

Board Meeting

Date of Meeting	Monday 11 August 2014
Paper Title	Effective Communications and Relationships Report
Agenda Item	11
Paper Number	BM2-J
Responsible Officer	Julia Henderson
Status	Disclosable
Action	For discussion

1. Report Purpose

1.1 To propose a framework for managing relationships, joint working arrangements and communications between the GCRB and its assigned colleges.

2. Recommendations

2.1 The Board recommends that this framework is developed with the assigned colleges and that a revised version is presented at the next meeting of the Board.

3. Background Rationale

3.1 Effective and healthy relations between the Glasgow Colleges' Regional Board and the assigned colleges are critical to the delivery of the Government's ambitions for college regionalisation. It is therefore crucial that we act quickly and collaboratively to get them right, whilst acknowledging that we need to retain some flexibility to learn and evolve in an entirely new and unique governance environment.

3.2 Reports commissioned by Glasgow Clyde College from Roger Mullin and Brodies Solicitors and kindly shared with the Chair are attached as appendices 3 and 4 to this report for the Board's information and to supplement this report. From Roger Mullin's report, Making Regional Arrangements Work, June 2014, appendix 3, there is a shared view that:

"Some form of Framework or MOU (or both) needs to be developed to clarify joint working arrangements".

4. Framework References

4.1 In defining relationships there are (or will shortly be in the case of documents listed at 2, 3 and 4 below) clear reference points on which to build an MOU or a Framework to further define and govern working relationships:

1. The Further and Higher Education (Scotland) Act 2005 as amended by the Post 16 Education Act 2013;
2. Ministerial Guidance on College Sector Appointments;
3. The Financial Memorandum between the Regional Strategic Body and Assigned Colleges (FM);
4. The Code of Good Governance for Colleges;
5. The Scottish Public Finance Manual (SPFM).

4.2 Whilst the legislation sets out clear roles and responsibilities for the GCRB, it is agreed that this alone is not sufficient to provide structure and clarity for joint working relationships. The Financial Memorandum (FM), which is currently being drafted by the Scottish Funding Council, should help significantly to provide further clarity in relation to the formal relationship between the GCRB and the assigned colleges. It will cover key issues such as administration and allocation of funding, respective responsibilities, accountabilities, conduct and expectations. It will set out levels of delegated financial authority and approval of derogations from that authority. The Guidance on College Sector Appointments undoubtedly provides clarity though the detail around delegation of authority for assigned Board appointments will need to be agreed. The Code of Good Governance will set out the expected principles and standards of governance for Colleges who will be required to comply as a condition of the FM. The SPFM provides guidance on the proper handling and reporting of public funds.

4.3 There is a very clear desire to minimize operational staffing costs for the GCRB. Roger Mullin's report refers to there being an agreement in principle amongst all parties of the desire to maximize funds available for colleges and education. This could be achieved via shared working arrangements with the colleges to access support and expertise from their staff. However, such arrangements will need to be carefully crafted to ensure that the GCRB is able to carry out its legislative functions properly, efficiently and effectively, to preserve its independence and to access independent advice and expertise where necessary.

4.4 Experience shows that above all else trust and mutual respect must underpin effective relations; no framework or MOU alone can deliver success, though they should provide a structure and clarity upon which to build relationships. Roger Mullin set this out clearly in his report:

“It was very evident, and unsurprising, that at this early stage in developments there were a number tensions evident in discussions. Perhaps because of the newness of roles and responsibilities, and the lack of clarity in some areas, two key aspects of culture need further strengthening. First, mutual trust and secondly mutual respect.”

5. Methodology

5.1 It is proposed that we use the framework at appendix 1 as the starting point for a conversation between the GCRB and the colleges to work towards developing a mutual understanding of respective roles and to promote effective relationships. The reference documents listed on page 2 above will form key pillars on top of which we can then build a jointly agreed ‘Regional Collaboration Framework’ (RCF), which should be a living document, flexible enough to evolve over time and to respond to the inevitable changing needs and priorities of this new regional governance structure.

5.2 There are four suggested themes:

- 1. Governance and Accountability**
- 2. Strategic Approach**
- 3. Financial and Performance Management**
- 4. Communication and Relationships**

5.3 There are a range of suggested objectives which sit under these themes:

Theme 1: Governance and Accountability:

- The overall roles and responsibilities of the GCRB and the assigned colleges are clear, well understood by all and updated as required;
- There are effective, efficient and productive joint working arrangements to support the statutory functions of the GCRB and its staff;
- The governance structures are aligned;
- The GCRB and the assigned colleges have the same expectations about the nature of their respective roles and their relationships with each other.

Theme 2: Strategic Approach:

- There is clear alignment between the GCRB strategic priorities and the assigned Colleges’ priorities;
- The Colleges are responsible for delivery of operational strategic priorities;
- There is a shared understanding of the Region’s strategic priorities.

Theme 3: Financial and Performance Management:

- Proper handling and reporting of public funds;
- Clear, transparent and reliable information flows;

- Stable and predictable performance management framework.

Theme 4: Communication and Relationships:

- Two way information flows;
- Clarity and consistency;
- Common understanding and messaging in relation to public positioning;
- Potentially sensitive issues are raised in advance to allow discussion;
- Mutual respect and understanding;
- Appropriate communication channels are agreed.

5.4 Thereafter there is a list of more immediate actions which are either underway or shortly could be underway. Finally there are suggested areas which would likely benefit from discussion and development within the RCF.

5.5 Appendix 1 is simply a best analysis from one perspective and should be developed, pulled apart and reassembled with expert input from colleagues across the Colleges.

6. Risk Analysis

6.1 The absence of effective relations between the Board and its assigned colleges could undermine the success of Regional governance and the achievement of the Government's ambitions for Glasgow and its students.

7. Legal Implications

7.1 A key driver of the framework is to ensure compliance with all relevant legislation and fulfillment of contractual obligations by all parties.

8. Financial Implications

8.1 No immediate cost implications.

APPENDIX 1

Theme 1 – Governance and Accountability	
Clarity on roles, responsibilities and expected behaviours Shared and managed expectations	
Objectives	The overall roles and responsibilities of the GCRB and the assigned colleges are clear, well understood by all and updated as required
	There are effective, efficient and productive joint working arrangements to support the statutory functions of the GCRB and its staff
	The governance structures are aligned
	The GCRB and the assigned colleges have the same expectations about the nature of their respective roles and their relationships with each other
Key reference documents (from the list on page 2)	1, 2, 3, 4 and 5
Short terms actions	Agree the Financial Memorandum governing the formal relationship between the GCRB and the assigned colleges
	Agree a review period for the Financial Memorandum
	Ensure that there is a clear escalation process within the FM
	Arrangements for providing staffing resource and expertise to the GCRB from the assigned colleges
	Adopt the Government Guidance on Appointment of Board Members (when issued) and agree operational practices and delegations in relation to the appointment of assigned college board members
	Arrangements in relation to delivery of the ROA to supplement those in the FM
Additional areas where clarity required within the RCF	Ensure that all Board Members and Staff understand their responsibilities and that this is well communicated within Colleges
	Further detail in relation to information flow (to supplement the FM) and sharing of data (as per the Brodies June 2014 report)

Theme 2 – Strategic Approach

Clarity on the strategic approach of the GCRB

Objectives	There is clear alignment between the GCRB strategic priorities and the assigned Colleges' priorities
	That the Colleges are responsible for delivery of operational strategic priorities
	There is a shared understanding of the Region's strategic priorities
Key reference documents (from the list on page 2)	1 (section 23E and F – duty to secure and plan coherent provision), 3 and 4
Short terms actions	GCRB to develop and agree its strategic plan (Colleges to support this process through production of their Strategic Intentions)
Additional areas where clarity required within the RCF	Arrangements to ensure clarity of the Board's strategic objectives and thinking and communication of these objectives throughout the Region at all levels
	Arrangements to ensure that staff are aware of what the strategic objectives mean for them and what they should do where projects are cross regional
	Arrangements for reporting progress on strategic priorities to the Board from the Colleges
	Agreement on the interface between and respective roles in local and regional policy making
	Arrangements to ensure joint working on projects of strategic importance

Theme 3 - Financial and Performance Management

Proper handling and reporting of public funds
 Clear, transparent and reliable information flows
 Stable and predictable performance management framework

