icsa

The Governance
Institute

ICSA: The Governance Institute

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By email

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Dear Sue,

Feedback on the *Draft code of good governance for independent training providers*

On behalf of ICSA: The Governance Institute, I am pleased to respond to your consultation on the above document. ICSA: The Governance Institute is the international professional body for governance, with more than 125 years' experience and with members in all sectors. Our purpose is defined in our Royal Charter as 'leadership in the effective governance and efficient administration of commerce, industry and public affairs' and we work with regulators and policy-makers to champion high standards of governance, providing qualifications, training and guidance.

We are the professional membership and qualifying body supporting chartered secretaries and governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and governance issues. The breadth and experience of our membership enables ICSA to access their practical knowledge in order to provide insights into effective practices across a range of organisations. This, together with detailed understanding of charity and company legislation and regulation, has informed our response.

General comments
Given the size and nature of the sector this code aims to cover, it is t very important that you have identified principles which are relevant to the whole range of learning providers, from small charitable providers to large listed companies. That said, there are a number of areas (detailed below) where the generic approach does not fully convey all the legal requirements placed on different types of organisations.

In the main, the principles highlight those areas of good governance that can be applied universally, regardless of structure, size and complexity of independent providers. However, some of the accompanying commentary does not reflect the legal and regulatory environment and requirements. For example, there are a number of occasions where terms like 'must' and 'should' are used and I would suggest that these be reviewed to ensure that 'must' applies to legal or regulatory requirements and 'should' to matters of good practice. It may be helpful, and give added weight to the legal requirements over suggested good practice, were you to list the legal requirements (the 'musts') ahead of the recommended good practice (the 'shoulds').

There is an inconsistent approach to terminology and headings within the draft code. Throughout the document the terms 'governance board' and 'board' are used. We suggest that the term 'board' be used consistently to avoid confusion or misunderstanding. Similarly, rather than refer to 'companies' it might be more inclusive to use the term 'organisation' in order to reflect the different types of entities that constitute the independent provider sector. The document refers to many different types of governing document, such as 'articles of government' and 'instrument'. For the convenience of readers it might be helpful to refer to them generically as 'governing documents', a footnote could be included to specify the different types, if it is felt necessary.

The document can sometimes jump from a high level overview to becoming more granular in some bullet points. This makes the document slightly confusing as to the overall tone and expectations. It may also, in its current form, appear text heavy and may benefit from some visual offerings. This may be addressed in the design and production of the final document.

Specific comments

Foreword:

The tone of the foreword appears to focus unduly on the demands and expectations of government and the Department for Education (DfE), rather than the legal and regulatory demands placed upon companies and charities. Funding agreements and regulatory oversight by the DfE will, understandably, have a strong influence on boards of trustees or directors, but we believe that a governance code should balance those demands with the specific legal requirements affecting the governance of providers, such as company and/or charity law. For example, a charity's aims are not to deliver government priorities, but to ensure public benefit and the fulfilment of their charitable objects. These may or may not reflect the priorities of the government of the day. Failure to perform such legal duties can result in significant repercussions for the organisations and individual directors or trustees.

Independent providers may derive all, or a significant proportion, of their income from the government and as such the importance of ensuring value for money from public funds will be a concern for the board. However, this should be balanced against the need to provide quality educational experiences to the students. Unless students believe they are receiving a high quality, productive and effective educational experience they are likely to vote with their feet and look elsewhere for training and education. The governance code should promote both the importance of prudential management of public funds, and the significance of student experience.

It is unlikely one code will be able to cover such a diverse sector without the room for organisations to adapt principles and explain why they have differed from the principles and practice detailed in the code. It is equally unlikely that every provider will be able, or want, to apply both the spirit and letter of the code. It would be helpful if the foreword, or another section near the front of the document, explicitly acknowledged that there is some flexibility in the application of the code's principles and recommendations so long as divergence is accompanied by an explanation of that difference and how it delivers good governance for that organisation at that time.

It could also be acknowledged that other sector-specific governance codes exist, and these may be more suited to different organisations. Where other codes are used, the organisation could state as such in their annual reports and online, along with an explanation as to why that particular code is better suited to the organisation.

