as an acceptable approach to attract and retain appropriately skilled, knowledgeable and committed individuals to perform the role. However, research in other sectors (particularly social housing) has not demonstrated a causal link between paying board members and improved governance.

Any powers to remunerate 'assigned college' chairs should be exercised in association with due diligence and regular review. ICOSA accepts that in some circumstances it will be necessary and appropriate to remunerate a chair, especially where the college is facing rapid expansion or more adverse conditions that require the attention of the chair. Where remuneration is provided, the college should be required to regularly review the conditions and establish whether the need for ongoing remuneration is required and in the best interests of the college, its students and wider stakeholder group. Regular review will ensure that limited resources are driving continuous improvement at the college and are not merely a reward for 'business as usual'. In addition, the chair's performance should be regularly reviewed and remuneration aligned to that performance.

A requirement to regularly review the remuneration of the chair, and the circumstances prompting the proposal, would enable charity law sensitivities to be considered while not undermining the voluntary principle of the sector. A strong business case for remunerating the chair should be presented in all cases, and a blanket permission with no further oversight should be avoided.

Q2. Should legislation require two trade union nominees from recognised main unions for 1) teaching and 2) non-teaching staff to be members of an incorporated college and Regional Board?

Q3. 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.

Whatever changes are made, great care should be taken to ensure that there is a majority of people on the college board who are suitably independent and free of any conflicts of interests or loyalty. It is absolutely imperative, for the best interests of the college and its students, and for facilitating sound decision making that there is a majority of non-executive members who can continue to make decisions in line with quoracy requirements when conflicted members are recused.

Due consideration should also be given to ensuring that boards do not expand to such a size that they become unwieldy and hinder constructive challenge and robust decision making. In other sectors, the maximum size is generally deemed to be no larger than 12 members.

A good induction and ongoing development will remind individuals of their legal duties and assist them in avoiding and managing any real or perceived conflicts. It is not uncommon, however, for those members elected or nominated from a particular group of stakeholders to be inclined to think that their role is to

represent that particular group rather than all beneficiaries. Additional governance arrangements might therefore be required to assure interested parties that decisions are made in accordance with the needs of all, not just a particular stakeholder group, such as policies and procedures for conflicts of interests and loyalties and public declarations.

While differing perspectives and experiences of the college and its activities are useful for decision making, the board is required to make decisions in the best interests of the college and act independently. An alternative option to ensure the voices of students, staff and other stakeholders are formally considered and responded to could be to introduce an advisory council. This would enable the board to remain a reasonable size, while also having access to stakeholder experiences without undermining the independence and robustness of decision making.

Q4. 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?

ICSA would urge against such a move as it could undermine attempts to demonstrate that board positions are filled according to an open, fair and transparent process that looks to appoint on transparent criteria. It may be that a 'highly regarded' candidate is identified, but that there is no suitable position available. However, in 12 months' time an open recruitment process may reveal additional candidates with an equal or better pedigree and ability to contribute to the college. Furthermore, the needs of the college may have changed and alternative skills, knowledge and experience may be required by the board.

Such a proposal appears to undermine the overarching commitment to open, fair and transparent recruitment. If a candidate narrowly misses out on an appointment, there are other options available to keeping the individual interested in the college and involved in a less formal role until open recruitment is commenced and the individual invited to re-apply, but with no guarantee of selection.

Q5. Should provision be made in relation to a proven ability to work well as a team?

Expertise, skills, knowledge and experience are all key to effective board members, but for the board collectively to work well requires team work. Recent governance failures in the UK, and abroad, have highlighted the importance of diversity in the boardroom. Diversity should be interpreted in its widest sense to incorporate visible and invisible differences; such as personality and neuro-diversity. As such, it is not unreasonable to require candidates to demonstrate previous ability and experience of working as a team. However, in the drive for team players, the power of an 'awkward' board member should not be overlooked for their ability to challenge and prevent 'group think'. In governance terms, the challenging board member with constructive and thoughtful contributions can be the grit in the oyster that builds the pearl.

Q6. Should appointing bodies advertise all board vacancies on CDN website?

All appointments should be made in accordance with a fair, formal and transparent process. Advertising should be duly broad to attract a range of diverse candidates. While it may be desirable for a college to recruit a specific type of individual, due care should be given to ensure that the recruitment process does

not fall foul of equalities legislation. All successful candidates should be able to demonstrably meet the criteria detailed in the application packs, aligned to the strategic plan of the college.

Q7. 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 considerations as to whether a removal order is warranted?

Q8. 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?

Any such powers should be balanced with the values of jurisprudence and rehabilitation. Further information is required as to what counter powers will be available for the accused to balance any additional powers of the State to deny individuals to volunteer. Where a criminal act has taken place, and the individual has been convicted, the principles of rehabilitation would apply. Similar courtesies should apply to those that have not been convicted of a crime but otherwise found guilty of wrongdoing, mismanagement or malfeasance.

Q9. Should Ministers have powers to direct a) incorporated colleges and b) regional boards?

Q10. 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 in regional strategic bodies?

Acknowledging the disapplication of the charities test for colleges, with regard to Ministerial direction, it does appear to be unduly heavy handed for both the regional strategic bodies and Ministers to have powers of direction. A streamlined approach to the use of powers would be more appropriate, with a clearer understanding of the role of each party and their respective powers. Undue bureaucracy and overlapping powers are unhelpful and can add to confusion and misunderstanding. For good governance to flourish a more straightforward and clear approach would be beneficial.

Q11. Should assigned colleges be required by legislation to co-operate with a SFC review under section 7C(7) of the 2005 Act?

Unless there is a weight of evidence to suggest that conditions within funding arrangements to co-operate with SFC reviews are being ignored, it might be more proportionate to deal with the problem within funding agreements rather than legislation.

Q12. Should SFC have powers to attend and address meetings if it has concerns about an assigned college's ability to meet criteria set out in section 7(2) of the 2005 Act?

Q13. 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?

There is a fine balance to be had in achieving an appropriate degree of oversight and assurance that public funds are being used effectively, efficiently and economically and permitting the board to make

decisions in the best interests of the college. It is unclear as to whether the proposed powers unduly undermine the authority of the board, especially where powers of direction can be applied.

Auditors and other external reviewers of the governance, financial and academic performance of the college are likely to provide sufficient independent insight for the board, and external regulators, to take action in accordance with strongly worded communications from auditors, SFC or regional strategic bodies (RSB). The board should not be denied the opportunity to discuss their response and agree actions without the presence of external parties present. Board to SFC or RSB meetings are always possible and may be better at achieving the intended outcome without compromising the integrity of the college's governance arrangements.

Q14. 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?

Where a college is deemed to be a public body as a result of their funding arrangements, it does seem incongruous that they would not be subject to the appropriate oversight of the Auditor General for Scotland.

Q15. 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?

It would be beneficial for the independence of the board to be able to decide whether to suspend an individual in the first instance, in accordance with the college's constitution and internal regulations, policies and procedures. A back stop power for others to suspend those they appoint, might have some advantages, so long as the power is appropriately balanced with a right of reply and appeal for the suspended person.

Q16. 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.

No other comments in addition to those made above.

I trust the above comments are helpful to your consultation. Should you require any clarification or have questions, please do not hesitate to contact me directly.

Yours sincerely,

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