Objectives	Compliance with the SPFM
	The GCRB (and assigned college Boards) have access to timely and reliable data
	Clarity on data requirements for the GCRB
	Data requests are proportionate and duplication in collection is avoided
	Any personal data sharing is compliant with the law
Key reference documents (from the list on page 2)	1, 3 and 5
Short term actions	Agree key data requests
Additional areas where clarity required within the RCF	Process for allocation of funds from GCRB to assigned colleges (where further detail required to supplement the FM)
	Process for sharing data – both a standardised process for routine data and for ad hoc data
	Process for publishing data and complying proactively with FOISA
	Process for data quality assurance

Theme 4 - Communication and Relationships

Relationships between the GCRB and the assigned colleges should be open, honest and constructive

Objectives	Two way information flows
	Clarity and consistency
	Common understanding and messaging in relation to public positioning
	Potentially sensitive issues are raised in advance to allow discussion
	Mutual respect and understanding
	Appropriate communication channels are agreed
Key reference documents (from the list on page 2)	1, 3 and 4
Short term actions	Agree position in relation to the attendance of Principals at the Board
	Agree arrangements for a 'regional joint executive group' or similar - to implement the Board's strategic priorities
Additional areas where clarity required within the RCF	Agree clear and consistent communications protocol to achieve the objectives set out above

SW/AG/0065

27 June 2014

Right Hon Henry McLeish
Chair
Glasgow Colleges Regional Board
Glasgow Caledonian University
70 Cowcaddens Road
GLASGOW
G4 0BA

Dear Henry

EFFECT OF REGIONAL LEGISLATION ON THE ACTIVITIES OF ASSIGNED COLLEGES

As you are aware the Board of Management of Glasgow Clyde commissioned an exercise in due diligence to ensure the effects of the Post-16 Legislation would not unintentionally adversely impact upon the activities of the College.

In support of the existing good relationships which the three Glasgow colleges enjoy, the decision was taken to seek the full involvement of City of Glasgow College and Glasgow Kelvin College in both elements of this exercise, namely the consideration of the new legislation and the early identification of areas which might result in unhelpful tension, with the intent of identifying pragmatic solutions before any difficulties emerge. Brodies provided the legal opinion and Roger Mullin acted as our independent consultant in relation to developing recommendations for pre-emptive action if such areas arose.

On Wednesday evening the Chairs, Principals and senior staff from the three colleges attended a briefing by Brodies and Roger Mullin which provided an opportunity to fully discuss a number of issues raised during the exercise. I have asked Brodies to incorporate into their draft report some of the issues raised during the discussion and once this has been completed I shall send to you the reports of both Brodies and Roger Mullin.

I think I speak on behalf of all those present at the briefing when I say we found the session extremely helpful and provided some clear recommendations and actions for ensuring that the work of the Regional Strategic Board and Assigned Colleges goes forward in harmony to the benefit of the people of Glasgow and beyond.

Susan H Walsh - Principal and CEO

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27 June 2014

Right Hon Henry McLeish

I look forward to sharing the reports with you in the very near future.

Yours sincerely



Mark Toma

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Making Regional Arrangements Work

Preface

1. This is an independent report from Roger Mullin for Glasgow Clyde College. The report does not offer any legal advice. That is for others to provide. Any errors of reporting or interpretation are entirely the responsibility of Roger Mullin. Thanks are due to all those from Glasgow Regional Board, the soon to be assigned colleges, the Scottish Funding Council, the Scottish Government and other individuals interviewed in the course of this study.

Background

2. Glasgow Clyde College invited Roger Mullin to conduct a review of prospective working arrangement involving the assigned colleges and Glasgow Regional Board. This was a parallel study, alongside a legal review of legislation. It was to take account of the recently enacted legislation and early progress in establishing practical arrangements to make the governance arrangements work.
 3. All of those with whom I held discussions have a desire to make matters work well in the interest of the region's learners. There was also a clear desire to ensure high standards of joint working. The task now is to ensure that positive attitudes are put into practice.
 4. As the study progressed, it became clear a significant number of questions were arising. This report reflects on the key questions raised, and where deemed both possible and helpful, recommendations are made for the future consideration not only of Glasgow Clyde College, but also other assigned colleges and Glasgow Regional Board.
 5. There is much that remains to be done to ensure the intentions of the legislation under which the assigned colleges and Glasgow Regional Board (GRB hereafter) must operate are properly secured.
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This report aims to provide assistance to the parties involved regarding such matters.

Making arrangements work

6. It is the opinion of Roger Mullin, that legislation and structures are necessary but insufficient to ensure governance and related arrangements for Glasgow work. Much is dependent upon building trust and respect amongst the various parties involved, and ensuring a strong common purpose is agreed. The key word here is agreed. It is clear both from the legislation itself, and from discussions with government that the intention of the arrangements for multi-college regions such as Glasgow is to ensure that progress is made through effective consultation, agreement and collaboration. Indeed the Act makes reference to consultation on 26 occasions and to collaboration on 12 occasions thus emphasizing their importance.
7. This places responsibilities on both assigned colleges and GRB to ensure they operate in an open, transparent and collegiate manner. The practical effect of this is discussed in subsequent sections of this report.

Board Matters

8. *What is the split in responsibilities between the GRB and assigned college boards?*
 9. The legislation clearly delineates some key roles (and is summarized in the separate legal opinion provided to Clyde College). A summary of the key roles and functions of GRB as a regional strategic body is also contained in the SG draft guide¹ published in October. However, this does not go into sufficient detail to provide overall clarity. A common understanding needs to be reached between the GRB and its assigned colleges on the detailed operation of board roles and responsibilities.
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10. It has already been suggested that some form of Framework or MOU (or both) needs to be developed to clarify joint working arrangements. It may be that this needs to include an agreed set of roles and responsibilities for both the GRB and assigned college boards. In addition, it should be noted that there will be a Financial Memorandum between the GRB and the assigned colleges, approved by SFC. At the time of writing, SFC is in the process of drafting a template for consideration by both GRB and the colleges.
11. *Under what circumstances can those members of GRB who are also chairs of assigned colleges be asked to leave meetings on grounds of conflict of interest, such as in relation to college funding?*
12. First, it is not merely chairs of assigned colleges who could have a conflict of interest. All members have to consider this. It is very important however to understand that it is for individuals themselves to declare a conflict of interest. This cannot be done by anyone other than the individual concerned. Reference should be made to the model code for Regional Boards produced by The Commissioner for Ethical Standards in Public Life and circulated to the colleges and GRB by Michael Cross on 22 May 2014.
13. Second, drawing on the experience of the Scottish Funding Council which currently deals with college funding and which contains on its board members with institutional connections, a conflict of interest is seen to arise only on very specific matters pertaining to the individual institution. Thus, the member is able to take a full part in discussions and decisions regarding funding policy and related matters, but has to declare an interest and withdraw if an issue related to his/her specific institution is being discussed. Unlike the SFC however, GRB will have the chairs of all the assigned colleges on its board. Thought needs to be given to the implications of this. For example, if one of the assigned college
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chairs has to withdraw over a conflict of interest, does this create an advantage for other assigned college chairs? If yes, should they withdraw by agreement?

14. It would seem reasonable to assume that all board members should take part in discussions regarding funding policy and related issues, and that it is only in the specific context of discussing issues pertaining to an individual college that a declaration of interest need be made and the individual withdraw for that item.

15. However, it may be wise for GRB board members (who could be staff and students as well as non-exec members) who are also members of an assigned college board to seek advice from the Standards Commission on this matter, prior to any potential matter of dispute arising.

16. *There is some concern about how student board members are to be elected for the coming period. Must elections be held for 2014-2015?*

17. The legislation is clear on this. I sought more formal opinion from government and the reply received confirmed the fact that matters are clear and that it is primarily a matter for Student Associations. The advice received was as follows:

“The current students on the Glasgow Board are on the board until 31 July 2014. This is in their terms and conditions of appointment. They were appointed as ordinary board members.

New student members will join the board when the colleges are assigned on 1 August. They may of course be the same people, but they have to go through a process. That process only involves elections in very specific circumstances. The relevant provision is paragraph 4 of schedule 2B to the 2005 Act.

Student members

4(1)The students' associations of the board's colleges are each

entitled to nominate students for appointment in pursuance of paragraph 3(2)(e).

(2)Where only two students are so nominated, those students are to be so appointed.

(3)Members are otherwise to be so appointed by being elected by the students of all the board's colleges from among the students so nominated.

