

## POLICY NOTE

### THE HIGHER EDUCATION GOVERNANCE (SCOTLAND) ACT 2016 (COMMENCEMENT, TRANSITORY, TRANSITIONAL AND SAVINGS PROVISIONS) REGULATIONS 2016

#### SSI 2016/382 (C. 36)

1. The above instrument is made in exercise of the powers conferred by section 26(2) and (3) of the Higher Education Governance (Scotland) Act 2016 (“the Act”). This instrument is not subject to any parliamentary procedure.

#### Policy Objectives

2. The Act received Royal Assent on 13 April 2016. Sections 26 and 27 came into effect on 14 April 2016, the day after Royal Assent.

3. These Regulations fully commence the Act by bringing into force:

- sections 1, 2, 10 to 25 and the schedule of the Act on 30 December 2016; and
- sections 3 to 9 of the Act on 30 June 2017.

4. The policy objectives of the Act are set out in the Policy Memorandum which accompanied the Higher Education Governance (Scotland) Bill (“the Bill”). The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum:

<http://www.parliament.scot/parliamentarybusiness/Bills/90125.aspx>

#### *Sections 1 to 9*

##### *Commencement:*

5. Sections 1 to 9 of the Act relate to the senior lay member of a governing body of a higher education institution (“HEI”). Sections 3 to 8 place a requirement on each HEI, where a vacancy arises, to appoint the senior lay member of its governing body in accordance with a two stage process comprising an advertisement, application and selection stage followed by an election stage. Section 9 also requires each HEI to pay, at the request of the senior lay member, reasonable remuneration and allowances for undertaking the role of senior lay member; and makes provision about the terms and conditions of that appointment.

6. These Regulations commence sections 1 and 2 of the Act on 30 December 2016 without any transitory, transitional or saving provision since HEIs do not have to update their governing documents in order to comply with these provisions.

7. However, these Regulations commence sections 3 to 9 of the Act on 30 June 2017, 6 months after the commencement of these Regulations. The effect of this is that all senior lay member vacancies arising on or after 30 June 2017 will be required to adhere to the recruitment and appointment processes as well as the remuneration and conditions obligations in the Act. The policy intention behind this later commencement date is to avoid disruption to any recruitment exercises that will be substantially underway by 30 June 2017 and to allow sufficient time for HEIs to decide how they will address, and make rules about,

the elements of the appointment process that are not set out in the Act such as the detail of how elections under sections 6 and 7 will be conducted.

*Transitory and transitory saving provision:*

8. Since the policy intention behind the commencement of sections 3 to 9 of the Act is only to avoid disruption to any recruitment exercises that are *substantially* underway, the transitory provision in regulation 3 ensures that sections 3 to 9 of the Act will apply, from 30 June 2017, not just to new vacancies but also to any vacancy that arose prior to that commencement date, where that vacancy has not yet been advertised within and outwith the HEI as required by the Scottish Code of Good Higher Education Governance.

9. Regulation 4 makes transitory saving provision so that, despite the commencement on 30 December 2016 of section 25 and the modifications in the schedule of the Act, those modifications which are consequential on the appointment of a senior lay member under section 8 of the Act, do not take effect in respect of a particular HEI until that HEI has made its first appointment under section 8 of the Act.

***Sections 10 to 14***

*Commencement:*

10. Sections 10 to 14 of the Act relate to the membership and proceedings of the governing body of an HEI. Section 10 of the Act places a requirement on each HEI to ensure that the membership of its governing body includes a senior lay member appointed in accordance with the process stipulated in sections 3 to 8 of the Act; two members who are directly elected from the HEI's staff; one member nominated by a trade union from among the academic staff; one member nominated by a trade union from among the support staff; two student members nominated by a students' association of the HEI; and such other persons appointed by virtue of an enactment or in accordance with the HEI's governing document. Section 11 of the Act applies to the election of staff members to the governing body and section 12 applies to the nomination of trade union and student members to the governing body. Section 13 of the Act makes provision about the rules that a governing body may make about how the members of the governing body may resign or be removed from that governing body (including the senior lay member). Finally, section 14 provides that the validity of the governing body's proceedings is not affected by any vacancy in membership or defect in the appointment of a member of the governing body.

