

Shadow Board – Shetland Merger Project

Committee	Shadow Board
Subject	Legal Status for the New College
Action requested	<input type="checkbox"/> For information only <input type="checkbox"/> For discussion <input checked="" type="checkbox"/> For recommendation
Brief summary of the paper	The Shadow Board was provided with an overview of legal status issues on 26-6-19. This paper reviews this information and requests the adoption of legal status as Unincorporated Association.
Resource implications [if yes, please provide detail]	Yes The finance procedures of an unincorporated association provide more scope for sustainability and self-determination over resources to enable future planning. The challenges facing the college make this essential.
Risk implications [if yes, please provide detail]	No
Date paper prepared	23-Jul-19
Date of committee meeting	31-Jul-19
Author	Project Manager
Equality and diversity	No
Status	Non-confidential
Freedom of Information Can this paper be included in 'open' business?*	Yes

7. Background	
1.1	<ul style="list-style-type: none"> • The Shadow Board was presented with information on the pros and cons of incorporation and unincorporated association models of governance and financial management, on 26-6-19. • EIS-FELA national position promoting incorporation was provided by Andrew Anderson. • Information from a range of colleges, both incorporated and unincorporated association, was provided by the Project Manager by presentation.
8. Report authors	
2.1	Project Manager
9. Partners / stakeholders	
3.1	The sustainability of the new college is at the forefront of all stakeholders' concerns. Incorporated colleges face significant financial challenges which this legal status exacerbates, because operating to the requirements of the Scottish Public Finance Manual is both more expensive in terms of staffing requirements; and more restrictive in retaining surplus and enabling this to be re-invested in college assets and activity.
10. Risks	
4.1	Board members are aware that the new college will face challenges in achieving sustainability and growth. Increasing this challenge by adopting a legal status requiring an unwieldy approach to financial management risks future sustainability.
11. Dependencies	
5.1	Application to register the company and secure charitable status requires the Mem & Arts to be finalised which in turn requires agreement on the legal status.

1. Introduction

This paper provides background already presented to the Shadow Board by presentation on 26-6-19. It also provides EIS-FELA national position. A response is provided to each point in this position.

2. Recommendation

Based on the information set out in this paper, it is recommended the Shadow Board opts for an unincorporated association model.

In agreeing to become an unincorporated association, the Board may wish to reiterate its intention to follow the requirements of the Scottish Funding Council to follow national collective bargaining.

The Shadow Board should agree to ensure staff and union consultation takes place on the final Ministerial Merger Business Case before submission.

3. Information from presentation

	Incorporated model	Unincorporated Association model
Overview	<ul style="list-style-type: none"> • There are 20 incorporated colleges in Scotland. These were incorporated (1993 Act) when colleges (except Shetland and Orkney) were removed from local authority control. • There have been many college mergers in Scotland of two or more colleges. On merging, the new college maintained the incorporated status that previous colleges already had. • In 2014, became classed as public bodies. Therefore, they were obliged to operate under the Scottish Public Finance Manual. 	<ul style="list-style-type: none"> • 6 colleges in Scotland adopted an unincorporated association model. This has grown from four in 2011 (Newbattle Abby, Shetland, Orkney and Sabhal Mor Ostaig) to include West Highland College (2015) and Argyll College (2015). • These colleges were never incorporated in the first place. Some are mergers of former very local learning centres. • These colleges still participate in national pay bargaining – Scottish Funding Council has confirmed it will require these colleges to sign up to NRPA as a funding condition
Commentary	<ul style="list-style-type: none"> • Anderson Strathearn (due diligence report for SIC on the merger) confirmed an incorporated college is problematic for the new college: • “[Incorporated] colleges have to control their expenditure so it does not exceed pre-set limits, even if expenditure is financed from borrowing it would still require “budget cover” which would mean that it would still be included within the Scottish Government budget and colleges cannot carry forward surplus funds to future years. <u>This has a fundamental impact on the operation of a college</u>” • Research into many incorporated college accounts shows widespread frustration with the Scottish Public Finance Manual amongst colleges to the extent that many present this frustration annually in their financial report of accounts. • Scottish Funding Council observation (Shadow Board 26-6-19) was that most colleges would 	<ul style="list-style-type: none"> • No college established as an unincorporated association has applied to become incorporated.