(4)Sub-paragraphs (1) to (3) do not apply where only two colleges are assigned to the board and, in such a case, the students' association of each college is to appoint one member from among the students of their respective colleges.

So there is only an election if the three students' associations between them nominate more than two students. If between them they only nominate two people, those two are elected. So it is entirely in the gift of the students' associations acting together whether there is an election or not.

Should the Regional Board at this stage be developing rules for student elections and having processes ready in case they are necessary? Absolutely. Elections may be need if there are more than two nominations. The Regional Board's powers in relation to elections are in paragraph 5 of schedule 2B.

Election of staff and student members

5(1)An election to appoint members in pursuance of paragraph 3(2)(c) or (d) or 4(3) is to be conducted in accordance with rules made by the board.

(2)Before making, varying or replacing election rules, the board must consult—

(a)its colleges;

(b)in the case of rules about elections in pursuance of paragraph 3(2)(c), the representatives of any trade union which any of its colleges recognise as being, or which otherwise appears to the board to be, representative of the teaching staff of its colleges; .

(c)in the case of rules about elections to be held in pursuance of paragraph 3(2)(d), the representatives of any trade union which any of its colleges recognise as being, or which otherwise appears to the board to be, representative of the non-teaching staff of its colleges; and

(d)in the case of rules about elections in pursuance of paragraph 4(3), the students' associations of each of its colleges.

Normally student members vacate office on 31 August of each year. In the case of the Regional Board, the first student members don't vacate office on 31 August 2014. That would be a waste of time and resource if an election was held for posts only to become vacant a few weeks later. They instead remain in office until 31 August 2015. The effect of the provision is explained in the Explanatory Note of the Assigned Colleges (Scotland) Order 2014, SSI 2014/80.

Article 3 of the Order makes a transitional provision in relation to any student of the City of Glasgow College, Glasgow Clyde College or Glasgow Kelvin College who is appointed on or before 31st August 2014 as a member of the Regional Board for Glasgow Colleges under paragraphs 3(2)(e) and 4 of schedule 2B to 2005 Act. Paragraph 7(2)(d) of schedule 2B (under which such a student's term of office would have otherwise ceased on 31st August 2014) is not to apply to such a student and such a student is to hold office until 31st August 2015.

For the sake of completeness I should add that a Regional Board has no responsibilities in relation to "students' unions" under the Education Act 1994."

18. Where do principals of the colleges stand in relation to attendance at GRB board meetings?

19. Principals have a place as participant observers. Good practice would suggest, similar to SFC officials who attend the SFC board, that they receive papers and are able to contribute in deliberations (unless the chair deems it inappropriate), but not vote. Specifically the legislation states:

20. "Unless the chairing member determines otherwise, a person who is the principal of one of the board's colleges but who is not a board member is entitled to participate in any deliberations (but not in making decisions) at meetings of the board."

21. It should be noted that the intent and underlying assumptions of the legislation, is that participation by Principals is a good thing in itself. In response to a question about this, the Scottish Government have responded thus:

21.1. *“The following is a statement of the policy intent behind this provision.*

- a) *One of the key functions of a regional board is to plan college provision across its region. Legislation was drafted to give the principals of assigned colleges a right to attend and participate in meetings of their regional board in order to provide the regional board with professional advice on curriculum and other learning-related matters.*
- b) *However, it was recognised that it may not be appropriate for principals to be in attendance for all items of business.*
- c) *It was our policy that the circumstances where a principal is excluded from particular items of business would be determined by the chair. Under existing principles of administrative law, the chair is required in exercising their discretion to act reasonably*

21.2. *Paragraph 13 was discussed when the Post-16 Education (Scotland) Bill was being considered by the Education and Culture Committee on 21 May 2013 and the Cabinet Secretary for Education and Lifelong Learning stated the policy intent of the provision in similar terms at column 2477/2478¹. Mr Russell stated that there may be occasions where the principals of assigned colleges should be excluded. “*

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<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8328&mode=pdf>

22. This in effect places an expectation on Principals to act as expert advisers of educational matters to the GRB, and to contribute to board deliberations unless deemed inappropriate by the Chair acting reasonably.

Powers of Direction and Charitable status

23. *Wont the regional board's power of direction compromise the charitable status of colleges?*

24. This question has already been formally addressed in a letterⁱⁱ originally addressed to Colleges Scotland Chief Executive and subsequently referenced at a session of the Scottish Parliament Education and Lifelong Learning Committee.

25. The gist of this is that there may be occasions when the use of a power of direction is warranted (such as to ensure the regional interest is safeguarded). This in itself would not threaten charitable status, a matter already discussed by government with the Charity Commission.

26. That said, it would be wise in my judgment to avoid regular use of such a power, as this might lead to questions as to whether a college board retains its ability to act in the interest of the college overall.

Areas of dispute

27. *Given there are no appeal bodies for matters of dispute between assigned colleges and GRB, does this mean the only recourse is to take legal action of some sort?*

28. This question assumes all other avenues have been explored and found wanting. It is very difficult to imagine circumstances where this would arise for the following reasons.
29. First, if consultation and collaboration is undertaken appropriately and effectively, this should be the basis for common understanding and agreement in most situations.
30. Second, appropriate policies and procedures must be clear, in compliance with the legislation, and in effective operation before the GRB and assigned colleges will be allowed to take on full powers. This will help ensure that high standards are in operation, reducing the possibility of unresolvable disputes. (Later, this is discussed under the heading “Criteria for Fundable Bodies”).
31. As things stand at the time of writing, GRB has been established as of 1 May, and is likely to assume full powers from 1 August, the date currently set for assigning the colleges. For this to happen as planned, the SFC will require reassurance that the appropriate governance processes and procedures are in place and working effectively. The SFC Accountable Officer must be fully satisfied that the GRB has in place appropriate and robust systems of governance and accountability before funds can be passed to the regional body rather than directly to the assigned colleges.
32. Third, in some areas an aggrieved party can seek to involve a specialist authority such as The Commissioner for Ethical Standards in Public Life. For example, if a board member for whatever reasons believes he/she is not treated with respect, then the case can be taken to the Commissioner to consider. The Commission has a number of powers that can be used where a case is established.
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33. Fourth, both the SFC and the Scottish Government have a clear interest in making arrangements work in the interest of Glasgow's learners. Long before an issue is taken to the courts, it would be likely one or other would intervene either formally or informally to address the issue under dispute.
34. In extreme cases of maladministration, ministers have powers to remove board members from office.
35. Thus there are practical avenues other than the courts for dealing with disputes. It is my judgment that an important and constructive approach will involve nurturing good relations between on the one hand GRB and assigned colleges, and on the other hand SFC and the Scottish Government.

Criteria For Fundable Bodies

36. *When will GRB become a fundable body, and what are implications for assigned colleges?*
37. Attached as an appendix is a draft of a good governance checklist against which the GRB will be assessed before becoming a fundable body. It will be for the SFC will make a judgment as to the quality of governance using this checklist.
38. Colleges will continue to be on the list of fundable bodies until an Order is made to remove them. This will only be done when Ministers are satisfied that the new arrangements are working effectively and this removal will also require approval from SFC.
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39. Amongst the checklist, are the following four questions which apply specifically to assigned colleges:

39.1. *Does the Board have an appropriate Financial Memorandum (FM) with its assigned colleges?*

39.2. *Does the Board have an agreement with each assigned college setting out expected activity levels and outcomes in the current year?*

39.3. *Does the Board have procedures in place to monitor delivery of the agreement during the year and assess performance on an annual basis?*

39.4. *Are the colleges required to submit periodic financial reports to the Board?*

40. It is worth noting that each of these criteria involves appropriate collaboration and consultation with the assigned colleges. Further, 32.4 addresses an issue raised in discussions, and namely the need for effective coordination of GRB and assigned colleges boards meeting dates in line with financial reporting requirements. In this regard, it must be remembered that assigned colleges have other fixed reporting requirements. Thus this question invites the GRB and colleges to cooperate and coordinate their respective board meetings in the interest of effective financial governance.

41. Other criteria are intended to ensure that the GRB is fully compliant with the legislation in relation to all matters with a bearing on finance, and that key personnel have the suitable sets of skills necessary to effectively support the GRB.

42. It should be noted therefore that neither the GRB nor for that matter assigned college boards operate in isolation from the legislation, and in addition have to satisfy SFC regarding their effectiveness on a range of matters.

