

# HIGHER EDUCATION GOVERNANCE (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

5. The Act has the following three Parts:
- Part 1 is concerned with governance arrangements for HEIs and is separated into three chapters. The first chapter deals with appointment of a senior lay member of a governing body of an HEI and membership of that governing body more broadly. The second chapter addresses the composition of academic boards in HEIs. The third chapter deals with key definitions.
  - Part 2 replaces the statutory definition of academic freedom as set out in section 26 of the 2005 Act.
  - Part 3 contains general provisions.

### **Part 1: Governance Arrangements**

#### **Chapter 1: Governing bodies**

#### *Senior lay member of governing body*

6. **Chapter 1** deals with the appointment of a senior lay member of a governing body of an HEI and membership of that governing body more broadly. Sections 1 to 8 set out the process which an HEI is required to follow when appointing a senior lay member. Section 9 concerns the remuneration and other terms and conditions of the senior lay member appointed in accordance with sections 1 to 8.

#### *Section 1: Position of senior lay member*

7. **Section 1** requires the governing body of an HEI to include the position of senior lay member. The senior lay member is the individual who will have the duty to preside at meetings of the governing body; a deliberative and a casting vote at such meetings; responsibility for the leadership and effectiveness of the governing body; and responsibility for ensuring that there is an appropriate balance of authority between the governing body and the principal of the institution.
8. Subsection (1) clarifies that the position of senior lay member can be given any name by an HEI, and this means that an HEI could, for example, use the title senior governor, convenor, vice-convenor, chair or any other term that the HEI considers appropriate. The responsibilities set out in subsection (2) and ascribed to the senior lay member appointed through the process in the Act reflect the existing role of the senior lay member in most HEIs (irrespective of the particular title used by an HEI) and encapsulate such functions as ensuring that the members of the governing body work well together. Subsection (3) provides that when the position of senior lay member is vacant or the holder of that position is absent, another member of the governing body may be selected by the governing body to exercise any of the senior lay member's

functions. Subsection (4) provides that subsections (2) and (3) – which relate to the functions of the senior lay member – are subject to section 2, which clarifies the interaction between senior lay members and rectors at those HEIs that have a rector with statutory functions under the Universities (Scotland) Acts of 1858 and 1889.

### ***Section 2: Interaction with role of rector***

9. **Section 2** provides for the interaction between the senior lay member and rectors at the four ancient universities. These are the University of Glasgow, the University of Edinburgh, the University of Aberdeen and the University of St Andrews. Subsection (2) provides that paragraphs (a) and (b) of section 1(2), and section 1(3) so far as relevant in relation to those paragraphs, do not apply in relation to the ancient universities. This overriding of sections 1(2)(a), 1(2)(b) and 1(3) by section 2 means that the statutory functions of the rectors at the ancient universities under section 4 of the Universities (Scotland) Act 1858 and section 5(5) of the Universities (Scotland) Act 1889 are preserved. These functions of the rectors are of presiding at meetings of the governing body and having a deliberative and a casting vote at such meetings. Nevertheless, the senior lay member at an ancient university is expected to continue to participate and vote at meetings of the governing body just as the other members participate and vote.

### ***Section 3: Relevant criteria and process***

10. **Section 3** provides that, whenever a vacancy arises in the position of senior lay member, the governing body of an HEI must delegate to a committee the responsibility of devising the relevant criteria with respect to the position, and ensuring the efficiency and fairness of the process for filling that position. The relevant criteria include the availability, skills and knowledge considered by the committee to be necessary or desirable to exercise the functions of the senior lay member and command the trust and respect of the other members of the governing body, the academic board of the institution and the staff and students of the institution. Section 3 does not prescribe which committee these responsibilities must be delegated to nor whether it should be an existing committee or a committee convened for this specific purpose. In practice, these responsibilities may be delegated to committees similar or equivalent to the nominations committees that many HEIs have for the purpose of making appointments to the governing body. However, under sections 3 to 8, the role of such a committee will not be nomination: it will be one of oversight of the recruitment process and selection of election candidates according to whether or not the committee is satisfied that an applicant meets the relevant criteria.
11. Each time the recruitment process for the senior lay member is undertaken, subsection (3) requires the committee to produce a publically available report. The report must give an overview (without disclosing individuals' identities or confidential information) of certain information. In particular, the report must disclose the number of applicants for the position of senior lay member. It must also, to the extent that consent to disclosure has been received from the applicant, disclose the protected characteristics listed in section 149(7) of the Equality Act 2010 in respect of: the overall number of applicants; the applicants invited to interview; and the applicants entitled to stand as candidates in an election for the position of senior lay member. The relevant protected characteristics are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The precise timing of the publication of the report is a matter for each HEI as long as such a report is published each time the recruitment process for the senior lay member is undertaken.
12. Subsection (4) requires that the committee which is tasked with these responsibilities under section 3 must include at least one staff member and at least one student member. Subsection (5) clarifies that the governing body of an HEI can, itself, make rules to further govern the appointment process, within the parameters set by sections 4 to 8.