	<p>move to an unincorporated association model given the choice – but that, once incorporated, government approval would be required to make such a choice.</p>	
<p>Day to day restrictions on financial operations</p>	<ul style="list-style-type: none"> • Operating with a fixed cash budget which must be spent on agreed government priorities. • Impact on non-cash depreciation charges. • Cash reserves must be held as low as possible and justified. • Must make monthly cash projections, with no funding in advance of need. • Transaction approval is needed from the Regional Strategic Body (in the case of Shetland this would be UHI) with a low delegated authority threshold. • Some incorporated colleges have set up additional foundations for freedom to hold cash and invest. This requires additional resources in terms of financial management, accounting and additional auditing, all carrying a cost. • Audit Scotland report 2019 shows 12 incorporated colleges are showing recurring deficits. There is limited analysis of this. 	<ul style="list-style-type: none"> • Smaller colleges that are unincorporated associations face financial challenges due to rurality and other factors; the unincorporated association model allows them greater flexibility in managing their finances within the same financial accountability framework for all colleges: <ul style="list-style-type: none"> ○ A requirement by SFC and Regional Strategic Body to properly account for all income and expenditure ○ A requirement by OSCR to properly account for all income and expenditure and make accounts publicly available ○ A requirement to follow the Code of Good Practice for College Governance with an Audit Committee and process for internal/external audit • An unincorporated association model allows for long term financial planning and strategic funding/investment strategy, using the ability to manage surplus to underpin this approach. • The cost of incorporation and SPFM requirements would be disproportionate to the size of the college. • Audit Scotland report 2019 shows 5 unincorporated colleges are showing recurring deficits. There is no further analysis of this. 5 of these colleges are also in remote/rural areas.
<p>Accountability and governance</p>	<ul style="list-style-type: none"> • In an incorporated college, Ministers appoint Board members. • Ministers can also remove Board members if performance or other issues arise. • Self-evaluation of Board performance is required. 	<ul style="list-style-type: none"> • An unincorporated association Board maintains good practice in line with the Code of Good Practice for College Governance in terms of membership, Board appointment processes, required sub committees etc. • Board appointments are made locally according to need, enabling vacancies to be filled quickly and ensuring

	<p>External review of this is also required.</p>	<p>decisions are made based on local knowledge.</p> <ul style="list-style-type: none"> • Self-evaluation of Board performance is required. External review of this is also required.
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4. Review of EIS-FELA national position (as presented in handout 26-6-19, direct copy of text in the left column)

EIS-FELA	Response
<ul style="list-style-type: none"> • The Scottish government has not sought any changes to legislation to remove colleges from the public sector – confirmation that they believe that the level of government control over colleges is appropriate 	<ul style="list-style-type: none"> • The government has not sought to incorporate any unincorporated colleges and has not objected to new colleges seeking unincorporated status – confirmation that they are satisfied that the governance of unincorporated colleges is appropriate and carries the safeguards applied to other colleges.
<ul style="list-style-type: none"> • There is very significant public investment in Scotland’s colleges – regardless of whether they are incorporated or unincorporated 	<ul style="list-style-type: none"> • Agreed. There may be further agreement on wishing there was more investment in both incorporated and unincorporated colleges. • The government has never sought to apply any advantages to incorporated colleges that unincorporated colleges cannot also benefit from. On every aspect except adherence to the Scottish Public Finance Manual, it expects the same guidance and performance requirements to be equally followed by both incorporated and unincorporated colleges.
<ul style="list-style-type: none"> • If any new merged college was unincorporated it would not be a public body with the same level of accountability to the Scottish parliament and not subject to parliamentary scrutiny 	<ul style="list-style-type: none"> • The College Board would nevertheless be subject to significant levels of scrutiny, by following the Code of Good Governance for Scotland’s Colleges, which requires: <ul style="list-style-type: none"> ○ The board must ensure a formal and open procedure is in place for recruiting and selecting new non-executive board members and follow the same Ministerial Guidance as for incorporated colleges, with the final difference of not requiring Ministerial approval for appointment. ○ Annual review of Board performance, and publishing a development plan online; ○ Annual self-evaluation of Board performance with 3-yearly externally facilitated evaluation. ○ All internal and external evaluations reported to funding body.

