



The Educational
Institute of Scotland

Lord Smith
Chair of Steering Group for Scottish Code
of Good HE Governance

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Dear Lord Smith

The EIS produced a detailed analysis of the draft Scottish Code of Good HE Governance for Parliament's Education and Culture Committee, which may be found here and which was emailed to the Steering Group on 15 May 2013 (attached for reference). Furthermore, the EIS (as part of the STUC delegation) met with the Steering Group on 16 May 2013 and the EIS has played a part in drafting the subsequent STUC response to the Steering Group.

The EIS believes that the draft code is currently not fit for purpose, and in addition to the submissions referred to above I simply wish to draw the following salient points to the Steering Group's attention:

1. Whilst the EIS is content with the 'comply or explain' principle of the draft code, it believes that its proposed 'explain' mechanism (consisting of publishing explanations for any non-compliance in the HEI's Annual Report halfway through the following financial year) is flawed and prevents the Code from being what it purports to be – i.e. a condition of SFC funding.

The EIS suggests that the draft code is amended so as to require HEIs to share any explanation of any non-compliance with the Code as soon as the minutes making that decision are passed and available for public scrutiny.

2. The draft code is based on the 'comply or explain' principle and yet it is worded in such a way that non-compliance is very difficult as it is peppered with caveats.



The EIS suggests the Steering Group consider removing some of the caveats present so that the code is tighter and underpinned by an effective 'comply or explain' mechanism. The EIS also suggests that the draft code is amended to clarify that staff representatives refer to elected staff representatives and not governing body members that are also members of staff.

3. The EIS had hoped that the draft code would be a mechanism that would improve HE management by setting out a clearer and improved code of HE practice. For example, the EIS believes that the draft code allows too many senior HE managers to attend Governing Body meetings and that their efficiency will be undermined as a result.

The EIS suggests deleting the word "dominate" and replace with "direct" or "unduly influence" on page 28. The EIS also suggests that the word "normally" be deleted from page 28 so as to ensure that key officers do not outnumber independent members. The EIS further suggests that main principle 14 and subsequent detail in the body of the draft code are amended so as to allow governing body agendas, minutes and papers to be released as quickly and as fully as possible.

Finally, I would like to thank the Steering Group for the meeting that was arranged via the STUC (on 16 May 2013) which was a useful meeting that explored all the issues raised.

Yours sincerely



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EIS Evidence to the Education & Culture Committee on the draft Scottish Code of Good HE Governance

The EIS welcomes this opportunity to give written evidence to the Education and Culture Committee on the draft Scottish Code of Good HE Governance, although it is disappointed not to have the opportunity to give evidence to the Committee in person on 7 May 2013.

The EIS is the largest educational trade union in Scotland with around 60,000 members in schools, colleges and universities across Scotland. The EIS is the sole union recognised for academic staff at five Scottish HEIs and shares recognition at a number of other HEIs. The EIS is the only education union in HE that makes all policy decisions here in Scotland.

The draft Scottish Code of Good HE Governance (henceforth, the draft code) describes itself as *a set of main principles supported by guidelines and examples of good practice* and subsequently states *that governing bodies will, wherever possible, comply with the Code*. The draft code also states; *Given the diversity of Scottish Higher Education Institutions it is possible that certain of the principles can be met by means different to those envisaged in the guidelines*.

The stated aim of the draft code (which is reflected in the explanatory notes to the Post-16 Education Bill currently before Parliament) is, “The Scottish Funding Council will require Institutions to follow the Code as a condition of a grant of public funding.”

The EIS does not believe that the draft code is fit for this purpose as it is merely a set of general principles with a few examples of good practice, with vague statements of openness, transparency and accountability - their vagueness means that it will be difficult to show whether HEIs meet these “requirements” or not. This is not a document that can meaningfully be used as a condition of public funding as the Post-16 Education Bill suggests.

Further, the draft code’s “comply or explain” mechanism is flawed and will prevent the document from being a true condition of public funding. This undermines a key tenant of the Post-16 Education Bill. Ultimately it may force Ministers or the SFC to use another measure to determine good HE governance – a provision already available within the current draft of the Post-16 Education Bill.

The draft code does offer some recommendations that are a small evolution of the Committee of University Chairs (UK) Governance Code of Practice (henceforth, the UK code) and could potentially marginally improve governance, but the vagueness of the code, its voluntary nature and its ‘comply or explain’ nature fundamentally undermines the draft code and its aims.

The failure of the Steering Group to include staff or student representatives led to a group without diversity, which in turn led to a draft code that simply meets the needs of its narrow group of members. This flaw fundamentally undermines the draft code. The irony that the Steering Group espouses diversity in governing bodies’ membership but was fatally undermined by its own lack of diversity is not lost on the EIS.

The EIS is disappointed with the draft code as it seems to simply reinforce the lack of accountability of universities and consolidate existing power structures. The EIS shares the principle of responsible autonomy – but does not believe that the draft code will promote responsible autonomy.