43. In summary, although as noted earlier GRB was established as a fundable body on 1 May, and colleges are likely to be assigned on 1 August, SFC would require the reassurances outline above before it would fund GRB directly.

Funding Colleges

44. *Will the regional board be able to set its own policy regarding fundable education with the colleges? What will the status be of the Regional Outcome Agreement with the SFC?*
45. These two questions indicate some uncertainty at present about how in practice matters will operate once the GRB becomes the fundable body with responsibility for allocating assigned college funds. There is some discretion to the regional board otherwise there would be no purpose in changing current arrangements, but it must carry out its responsibilities under both the requirements of government policy and with regard to the conditions of grant attached by the SFC to the funds it will receive for Glasgow. The funding allocated for the next academic session, for example, is conditional on the delivery of the academic year 2014-2015 Outcome Agreement.
46. Furthermore, there is a specific requirement in the legislation for the GRB to consult with its assigned colleges in relation to any terms and conditions (conditions of grant) it may wish to attach to funding. This again emphasizes the importance of having proper consultation and collaboration arrangements put in place at an early stage.
47. Put concisely, GRB will receive from SFC funds with conditions of grant including having a responsibility to ensure funding is allocated in a manner appropriate for the delivery of all aspects of
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the Regional Outcome Agreement. SFC may attach such other conditions as it sees fit in the light of government policy and the need to ensure good practice. The SFC are of the view that SFC should continue to administer the funding of assigned colleges acting on the instructions of the GRB.

48. GRB must have established after due consultation a robust and transparent process for allocating funds to the assigned colleges. The GRB may well attach its own conditions of grant for the assigned colleges, such conditions having been discussed in advance with them. By setting its own conditions of grant it does not relieve the GRB from its responsibility to ensure its funding policy for Glasgow is fully compliant with the SFC condition of grant.

49. Finally in relation to these questions, GRB has no power to make or change national education policy. It can ask government to change policy, but it is for government and parliament to decide on policy issues.

Staffing and work arrangements

50. Once everything regarding structures, procedures and processes are in place, the issue of how the work of the Board is undertaken arises. Questions arising in discussions were centred around two main areas:

50.1. What will staffing arrangements be for the new GRB and at what cost?

50.2. How will meaningful collaboration on the work of the GRB be established?

51. There is a perfectly understandable concern amongst colleges, not least in a context of very tight public expenditure, that the

funding taken from the SFC grant for Glasgow to support the operations of the GRB should err on the side of frugality, thus maximizing the amount available for colleges and education.

52. Our wider discussions suggest others too, including GRB, SFC and the Scottish Government also recognise the desire to minimize operational costs of GRB. It does not appear to be an issue of principle. It is an issue of what the practice is going to be. As an example, and as referred to elsewhere, SFC is keen to administer funds acting under direction from GRB as to how it should be distributed to colleges. This would minimize additional administrative costs.
53. Furthermore, it should be reassuring to note that the legislation gives the GRB the power to employ staff subject to direction from SFC. As SFC has been asked by the Cabinet Secretary to ensure structures are efficient as well as effective, it is reasonable to assume they would use that power to ensure that the amount of resource diverted from education provision is consistent with efficiency.
54. Our discussions suggest there is agreement in principle that as far as possible GRB should avoid the costs of externally recruiting staff, and instead favour making arrangements with assigned colleges for appropriate access to the necessary expertise. This could be done in a number of ways including secondment and service agreements, and we judge such an approach would gain the cooperation of all parties. It would also be a practical demonstration of strong collaboration between the colleges and the GRB. This matter could usefully be pursued at a very early stage.
55. Such discussion would need to include a focus on all areas of need for the effective operation of the GRB. For example, the open
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sharing of data required under the legislation begs further issues. Data require to be interpreted and understood. Much of the data will relate to matters such as performance indicators, education data and broader qualitative data. Data does not speak for itself. What expertise is needed and how will this be organized? This question needs answering across a range of matters pertinent to the effective operation of the GRB.

56. More contentious is the cost of maintaining a physical office space for the GRB outwith the three colleges. It is not for me to make a specific recommendations on this, but it would in my judgment be appropriate at an early stage to have detailed discussions between GRB and the colleges about this, and to give detailed consideration to issues such as opportunity cost and value for money.

Protocols and Agreements

57. Discussions, particularly with representatives of the GRB, demonstrated a keen awareness of the need to develop appropriate agreements and protocols to enable effective working on a variety of matters. This was very encouraging at this early stage, but it was also clear much work has yet to be undertaken on this.
58. It is for the GRB and colleges themselves to agree all the areas where some form of agreement (such as service level agreements and more general “undertandings” perhaps expressed via a MOU) or where some detailed protocol such as in relation to data sharing is required. It should also be noted that SFC has an interest in ensuring appropriate agreements and protocols are in place. It may therefore be wise to include SFC in discussions regarding where and how such agreements should be established.
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59. However, given this report and the intent of the legislation, I think it would be wise to ensure areas covered include developing a formal agreement on how consultations will be conducted. It will in my judgment be necessary to ensure there is a proper audit trail of consultations lest any challenge is made.

Cultural Issues

60. It was very evident, and unsurprising, that at this early stage in developments there were a number tensions evident in discussions. Perhaps because of the newness of roles and responsibilities, and the lack of clarity in some areas, two key aspect of culture need further strengthening. First, mutual trust and secondly mutual respect.

61. For arrangements to work well, in my judgment there is a need to consider how to enable effective interaction amongst GRB, college principals and college boards. It is through such interaction that, with good will, trust and respect can be further strengthened.

62. This will be aided by something everyone interviewed expressed a commitment towards - namely operating an open and transparent approach to governance.

63. Furthermore, in my judgment it is insufficient to simply follow legislation and other formal requirements. For example, it is all very well to have Principals of assigned colleges attend GRB board meetings, but this will probably be an insufficient basis for the development of high levels of trust and mutual respect. Ensuring for example that Principals and GRB members interact in other settings will be important, such as when acting as education ambassadors at events in Glasgow, in award ceremonies, in regular visits to see the working of colleges and such like.

64. It would also in my judgment be useful to agree communication links amongst board members of both GRB and assigned colleges and of senior college staff.

65. In other words, some thought needs to be given to strengthening the various ways in which those leading the sector in Glasgow should interact and thus build even more trust and respect in one another.

Independent Recommendations

66. The following recommendations are for consideration by Glasgow Clyde College. It is quite properly for the GRB and the colleges in Glasgow to decide how best to take matters forward. These recommendations should therefore be considered simply as possibilities, but ones which hopefully merit serious discussion. The list of recommendations is deliberately restricted to a few essential areas.

66.1. Glasgow Clyde College should share this report with other Glasgow Colleges and use it as part of ongoing discussions regarding the role of assigned colleges. It should be considered alongside the formal legal review of legislation.

66.2. Glasgow Clyde College should decide how and when to share this report with other key players, and most notably the GRB.

66.3. Consultations by GRB with its assigned colleges should be conducted through some agreed formal process. Glasgow Clyde and other assigned colleges should ask GRB to initiate the development of an agreed consultation process.

- 66.4. Glasgow Clyde and other assigned colleges should seek discussions with GRB and SFC to agree where formal written agreements and protocols are needed. This should lead to joint working on their development.
- 66.5. Principals of all assigned colleges should assist GRB by acting as its education experts.
- 66.6. GRB board members who are also members of assigned college boards, should seek discussions with the Standards Commission regarding declarations of interest in relation to issues discussed in this report.
- 66.7. Assigned college personnel should strive to work closely with key personnel from the GRB and SFC with a view to strengthening mutual trust and respect.

