An Enhanced Code for Good Governance

The conclusions and recommendations of the Steering Group for the review of the Scottish Code of Good Higher Education Governance

Background: the review process

In 2013, when the Committee of Scottish Chairs (CSC) published the Scottish Code of Good Higher Education Governance, it made a commitment to review the Code after three years. Accordingly, the CSC commissioned a steering group to conduct this review from the summer of 2016. By this time, the review was also required in order to maintain the coherence and currency of the Code in a changing legislative context, in particular since the introduction of the Higher Education Governance (Scotland) Act 2016. The steering group's remit was to conduct an evidence-based review the 2013 Code and to revise it as appropriate (see Annex B for the steering group's full terms of reference.)

The steering group had a diverse membership, to include voices from all major stakeholder groups. The group included a nominee of the National Union of Students (NUS) Scotland, a representative of student associations that are not NUS-affiliated, and two nominees of the Scottish Trade Union Congress. Its five 'lay' members included current or former governing body members from all of the major institution types in Scotland and from alumni organisations, as well as members chosen primarily for their experience in public, private and third sector roles. In addition, a representative of the Small Specialist Institutions attended the steering group's meetings. The Chair, while highly experienced in governance in other sectors, was chosen to be fully independent with regard to higher education. The full membership of the steering group can be found in Annex A.

The review proceeded in three phases:

Phase 1: Evidence gathering
Independent consultants from the Leadership Foundation for Higher Education (LFHE) were commissioned to gather evidence through a public consultation, a survey of governing body members, meetings at each Scottish HEI (involving 292 individuals in total) and meetings with the national leadership of major stakeholder groups. The consultants produced a written report and attended early steering group meetings to convey their findings. This report and responses to the Phase 1 consultation can be found on the review's webpages.

Phase 2: Consideration of the evidence and re-drafting
Evidence gathered in Phase 1 was considered by the steering group over a series of meetings in the second half of 2016 and early 2017. Following extensive discussion of the often highly diverse views held both outside and within the steering group, the group produced a revised version of the Code. In line with the group's remit and the Phase 1 outcomes, this draft revised Code was firmly grounded in the substance of the 2013 Code but with significant presentational changes as well as certain changes to its content.

Phase 3: Consultation and adjustment
The draft revised Code was released for an open public consultation, which ran during June and July 2017. All the submissions to this consultation can be found on the review's webpages. The steering group held two further meetings to consider the views received and amend the draft revised Code accordingly. The result of this process is the final revised Code that accompanies the present document.

Background: the nature of the Code

The overarching aim of every participant in this review has been to promote good governance in the Scottish higher education sector. It is important to recognise that there is no fixed definition of good governance, nor is there a single way to assure it. In fact, it is clear from the evidence gathered for this review that there exists in the sector a wide range of views concerning not only the ideal content of a code of governance but also the fundamental nature of such a document.

Existing codes of governance, in higher education and beyond, vary significantly in both style and content, reflecting the different circumstances in which each of them was created and in which each applies. Our revised Scottish Code of Good Higher Education Governance, similarly, has its own character.

Factors that influenced the nature and content of the revised Code include:

Dialogue	The steering group had a diverse membership, inclusive of all major stakeholders, and engaged in an extensive process of evidence-gathering and consultation. At all stages, feedback received through these processes was fully considered by the steering group and directly influenced the development of the Code. The revised Code therefore constitutes a work of consensus that draws on diverse views on how to promote good governance.
The existing code	The steering group's remit was to review and revise the existing (2013) Code, not to create a wholly new document. The majority of respondents in the evidence-gathering phase stated that the 2013 Code was a good basis from which to work and that it should be revised rather than replaced. Accordingly, the greater part of the content of the revised Code is made up of material from the 2013 document.
The Scottish legislative context	Compared to other codes of governance, the Code has a distinctive relationship to regulatory requirements, by virtue of Scottish law. In particular, the Post-16 Education (Scotland) Act 2013 makes it a condition of grant from the Scottish Funding Council (SFC) for HEIs to comply with "principles of governance which appear to the Council to constitute good practice in relation to higher education institutions". The Code has so far been adopted by the SFC as embodying the appropriate principles of governance for this purpose and must remain suitable for this function if the structures around Scottish higher education governance are to remain clear and coherent. In addition, the Higher Education Governance (Scotland) Act 2016 came into force shortly before the review of the Code commenced. While this does not change the status of the Code itself, it adds to the legislative context and affects some of the Code's content.

The content of the Code

The revised Code is fundamentally a development of the 2013 Code and the majority of the material in it is derived from the older document, either directly or in a minimally amended form. However, there are some notable differences between the two Codes. Structural and presentational changes are the most obvious of these, and may to some extent give the impression of a more radical departure from the 2013 Code. There are also some more substantial changes to the content of the Code, made in response to specific point raised in Phase 1 of the review.

