

Review of the 2013 Scottish Code of Good HE Governance: Consultation feedback from Audit Scotland

Main points

Overall the Scottish Code of Good HE Governance is a comprehensive document which reflects and incorporates many of the key governance issues that the Auditor General for Scotland (AGS) and the Accounts Commission (AC) have highlighted in a range of audit reports that have focused on issues of governance across the public sector. These reports include: *The role of boards* (AGS, September 2010); *How councils work: roles and working relationships: are you getting it right?* (AC, August 2010); and *Arm's-length external organisations (ALEOs): are you getting it right?* (AC, June 2011).

We have identified some elements of the current code that we consider are worthy of further consideration as part of the review. In offering our feedback, we have focused solely on the principles contained with it, rather than the effectiveness of the code in practice as we have no audit evidence in relation to its operational implementation.

Our comments follow the ordering of the code and are set out below:

Main Principles

- Legal obligations (Page 3, para 2) – whilst it is helpful to clearly specify the important role that the governing body has to ensure compliance with legal obligation placed on the HEI, it would be useful to cross-refer here to the important role that the HEI's key legal adviser has in supporting the governing body to discharge this obligation. Later in the Code (page 10), this issue recurs and it would be helpful here to highlight the importance of the University Secretary being visible and accessible to members of the governing body and for members of the governing body to be proactive in seeking advice from him/her.
- Frequency of meetings (Page 3, para 4) – whilst recognising that the guidance is designed to be flexible in its operation to reflect the different scale and nature of institutions that constitute the HE sector, we would question whether setting a minimum of four meetings a year for the governing body is sufficient to enable it discharge the wide range of responsibilities placed upon it, even if the University has a well-developed committee structure supporting it in its work. It will therefore be interesting to see whether this view is reflected in the feedback that you receive from the sector in relation to its experience of implementing the code.
- Statement of Primary Responsibilities (Page 3, para 5) – although the code places an expectation on the governing body to adopt a Statement of primary responsibilities, as currently drafted it is not clear whether this document should incorporate a scheme of delegation that sets out the decision-making powers that have been devolved/delegated to the institution's paid officials. In our experience, clearly setting out roles and responsibilities in this way is a helpful way of clarifying the boundaries between those charged with governance and those with operational responsibilities and avoiding boards (and elected members in councils) becoming inappropriately involved in operational matters. Such a document could also usefully set out the specific responsibilities that rest with the principal in relation to operational management and governance and control within the institution (in particular his/her designated officer responsibilities in relation to the use of Scottish Funding Council funds). This is particularly important given the dual accountability that the Principal has to the governing body and the SFC. Given the significant challenges facing HEIs in the coming years, it may be helpful if the Statement of primary responsibilities specifically highlights the important role of the governing body to oversee the assessment of, and response to, the key strategic risks facing each HEI.
- The Chair (page 4, para 7) – it would be helpful if this section of the code reflects the fact that maintaining connections with stakeholders is largely the responsibility of the Principal and his/her management team; and clarified that the role of the Chair is to assure him/herself and the governing body that these arrangements are in place and are effective.
- The Head of the Institution (page 4, para 8) – it would be helpful if the language used in this paragraph was aligned with the terminology contained in the SFC's Financial Memorandum with HEIs.
- Governing body members (page 4, para 9) – the focus on ensuring a balanced and diverse board is welcome as it reflects the recommendations that were made in our Role of boards report (AGS, September 2010) in relation to increasing diversity in board membership across the public sector.

- Governing body members (page 5, para 10) – we welcome the focus on ensuring a majority of independent members to offer effective scrutiny and challenge of the operation of the HEI. However, the use of the term ‘clear majority’ may be ambiguous if the purpose is to imply a simple majority.
- Governing body members (page 5, para 10) – the guidance sets a suggested maximum size of 25 members for the governing body of an HEI and in 2010 we found that two-thirds of boards had between ten and 17 members. We would highlight the need for each HEI to assure itself that the size of the board is not such that it becomes difficult to create a coherent and effectively functioning board.
- Governing body members (page 5, para 11) – the code highlights the importance of the board being clear about the attributes that it is looking for when appointing replacement members. Earlier on in the code (para 9) also highlights the need for the board to consider the balance of skills, attributes and experience required across the board. It would be helpful if the code explicitly highlighted the need for financial expertise to present within the board membership.

The Secretary (page 6, para 13) – given the significance of the Secretary’s role in supporting good governance, it might be helpful here to highlight the importance of the University Secretary being visible and accessible to all members of the governing body; and for all members of the governing body to be proactive in seeking advice from him/her.