ⁱ The Operational Guide is available here:

<http://www.scotland.gov.uk/Resource/0043/00436880.pdf>

ⁱⁱ The letter referred to can be accessed here:

http://www.scottish.parliament.uk/S4_EducationandCultureCommittee/Bills/Scottish_Government_letter_to_John_Henderson_Colleges_Scotland_6_March_2013.pdf

Client Contact: Susan Walsh - Principal and Chief Executive, Glasgow Clyde College (“the College”)
Brodies Contact: Lynne Marr and Niall McLean
Subject: Post-16 Education (Scotland) Act 2013 – Briefing Paper
Date: Updated - 27 June 2014

PRIVILEGED & CONFIDENTIAL

1 Introduction & legislative background

- 1.1 We have been asked by the College to provide advice on issues arising out of the Post-16 Education Scotland Act 2013 (“the 2013 Act”). The 2013 Act makes amendments to the Further and Higher Education (Scotland) Act 1992 (“the 1992 Act”) and the Further and Higher Education (Scotland) Act 2005 (“the 2005 Act”).
- 1.2 The Regional Board for Glasgow Colleges (“the Regional Board”) was established on 1 May 2014. The Assigned Colleges (Scotland) Order 2014 will assign the College, City of Glasgow College and Glasgow Kelvin College to the Regional Board from 1 August 2014. At this point the College will become an assigned college and the Regional Board will have the functions of a regional strategic body with respect to its assigned colleges from that date.
- 1.3 For the purposes of this note we have focussed on the functions, duties and powers of the Regional Board and the College. Our comments about the governance structures of the College will apply equally to City of Glasgow College and Glasgow Kelvin College. We do not comment on the role of “other” regional strategic bodies (e.g. the University of the Highlands and Islands) or regional college boards (e.g. Edinburgh College). We have therefore used the term Regional Board throughout the briefing paper rather than regional strategic body. We can provide more detailed advice on distinct governance arrangements if that would assist.
- 1.4 We would be content to discuss any aspect of this briefing paper in further detail.

2 Executive Summary

- The Regional Board is involved in the approval of the appointment of a principal of an assigned college, it does not have any power to remove a principal. Removal of a principal will therefore continue to be by that principal's employer (the board of management) under the usual principles of employment law. Once approved it will be for the assigned college to manage the terms of the relationship with its principal.
- We consider the wording of paragraph 13 of Schedule 2B of the 2005 Act means there should be a presumption in favour of the participation of principals at meetings of the Regional Board. As they cannot directly affect the outcome of the vote on any issue that falls to be determined by the Regional Board, there should be relatively few occasions on which it should be necessary to exclude principals from Regional Board meetings.
- The Regional Board (as the regional strategic body) will negotiate with the SFC for funding. Under section 12A and 12B of the 2005 Act the Regional Board will also control the allocation of funding to each assigned college.
- Neither the 2005 Act nor the 2013 Act makes provision for any review of decisions taken by the Regional Board. Any challenge to a funding decision would be restricted to a challenge by judicial review.
- We consider that the establishment of a funding protocol between the College, assigned colleges and the Regional Board would help mitigate the risk of funding disputes.
- A failure by the Regional Board to consult or to have regard to any of the matters in section 23L of the 2005 Act (Regional Board to have regard to particular matters) when exercising its function would be open to challenge by judicial review.
- Section 23O of the 2005 Act provides for the transfer of staff, property, rights or obligations as may be specified by the Regional Board.
- Under section 23O(8) of the 2005 Act a transfer requirement is binding on an assigned college and the Regional Board can require the transfer of staff, property, rights or obligations without the consent of the College.
- We consider that the College's best prospect of challenging a transfer requirement without the need for litigation is at the consultation stage. We recommend that the College suggests that a clearly defined consultation process is put in place to manage any proposed consultation about transfer requirements.

- The provisions of section 23O of the 2005 Act should not affect the charitable status of assigned colleges. Section 23O(7) provides that all property and rights transferred are to be applied for the purpose of the advancement of education, which is listed as a charitable purpose in section 7 of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”).
- We are not convinced that the current wording of section 23N(5) equates to directions served on board members in their capacity as charity trustees. Therefore they may not be exempt for the purposes of section 66(3) of the 2005 Act.
- The College will be required to share data, with amongst others: (1) its Regional Board; and (2) other assigned colleges. As the College will be sharing information on a regular basis we recommend that a data sharing agreement is entered into with each of the assigned colleges and the Regional Board to govern how information will be shared. This is consistent with guidance issued by the Information Commissioner’s Office.
- The College’s sole ground of challenge to decisions of the Regional Board is judicial review. A judicial review could raise significant political issues for the College and may therefore be of limited value as a remedy. The College should raise any concerns regarding proposed decisions or directions by the Regional Board which it considers unacceptable at an early stage. This may help to resolve matters before there is any need to challenge the decision or direction.

3 Membership and functions of boards

3.1 We have enclosed as an Appendix a table comparing the Regional Board and an assigned college board, with regard to the following factors:

- membership;
- appointment / removal;
- term;
- powers/responsibilities and functions; and
- other relevant considerations.

The table shows the statutory provisions underpinning each of these headings. The powers and functions of each body are quite separate. The only significant area of overlap is functions relating to good governance.

3.2 We also draw out some of the key issues in relation to each type of board throughout the briefing paper.

4 Position of Principals of Assigned Colleges

- 4.1 The board of management of an assigned incorporated college retains responsibility for appointing the principal and determining their terms and conditions of employment. However both the appointment and the terms and conditions to be offered must be approved by the Regional Board. The principal appointed sits on the assigned college's board of management by virtue of their position as Principal.
- 4.2 Although the Regional Board is involved in the approval of the appointment of a principal of an assigned college, it does not have any power to remove a principal. When the Post-16 Bill was going through the Scottish Parliament, there was a proposal to amend the ministerial powers to remove college board members where there is mismanagement so that it would include a power for Ministers to remove a principal serving as a board member. This is not included in the final legislative provisions and so Ministers can remove any board member except the principal.
- 4.3 Removal of a principal will therefore continue to be by that principal's employer (the board of management) under the usual principles of employment law. In other words, the employing board of management would need to have a potentially fair reason for dismissal (for example misconduct, performance, a material reason) and would need to act reasonably in accordance with the relevant provisions of the Employment Rights Act 1996 (and case law under it).
- 4.4 The legislation (referred to at paragraph 1.1 above) does not set out any specific functions or powers that the Regional Board will have over the principals of each of the assigned colleges. However, the Regional Board has wide powers to attach conditions to funding which it receives from SFC and which it distributes to its assigned colleges; the power to issue "directions" which term is not defined in the 2005 Act; and the ability to require transfers of staff and property primarily where programmes of learning or services are moved. In theory, these powers could be used to exercise a large degree of control over the ability of the principals and their boards to manage their colleges on a day to day basis (in accordance with section 12 of the 1992 Act – see section 5 below).
- 4.5 However if the Regional Board did issue directions which appeared to cut across the College board's duties to manage the College under section 12 of the 1992 Act, this could be regarded as undue interference. The route for challenging such interference would be to seek a judicial review of the direction (see section 14 below). As this would be a Court of Session action, it would not be inexpensive and the test for challenging a direction would be to show that it was "manifestly unreasonable". This is a high bar and whilst the courts do seem to be moving towards a plain meaning of unreasonable they are not quite yet there.

5 Appointment, appraisal and terms and conditions of service for Principals

- 5.1 The provisions governing the appointment of principals are contained in paragraph 16A of Schedule 2 of the 1992 Act which provides that:

“The appointment of a principal of a college which is not a regional college, and the terms and conditions of such an appointment, have effect only if approved by the regional strategic body for the college.”

- 5.2 As per section 12 of the 1992 Act boards of management retain the responsibility for the day-to-day management and conduct of their college, including:

“(i) contracts for the employment of teachers and other staff for the purpose of or in connection with the carrying on of any such activities as are mentioned in this subsection or in subsection (1) above;

and

(ii) contracts with respect to the carrying on by the board of any of such activities”

- 5.3 Therefore the Regional Board must approve the appointment and the terms and conditions on appointment of a principal but once approved it will be for the assigned college to manage the terms of the relationship. The Regional Board will not be the employer so once established the relationship between the principal and his/her college will be governed by normal employment law principles (e.g. dismissal, variation of terms and conditions etc). We do not think the Regional Board will have any power to appraise, set or vary the terms and conditions once the appointment of the principal is approved.

- 5.4 That said, it is just worth noting the Regional Board’s overarching responsibility to hold its assigned colleges to account. If the Regional Board were to uncover a concern in relation to the terms and conditions of employment of a principal it would be open to it to issue directions under section 23N of the Further and Higher Education (Scotland) Act 2005. In extreme cases the Regional Board could approach the Scottish Ministers to request removal of a board member (although not the principal). As an example – if the Regional Board became aware that a board of management of an assigned college was to award a pay rise which was (in the view of the Regional Board) unreasonably high it may try to intervene. Presumably it would do this by way of seeking information and issuing a direction under section 23N of the 2005 Act. This may sound like an alarmist example but we imagine that it may reflect the sort of concerns an assigned college may have. It seems to us that this is not what directions are intended to cover not least because the Regional Board has to consult with the college, trade unions and student associations before issuing a direction under section 23N of the 2005 Act. That seems inappropriate for individual pay and terms and further it cuts across section 12 of the 1992 Act. Also, as the National Bargaining Framework is not yet in place, it is not clear what role the Regional Board will have in negotiating pay and terms and conditions for staff including principals.