	<ul style="list-style-type: none"> ○ Chair and committee chair performance evaluated by vice-chair or other independent member ○ Chair responsible for appraisal of all other Board members.
<ul style="list-style-type: none"> ● Unincorporated colleges can change their governance structures by simply amending Articles of Association following a decision by the Board of Management – does not provide the security of regulatory provision sought by Scottish Ministers ● Therefore, it would not have the appropriate level of accountability to the public, students or college employees 	<ul style="list-style-type: none"> ● The Code of Good Governance for Scotland’s Colleges states that Board members must make decisions in the best interests of the college and/or region as a whole rather than selectively or in the interests of a particular group. Some would argue that local people are best placed to understand what is best for the college and the region. ● Accountability to the public, students and employees takes many forms. The new college has the scope to be proactive in engaging all stakeholders and bringing their views into decision making, as well as making its performance known to all stakeholders. Can the government say the same?
<ul style="list-style-type: none"> ● There are significantly more colleges in the Highlands and Islands who are unincorporated and effectively companies limited by guarantee – it is clearly no accident some of these have historically experienced poorer terms and conditions 	<ul style="list-style-type: none"> ● The history of terms and conditions in any college cannot be directly attributed to its legal status. Some colleges grew out of small local, community-led initiatives or special interest groups which have become colleges for a range of reasons. Their development trajectories are all different and their different approaches to employment is more complex than a simple causal linkage to incorporation or unincorporated association.
<ul style="list-style-type: none"> ● Unincorporated colleges do not have to consult on any changes of the collective bargaining framework under Post-16 Education (Scotland) Act 2013 	<ul style="list-style-type: none"> ● Since Scottish Funding Council has committed to ensuring a condition of funding is to follow NRPA, the new college will be equally engaged in consultation and collective bargaining, along with all colleges.
<ul style="list-style-type: none"> ● Would effectively result in the delivery of FE by a private company (companies limited by guarantee), which is wholly inappropriate given the level of public funding invested in FE 	<ul style="list-style-type: none"> ● A more accurate description would be a Scottish Charity and Company Limited by Guarantee. A private company operates only in the interest of owners or shareholders. A charitable company must exist to achieve charitable objects and meet the needs of its identified beneficiaries (in this case, students, learners and researchers of all ages and at all levels). There are no owners or shareholders. In the event of dissolution, assets must be distributed to a charity with similar aims. The purpose of being a limited company is to limit the liabilities of trustees.
<ul style="list-style-type: none"> ● It is crucial that students and college employees receive security 	<ul style="list-style-type: none"> ● Agreed. The difficulties with being bound to the Scottish Public Finance Model makes an

	<p>incorporated model the least likely of the options to provide security.</p>
<ul style="list-style-type: none"> • Why should any new entity not be created on the same basis and with the same legal protections as those colleges delivering FE in the central belt? • The new body will be receiving public funds and should be subject to the same level of scrutiny as other incorporated colleges in the central belt. 	<ul style="list-style-type: none"> • Given the protections assurances and accountability are well covered by an unincorporated association model, why would a central belt model with thousands of students be a good model for Shetland? • The level of scrutiny for Shetland will be the same as anywhere else, with the exception that it will not have to set up an arms-length foundation (money placed beyond the regular college scrutiny and under the purview of a different unincorporated association board!) in order to plan for sustainability.
<ul style="list-style-type: none"> • Cost should not be a factor in the consideration of the creation of a new body which will be delivering publicly funded education. 	<ul style="list-style-type: none"> • Agreed. Nevertheless, we cannot escape the reality that cost of delivery, and the ability to attract income from as many sources as possible, is very much a feature of all colleges and particularly for remote and island communities.
<ul style="list-style-type: none"> • Would therefore recommend that all relevant unions are formally consulted on their views in relation to the new merged college being either incorporated or not incorporated. This would include EIS-FELA; UNISON; and UNITE 	<ul style="list-style-type: none"> • Formal consultation, on all aspects of the new college, will take place prior to submission of the Ministerial Merger Case, with additional separate consultation on TUPE transfer and restructuring. • In order to meet the timescales for the merger, it is recommended that the Board adopts a Memorandum and Articles of Association for an unincorporated college as a vehicle for the merger. • Until the point of transfer, the existing legal status of both entities (one a local authority subject to SPFM and the other a charitable trust) will apply to their separate undertakings.