- Conduct of meetings (page 6, para 14) – whilst the language of transparency in this section is welcome, it would be helpful, in the spirit of openness and transparency, if the code more clearly stipulates a presumption that all business will be conducted in public and all papers associated with the work of the governing body will be publicly available unless specific commercial or personal matters are being considered.
- Remuneration (page 6, para 15) – based on our recent audit experience at the former Coatbridge College, believe that the chair of the governing body should not chair the remuneration committee. This position was reflected in the March 2016 Education Secretary Task Force report on Good Governance in Colleges. The more detailed supporting guidance within the Code recommends that the chair of the remuneration committee should be drawn from one of the independent members of the committee. It would be helpful if this point were included within Main Principle 15.
- Effectiveness (page 6, para 16) – the focus on periodic review of the performance of the governing body, the senate, academic boards and committees is welcome. An annual review supplemented by more comprehensive externally facilitated self assessment is a practice that we consider to be good practice. It would be helpful if the code set out some minimum requirements for the governing bodies’ annual review process (as it does for the five-yearly review)

Part II: supporting guidance

Given the charitable status that applies to all HEIs, it would be helpful for the code to specifically refer to the obligations this places on HEIs with the Office of the Scottish Charity Regulator (OSCR).

Main Principle 1 (page 8)

The code talks about a policy of openness ‘wherever possible’ (page 8). For clarity, it would be helpful if the code includes specific examples of where the presumption of openness should not apply.

The code talks about institutions adopting ‘a risk-based approach to strategic planning’. It might be helpful to specify what is meant by this term, perhaps by illustrating what is meant by risk and how that might be translated into the HEI’s strategic planning approach.

Main Principle 2 (page 10)

It would be helpful to highlight the important role that the Secretary has in providing advice and guidance to help ensure compliance with statutory and other duties that apply to the HEI.

Main Principle 4 (page 11)

The code talks about ‘reserved’ matters that will not be open to discussion by the whole governing body. This is an unusual approach to governance. The code does not give specific examples (other than in general terms, i.e. matters relating to individual members of staff or commercially sensitive material) of what might fall into this category, nor does it clarify who decides which matters are ‘reserved’. As a point of principle we do not think that any significant issues affecting the HEI (including commercial or staff-related matters) should not be considered by the governing body as this would compromise the effectiveness of the governing body in exercising its corporate oversight role.

It would be helpful if the code was explicit about the need to maintain a public register of gifts and hospitality (including offers that were declined and why). Similarly, a public register of interests should be maintained, with any conflicts publicly declared and appropriately managed at meetings.

Main Principle 5

Delegation of powers – This section (page 13) gives examples of significant decisions taken under delegated powers which should always be reported back to the governing body. We suggest that significant or unusual severance payments to staff should be included in this section.

Committees – This section (page 14) whilst recognising the need for flexibility it might be useful for the code to include a suggested list of ‘mandatory’ or usual committees.

Information about the governing body (page 14) – As previously mentioned, it would be helpful if the code was explicit about the need to maintain a public register of gifts and hospitality (including offers that were declined and why). Similarly, a public register of interests should be maintained, with any conflicts publicly declared and appropriately managed at meetings.

Risk management (page 14) – It would be useful if the code highlighted the need for a risk register and set out some principle for the management and reporting of risk.

Audit and VFM (page 16) – It would be helpful if the code reflected the audit powers of the Auditor General for Scotland in relation to HEIs as contained in the Public Finance and Accountability Act (Scotland) 2000.

Main Principle 6 (Page 18)

The supporting guidance implies that a member of the governing body with a pecuniary, family or other personal interest in a matter might still participate in discussion of that item, once they have declared their interest, unless requested by the chair to withdraw from that part of the meeting. This approach is unusual in a number of ways. Firstly, it places the onus on the chair to ask the member to withdraw, rather than placing the emphasis on the member to apply their judgement. Secondly, it would be more common for any board member or elected member of a local authority as a point of principle to be expected not to participate in any discussion on an item in which they had a pecuniary, family or other personal interest.

The code sets out that the governing body should have the power to remove any member from office, and must do so if they materially breach the condition of their appointment. It would be helpful if the code made clear that the governing body should have a clear policy on how this removal process will operate and must keep proper records of any removal decisions that it makes.

As mentioned previously, it would be helpful if the code was explicit about the need to maintain a public register of gifts and hospitality (including offers that were declined and why). Similarly, a register of member and staff interests should be maintained, with any conflicts publicly declared and appropriately managed at meetings.

Main Principle 7 (page 19)

The fifth paragraph in this section makes a reference to NAO reports. It would be helpful if the code also referred to Audit Scotland’s reports on good governance, several of which are referred to at the head of this consultation response.

Main Principle 12 (page 25)

This section focuses largely on induction. It would be helpful to also refer to the ongoing training and development needs of board member, including the potential benefit of personal development plans (PDPs) and the importance of regularly reviewing the uptake of member training and the overall performance of all board members (not just the chair).

Main Principle 15 (page 30)

Third paragraph refers to independent members on remuneration committees. The code specifies that there should be at least three independent members. It is not clear why this figure has been chosen as if the principle is to ensure that there is an appropriate level of independent representation on the committee then the number of independent members required will vary depending upon the size of the committee.

As previously mentioned, based on our recent audit experience at the former Coatbridge College, we feel that this should section of the Code should explicitly state that the chair of the governing body should not chair the remuneration committee.

Annex A1 – Guidance on Whistle-blowing

It would be helpful if the code refers to more up-to-date guidance available across the public sector regarding whistle-blowers, e.g. on protecting the confidentiality of whistle-blowers. It could also usefully include a reference to [Public Concern at Work](#).