The EIS sets out specific areas of concern below and has made several suggestions as to how the draft code must be improved if it is to be a meaningful document and fit for purpose as a condition of public funding for a HEI.

The preface of the draft code states that the draft code seeks to:	EIS comments and response to the draft code
a. enhance the obligation of the governing body to protect academic freedom	<p>It is a legal requirement for all HE governing bodies to protect academic freedom as defined in the 2005 Further & Higher Education Act (Scotland). The Code does not go beyond this – and does not go as far as the Prondzynski Review’s recommendations on Academic Freedom.</p> <p>In short, the draft code adds nothing new on this.</p>
b. introduce new requirements to secure the active involvement of staff and student members on the nominations committee	<p>This is new as the UK code simply specifies at least three lay members (which could include staff and students). However:</p> <ul style="list-style-type: none"> • Staff is not defined – it may be a non-independent member of the court such as the Vice Principal. • The draft code does not provide “requirements”, merely guidelines. <p>To be requirements then these recommendations need to be binding. Staff should be defined as “elected staff representatives” and non-independent staff should be excluded.</p>
c. require that equality and diversity considerations are a key part of building the membership of governing bodies, through a goals-based approach	<p>This is new, although the UK code states; <i>There should be a balance of skills and experience among members sufficient to enable the governing body to meet its primary responsibilities and to ensure stakeholder confidence.</i></p>
d. require governing bodies to regularly review progress on diversity of membership and to put in place associated broader measures to support court members with caring responsibilities;	<p>This is new, although arguably it is seeking to meet the principle of making reasonable adjustments under (and arising from) the Equality Act (2010)</p>
e. set out key considerations for universities wishing to remunerate their lay members, in the interests of enabling participation by members from diverse backgrounds;	<p>This is already set out in paras 2.29 and 2.30 of the UK Code. The draft code recognises this as it refers readers to the CUC (UK) guidance for further information. (p23)</p>
f. introduce new requirements to secure the involvement of staff and students in the process for appraising the performance of the Principal;	<p>The draft code’s “requirements” in this regard are set out on page 12:</p> <p><i>“Furthermore, in assessing the performance of the Principal views should be sought from staff and student members of the governing body as well as independent members.”</i></p> <p>This suggestion seems vague and opaque – and excludes student/staff representatives from the</p>

	<p>Committee looking at appraising the Principal. Staff members should exclude non-independent staff members of the governing body – e.g. Vice Principals etc.</p> <p>To make this suggestion work – students and staff should be part of the appraisal committee or at least part of the formal evidence gathering session.</p>
g. introduce new requirements to secure the involvement of staff and students in the process for selecting chairs of governing bodies;	This is a small step forward and to be welcomed. Staff should be defined as elected staff representatives. The voluntary nature of the code undermines the term “requirements”.
h. introduce new requirements for clarity and transparency of remuneration committee decision-making and the publication of salary information of senior staff, with full and open reporting of decisions to all court members;	<p>The SFC already requires information on senior staff salaries to be published.</p> <p>The UK code (para 2.50) requires information to be shared with the governing body – as opposed to “court members” in the draft code – which seems more accountable.</p>
i. ensure a strategic approach to consideration of the breadth of skills and attributes required by courts, to seek to meet these through the active promotion of lay membership across the breadth of Scottish society and to ensure that all members receive effective induction and training programmes	<p>Much of the nominations process for new governing body members is covered in the UK code (paras 2.51 to 2.54)</p> <p>Induction is covered in para 12 of the UK code and also para 2.25 of the UK code: <i>It is the responsibility of the chair of the governing body, working with the secretary as appropriate, to ensure that all members of the governing body, when taking up office, be fully briefed on the terms of their appointment and be made aware of the responsibilities placed on them for the proper governance of the institution. They should receive copies of background documents at the time of their appointment. These could include:</i> <ul style="list-style-type: none"> • a copy of this guide • the institution’s annual report, audited financial statements, and financial forecast • the overall strategic plan, and strategy documents covering areas such as learning and teaching, research, widening participation and estates • notes describing the institution’s organisational structure • the rules and procedures of the governing body. <i>It is important for governing bodies to provide an induction or briefing session for new members, to explain their responsibilities, the function of the governing body and other organisations within HE, and the strategic objectives of the institution.</i> </p>

j. enhance practice for the openness and transparency in the proceedings of governing bodies including the publication of agendas before meetings and a breadth of broader engagement with the community within and beyond the campus; and	<p>This is covered by UK code (para 2.5): <i>The agenda and supporting papers should be circulated in advance and the decisions minuted.</i></p> <p>The breadth of broader engagement is too vague to respond to – although the EIS agrees in principle.</p>
k. ensure that governing bodies have a clear lay majority within their membership, to support the full participation by staff and student members and to identify a lay member who will improve accountability by providing a route for other members who might wish to raise concerns about the chair, and to lead an annual appraisal of the chair's performance.	<p>The clear majority of lay membership is enshrined within the UK code para 10 (Part 1): <i>The governing body shall have a majority of independent members, defined as both external and independent of the institution.</i></p> <p>The Chair's annual appraisal is new to the draft code and welcomed in principle, although the proposed method of appraisal seems missing.</p> <p>The appraisal of governors receiving remuneration is covered in para 2.29 (Part II) of the UK code.</p>