The most significant differences between the two Codes are as follows:

Structure and presentation has been overhauled for clarity	The 2013 structure used 'Main Principles' and 'Supporting Guidelines' and to some extent aligned these with degrees of obligation with regard to compliance. This meant there were some very detailed matters listed under the 'principles'. The new structure more clearly separates overarching principles from detailed requirements and also groups principles more systematically by theme. Degrees of obligation/expectation are now conveyed more systematically, through the use of *must, expected* and *should*. This does not fundamentally alter the nature of the Code or signal a change in its relationship to compliance (see below).
Good practice examples have been removed	Inclusion of good practice examples in the Code itself was felt to limit the dynamic nature of good practice sharing and to imply an official sanction on certain practices, thus blurring the lines between Code and good practice. The steering group will recommend that the sector devise its own practice-sharing mechanism, outside of the Code.
Governing body members' 'rights and responsibilities' have been clarified and made more consistent	On the one hand, all members must accept collective responsibility and must not act in sectional interests or to a mandate; on the other, all members should be afforded equal status as governing body members, regardless of who nominates or elects them.
The principles of committee membership have been clarified, in line with common responsibilities	It follows from the previous point that committee membership should generally not be restricted purely on the basis of the 'category' of governing body member (Audit Committee is an exception to this). In asserting this, the Code does not mandate the presence of any category of member on any given committee (although there are separate provisions that do so in some cases). The skills and abilities of members remain paramount in determining committee membership and conflicts of interest must still be taken into consideration. Certain specific requirements will apply over and above this; e.g. a requirement for a lay member majority on some committees and the requirement, already in the 2013 Code, for staff and student membership of Nominations Committee.
The preamble has been revised	The new foreword to the Code includes a little more focus on the values and purpose of HE and relates these to the particular responsibilities of HEIs' governing bodies. A glossary of certain terms has been added for clarity.

A new section/principle on Equality and Diversity has been added	This contains updated material from the existing Code, but also emphasises the governing body's responsibility for E&D throughout the institution.
Staff and student input to Remuneration Committee is now required	On the basis of the above, it must be possible (but not required) for staff and students to serve on the Remuneration Committee. The Code will require the Remuneration Committee to seek the views of staff and students, through their representatives. This can be fulfilled in different ways. (Note that existing CSC guidance on Remuneration Committees is in effect superseded by these innovations in the Code. It is for the CSC to determine whether updated guidance is required.)
There is a new requirement for a public meeting	The governing body will be required to hold an open meeting each year. This need not be a substantive business meeting, but should rather be an 'AGM-like' event, at which members of the governing body and Principal give an account of the institutions' position and strategy and are available to answer questions.
There is new wording on the role of senior management attendees at governing body meetings	The Code contains strengthened wording on Chairs' and Principals' responsibilities to ensure that executive officers facilitate effective decision making by all and only the members of the governing body, or its committees.
There is increased emphasis on induction and development opportunities	The revised Code contains strengthened wording to ensure that governing body members, particularly (but not only) student members, are well prepared and supported to carry out their roles.
The 2016 HE Governance Act has been accommodated	The revised Code contains explicit recognition of the new legislation, but does not attempt to impose an interpretation on it, nor to duplicate its provisions redundantly. Therefore, minimal changes have been made to reflect new requirements and new roles.

New organising principles

The most obvious change between the two versions of the Code is the re-organisation of the text from the 'Main Principles' and 'Supporting Guidelines' of the 2013 Code to the general principles and detailed provisions of the revised Code. This change merits some additional explanation, given that it affects the document throughout and, in an earlier version, attracted significant attention at the consultation stage.

The Phase 1 evidence gathering identified a need to improve the clarity of the Code and introduce more consistency in its presentational features. Many respondents to the Phase 3 consultation suggested that this has been achieved.

The Main Principles and Supporting Guidelines framework of the 2013 Code was removed because it was felt to hinder the creation of a fully coherent document structure. The Main Principles contained both very general and highly specific points, meaning that they were not always clearly 'principles' at all, while some quite general and fundamental statements were found in the Supporting Guidelines. The decision was therefore taken to re-structure the Code by:

1. **separating general principles from relatively detailed matters**

As a result of this, the detailed paragraphs in the revised Code include a range of statements that had previously appeared in the Main Principles as well as Supporting Guidelines. Since the Principles/Guidelines structure had been taken to signal different degrees of obligation among the Code's statements, these now have to be signalled in another way, necessitating another change:

2. **indicating degrees of expectation or obligation through systematic use of certain verbs**

The revised Code's systematic use of *must*, *expected to* and *should* provides the required clarity. consistent indication purpose while improving general clarity and consistency. The 2013 Code had used a number of related expressions – e.g. *must; should; shall*; *has a responsibility/duty to*; *has to*; *is required*; *it is incumbent upon* – without fixed definitions.