#### ***Section 4: Advertisement and application***

13. **Section 4** sets out requirements in relation to advertisement of a current or upcoming vacancy in the position of senior lay member, as described in section 1. Section 4(1) obliges an HEI's governing body to advertise such a vacancy widely in a manner suitable for bringing it to the attention of a broad range of persons. Section 4(2) requires that the committee to whom responsibility has been delegated for devising the relevant criteria with respect to the position of senior lay member must ensure that the advert includes certain things. Specifically, it must set out the functions exercisable by the senior lay member under section 1(2), summarise the relevant criteria and state how more information about those criteria can be obtained, as well as explaining the appointment process, how the application form can be obtained, that expenses can be met for attending an interview and campaigning in an election, and that remuneration and allowances are available for holding the position. Section 4(2)(a) does not require the advert to make reference to functions beyond those specified in section 1(2). In the case of the ancient universities at which there is a rector, the senior lay member's functions under paragraphs (a) and (b) of section 1(2) are subject to the preservation of the functions of the rector by section 2 as discussed above and so the terms of the advertisement will need to reflect this. In that and any other case, there is no requirement as to the level of detail that the advert must contain when explaining the matters in section 4(2) and so this remains a decision for the HEI.

#### ***Section 5: Interview of certain applicants***

14. **Section 5** concerns the assessment of applications and the subsequent assessment of applicants at interview for the position of senior lay member. Subsection (1) requires that where an application for the position of senior lay member is made in the correct form in response to the advertisement of that position and where the applicant appears from the application, in the view of the committee provided for in section 3(1), to meet the relevant criteria, the applicant must be invited to an interview conducted by the committee. This requires the committee to decide whether or not it is satisfied that an applicant appears from the application to meet the criteria that the committee has set. Subsection (2) provides that if the applicant satisfies the committee at interview that the applicant meets the relevant criteria, then the applicant is entitled to stand for election to the position. Again, it is for the committee to decide whether or not it is satisfied that an applicant has demonstrated that he or she meets the criteria. Subsection (3) requires the HEI to offer every applicant reimbursement of reasonable expenses incurred in attending an interview (with the HEI determining what is reasonable).

#### ***Section 6: When election to be arranged***

15. Subsection (1) of section 6 places a duty on the governing body of each HEI to arrange an election for the position of senior lay member if more than one applicant for the position is entitled to stand as a candidate in the election, in the terms described in section 5, and confirms an intention to stand as a candidate. If fewer than two candidates are entitled to stand under section 5 then there would be a subsisting vacancy and the recruitment process would have to begin again from the point of advertisement under section 4. Where an HEI has arranged such an election but the number of candidates subsequently falls below two, subsection (2) of section 6 requires the HEI to postpone the election until it can be held with more than one candidate. In such a case, the vacancy would need to be advertised again, but any subsisting candidate remains entitled to stand in that reconvened election without the need to reapply or be interviewed again. Subsection (3) requires HEI governing bodies to offer reimbursement of campaigning expenses to candidates standing for election up to a limit to be fixed by the governing body. That limit is to apply per candidate and must apply equally to every candidate.

