

Higher Education Code of Governance
CUC

16 March 2020
Via email

Dear Sir/Madam,

Higher Education Code of Governance consultation

On behalf of The Chartered Governance Institute (the Institute) I am pleased to provide feedback on the Higher Education Code of Governance consultation.

The 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.

The Institute 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 the Institute to access a variety of applied experience in order to provide insights into effective practices across a range of organisations. Our wealth of expertise and experience has informed our response.

General comments

Good governance is not an end in its own right and it is appropriate that the CUC Code be reviewed regularly to ensure that it continues to reflect good governance practice. That practice should be drawn from both inside and outside the sector to ensure the provisions adopted further stretch those institutions in a position to develop their governance arrangements while not leaving other institutions behind. The new version of the Code achieves that balance in places, but also can be seen to take a step back in other areas, which we will cover further below.

We note that the intention of the Code is to 'not try to differentiate mandatory principles from suggested provisions' and focus on the 'foundations for good governance which institutions adopting the Code 'must' apply or explain' (although it is unclear how this approach will be monitored and enforced). Reading the document, it is not clear whether this aim has been achieved. Moreover, while we understand the motivation behind this approach, we do not think that it is helpful for users. The use of the word 'must' in other codes is generally seen as a non-negotiable, in the sense that it reflects legal or regulatory requirements, with terms like 'should' or 'could' being used to address other levels of requirement. Within the CUC Code, some provisions are prefaced with a 'must' where they are not a legal or regulatory requirement and where a legal requirement is covered it is sometime termed as a 'should', which is seen as being more flexible. This can cause confusion and misunderstanding, which in turn is likely to lead to poor governance practices, not to mention regulatory intervention in the worst



case. We strongly recommend a review of the use of ‘must’ and ‘should’ in the Code to support a more accurate reading of those aspects that have a statutory backing and those that reflect accepted good practice. The Institute is happy to provide further details as to where the use of ‘must’ should be reviewed, if that would be helpful.

Finally, in places, the Code’s tone and language gives the impression of having had many authors. A single author for the final version will help to ensure consistency in the use of language and tone thereby making the Code more accessible to a range of intended audiences.

Specific questions

Q8. The revised Code is the appropriate length?

Given our experience of drafting governance codes, the Institute appreciates the desire to make such documents as concise as possible to ensure the document is readily understood. However, in the drive to make the document succinct, the authors should avoid removing any aspects that are critical to the purpose and spirit of the Code. Placing essential matters in a separate document, such as the proposed governance handbook, could create a risk that important points are missed. The handbook will be very useful to organisations trying to implement the Code, but core principles should be retained in the Code itself.

Additionally, by separating the statement of primary responsibilities into an appendix the Code removes a key plank of good governance in HE Institutions. More needs to be made of the essential aspects of this statement and they would add value by being marbled throughout the Code or placed towards the front of the document, perhaps as part of a preamble/prologue. The drawback of placing the statement at the rear of the document is that many readers will not read it, especially if it is one appendix amongst many, and consequently its real value may be ignored.

In short, brevity should not come at the expense of quality.

Q9. The revised Code sets out clearly the foundations of good governance in an appropriate way?

On the surface, the six elements of: accountability; sustainability; reputation; inclusion and diversity; effectiveness; and engagement cover those issues expected within a governance code. The supporting explanations and provisions, however, do not always fully encapsulate those good governance elements. The following provide a few examples where the Institute feels the elements could be improved.

Accountability

The supporting statement does not fully convey the legal role of the governing body. In particular, ‘... approving all final decisions on matters of fundamental concern’ could give the impression that the role of the governing body is to ‘rubber stamp’ decisions already taken by the executive. This is not good governance and does not accurately reflect the purpose of the governing body. It may be that the primary purpose has been lost slightly in the language used.

This element could do more to articulate all aspects of board accountability and encourage governing bodies to interpret them in a more expansive way. For example, the sub-points to 1.1 all deal with legal, regulatory or funding accountability requirements. There is no specific reference to the organisation’s wider accountability to its stakeholders and society in general.



Given developments in other sectors, this seems like a missed opportunity to recognise developments outside HE and adapt that good practice.

1.2 covers the different legislation applicable to different types of structures, including charities and companies. There is no reference to charitable companies and the fact that the primary legislation for each can cause tension in such entities. The final sentence appears to suggest that the Companies Acts takes priority, but this does not necessarily reflect the actual experience of some charitable companies.