- 5.5 We note that the Scottish Government recently consulted on a draft Ministerial guidance on appointments to college sector boards. The consultation closed on 30 May 2014. The draft guidance says very little about the approval process for the appointment of principals. However, we consider that the Regional Board will have in mind some of the factors set out in the guidance

relating to the appointment of ordinary members when considering the approval of a principal, for example:

- the extent to which any guidance has been followed by the board of management, for example, compliance with the Code of Good Governance;
- how widely advertised the post was;
- the assessment of the skills and attributes of the candidates; and
- encouraging equal opportunities.

6 Participation of Principals on Regional Board

6.1 The 2013 Act introduces a new section 23M into the 2005 Act which places certain duties on the Regional Board as regards consultation and collaboration. Section 23M(3) provides that the Regional Board must, so far as is consistent with the proper exercise of its functions, seek to ensure collaboration with its colleges. The reorganisation of the college sector therefore proceeds on the basis of collaboration between stakeholders.

6.2 Paragraph 13 of Schedule 2B of the 2005 Act also provides that: *“Unless the chairing member determines otherwise, a person who is the principal of one of the board’s colleges, but who is not a board member is entitled to participate in any deliberations (but not in making decisions) at meetings of the board”*. We consider the wording of paragraph 13 of Schedule 2B of the 2005 Act means there should be a presumption in favour of the participation of principals at meetings of the Regional Board.

6.3 The draft “informal summary guide” to the 2013 Act (issued in October 2013) does not elaborate at any length on the provisions of paragraph 13, but it refers to principals having *“a right to participate in any deliberations (but not in making decisions) unless the chair of the Regional Board determines otherwise”*. We consider this reinforces the argument that the presumption is in favour of participation and that an approach that excludes the principals on a routine basis is the wrong approach and not in accordance with the spirit of the legislation. If the principal is to be excluded then the chair should apply his/her mind to specific circumstances in which it might not be appropriate to have the principal present. As they cannot directly affect the outcome of the vote on any issue that falls to be determined by the Regional Board, there should be relatively few occasions on which it should be necessary to exclude principals from Regional Board meetings.

7 Funding allocation

7.1 The College will remain on the list of fundable post-16 education bodies in Schedule 2 of the 2005 Act until the Scottish Government is satisfied the new arrangements are working well. This means that whilst the College remains a fundable post-16 education body it will remain eligible in principle for funding direct from the Scottish Funding Council (“SFC”) and the SFC will retain functions in respect of it.

- 7.2 Once the College is removed from the list of fundable post-16 education bodies, the structure in respect of funding becomes more complex. Whilst each assigned college retains its own board it is the Regional Board (as the regional strategic body) that will negotiate with the SFC for funding. Under section 12A and 12B of the 2005 Act the Regional Board will also control the allocation of funding to each of the assigned colleges. This means the College will lose a degree of control over the funding that it receives.
- 7.3 There could also be potential difficulties in terms of how funding is allocated by the Regional Board to its assigned colleges. There is scope for the structure to be less cohesive than the existing structure for allocating funds, with assigned colleges effectively competing for funding from the Regional Board. This may have implications for the quality of service that is provided by the College or the other assigned colleges. Under section 12B of the 2005 Act the Regional Board can impose conditions of grant on its assigned colleges.
- 7.4 Neither the 2005 Act nor the 2013 Act makes provision for any review of decisions taken by the Regional Board. Any challenge to a funding decision would be restricted to a challenge by judicial review. If the Regional Board can demonstrate it has acted reasonably, for example, by engaging and consulting with the College, and by allocating funds in accordance with clearly defined criteria, then there will be less scope for successfully challenging a funding decision by means of judicial review.
- 7.5 We consider that the establishment of a funding protocol between the College and the Regional Board, which provides for appropriate consultation prior to funds being allocated, may help ensure that the voice of the College is properly heard before funding is allocated.
- 7.6 We also consider that the establishment of a funding protocol between each of the assigned colleges could reduce the potential for disputes over funding within the region, although there will inevitably be scope for disagreement on the terms of any such protocol. The 2013 Act does not provide for a review mechanism where funding becomes a matter of dispute between assigned colleges and any challenge would again be limited to a challenge by judicial review.
- 7.7 It should be noted that the Regional Board cannot apply terms and conditions to the use of any sums of money which do not come from the SFC. In making grants or payments, the Regional Board can however have regard to the desirability of encouraging its colleges to develop funding from other sources. If a particular college does well in developing particular streams of funding, this might then impact on the level of funding it receives from the Regional Board.

8 Financial Accountability

- 8.1 There must of course be accountability for the how the funding provided is used and you have raised a question about the financial accountability of the principals of the assigned colleges now that the Regional Board is established.
- 8.2 We understand that the Permanent Accountable Officer will continue to designate the chief executive of SFC as Statutory Accountable Officer under the Public Finance and Accountability

(Scotland) Act 2000. It is proposed that the outcome agreement between the SFC and the Regional Board will form the basis of its accountability to SFC and in turn the Scottish Parliament. In essence, the chief officer of the Regional Board will become a non-statutory Accountable Officer and the Financial Memorandum will set out responsibilities similar to many of those of statutory Accountable Officers designated under the Public Finance and Accountability (Scotland) Act 2000. The Regional Board will then impose similar responsibilities on the principals of assigned colleges through their Financial Memorandum with the assigned colleges. This will ensure that the principals of the assigned colleges continue to be directly accountable to the chief officer of their Regional Board for their college's use of funds received from the Regional Board.

- 8.3 This proposal for ensuring financial accountability is not set out in detail in the legislation but rather in guides to the reforms prepared by the Scottish Government. It is not clear exactly what form of wording will be included in the respective Financial Memorandums and whether principals of assigned colleges will have a specific responsibility to report concerns about their own board to the Regional Board and concerns about the Regional Board directly to the SFC.
- 8.4 As noted above, principals of assigned colleges have the right to attend Regional Board meetings and to participate in their deliberations (but not decision making). If the principals of the assigned colleges were in fact excluded from meetings on a regular basis, then it will be difficult for them to know what is being discussed and whether they should have concerns which they might otherwise have been reported in their capacity as Accountable Officers directly to SFC.
- 8.5 It is arguable that the principals are accountable only for the funds allocated to them and not for the actions of the Regional Board in relation to the funds provided to it by the SFC. However, we understand that the decisions and actions of the Regional Board do directly impact in a significant way on the individual assigned colleges. If principals are being routinely excluded from Regional Board meetings with no apparently valid reason being given, this may in itself give rise to a concern about whether the Regional Board is taking appropriate decisions about the use of the funding which it receives from SFC. It seems to us that although there is no direct line between the principal of an assigned college and the SFC, that this might justify an approach to the SFC by the relevant principal.
- 8.6 We appreciate that the personal implications for the principals of approaching the SFC about concerns they may have about their Regional Board or indeed their own board may not be the key issue here. However, it should be noted that provided a principal meets the eligibility criteria in the Employment Rights Act 1996, then he/she may well have grounds for claiming protection as a whistleblower from any detriment they suffer in their employment or indeed from dismissal where they report suspected breach of legal obligations.

9 Consultation, controls and directions

- 9.1 The 2005 Act does contain safeguards that will act as checks and balances on the Regional Board's decision making. Section 23M of the 2005 Act provides that the Regional Board must consult colleges and relevant associations "*where it considers it appropriate to do so in the*

exercise of its functions". The Regional Board is therefore afforded a wide degree of discretion as to whether to consult before taking a decision and is only required to do so where it considers it appropriate. However, the Regional Board is required to consult before taking decisions about transfer of staff, property, rights and obligations (see section 11 below). Save where expressly provided for the only challenge to a failure to consult would be by judicial review.