### ***Section 7: Election franchise and result***

16. **Section 7** relates to the election franchise and the election result in an election for the position of senior lay member. Section 7(1) provides that all staff and students of the HEI as well as members of the governing body will be entitled to vote in that election. The term students of the HEI is defined in section 22. Subsections (2) and (3) provide that an individual can only cast one vote (regardless of the number of eligible voting categories into which the individual falls), with each vote cast carrying equal weight. Subsection (4) provides for a simple majority electoral system such that the election is won by the candidate who secures the highest number of votes. Subsection (5) provides that when there is a tie for the highest number of votes cast, the winner is whoever is deemed to be the winner in accordance with rules made by the governing body of the HEI.

### ***Section 8: Appointment and tenure***

17. Subsection (1) of section 8 places a duty on the governing body to appoint the winning candidate in an election (as determined under section 7) to the position of senior lay member. Subsection (2) provides that appointment is to be made for the period specified in rules made by the governing body. Those rules may also specify that this period can be extended, without the need for the individual to seek re-election. Subsection (3) provides that appointment under section 8 (i.e. appointment following an election under section 7) is the only way in which a senior lay member may be appointed. Should the winning candidate decline to be appointed or be unable to take up the position, there would be a subsisting vacancy and the recruitment process would have to begin again from the point of advertisement under section 4.

### ***Section 9: Remuneration and conditions***

18. **Section 9** concerns the remuneration and terms and conditions of the appointment of a senior lay member. It requires the governing body of an HEI to pay such remuneration and allowances as it considers reasonable to the senior lay member of the governing body on the request of the appointed senior lay member. It also makes provision about the terms and conditions of appointment of the senior lay member.
19. Subsection (1) ensures that a senior lay member can obtain on request remuneration and allowances for the functions that the senior lay member has fulfilled in relation to that position. The sum to which the senior lay member is entitled under this section is not a salary; it is remuneration and allowances for specific work actually done, and need only be paid if requested by the senior lay member. Following such a request, payment must be made by the HEI of remuneration and allowances that are reasonable and commensurate with the nature and amount of work done by the senior lay member (with the HEI determining what is reasonable).
20. The position of senior lay member is to be independent and, to that end, subsection (2) provides that the post holder must not be a staff member or student of the institution during the person's period of appointment. Subsection (3) provides that it is for the governing body of each HEI to specify the other terms and conditions of that appointment.

## **Membership of governing body**

### ***Section 10: Composition of governing body***

21. **Section 10** sets out the composition of the membership of an HEI's governing body. This provision is intended to introduce greater consistency in the basic composition of the governing bodies of HEIs. Section 10(1) provides that each governing body must include the members listed below. A person cannot be appointed as a member under more than one of these categories at the same time. The required members are:

*These notes relate to the Higher Education Governance (Scotland) Act 2016 (asp 15) which received Royal Assent on 13 April 2016*

- the person appointed to the position of senior lay member by virtue of section 8 (section 10(1)(a));
  - two members directly elected by the staff of the HEI from among the staff of the HEI (section 10(1)(b));
  - two members nominated by trade unions; both members must be members of staff of the HEI in question and must be members of a branch of a union that has a connection with the HEI; one member is to be nominated from among the academic staff and the other member from among the support staff of the HEI (section 10(1)(c) and (d));
  - two members nominated by a students' association of the HEI (section 10(1)(e)); the student nominees must be students of the HEI which, by virtue of section 22, includes sabbatical officers whether or not they remain as students during their period in office; and
  - other persons appointed in accordance with the governing instruments of the HEI or any enactment (section 10(1)(f)); this leaves the governing body to appoint the remaining members as it wishes, provided that this is in line with its governing instruments or any applicable legislation, for example the Universities (Scotland) Acts or individual governance orders made under section 45 of the 1992 Act.
22. **Section 10(2)** provides that a trade union nominating a person from among a category of staff must either be one that is recognised by that HEI in relation to that category of staff for collective bargaining purposes (as described in section 178(3) of the Trade Union and Labour Relations (Consolidation) Act 1992) or otherwise appears to that HEI to be representative of the category of staff, having regard to all relevant factors.