To further improve consistency of expression, all of the Code's provisions are now phrased as active statements concerning expectations on those to whom the Code applies (usually the governing body or Institution, but sometimes individual governing body members or other organisations with active roles in HE governance).

The Steering Group's view is that these presentational changes do not constitute a significant change in the nature of the Code or its application. The 2013 Code made clear that the 'comply or explain' approach applied to the Supporting Guidelines as well as the Main Principles: "Given the diversity of Scottish Higher Education Institutions it is possible that certain of the Main Principles can be met by means different to those envisaged in the Guidelines. Accordingly the Code is issued on a 'comply or explain' basis." It follows that compliance with the Guidelines was the usual expectation. In line with this, all institutions worked to achieve compliance with the entirety of the Code within a year of its publication.[1]

The revised Code works in the same way, in that the whole Code is issued on a 'comply or explain' basis, whereby any explanation of non-compliance must show how the general principles are met. Indeed, the Steering Group believes that the revised Code is more coherent in this respect, given that the principles in the revised Code are more consistently general and high-level than the Main Principles in the 2013 Code were.

The revised is also more concise than its predecessor. Not counting annexes, the revised Code is around 1,600 words shorter than the 2013 version.

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[1] See the CSC's 2014 report on compliance after one year: http://www.scottishuniversitygovernance.ac.uk/wp-content/uploads/2014/11/Scottish-Code-of-Good-HE-Governance-ONE-YEAR-ON-final-4NOVEMBER.pdf

The Steering Group's recommendations

The remit of the steering group has been to review and revise the Code. In the course of reviewing the Code, the group has also identified a number of points on which it wishes to make recommendations, to help ensure that the Code not only contributes to good governance in the Scottish HE sector, but does so in a context that provides maximum reassurance to all parties:

1. **The Scottish Funding Council (SFC) should adopt the revised Code as its identified principles of good governance, in the terms of the Post-16 Education (Scotland) Act 2013, and should clearly state for the benefit of HEIs and stakeholders:**
   a. **how it intends to monitor compliance with the Code; and**
   b. **what steps it would take in the event of non-compliance and the absence of an acceptable explanation that is judged to satisfy the Code's 'comply or explain' provision.**

2. **The revised Code should be adopted as soon as possible, with a realistic timeframe set for implementation and expectations of compliance. The CSC and SFC should together agree a schedule for this and communicate it clearly to HEIs and major stakeholders. We note that some parts of the revised Code are dependent on the implementation of the Higher Education Governance (Scotland) Act 2016 and that expectations of compliance with these parts of the Code will therefore need to be adjusted according to each institution's timetable for implementing the Act.**

3. **The HE sector and its major stakeholders should collaborate on creating and maintaining a repository of best practice in Scottish HE governance. The steering group recommends that the CSC, SFC and the University Secretaries' Group, in consultation with trade unions, student representative bodies and other major stakeholders, create appropriate proposals for achieving this. To encourage openness and creativity, all parties should recognise that best practice may be varied, especially given the diversity of the sector, and that publication of a best practice example does not imply that the practice in question should become obligatory for the HEI that publishes it or for any other institution.**

4. **The Code should be reviewed again within four years of its implementation date. The process should be inclusive and proportionate. The depth and scope of the review will depend on the circumstances at the time.**

Annex A: Membership of the steering group

Ian Marchant	Independent Chair
Keir Bloomer	Lay member
Lesley Knox	Lay member
Helen Martin	STUC
Pat Mathewson	Representative of the non-NUS student associations
Professor Stuart Monro	Lay member
Emma Philips	UNISON
Vonnie Sandlan	NUS Scotland
Ann Smyth	Lay member
Tony Strachan	Lay member

Biographical details for all of the steering group members can be found at
http://www.scottishuniversitygovernance.ac.uk

Scottish Code of Good HE Governance

Review Steering Group Terms of Reference

The remit of the Steering Group is to review and, where appropriate, revise the Scottish Code of Good Higher Education Governance in a manner which:

- incorporates the standards of good practice existing in the Higher Education sector and elsewhere;

- makes proposals that are based on sound evidence;

- considers the viewpoints of all major stakeholders;

- takes account of any relevant changes in the legislative and regulatory context, in particular the Higher Education Governance (Scotland) Act 2016;

- recognises the separate duties and responsibilities of management and governing bodies;

- is sensitive to the diversity of the sector, including the nature of the Small Specialist Institutions;

- takes account of the importance of both the relationships and processes required to achieve good governance; and

- reflects both the inputs and the outputs required of governing bodies and governance.