- 9.2 Section 23L of the 2005 Act provides a further control on the activities of the Regional Board. It says that the Regional Board "*is to have regard to*" particular matters. These include, amongst other things: (1) skills needs in the locality; (2) issues affecting the economy of the localities of its colleges; (3) social and cultural issues; (4) the needs and issues in relation to Scotland identified by the SFC; and (5) educational and related needs. A failure by the Regional Board to have regard to any of the matters in section 23L when exercising its function would be open to challenge by judicial review.
- 9.3 Finally, section 23N of the 2005 Act allows the Regional Board to give such directions to the Colleges as it considers appropriate. Directions can be general or specific in character but cannot relate to the transfer of staff, property, rights, liabilities or obligations of the College. This restricts the scope of directions that can be made. Before a direction can be made there is a duty to consult any college to which proposed directions relate, trade union representatives and the students' association.
- 9.4 Under section 23G of the 2005 Act the Regional Board is required to monitor the performance of its colleges. This may include monitoring or assessing the quality of fundable further higher education being provided. Section 23I of the 2005 Act allows the Regional Board to carry out studies designed to improve economy, efficiency and effectiveness of its colleges (called an efficiency study). A college must provide information and make available for inspection accounts and documents as may be reasonably required.
- 9.5 Section 23G and 23I replicate similar rights that the SFC has to assess colleges under the 2005 Act. We think the powers here are broad enough to allow a three yearly evaluation of *the Assigned Colleges* on the matters referred to in these sections of the 2005 Act. However, in so far as the Regional Board is suggesting that it would seek to evaluate the Boards of Management of each of the Assigned Colleges that is not a power which is expressly given in the legislation (section 23G and 23I of the 2005 Act). We understand that each of the Boards of the Assigned Colleges already self-evaluate on an annual basis and currently provide a Statement of Assurance to the SFC that this has been done and that there are no concerns to report. The Regional Board could, if it wished require each of the Assigned Colleges to provide it with a copy of that self-evaluation – this would amount to "information" within the scope of section 23N of the 2005 Act.

10 Transfer of staff, property, rights and obligations

- 10.1 Section 23O of the 2005 Act provides for the transfer of staff, property, rights or obligations as may be specified by the Regional Board. The transfer is called a "requirement" and is likely to be the most contentious of the powers available to the Regional Board. During the passage of the Post-

16 Bill (“the Bill”) several attempts were made to dilute this power by making it either non-binding or consensual. These amendments failed and under section 23O(8) a transfer requirement is binding on an assigned college and the Regional Board can require the transfer of staff, property, rights or obligations without the consent of the College. However, there are safeguards in place in section 23O to prevent the abuse of this power by the Regional Board.

Purposes of transfer

- 10.2 Section 23O provides a transfer can be required for the following purposes:
- 10.2.1 To transfer programmes of learning, or courses of education, from one assigned college in the region to another – e.g. the transfer of a course from the College to Glasgow Kelvin College.
- 10.2.2 To transfer services to either: (a) another assigned college in the region; or (b) to the Regional Board e.g. a transfer of a service like back-office support
- 10.2.3 Or for any other purpose relating to the functions of the Regional Board or any of its assigned colleges – i.e. a general power to transfer.
- 10.3 A transfer must be for one of these purposes albeit 10.2.3 confers a wide discretionary power on the Regional Board.

Consultation

- 10.4 Section 23O(3) requires the Regional Board to consult before making a transfer requirement. The Regional Board must consult:
- Any college to which the proposed transfer relates (we assume this would include the other colleges assigned to the Regional Board);
 - The representatives of any trade union recognised by the assigned college, or which otherwise appears to the Regional Board to be representative of its staff; and
 - The students’ association of every such college.
- 10.5 Section 23O(4) provides that the consultation is to be undertaken with a view to seeking the agreement of the college to the proposed transfer. We consider that the College’s best prospects of challenging what is proposed in a transfer under section 23O, without the need for litigation (see section 14 below), is at the consultation stage. This will be the time to raise concerns about the impact on staff and financial issues such as vacant property. We recommend that the College suggests that a clearly defined consultation process is put in place to manage any proposed consultation about transfer requirements.

Transfer of staff

- 10.6 Section 23O(6) provides that any transfer of staff by the Regional Board as part of a requirement under Section 23O is a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended by 2014 Regulations) – i.e. a TUPE transfer. TUPE will also apply where staff of any of the assigned colleges are transferred to the Regional Board.
- 10.7 Where TUPE does apply, what does that mean for the College? The College and the other assigned colleges will be familiar with the practical application of TUPE as a result of the recent merger activity. On a practical level the transferor college will have to provide the prescribed employee liability information to the transferee college; both colleges will have to inform and consult with their own employees (and their representatives) affected by the transfer about any measures proposed as a result of a transfer (e.g. change of location); and the transferee college will have to handle issues such as changes to terms and conditions either to harmonise or as part of a genuine economic, technical or organisational reason entailing changes in the workforce (for example a redundancy if the provision moved leads to overstaffing). Even with the advent of national bargaining, transferring staff may seek to rely on the transferor’s local working practices connected to their employment. The scale of a TUPE exercise, the time involved and costs will be driven by the programme of learning being transferred. Employee engagement issues will have to be handled by line managers and HR. It is not clear whether the Regional Board (or the SFC) would make funding available to affect any transfer.
- 10.8 The Scottish Government has produced a summary guide on the 2013 Act. It provides in relation to transfer requirements that:
- “Before making a transfer requirement, a regional strategic body must consult a list of bodies...As well as requiring a regional strategic body to properly consider representations, this would require a regional strategic body to show that they have entered into meaningful dialogue with those giving the representations with a view to reaching a common position on the requirement.”*
- 10.9 The College may take comfort from this statement and we consider it likely that the Regional Board would engage with the College before making a requirement. However, it is also clear that provided such a consultation has taken place the Regional Board could make a requirement even if the College did not consent. The only ground of challenge for the College would be to judicially review the Regional Board’s decision.

11 Charitable status and charity trustees

- 11.1 The provisions of section 23O of the 2005 Act should not affect the charitable status of assigned colleges. Section 23O(7) provides that all property and rights transferred are to be applied for the purpose of the advancement of education, which is listed as a charitable purpose in section 7 of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). Therefore the transfer of college assets pursuant to the provisions of section 23O will not cause the College to fail the charity test.

- 11.2 However, there may be a potential issue if a direction is issued under section 23N of the 2005 Act that conflicts with the general duty imposed on a charity trustee under section 66 of the 2005 Act. Section 66(1) of the 2005 Act requires that a “charity trustee must, in exercising functions *in that capacity*, act in the interests of the charity”. Section 66(3) provides, “that duty is, however without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions *in that capacity*”. As noted above, section 23N(5) of the 2005 Act states that “a college must comply with directions given to it under this section”. It is a technical point but we are not convinced that the current wording of section 23N(5) equates to directions served on board members in their capacity as charity trustees.
- 11.3 However, Section 23N(4) places the Regional Board under an obligation to consult prior to issuing a direction and board members should raise any concerns they have about a potential conflict with their role as charity trustees at this point. We would also hope that the limitation on the types of directions that can be made (i.e. they cannot be made about the transfer of staff, property, rights, liabilities or obligations of the College) should provide some comfort that directions will not be controversial. We also note that during the passage of the Bill the Cabinet Secretary confirmed his view that compliance with a direction under section 23N would not mean a charity trustee is in breach of their duties under section 66 of the 2005 Act.
- 11.4 That said, the limitations on directions or consultation requirements may not safeguard against all directions that are considered to be unacceptable by the College but which it must apply. The 2005 Act does not provide for a right of appeal so if the College wishes to challenge a direction on charitable grounds it would be limited to a challenge by judicial review.

12 Good Governance

- 12.1 The College is required to adhere to good governance principles. A Code of Good Governance is currently out for consultation and is being prepared by a steering group of college chairs and principals. Under section 9B of the 2005 Act, the Scottish Ministers may impose a condition that the SFC must, when making a grant to the Regional Board, require that it in turn impose as a condition of grant on its colleges that they comply with principles of good governance. We expect it will be a condition of grant the College complies with the Code of Good Governance.
- 12.2 We understand the College is concerned about reporting requirements to SFC where it considers there has been mismanagement. We would expect any such reporting requirement to be caught as a governance issue and contained within the Code of Good Governance.

13 Data sharing

- 13.1 The College will be required to share data, with amongst others: (1) its Regional Board; and (2) other assigned colleges. This could include personal data or sensitive personal data about staff or students. The College must comply with the Data Protection Act 1998 (“the DPA”), including ensuring the security of any shared data. The DPA requires that data must be processed fairly and lawfully and in compliance with the Data Protection Principles.