***Section 11: Elections to governing body***

23. **Section 11** makes provision for the election of staff members appointed under section 10(1)(b). Section 11(2) states that the election is to be conducted according to rules made by the governing body of the HEI. Section 11(3) clarifies that the rules may make different provision for different vacancies (which means that different rules could be made by an HEI to apply to different categories of membership of the governing body if the HEI considers that to be appropriate) and may define "staff" as academic staff, support staff or all staff in order to specify the electorate and eligible candidates for a particular vacancy. Section 11(4) makes it clear that when the number of eligible candidates is equal to or fewer than the number of staff members being sought in any category of staff, those candidates are deemed to be elected.

***Section 12: Nominations to governing body***

24. **Section 12** makes provision for the nomination of the members of the governing body who are appointed by being nominated under section 10(1)(c) to (e). Section 12(2) requires that the nomination process is conducted according to any rules on nomination made by the governing body of the HEI. The rules required under this section deal only with the nomination process. The Act provides that the role of nominating bodies is simply to nominate but it remains open to an HEI to make provision for a more extensive role which might include the recall of nominees, subject to the provisions on removal in section 13. Section 12(3) provides that the rules may determine who can exercise the right of nomination (for example, where there is more than one body which meets the criteria for making a nomination under section 10) and that different provision might be made for different vacancies on the governing body.
25. **Section 12(4)** sets out that before making or changing any existing rules under section 12(2), the governing body must consult the representatives of anyone who has both a right of nomination under the proposed rules (section 12(4)(a)) and who is affected by the proposed new rules or by any proposed amendment to existing rules

(section 12(4)(b)). Accordingly, if only part of the rules are revised, there will be no requirement to consult with bodies that have a right to make a nomination if the rules that are applicable to that body are not subject to any changes.

### ***Section 13: Resignation or removal from body***

26. **Section 13** concerns the resignation or removal of the senior lay member and other members of the governing body of an HEI.
27. Subsection (1) provides that rules made by the governing body of an HEI may contain provision about the procedure for the resignation or removal of members of the governing body, including the senior lay member. Subsection (2) provides that rules for removal should in particular prescribe the grounds for removal, require that removal can only be effected by a resolution based on those grounds and passed by a specified majority of the members of the governing body, and allow the person who is the subject of the resolution to seek a review in order to have the resolution reconsidered or quashed. Subsection (3)(a) provides that, for the purposes of subsection (2)(b), the majority to be specified by the HEI can be any size so long as it is a majority. Subsection (3)(b) provides that the member of the governing body who is the subject of the resolution should not be counted in the calculation of a majority and is not entitled to vote on the resolution. Subsection (4) provides that rules made about the procedure for the resignation or removal of the senior lay member do not need to be the same as rules made about the procedure for the resignation or removal of other members of the governing body of an HEI.

### ***Section 14: Validity of body's proceedings***

28. **Section 14** ensures that the validity of proceedings of the governing body of an HEI is not affected by any vacancy arising in membership or category of membership (section 14(a)). This means that, in the event of an unexpected vacancy arising, the HEI can continue to function pending the appointment of a new member under section 10. Further, this validity is not affected by any defect in the appointment of a member of the relevant governing body (section 14(b)).

## ***Chapter 2: Academic boards***

### ***Section 15: Composition of academic board***

29. **Section 15(1)** sets out the composition of the membership of an academic board of an HEI. Each academic board must include the following members:
- the principal of the HEI (section (15)(1)(a));
  - heads of school, who are the individuals who are the most senior academics in a particular department within an HEI (section 15(1)(b));
  - academic staff elected from among their own number (section 15(1)(c));
  - students elected from among their own number (section 15(1)(d)) which, by virtue of section 22, includes sabbatical officers whether or not they remain as students during their period in office; and
  - other persons appointed by virtue of an enactment (section 15(1)(e)(i)) or in accordance with the governing instruments of the HEI (section 15(1)(e)(ii)) or in accordance with a decision made by the governing body of the HEI (section 15(1)(e)(iii)).
30. **Section 15(2)(a)** provides that more than 50% of the membership of the academic board members must be persons elected by staff or students. **Section 15(2)(b)** provides that at least 10% of the membership of the academic board members must be persons elected by students.

31. [Section 15\(3\)](#) provides that, despite section 15(2)(b), HEIs are not obliged to elect more than 30 student members. The proportions that will be required (just over 50%, and 10%, respectively) are generally reflected in the composition of the majority of existing academic boards. Election, rather than nomination, of student members to academic boards will be new to the majority of HEIs.