The duty of all members to record and declare conflicts of interest (1.4) would benefit from going back to the source where the duty actually appears earlier in any role. In both company and charity law there is a duty to *avoid* conflicts of interest. The requirements to declare, register, manage and otherwise report such matters are supported by a range of law, regulation or accepted good governance practice. The sentence relating to no governing member being 'routinely excluded' could be misunderstood as it is good practice for no individual to participate in any discussion on their own pay, and as such will 'routinely' be asked to recuse themselves.

1.6 states that good practice will ensure there is a clear separation of the responsibilities of the governing body and executive. This paragraph would benefit from being explicit that such delegations should be agreed in writing, monitored and reviewed regularly by the governing body. An unrecorded conversation or 'gentleman's agreement' would not represent good governance as there is no audit trail to follow should there be a governance lapse and external investigation.

Sustainability

Sustainability is traditionally viewed as referring to financial viability and ongoing survival of the organisation in question. However, the issue of sustainability has taken on a wider interpretation in recent times. Developments in other sectors have seen the rise of ESG (environmental, social/sustainability and governance) reporting by boards to demonstrate commitment to improving more than just the 'bottom line'. As institutes of learning, attracting a number of people interested in such issues, the absence of wider sustainability issues and reporting could be seen as a missed opportunity for the sector. It is certainly an area that will grow in the future, and possibly one where potential students and other commercial entities may seek out your credentials before committing to work or study with you.

2.3 states the governing body 'will need' to receive regular, reliable information. This sentence should be more proactive with responsibility placed on the governing body to decide the type, timing and format of information it requires to fulfil its legal duties. This should be in agreement with the executive, but it is a decision that ought to be driven by the governing body in order to ensure it can do its job.

This element places a lot of store on the governing body receiving assurance for several things without detailing what assurance is (as opposed to re-assurance) and how that assurance can be provided, including the range of sources and format of triangulation. The document would benefit from being clear when it means the governing body must *ensure* something is happening and when it requires *assurance*. Providing more information on what is meant by assurance and the forms that could take in the HE environment would also be of value and could be included in the accompanying governance handbook.



Provisions 2.6 and 2.7 deal with remuneration and audit committees. On reflection, while the matters might have an impact on sustainability in terms of financial viability and reputation, these issues might be better suited to other elements such as 'reputation' and 'effectiveness'.

2.11 provides a list of things on which the governing body need assurance, such as providing value for money, robust financial controls, and other funding conditions. These are usually seen as something the board must ensure, as the legal repercussions will fall upon it. Terminology can have a significant impact on a reader's understanding of what is required and as such needs to be strong and clear to avoid confusion. In this instance, the term 'need assurance' feels passive rather than proactive in ensuring the institution has effective internal controls and other oversight in place.

Reputation

Given recent media stories about the HE sector it is understandable that a governance code would want to give this area due consideration. This focus, however, should be tempered with an awareness of the potential adverse impact of viewing reputation solely in terms of the impact on the institution without having due regard for the impact of its actions on others (the Oxfam example being one such case). Governance developments in other sectors have started to frame such governance factors in terms of wellbeing and safeguarding as part of the discussions and provisions covering matters of integrity.

Provision 3.2 would benefit from being cross-referenced to 1.4, which also covers conflicts of interests.

Stakeholder communications in 3.5 might sit better within a different section, such as 'engagement'. In addition, the paragraph should place stakeholder communications on a more positive basis. The governing body should be seen to be interacting with a range of stakeholders in various formats, not just benignly receiving assurance that communication has taken place. Accountability is a growing issue and can take many forms, including being seen to engage meaningfully with stakeholders in an approach that is more of a partnership.

Provision 3.8 and the issue of governing body member remuneration seems out of place in this element. It would sit more comfortably within the 'effectiveness' element alongside other aspects of nomination, appointment and ongoing performance. Furthermore, the provisions relating to governing body remuneration could be augmented with details about how remuneration decisions are made, benchmarking such emoluments and receiving professional input on the matter. These should be recorded within an agreed written framework, reported widely and reviewed regularly.

Inclusion and diversity

Governance issues regarding inclusion and diversity are among the most challenging for organisations to address and readers would benefit from some additional guidance on how to do so and embed these principles throughout the organisation, not just the governing body. Further guidance in this section would therefore be invaluable for the sector.

Furthermore, the relative brevity of this section, compared to other elements, could lead some readers to perceive that it is less important. While this is not the intention, some individuals, especially those who require encouragement to embrace inclusion and diversity as a governance concern, could take advantage.



Effectiveness

The Institute welcomes the inclusion of the role of the secretary in this section (5.1) and suggests that a specimen role description and further guidance regarding their appointment and removal should be included in the forthcoming governance handbook. If the Institute can provide any assistance with this, please do not hesitate to contact us.

Provision 5.2 could be expanded to include the need for tailored inductions and ongoing development opportunities for governing body members to continue to be effective.

