
Performance and Resources Committee

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| Date of Meeting | Thursday 14 March 2018 |
| Paper Title | Committee Terms of Reference |
| Agenda Item | 11 |
| Paper Number | PRC3-L |
| Responsible Officer | Penny Davis, Board Secretary |
| Status | Disclosable |
| Action | For Decision |

1. Report Purpose

- 1.1 To provide a basis for the Committee to determine its position on proposed amendments to its terms of reference.

2. Recommendations

- 2.1 The Committee is invited to **consider** the report and **decide** whether to recommend to the Board the proposed amendments to its terms of reference.

3. Background

- 3.1 At its last meeting, the Committee considered some proposed amendments to its terms of reference and, further to discussion, deferred a decision on the matter to its next meeting. The following report sets out in more detail the rationale for the proposed amendments to allow the Committee to reach a decision.
- 3.2 Members should be aware that the Scottish Government has issued an initial response on outcomes from its 2017 consultation on good governance, and that one of its decisions is to include two trade union representatives on college sector boards in addition to the two staff board members currently in place. Further detail on how and by when this change must be implemented will be available in due course. While this does not directly affect matters considered in this paper, it does mean that further consideration, at both GCRB and Scottish Government level, of the issue of non-executive balance on boards will need to take place in the coming months, noting in particular the constitutional differences between regional boards and college boards.

4. Proposed Amendments

- 4.1. At its meeting on 19 December the Committee considered two proposed amendments that would ensure at least 50% non-executive participation a) on the committee and b) in a quorum and, therefore, for the purposes of transacting committee business.

- 4.2. The proposed amendments were questioned on the basis that they created an unsubstantiated distinction between non-executive members and staff and student members.
- 4.3. The two points to consider, therefore, are whether there is a distinction between non-executive and other members of boards and, if that is the case, whether there is valid basis on which to ensure a minimum of 50% non-executive participation on the committee and in determining a quorum.
- 4.4. This is not a straightforward matter as it is not stated explicitly in college legislation or the Code of Good Governance that a board should in all of its decision-making have at least 50% non-executive engagement. However, there are several points of reference that the Committee may wish to consider, in relation to both the definition of a “non-executive” member and the balance of non-executive and other members.

a) Definition of “Non-Executive”

It could be argued that all GCRB members are non-executive since none is an employee of GCRB: staff are elected by the regional staff body as a collective and are employees of a college not GCRB; students are elected by the regional student executive; and College Chairs have a non-executive role in relation to their colleges.

However, the term “non-executive” in the context of college sector boards is defined formally in the Scottish Government's guidance on appointments, as follows.

A “non-executive board member” is a member who is not the chair and who does not otherwise hold a specific position on the board, ie, is not a student or staff member; and in the case of a college board, is not the principal; and in the case of a regional board, is not the chair of an assigned college.

The *Code of Good Governance* recognises this definition in its references to a non-executive member becoming the senior independent member, and non-executive members setting a principal's salary, and restates the Scottish Government's definition in its annex.

Audit Scotland's *Role of Boards* report published in 2010 (NB: this report pre-dates the changes to college board constitutions, but remains a reference link in the Scottish Government's *On Board* guidance), includes “representative” members in the definition of “non-executive”. It does, nonetheless, recognise a distinction:

Some non-executives have a representative role, such as local authority, employee and patient representatives for NHS bodies, and student representatives on college boards. They serve an important function in ensuring that the board is aware of the views of its key stakeholders. However, there is potential for conflict in the role as these non-executives seek to represent their stakeholders but are also members of the board.

b) Non-Executive Balance

The *UK Code on Corporate Governance* (with which college sector boards were required to comply as a condition of grant prior to the introduction of the *Code of Good Governance*) and which remains a point of reference in the Scottish Government's guidance for boards, states:

Except for smaller companies, at least half the board, excluding the chairman, should comprise non-executive directors determined by the board to be independent.

The role of non-executive members is further explained in the Scottish Government's On Board guidance, which refers to "industry background" as one aspect of board diversity and states that:

The different perspectives that different types of Board members bring mean that they are more likely to be able to constructively challenge proposals.

Perhaps the most important point, however, is that college sector boards are constituted in law in such a way that non-executive members comprise at least 50% of the board. Most sector bodies have a clear majority of non-executive members. The minimum legal membership for GCRB as a regional board is 15 (full membership being 18). At full capacity, GCRB operates with ten non-executives, the Chair, and seven other members made up of staff, students and College Chairs. With a board comprising 15 members, there would be two staff members, two student members, the three College Chairs, the Board Chair and seven non-executive members. The current legal minimum membership of GCRB is therefore 50% non-executive, excluding the Chair.

- 4.5.** Notwithstanding any changes that may follow the Scottish Government's decision to include additional trade union representatives, it is for the Board to decide whether it thinks there should be at least 50% non-executive engagement in all its decision-making (ie, not only on the board as a whole, with reference to its constitution, but on its committees, and recognised when setting a quorum).
- 4.6.** The amendments proposed to the Terms of Reference at the December have been revised to take account of the observation by Members that the Chair would have a casting vote and that this may be taken account of in setting a quorum. Revised proposed amendments are as follows.

- a) Where the Terms of Reference currently read:

The committee shall ... consist of not less than four members, at least one of whom should have recent and relevant financial experience.

It is suggested they should read:

The committee shall ... consist of not less than five members, a majority of whom must be non-executive members, and at least one of whom should have recent and relevant financial experience.

- b) Where the Terms of reference currently read:

The quorum necessary for the transaction of business of the committee shall be at least two committee members.

It is suggested they should read:

The quorum necessary for the transaction of business of the committee shall be at least two non-executive committee members.

4.7. In making any recommendation to the Board, the Committee may wish to note that the Board Regulations, that incorporate standing orders for the board and committees, were approved in February 2017 and it would be appropriate to review these once the Scottish Government has published its guidance on implementation of the changes to college sector boards.

5. Risk Analysis

5.1. Terms of reference should be based on robust governance principles and it is good practice for the committee to review its terms of reference regularly to ensure that this is the case. Therefore, this report contributes to the mitigation of *GCRB Risk 011: the capacity and capability of the Board is inadequate and standards of governance fall below the required level.*

6. Legal Implications

6.1 No legal implications are identified.

7. Resource Implications

7.1. There are no specific resource considerations arising from this paper.

8. Strategic Implications

8.1. Through the conditions of grant associated with the Regional Outcome Agreement, GCRB and the assigned colleges are required to conduct their affairs in accordance with the expected standards of good governance.

9. Equalities Implications

9.1 There are no equalities implications arising from this paper.