Core governance values:

The inclusion of the values and beliefs of the sector on page 4 (bullet points) is welcome and help to focus the minds of boards on the delivery of quality services and experiences for students. If these sentiments were championed in the previous pages there would be a more appropriate balance between student experience and value for money considerations.

The final paragraph of this section could provide more information about the other codes available including the UK Corporate Governance Code, the Charity Governance Code, and the Good Governance Standard for Public Services and, if these are more appropriate for the specific organisation, how their adoption should be reported.

Seven themes of good independent training provider governance:

To help strengthen the message that delivering high quality learning and education and the associated student experience is just as important as prudent oversight of public funds, the themes could be re-ordered so that student experience is placed closer at the top of the list.

Theme 5 – equality, diversity and safeguarding. Safeguarding does not sit comfortably alongside equality and diversity, as a theme. Perhaps, it might be worth considering breaking this up into equality and diversity, and a new theme of safeguarding and whistleblowing? Alternatively, safeguarding could be

included in theme 4 – teaching and learning and outcomes for learners? Theme 5 should also refer to staff in its diversity and equality overview.

Theme 6 – Transparency and accountability. Along with demonstrating public funds are spent well, due consideration should be given to other stakeholders views and concerns.

Theme 1 – Strategy and leadership:
More could be included on the leadership of the organisation and the appropriate behaviours of the board. The inclusion of points relating to the organisation's culture would also be of value and mirror developments in other codes of governance.

Principles
First bullet point. This point does not translate across the different types of providers. The duty of charity trustees is to provide public benefit and deliver their charitable objects. They do not have shareholders so do not seek to maximise value for them. Social enterprises will also have a different social benefit aim, which may or may not be combined with generating value for shareholders. We suggest that this point be redrafted, if the document is to cover all the types of organisations in the sector. Furthermore, the purpose of a charity or social enterprise is likely to be included in the governing document, so the board has no role in deciding them, but will play the lead role in agreeing the organisation's vision, mission, values, culture and strategy.

Second bullet point. Possibly consider moving this to theme 3 – financial strategy and audit as it relates more to resources and performance measures?

Third bullet point. Provide more information as to how stakeholder considerations will inform the decision making of the board. This would also reflect the good practice established in other governance codes, in particular the recently revised UK Corporate Governance Code.

Fourth bullet point. Change the emphasis of the sentence so that board members are clear that they must act in the best interests of the organisation, which includes leading by example and behaving with integrity. It might also be prudent to explicitly mention whistleblowing in relation to staff being able to raise concerns.

Sixth bullet point. This is a little confusing as to what point is actually being made, especially for those unfamiliar with the sector.

To demonstrate the importance of the learner voice and the opinions of employers, those sections could be included within the principles or above the section on policies. Further information could be included as to how the board will use the experiences and considerations of learners and employers in their decision making and how that impact will be communicated to stakeholders.

Theme 2 – Corporate structures, accountability and roles:
There is an inconsistency in the title of this theme. On page 5 the theme is defined as 'corporate structure and roles'. The accountability aspects of this theme could be removed and placed within theme 6 – transparency and accountability so that all relevant points are under the same heading.

Second bullet point. In general, charity boards are comprised of voluntary trustees (akin to independent non-executive directors), with the chief executive and possibly other executive directors in attendance, but with no voting rights. This bullet point therefore does not accurately reflect the situation in charities where trustees must not benefit from their position (unless authorised by their governing document, Charity Commission or the courts) and as such they would not be able to apply the spirit or letter of the code with regards to composition.

Fourth bullet point. If non-executive directors are to 'offer specialist advice' it might be prudent to alert them to the higher degree of accountability that will be placed on them by the courts if they hold themselves out as experts or professionals in a particular subject.

Sixth bullet point. While the board will remain accountable for its decision making, it should be noted here that some functions can be delegated. A board is unlikely to work effectively without delegating some authority to executive directors and committees.

Eighth bullet point: The reference to schemes of delegations and matters reserved to the board should include additional information encouraging the board to regularly monitor, review and revise schemes of delegations and terms of reference to ensure they are appropriate and effective.

Theme 3 – Financial strategy and audit:
Eighth bullet point. The role of the accountable officer in publicly funded organisations has a responsibility for ensuring the appropriate use of public funds, as determined by funding agreements. However the board still has legal duties to ensure the appropriate use of funds and the protection of assets. By focussing on the importance of the role of the accountable officer you may inadvertently underplay the ongoing legal duties of the board. The accountable officer may have to sign off on annual returns to the funder but that does not negate the ongoing duties of trustees and directors.