- 13.2 Key issues for the College (and any other assigned college) to consider before sharing data include:
- 13.2.1 The College must identify either an express or incidental power that allows the College to share the data. Section 23N(1) of the 2005 Act is an example of an express power allowing the College to share data with the Regional Board.
 - 13.2.2 Consideration should be given to carrying out privacy impact assessments (PIAs), before entering into any data sharing arrangements with other bodies.
 - 13.2.3 The objectives of sharing any information should be clear and documented.
 - 13.2.4 The data shared should also be limited to what is needed to achieve the objectives. If it is not necessary for a body to have access to all the information then consideration should be given to providing limited access only.
 - 13.2.5 Regular meetings with organisations with whom the College shares data should allow the College to ensure that appropriate security of data is maintained.
- 13.3 Data will be processed fairly and lawfully, amongst other things, if it is necessary for the exercise of any functions conferred on any person by or under any enactment. Section 23N(1) of the 2005 Act says (emphasis added) that the assigned colleges must provide the regional strategic body with such information as it may reasonably require for the purposes of, or in connection with the exercise of any of its functions. There is no exception under section 23N(1) of the 2005 Act on the basis the information is confidential. We consider the College will have difficulty in resisting the release of information to the Regional Board using the DPA or confidentiality as its reason.
- 13.4 We understand that the College is concerned about sharing information and in particular in circumstances where it provides data to the Regional Board and that data is shared with other assigned colleges. We appreciate there are good reasons why the College may want to keep certain information confidential. There are also likely to be additional administrative costs for the management of data sharing for the College. The terms on which information is shared could be regulated by a data sharing agreement which would place obligations on the Regional Board not to share specific categories of data with the other assigned colleges.
- 13.5 If the College is sharing data on a regular basis we recommend that a data sharing agreement is entered into with each of the assigned colleges and the Regional Board to govern how information will be shared. This is consistent with guidance issued by the Information Commissioner's Office.

14 Challenge – judicial review

- 14.1 The College's sole ground of challenge to decisions of the Regional Board is by judicial review. This would include challenges to a failure to:
- 14.1.1 consult;

- 14.1.2 funding decisions by the Regional Board;
 - 14.1.3 funding decisions between assigned colleges;
 - 14.1.4 challenges to requirements; and
 - 14.1.5 challenges to directions as a charity trustee.
- 14.2 Broadly speaking the grounds of judicial review would be illegality (the Regional Board had no power to act in the way it did), irrationality (the Regional Board acted unreasonably) or procedural impropriety (the Regional Board failed to follow the correct procedure). Provided the Regional Board has acted reasonably and complied with the relevant legislation then a judicial review is unlikely to succeed.
- 14.3 As well as having to meet a strict legal test, a judicial review could raise significant political issues for the College and may therefore be of limited value as a remedy. The College should raise any concerns regarding proposed decisions or directions by the Regional Board which it considers unacceptable at an early stage. This may help to resolve matters before there is any need to challenge the decision or direction. In the event that litigation is necessary it will help to avoid any argument of delay in bringing the challenge if the College has raised its concerns at an earlier stage.

APPENDIX

COMPARISON OF REGIONAL BOARD AND ASSIGNED COLLEGE BOARD

	REGIONAL BOARD	ASSIGNED COLLEGE BOARD
MEMBERSHIP	<p>Paras 3-6, Schedule 2B 2005 Act</p> <p>Minimum 15 including:</p> <ul style="list-style-type: none"> • Chairing member • Chair of the board of each of the Regional Board's assigned colleges • 2 staff members: one teaching, one non-teaching • 2 student members • Up to 10 ordinary members 	<p>s. 24 and para 3, Schedule 2 1992 Act</p> <p>13-18 including:</p> <ul style="list-style-type: none"> • Chair • Principal of the college • 2 staff members: one teaching, one non-teaching • 2 student members
APPOINTMENT / REMOVAL	<p>Paras 3-6, Schedule 2B 2005 Act</p> <p><u>Appointment</u></p> <ul style="list-style-type: none"> • Chairing member appointed by the Scottish Ministers • Chair of assigned college <i>ex officio</i> • Teaching staff member elected by teaching staff of assigned colleges in region • Non-teaching staff member elected by non-teaching staff of assigned colleges in region • Student members nominated by students' association or by election 	<p>Para 3, Schedule 2 1992 Act</p> <p><u>Appointment</u></p> <p>All members appointed by Regional Board except:</p> <ul style="list-style-type: none"> • College principal <i>ex officio</i> • Teaching staff member elected by teaching staff of college • Non-teaching staff member elected by non-teaching staff of college • Student members nominated by students' association of the college <p>Grounds for removal of individual or board:</p>

	<ul style="list-style-type: none"> • Ordinary members appointed by Regional Board, with approval of chairing member and the Scottish Ministers <p>Grounds for removal of individual or board:</p> <ul style="list-style-type: none"> • Serious breach or repeated breach of term of condition of grant • Failure to provide/secure provision of education to an adequate standard • Other failure to discharge duties or mismanagement of financial or other affairs 	<ul style="list-style-type: none"> • Serious breach or repeated breach of term of condition of grant • Failure to provide/secure provision of education to an adequate standard • Other failure to discharge duties or mismanagement of financial or other affairs
TERM	<p>Paras 7 and 9, Schedule 2B 2005 Act</p> <ul style="list-style-type: none"> • Appointment can be for up to 4 years (which appointment can be extended for up to one further 4 year period, other than for staff members). However, no limit on the number of times a person can be reappointed. • Chairs of assigned colleges each for as long as (s)he remains in office • Student members' appointments end 31 August following appointment 	<p>Para 5, Schedule 2 1992 Act</p> <ul style="list-style-type: none"> • Appointment can be for up to 4 years (which appointment can be extended for up to one further 4 year period). However, no limit on the number of times a person can be reappointed. • College principal for as long as (s)he remains in office • Student members' appointments end 31 August following appointment
POWERS / FUNCTIONS/	s.12A-B, 23E-O 2005 Act	s. 12 1992 Act and sections 23E – O

RESPONSIBILITIES	<ul style="list-style-type: none"> • General duty to secure coherent provision of a high quality of fundable further and higher education in the locality of its colleges (deals directly with SFC) • When planning, ensure that funds are used as economically, efficiently and effectively as possible • Consult where necessary and work collaboratively with other bodies • Exercise functions with a view to improving economic and social well-being of the locality • Plan funding and fund assigned colleges • Hold assigned colleges to account, including monitoring performance • Appoint the chair and ordinary members of assigned incorporated college boards • Approve the appointment of the principal of assigned incorporated colleges (no power to remove a Principal of an assigned incorporated college) • General duties to exercise functions in accordance with good governance 	<p>2005 Act</p> <ul style="list-style-type: none"> • Provide the Regional Board with any information it reasonably requires (no direct relationship with SFC) • Comply with directions given by the Regional Board • Appoint college principal with approval of Regional Board (ability to dismiss a Principal without reference to Regional Board but subject to employment law) • Have regard to Regional Board plans • Ensure equal opportunities in exercising functions • Ensure students' interests represented by students' association • General duties to exercise functions in accordance with good governance • The board retains its existing powers under s12 of the 1992 Act to deliver education, charge fees, enter into contracts, deliver services, acquire and dispose of property etc. We understand this to mean the assigned college will remain responsible for day-to-day operational decisions rather than the Regional Board.
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	<ul style="list-style-type: none"> • Can acquire and dispose of land and other property, enter into contracts, invest money, accept gifts, form companies etc but cannot borrow money 	
<p>OTHER RELEVANT CONSIDERATIONS</p>	<ul style="list-style-type: none"> • The principal of an assigned college who is not a member of the Regional Board to which their college is assigned has a right to participate in any deliberations (but not in making decisions) at meetings of the Regional Board, unless the chair of the Regional Board determines otherwise (para 13, Schedule 2B 2005 Act) • The only "other" regional strategic body (i.e. not a regional board) at the moment is the University of the Highlands and Islands, to which special arrangements apply. • Ministerial guidance will be produced on the making of appointments to the board (para 3(6), Schedule 2B 2005 Act) 	<ul style="list-style-type: none"> • A member of the Regional Board is entitled to attend any meeting of the college and address the meeting on any matters the board is concerned about relating to funding (s.23J 2005 Act) • Note that there are slightly different arrangements under the act for unincorporated colleges i.e. colleges without a board of management under the 1992 Act. • Ministerial guidance will be produced on the making of appointments to the board

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