### ***Section 16: Elections to academic board***

32. [Section 16](#) makes provision for the conduct of elections of members appointed under section 15(1)(c) or (d). Section 16(2) provides that the election is to be conducted in accordance with rules made by the governing body of the HEI. Under section 16(3) the rules may determine the number of appointments to be made (paragraph (a)), and make different provision for different vacancies (paragraph (b)) (which means that the rules for the election of staff members could be different to the rules for the election of student members).
33. [Section 16\(4\)](#) provides that where the number of eligible candidates in one of the categories in section 15 is equal to or fewer than the number of vacancies available in that category, those candidates will be deemed to be elected.

### ***Section 17: Validity of board's proceedings***

34. [Section 17](#) ensures that the validity of proceedings of the academic board of an HEI is not affected by any vacancy in membership or category of membership (paragraph (a)). It further provides that this validity is not affected by any defect in the appointment of a member of the relevant academic board (paragraph (b)).

## ***Chapter 3: Key definitions***

### ***Section 18: Meaning of higher education institution***

35. [Section 18\(1\)](#) provides a definition of the term “higher education institution” which applies for the purposes of Part 1 of the Act. Section 18(1) provides that the term has the same meaning as in the 2005 Act, but that it includes an institution here only if it is also listed in schedule 2 to the 2005 Act. The definition of HEI, however, explicitly excludes the Open University (subsection (1)(b)).
36. The 2005 Act definition of “higher education institution” is found in section 35(1) of that Act where it is defined as (1) a university or (2) a designated institution within the meaning of section 44(2) of the 1992 Act. In practice, the only non-universities which are currently designated under that section are:
- the Royal Conservatoire of Scotland (which was designated by [SI 1992/1025](#) under its former name, the Royal Scottish Academy of Music and Drama),
  - Glasgow School of Art (which was also designated under [SI 1992/1025](#)), and
  - SRUC, or Scotland’s Rural College (which was designated by [SSI 2008/177](#) under its former name, the Scottish Agricultural College).
37. Any institution listed in schedule 2 to the 2005 Act is a fundable post-16 education body, meaning that it is currently eligible to receive funding from the Scottish Further and Higher Education Funding Council. However, the further education colleges listed under the first italic heading in that schedule will not be caught, as they are not covered by the definition of higher education institution in section 35(1) of the 2005 Act.
38. The effect of the definition is to capture institutions which provide higher education in Scotland only if they are eligible for public funding, while excluding the Open University on the basis that it is a single institution established elsewhere and operating across multiple jurisdictions which might otherwise be made subject to conflicting governance requirements.

39. **Section 18(2)** provides that the Scottish Ministers may by regulations modify the definition of “higher education institution” in subsection (1). This would enable the Scottish Ministers to exclude a particular HEI from that definition (in addition to the Open University, which is already excluded). There is no power for the Scottish Ministers to add a particular HEI, but all new HEIs will automatically be included within the definition as long as they are fundable post-16 education bodies. Section 18(3) provides that such regulations will be subject to the negative procedure.

### ***Section 19: Meaning of governing document***

40. **Section 19** sets out the meaning of the term “governing document” used in Part 1 of the Act:
- section 19(1)(a) confirms that in the case of an older university this means any ordinances made under the Universities (Scotland) Acts;
  - section 19(1)(b) confirms that for an HEI established by royal charter, a governing document is any of its charters and any statutes made under them;
  - section 19(1)(c) confirms that in the case of a “designated institution”, a governing document will be any orders of the Privy Council which are in force with respect to the HEI, except where the HEI is a registered company under the Companies Acts and it has no orders of the Privy Council in force in relation to it where the governing document is the articles of association of the HEI. Section 19(2) clarifies that the term “designated institution” means an institution designated under Part II of the 1992 Act (where the definition is found in section 44);
  - section 19(1)(d) explains that a governing document, aside from the cases set out in section 19(1)(a) to (c), means any instrument which establishes the HEI or which governs the composition of its governing body or academic board;
41. In addition to defining “designated institution”, section 19(2) provides that, “older university” is to be construed in accordance with section 16(1) of the Universities (Scotland) Act 1966. The older universities are the University of Aberdeen, the University of Edinburgh, the University of Glasgow and the University of St. Andrews. It also provides that “registered company” means a company registered under the Companies Acts as defined in section 2 of the Companies Act 2006.