Audit committee
For a smaller provider, the requirement for an audit committee may be disproportionate to the size, complexity and risks of the organisation. For those organisations where an audit committee would not be proportionate, there could be a recommendation that the full board, or other appropriate committee takes the lead on audit matters to demonstrate that the principles have been applied in the spirit, if not the letter of the code.

Partnerships
Second bullet point: Any demands on subcontractors to adopt the code must be proportionate to the size, complexity and income of the subcontractor. It would appear unreasonable if an independent provider demanded a subcontractor to sign up to the code if the total income derived from the relationship was insignificant to either. Further information as to how such adoption of the code will be monitored and policed would also be helpful for both the provider and the subcontractor.

Group structures
The information supporting this section could be more detailed in relation to the identification and management of conflicts of interests and loyalty. This is a particular issue for charities with commercial subsidiaries, and is also relevant to company directors that sit on both the parent and subsidiary board.

Theme 4 – Teaching and learning:
Seventh bullet point. Change first sentence to read: '…report is benchmarked against norms and best practice in England'?

Eighth bullet point. Is the senior leadership team expected to provide 'external validation' or seek 'external validation' to provide assurance to the board?

Theme 5 – Equality and diversity and safeguarding:
Principles
To reflect developments in governance, it might be beneficial to insert specific recommendations regarding the importance of diversity in the boardroom.

Safeguarding and prevent.
Third bullet point. The recommended practice should include some mechanism by which the board receives information about whistleblowing and complaints and how that information is used to improve governance arrangements. Where an organisation has an audit committee, it is common practice in other sectors for it to lead on reviewing the effectiveness of whistleblowing arrangements.

Theme 6 – Transparency:
There appears to be some inconsistency as to the title of this section. On page 5 of the document it is referred to as 'transparency and accountability which, as noted above, we think preferable.

Second bullet point. The language regarding the duty on trustees to have regard to Charity Commission guidance on the delivery of public benefit and the achievement of charitable purposes should be revised to reflect the legal responsibilities and regulatory requirements of charity trustees. At the moment the language is not sufficiently precise to reflect those requirements. A statement as to how the charity has delivered public benefit and met its charitable objects will be included in the annual report and returns of the charity. Charitable objects and public benefit are central to determining what can be a charity, while mission, vision and values are those areas that can help refine the way the charity delivers its objects and public benefit.

Fourth bullet point. The Charities Statement of Recommended Practice (SORP) details the specific annual accounting requirements for charities. The accounting and reporting requirements for both charities and companies (listed and non-listed) should be better reflected in this section.

Fifth bullet point. The reporting requirements covering charities, social enterprises and companies will provide more detailed information relating to governance statements. We suggest that the code signpost the reader to further information while recognising that each type of structure has different standards to fulfil.

Eighth bullet point. It would be more convenient for the reader were all points dealing with whistleblowing placed under the one theme and grouped together.

Theme 7 – Effective governance:
Sixth and seventh bullet points. The sentence relating to staff as trustees is incorrect. In general, trustees must not benefit from their position, which can preclude staff being trustees unless authorised by the governing document, Charity Commission or the courts. In such cases, conflicts of interests must be managed in an appropriate and effective manner. The Charity Commission has specific guidance relating to 'users on board' which would cover the learner voice issues within the bullet. A charity can change their governing document to include beneficiaries (or learners in this instance), if they deem it in the best interests of the charity and the fulfilment of charity objects. Mechanisms for changing the governing document will depend on the structure of the charity and the powers therein. Changes resulting in the payment of trustees will require the approval of the Charity Commission, as a regulated alteration.

Twelfth bullet point. The information provided needs to be reviewed as some aspects are legal requirements rather than good practice, and this should be presented accordingly.

Induction and training and development.
This section could be augmented to better reflect good practice detailed in other codes of governance.

I hope that these comments are helpful and contribute to your deliberations on the development of this code of governance. Should you wish to discuss them further or require any clarification, please feel free to contact me on lthomson@icsa.org.uk or on 0207 612 7040.

Yours sincerely,

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