Further EIS points on the draft code:

1. The draft code makes one improvement to the UK code which is not highlighted in the preface's bullet points; that the governing body will review its effectiveness "*normally not less than every three years*", it is not less than every 5 years in the UK code. The EIS welcomes this improvement. However the EIS believes that internal reviews of governing body effectiveness should occur every year – and should inform the annual appraisal cycle for the Chair, remunerated lay governing body representatives and the Principal.
2. The EIS welcomes the principle that the Scottish Funding Council (SFC) will require Universities to follow the (final) draft code as a condition of a grant of public funding, however the Universities also state that the code "*can be met by means different to those envisaged in the guidelines*" – which is far too vague and devalues the code.

According to the code, universities will treat the (draft) code's recommendations – which may be a condition of SFC funding - on a "comply or explain basis":

"Accordingly the Code is issued on a "comply or explain" basis. This approach is widely accepted as the most suitable means of achieving good governance in an effective and transparent way. It is expected that governing bodies will, wherever possible, comply with the Code. Institutions should report in the corporate governance statement of their annual audited financial statements (Annual Reports) that they have had regard to the Code, and that where an Institution's practices are not consistent with particular provisions of the Code an explanation should be published in that statement."

In reality, therefore, the idea that SFC public funding for a particular HEI is linked to the HEI satisfying the draft code is likely to be difficult. Let us consider Academic Year (AY) 2014-15, the SFC gives

University of Poppleton £300m on condition that it satisfies the draft code and its Outcome Agreement for AY2014-15. The University of Poppleton does not meet some parts of the draft code – but makes an explanation as to why not in its AY2014-15 Annual Report – which would be shared with the SFC by 31 December 2015 and publicly published in early 2016. It is difficult to see how the University of Poppleton is accountable for its failure to meet the draft code in such circumstances or how its funding for AY 2015-16 relied on meeting the draft code the year before.

The draft code makes no mention of how the SFC (or the government) examines the explanation or can claw back any funding. In other words, the “comply or explain” does not meaningfully increase accountability or make the code enforceable. **For this flawed “comply or explain” mechanism alone – the draft code is unfit for its purpose of being an implied part of the Post-16 Education Bill i.e. a condition of public funding.**

3. The EIS has made several submissions outlining how effective university governance should improve the quality of university management – and that the two should not be considered mutually exclusive. One recommendation that the EIS made to the authors of the draft code was that the Principal should not be a member of court and that the number of senior university staff at present at governing body meetings in ex officio (usually as non-members) should be minimised or eliminated entirely. The EIS had suggested that senior university managers (i.e. key officers) only attend the items for which they have an input. The draft code states (p28):

“It is desirable for the effective conduct of meetings that key officers are in attendance to offer guidance and advice. However, the number of those in attendance should be constrained so as not to dominate the business of the governing body and normally should not exceed the number of independent members present.”

The use of the caveat “normally” undermines this recommendation.

According to the draft code, independent members should make up not less than half of the governing body – e.g. 13 of the 25 maximum. The EIS believes that the draft code’s permission for up to 13 “key officers” to be present at meetings – in addition to the Principal and up to 12 other non-independent governing body members – will dominate governing body meetings, and runs contrary to the stated aim.

4. The draft code suggests that governing bodies should determine their own quorum; however, the EIS believes that no governing body meeting should be quorate unless there are 50% or more independent members present.
5. Every Scottish University (except UHI) has recognised trade unions as representing the views of staff – yet the draft excludes the recognised voice of staff from governing bodies. This is contrary to the conclusions of Prondzynski’s Report. Further, the draft code makes no mention of how many staff representatives should be identified- or whether they must be elected.
6. The draft code refers to the role of “chairs” of the governing bodies and the role of “rector” in four universities. An overlap is identified between these two roles within these four Universities but no meaningful guidance is given to remedy these overlaps – this will not lead to consistent governance or promote good practice.

7. Universities Scotland has called the draft code *“a progressive code which would set Scotland’s universities at the leading edge of accountable governance amongst all of Europe.”*

The EIS shares the principle of responsible autonomy in line with the Salamanca Declaration, issued during the creation of European Universities Association (EUA) in 2001, holding “autonomy with accountability” as its first principle. The EUA Autonomy Scorecard gives UK HEIs the highest autonomy score within the European Union – which makes Universities Scotland’s claim difficult to understand – as high levels of autonomy inherently imply independence and lack of accountability to external bodies.

The EIS, therefore, finds it difficult to believe that the draft code would put Scottish Universities at the *leading edge of accountable governance*, although it would accept that the draft code would put Scottish Universities at the leading edge of autonomous governance – entirely free from democratic accountability.