### ***Section 20: Meaning of governing body***

42. **Section 20** states that, in Part 1 of the Act, the term “governing body” has the same meaning as in Part II of the 1992 Act (where the definition is found in section 56(1)).

### ***Section 21: Meaning of academic board***

43. **Section 21** states the meaning of the term “academic board” in the context of an HEI. Section 21(1)(a) and (b) explains that the term means the body of persons with responsibility for overall planning, co-ordination, development and supervision of the academic work of the HEI (although the academic board discharges that responsibility subject to the general control and direction of the governing body of the HEI).
44. **Section 21(2)** clarifies that the “academic board” is also known in some HEIs as the Senate, Senatus or (and in the case of the older universities, in the Universities (Scotland) Acts) Senatus Academicus.

### ***Section 22: References to students***

45. **Section 22** provides for how the term ‘students of a higher education institution’ is to be understood for the purposes of the Act. This section states that a reference to the students of a higher education institution includes all persons holding sabbatical office



in a students' association of the institution, whether or not they remain students of the institution during their period of office.

46. The term 'sabbatical officer' is generally understood in the higher education sector and is used in certain governance orders made under section 45 of the 1992 Act as well as other education legislation. Section 22 of the Education Act 1994 sets out the requirements to be observed in relation to students unions (i.e. students' associations). Section 22(2)(f) of that Act states that "a person should not hold sabbatical union office, or paid elected union office, for more than two years in total at the establishment".

## **Part 2: Academic Freedom**

### ***Section 23: Upholding academic freedom***

47. **Section 23** of the Act substitutes a new section 26 into the 2005 Act. The new section strengthens the obligation on post-16 education bodies by providing that such bodies must aim to uphold, so far as the body considers reasonable, the academic freedom of persons engaged in teaching, the provision of learning or research at that body (section 26(1)(a)). In particular, the new section 26(1)(b) provides that post-16 education bodies must aim to ensure, so far as the body considers reasonable, that appointments of such persons (whether held or sought) and any entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of a person's academic freedom. The new section 26(4) expands the current definition of academic freedom to clarify that it includes the freedom, within the law, to develop and advance new ideas or innovative proposals. This adds to the existing freedom to hold and express opinions, question and test established ideas or received wisdom, and present controversial or unpopular points of view.

## **Part 3: General Provisions**

### ***Section 24: Ancillary regulations***

48. **Section 24(1)** gives the Scottish Ministers the power, by regulations, to make such supplemental, incidental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes of or in connection with the Act. Section 24(2)(a) provides that these regulations will be subject to the affirmative procedure when they add to, replace, or omit any part of the Act or any other Act. Section 24(2)(b) provides that, in all other circumstances, regulations will be subject to the negative procedure.

### ***Section 25: Consequential modifications***

49. **Section 25** introduces a schedule to the Act making a number of consequential amendments to, or modifications of, other enactments as a result of the Act. Paragraph 1 of the schedule makes consequential amendments to the Universities (Scotland) Act 1858. Paragraph 2 of the schedule makes consequential amendments to the Universities (Scotland) Act 1889. Finally, paragraph 3 makes consequential amendments to the Universities (Scotland) Act 1966. The consequential amendments are necessary as a result of the Act's provisions on the appointment of senior lay members of governing bodies, the composition of governing bodies of HEIs and the composition of academic boards.

### ***Section 26: Commencement***

50. **Section 26(1)** brings sections 26 and 27 (which provides for the Act's short title) into force on the day after Royal Assent. Section 26(2) provides that the other provisions in the Act come into force on a day appointed by the Scottish Ministers in regulations. Section 26(3)(a) allows the Scottish Ministers by regulations made under subsection (2) to bring the other provisions of the Act into force on different days for different purposes

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and section 27(3)(b) allows the Scottish Ministers to include transitional, transitory or saving provision in those regulations.