11. These Regulations commence sections 10 to 14 of the Act on 30 December 2016. However, section 10 is subject to transitional provision in regulation 5.

*Transitional and transitional saving provision:*

12. In order for an HEI to comply with section 10 of the Act, it will have to amend its current governing document and also make rules in anticipation of complying with section 10. The policy intention behind the transitional provision in regulation 5(1) to (3) is to allow sufficient time for every HEI to do this while minimising disruption to existing members of the governing body. The four older universities (St Andrews, Glasgow, Aberdeen and Edinburgh) will need to amend their ordinances; HEIs established by Royal Charter will need to amend their Statutes; HEIs established after the commencement of the Further and Higher

Education (Scotland) Act 1992 will need to amend the statutory instruments that provide for their governance and the other HEIs will need to amend their Articles of Association. All governing document amendments have to be approved by the Scottish Ministers in some capacity and the preparation, drafting and approval process will take time.

13. As such, these Regulations commence section 10 of the Act on 30 December 2016 with a transitional period of 4 years. This aims to ensure sufficient time for an HEI to amend its current governing document in line with the requirements of section 10 but also to ensure that, as soon as this has been done within that 4 year period, and a governing document no longer prevents compliance with section 10, section 10 will apply. The policy intention behind this transitional provision is to enable an HEI to meet the requirements of the Act earlier than 30 December 2020, if it wishes to do so over the course of the transitional period but no later than 30 December 2020. This enables, for example, the governing body to meet the requirements of the Act over the period in harmony with the natural turnover of governing body members as terms of office expire should they wish to do so and avoids, as far as possible, a need to terminate a member's term of office early. Where an HEI updates its governing document to reflect the requirements of the Act but also makes its own transitional provision in that governing document for a governing body member to continue in office for a certain period because the HEI does not wish to terminate that member's office early, then the HEI's governing document could still be preventing compliance with section 10. However, when any such transitional provision within an HEI's governing document expires, and the governing document otherwise reflects the requirements of section 10, there will be no obstacle to compliance and section 10 will apply to that HEI. Because the Scottish Ministers have a role in approving all amendments to governing documents, Ministers will be able to prevent an HEI making its own transitional provision that extends non-compliance beyond the backstop commencement date of 30 December 2020.

14. As soon as an HEI's governing document no longer prevents compliance with section 10 of the Act, that section will apply which means that any appointments to the governing body made in line with the rules made in advance in line with sections 11 and 12, will be supported by primary legislation. Within the 4 year transitional period, HEIs will be expected to amend their governing documents as necessary and to manage the terms of office of existing members of their governing body to ensure that by 30 December 2020 they are compliant with the requirements of the Act.

15. Transitional saving provision is made in regulation 5(4) so that, despite the commencement on 30 December 2016 of section 25 and the modifications in the schedule of the Act, those modifications which are consequential on section 10 of the Act, do not take effect in respect of a particular HEI while the transitional provision in regulation 5(1) to (3) applies to that HEI.

### ***Sections 15 to 17***

#### ***Commencement:***

16. Sections 15 to 17 of the Act relate to the membership and proceedings of the academic board of an HEI. Section 15 of the Act requires each HEI to ensure that the membership of its academic board includes the principal of the HEI, the heads of school of the HEI, directly elected academic staff, directly elected student members, and such other persons appointed by virtue of an enactment or in accordance with the HEI's governing

document or a decision of its governing body. Section 16 of the Act applies to the election of academic staff and student members to the academic board and section 17 provides that the validity of the academic board's proceedings is not affected by any vacancy in membership or defect in the appointment of a member. As well as providing for mandatory categories of membership of the academic board, section 15 of the Act requires HEIs to ensure that elected members comprise more than 50% of the total membership of the academic board and that at least 10% of the membership of the academic board is made up of elected student members unless that exceeds 30 elected student members. All staff and student academic board members appointed by election under the Act (which does not include members appointed *ex officio*) must be elected by the constituency that they represent.

