Dear John

POST-16 EDUCATION (SCOTLAND) BILL
CHARITY ISSUES

You will no doubt be aware of the discussion at the Education and Culture Committee on 26 February 2012\(^1\) when the Cabinet Secretary for Education and Lifelong Learning gave evidence to the Committee on the Post-16 Education (Scotland) Bill. One of the matters discussed was any impact of the Bill on colleges as charities (which I refer to as “charity test”) and (a separate point) their board members as charity trustees (which I refer to as “charity trustees duties”) [OR columns 2074-2076]. Reference was made to correspondence from you as well as to your evidence given to the Committee. Mr Russell concluded by saying that “It is good to address the matter and we will look at the detail if Mr Henderson has an issue that we are unaware of” [OR 2076].

As you know, subsequent to that discussion, the Committee wrote to the Office of Scottish Charity Regulator (OSCR). OSCR’s reply to the Committee was copied to both Colleges Scotland and Scottish Government.

Summary of college regionalisation plans

College regionalisation plans involve, among other things, Ministerial appointment of the chairs of regional colleges in single-college regions and the extension of the grounds on which Ministers could remove board members of incorporated colleges. In regions with more than one college, new regional strategic bodies would have powers to direct colleges in their region. In those multi-college regions (other than in the Highlands and Islands) regional strategic bodies could in some circumstances transfer staff and property of incorporated colleges without the consent of the incorporated college.

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Charitable status

In its evidence, OSCR has confirmed that the Bill will not affect the charitable status of colleges which become either regional colleges or colleges within a region.

To meet the charity test in the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”) a body must (a) operate for one or more charitable purposes and (b) provide public benefit. However, a body is excluded from meeting the test if its constitution permits the Scottish Ministers to direct or control its activities. Ministers have the power to disapply this exclusion. The Charity Test (Specified Bodies) (Scotland) Order 2008 makes provision to disapply the Ministerial aspect of the charity test in relation to incorporated colleges. The Bill does not affect this Order and the Order will remain in place after the Bill is enacted. Amendments would be made to it to ensure that it is up to date following college mergers.

A body is also excluded from meeting the charity test if its constitution permits it to distribute or apply its property for a purpose which is not a charitable purpose. The provision of the Bill which empowers regional strategic bodies to require colleges to transfer staff and property is framed with a view to avoiding any risk that colleges will be excluded from meeting the charity test on this basis; property transferred must be used for the purposes of the advancement of education (a charitable purpose).

Charity trustee duties

While section 66(1) of the 2005 Act requires college board members, as charity trustees, generally to act in the interests of their college, section 66(3) of the 2005 Act provides that a charity trustee’s duty to act in the interests of their charity is “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”.

In its evidence, OSCR advise that charity trustees “might feel themselves to be in a complex and conflicted position” if a regional strategic body were to issue a direction that the trustees consider was not in the college’s best interest. We agree that college board members may find themselves in a conflicted position. However, it seems to us that is not the only potential scenario. College board members may find themselves in a situation where they agree that an action is in the best interests of the region as a whole, but consider a particular matter to be against the interests of the college itself. Without a direction, they would be obliged under charity law to put the interests of the college first.

Put plainly, whether college board members feel conflicted or not does not affect their legal position. Complying with such a direction would be a legal requirement. Following such a direction would therefore not compromise their role as charity trustees. OSCR acknowledge this – “compliance with applicable legislation is a duty on trustees under the 2005 Act.”

OSCR has acknowledged in its evidence that the scenario it perceives might give rise to the conflict “may not be particularly likely”. OSCR also usefully mention that consultation with a college (and others) is required before a direction can be issued which might avoid the scenario arising. The same considerations apply to the transfer of staff and property without consent. Again, consultation is also required before a transfer requirement is made.

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2 In its evidence, OSCR confirm that it is likely to find the proposed new functions of regional colleges as charitable purposes.
Remaining concerns

In drafting the Bill, we have had the charity matters firmly in mind. We know that Ministerial control is not an issue, given the exemption order that is - and will remain - in place. There is specific provision in the Bill to ensure that any transfers are for the advancement of education (a charitable purpose). And we have sought to provide a mechanism in multi-college regions to ensure that college board members can continue to discharge their duties as charity trustees.

We hope that OSCR’s evidence and this letter assures you that the Bill is consistent with charity legislation. However, I should welcome the opportunity to provide any further clarification if there are issues of charity law that you consider we have not fully addressed. If you have any specific concerns that either colleges would not be able to continue to be charities or college board members would not be able to discharge their role as charity trustees, please let me know.

I am copying this letter to the clerk of the Education and Culture Committee and to Martin Tyson of OSCR.

Yours sincerely

COL BAIRD