The provision regarding culture and values (5.5) could sit equally within the 'reputation' or 'inclusion and diversity' elements.

The language dealing with chairing responsibility in the absence of the chair (5.7) could be tightened and made more succinct. It currently seems out of place within much of the document. The same issue arises in 5.8 and the decision to appoint a SID. Given the differences in terminology between the corporate sector (from where the SID concept derives) and HE, it would be advantageous to change the SID to something that is more familiar to governing bodies. The use of the term 'director' could lead to confusion and a misplaced understanding of the legal implications that support it.

The final sentence of 5.10 might benefit from additional information as to when 'final decisions' on appointments to the governing body would not 'normally' be taken by the governing body. We assume that this refers to the election of student and staff members, so making this explicit in the Code would be helpful as it does clarify that there are different routes to the governing body and that each is equally valid (echoing the point made in 1.4).

5.13 defines the need for independent review, however it is not clear as to why. The provision would benefit from a little more detail as to how the actions arising from such reviews will be reported against publicly with the ultimate purpose of such exercises being to improve future governance arrangements and thereby the ongoing success of the organisation.

Engagement

As with the 'inclusion and diversity' element, this section appears to be shorter than others and therefore might be perceived as being less important. This could be remedied by moving provisions from other sections into this one.

This section might also benefit from a paragraph about the role of staff and student members being not to *represent* the community that elected them, but to *be representative of* those stakeholders generally and share their relevant insights in order to improve decision making in the best interests of the organisation. This should help reinforce the issue regarding conflicts of loyalty.

Provision 6.2 as with 3.5, could benefit from changing the language to ensure that governing body members are active in stakeholder engagement exercises and are not seen to be 'remote' or 'distant' from key stakeholders.

6.3 should include failures, as well as successes, to ensure reporting to stakeholders is accurate, fair and balanced. An acknowledgement of any failure and lessons learnt is also likely to improve trust and confidence in the institution and reinforce the stated values, ethics and culture of the



organisation. Any perception of failures being hidden is likely to have an adverse impact on reputation.

Q10. The Code objectives are underpinned by views on what future higher education governance will need to deliver if it is to meet the challenges of sustainability, growth and change. The objectives are to:

- **Support the delivery of the provider’s mission and success;**
- **Maintain, and enhance, trust in high education providers in delivering public benefit and contributing to economic and social growth;**
- **Protect institution autonomy;**
- **Manage risk effectively to sustain reputation and provide the flexibility and agility to respond to opportunities;**
- **Promote and develop diverse and inclusive practices;**
- **Have meaningful engagement with relevant stakeholders locally, regionally and nationally.**

Do you agree that these are the right objectives?

In general, yes, however they could benefit from being viewed as broadly as possible. In parts of the Code, the provisions read as measures to protect the organisation and do not necessarily consider its ongoing existence and success within a broader environment or acknowledge the growing demands of the wider public on those bodies that are seen to receive government funding or are otherwise held in a position of esteem.

Governance is expanding and is now expected to have a role in supporting wider societal interests such as climate change and environmental sustainability, wellbeing and equality. These are issues the corporate sector is currently getting the measure of, with a mix of voluntary and statutory motivators (shareholder and stakeholder activism, modern day anti-slavery legislation, and gender pay gap reporting). These issues are rising in importance in other sectors and any future governance standards should at least acknowledge their emergence even if now is not the right time to embed them within any governance code provisions.

Q11. Do the values outlined in the Code represent an appropriate set of values for the Higher Education sector?

As mentioned above, HE institutions are part of a wider community and as such the sector’s values should include an awareness of the changing expectations of other stakeholders and the general public’s higher demands of those organisations operating in the public sphere.

Q12. Do you agree that the six primary elements of the Code constitute an effective framework for good governance practice across the Higher Education sector?

To some degree. The comments above offer suggestions as to where the current provisions could be reviewed and revised with a view to improving the Code and ultimately the governance of HE institutions.



Q13. Are there any elements you think are missing in the revised Code?

There are places where the Code could better anticipate future governance challenges and prepare the sector for their wider implementation. These areas have been detailed in response to previous questions, but other issues that might benefit from your consideration now include big data, digital and cyber risks.

Q14. Broadly, do you agree that the requirements/content listed under each Element constitute a solid framework for good governance practice for all Higher Education providers?

Given the comments above, there are areas of the Code that would benefit from further consideration especially the length of the document, terminology and tone. There is great value to be gained from looking at governance codes in other sectors and adapting those provisions that could be of benefit.

I trust the above comments help with the development of the Higher Education Governance Code. Should you require any clarification or have questions, please do not hesitate to contact me directly.

Yours faithfully,

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