17. These Regulations commence sections 15 to 17 of the Act on 30 December 2016. However, section 15 is subject to transitional and transitory saving provision in regulation 6.

*Transitional and transitory saving provision:*

18. The policy intention behind the transitional provision in regulation 6(1) to (3) for section 15 of the Act is the same as that behind the transitional provision in regulation 5(1) to (3) for section 10 of the Act. Transitory saving provision is made in regulation 6(4) so that, despite the commencement on 30 December 2016 of section 25 and the modifications in the schedule of the Act, those modifications that are consequential on section 15 of the Act do not take effect in respect of a particular HEI while the transitional provision in regulation 6(1) to (3) applies to that HEI.

### **Sections 18 to 22**

*Commencement:*

19. Sections 18 to 22 of the Act contain the key definitions in the Act and are commenced by these Regulations on 30 December 2016.

### **Section 23**

*Commencement:*

20. Section 23 of the Act relates to academic freedom and replaces section 26 of the Further and Higher Education (Scotland) Act 2005 with new provision for the protection of academic freedom by post-16 education bodies. The new section strengthens the obligation on post-16 education bodies. It requires 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 the body. It also requires that such bodies must aim to ensure, so far as the body considers reasonable, that appointments held or sought and entitlements or privileges enjoyed by such persons are not adversely affected by the exercise of academic freedom of such persons. The new section also expands the definition of academic freedom to clarify that it includes the freedom to develop and advance new ideas or innovative proposals.

21. These Regulations commence section 23 of the Act on 30 December 2016.

## **Section 24**

### *Commencement:*

22. Section 24 of the Act gives the Scottish Ministers the power to make ancillary regulations. These Regulations commence section 24 of the Act on 30 December 2016.

## **Section 25 and the schedule**

### *Commencement:*

23. Section 25 and the schedule of the Act make consequential modifications to other enactments which apply only to the universities of St Andrews, Glasgow, Aberdeen and Edinburgh. Subject to the savings provisions in regulations 4, 5(4) and 6(4), These Regulations commence section 25 and the schedule of the Act on 30 December 2016.

## **Consultation**

24. The requirements of all provisions of the Act were consulted on during the parliamentary progress of the Bill. Informal consultation on the proposed commencement strategy was discussed at a roundtable of key stakeholders including Universities Scotland, Committee of Scottish Chairs, National Union of Students Scotland, University and College Union, EIS, Unison and representatives of the small specialist institutions (SRUC, Glasgow School of Art and the Royal Conservatoire of Scotland) on 25 May 2016 and in a letter to all HEIs dated 30 June 2016. These Regulations implement that commencement strategy.

## **Impact Assessments**

25. All impact assessments were carried out prior to introduction of the Bill. These Regulations simply bring the Act into force.

## **Financial Effects**

26. A Financial Memorandum was completed prior to introduction of the Bill. A supplementary Financial Memorandum was also completed during the parliamentary progress of the Bill.

Link to the original Financial Memorandum:

[http://www.parliament.scot/S4\\_Bills/Higher%20Education%20Governance%20\(Scotland\)%20Bill/b74s4-introd-en.pdf](http://www.parliament.scot/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/b74s4-introd-en.pdf)

Link to the supplementary Financial Memorandum:

[http://www.parliament.scot/S4\\_Bills/Higher%20Education%20Governance%20\(Scotland\)%20Bill/SPBill74AFMS042016.pdf](http://www.parliament.scot/S4_Bills/Higher%20Education%20Governance%20(Scotland)%20Bill/SPBill74AFMS042016.pdf)

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