

# Open consultation: Review of the Scottish Code of Good Higher Education Governance

**April 2017**

## Context

In 2016, the Committee of Scottish Chairs (CSC) of Scottish higher education institutions launched an evidence-based Review of the Scottish Code of Good Higher Education (HE) Governance (henceforth 'the Code'). The review was entrusted to a Steering Group whose membership includes all major stakeholder groups. Independent consultants from the [Leadership Foundation for Higher Education](#) were commissioned to collect and analyse evidence from an open public consultation, a survey of governing body members and extensive consultation with stakeholders at each institution and at national level. Full details of the Steering Group and the evidence-gathering process can be found at [scottishuniversitygovernance.ac.uk](#).

The Steering Group has now completed its review and has produced a draft revised Code. This seeks to recognise and reflect the continuous evolution of best practice in governance and to accommodate changes that follow from the [Higher Education Governance \(Scotland\) Act 2016](#). Views are now sought on the draft revised Code.

## How to respond

Please complete these questions using the online response form before **21 June 2017**.

Alternatively, please email a response to the consultation, including your completed respondent information details, to [dan@universities-scotland.ac.uk](mailto:dan@universities-scotland.ac.uk) or send a written response to the consultation by post to:

Daniel Wedgwood, Universities Scotland, Holyrood Park House, 106 Holyrood Road, Edinburgh EH8 8AS.

## Respondent information

Are you responding as an individual or an organisation?

Individual	
Organisation	X

Please enter your full name or the organisation's name here

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The Committee of Scottish Chairs would like your permission to publish your consultation response. Please indicate your publishing preference:

NOTE - If you are responding on behalf of an organisation, anonymous publishing refers only to your name, not your organisation's name. If this option is selected, your organisation name will still be published.

Publish response with name	X
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**This consultation is an open invitation to comment, not limited to a specific set of questions. We welcome your views on any aspect of the *content* or *structure* of the draft revised Code.** (Please do not comment on superficial presentational issues. This draft does not show the final formatting of the document, which will be finalised following the consultation.)

**If your response contains multiple comments and/or covers different elements of the Code, please structure your response accordingly, separating different points clearly. Please refer to paragraph or page numbers where possible.**

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## Summary

Queen Margaret University Court welcomes the opportunity to comment on the proposed revisions to the Scottish Code of Good HE Governance, published originally in July 2013. We offer a number of detailed comments on those revisions against the appropriate section of the Code, but would preface those with comment on the general approach adopted to the re-drafting of the Code, and the impact of that approach on both the resulting 'tone' of the Code and its practical implementation. Court members reflect a range of backgrounds and opinions and this response has sought to reflect the views of the majority, whilst recognising that, on some points, there was a diversity of opinion.

The purpose of the Code is to ensure a balance between enhancement of good practice and prevention of bad practice, between protection of autonomy and accountability to stakeholders. We believe that this balance has not been achieved, but rather shifted towards prescription.

The 2013 Code provides for all universities in Scotland to 'comply' with the Code's Main Principles and to 'observe' the guidelines, with exceptions being 'rare'. Nevertheless, it is recognised on page 1 of the Code that the Code is 'not a prescriptive set of rules'. The shift in the balance between 'should' and 'must' is a key element in the draft, with the term 'must' now employed 230 times within the document compared to the 26 instances in the 2013 Code. This represents a significant move towards a prescriptive set of rules, and moves the Code away from good practice towards regulation. Such prescription does not provide for the diversity of institutions in Scotland, and appears to challenge the autonomy of higher education institutions.

The Foreword to the revised code recognises clearly that the 'missions, strategic priorities, and constitutions of HEIs are highly diverse, reflecting their status as autonomous institutions'. However, this does not translate to the provisions of the Code.

Autonomy and diversity are much-respected hallmarks of the higher education sector in Scotland. These characteristics enable it to meet the needs of society and economy in a variety of ways and to compete on an international level. They ensure that each institution has the freedom to create and to innovate in every branch of knowledge, and to be agile in responding to new challenges and opportunities, in ways appropriate to its distinctive mission.

To advance these overall aims, the sector draws funding from a multiplicity of sources: public and private, individual and corporate, national and international; and each institution has a network of stakeholder interests with which it engages in pursuit of its goals.

The purpose of the Code should be to enable this autonomy and diversity to flourish by

setting out the principles of good governance for HEIs in Scotland and by encouraging good practice in the application of these principles. The Code should be a support, but not a straitjacket, for the sector. It is entirely appropriate to aim for harmony and consistency across the sector through HEIs' compliance with high-level principles, but the Code should also seek to avoid unnecessary, and potentially damaging, uniformity through over-prescription as to how these principles are to be implemented in practice.

As it stands, the 2017 draft Code has moved away markedly from the explicit intention of its 2013 precursor not to set out a prescriptive set of rules. No explanation is given for this shift towards a regulatory approach, which is out of keeping with the genesis of the Code in a voluntary agreement of the Scottish Chairs. The 'comply or explain' philosophy is, in execution if not intent, extremely heavy-handed; and the often very detailed elaboration of how each provision is to be implemented appears not to recognise that consistency of purpose need not also involve uniformity of method. The first is laudable and desirable; the latter unnecessary and overly bureaucratic.

There are significant parts of the Code which give little room for flexibility in how certain provisions can be implemented; the need to take into account existing processes and organisational cultures is largely ignored. Where there are particular requirements, 'the musts', we would commend the approach taken by the CUC Code which states that, 'recognising the strength derived from the diversity and autonomy of the sector, governing bodies are free to achieve the expectations of the 'must' statements by the means and mechanisms appropriate to their own context'.

Similarly, we would commend the Financial Reporting Council's UK Code of Corporate Governance: <https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>

The "comply or explain" approach is the trademark of corporate governance in the UK, and is stated within the UK Code as being 'the foundation of its flexibility'. The UK Code states explicitly that it 'is not a rigid set of rules'. Rather, the principles are the core of the Code, and 'the way in which they are applied should be the central question for a board as it determines how it is to operate according to the Code'.

## **The Draft Code**

We would comment on specific provisions of the Code as follows:

### **Foreword**

Paragraph four recognises that Scotland's HEIs have charitable status, and that this places on their governing bodies the legal responsibilities of trustees. A number of HEIs are also constituted as companies, including Queen Margaret University, which means that the primary legislation will be the Companies Act. This comment applies to the bullet points at the bottom of page 1 also.

We note that, in describing the aims of the Code, the foreword uses the following words interchangeably - 'high', 'highest' and 'good' standards of governance. Elsewhere, there is reference to 'best' practice. We wonder if the Steering Group came to a view as to the threshold standard, and so, the extent to which that influenced the more prescriptive tone of the document.

We consider that the removal of Part One of the current Code, which sets out the purpose of Governance, contributes to a general loss of a sense of the audience for the Code.

In line with comments made elsewhere in this response, we would suggest that the foreword to the Code could benefit from a statement that an HEI's approach to the Code should not be evaluated in a mechanistic way, and that departures from the Code should not be automatically treated as breaches.

### **Form of the Code**

Our comments concerning the use of 'must' and 'should' apply. We consider some of the language/terminology used in this section to be over-stated, which adds to the overall sense of prescription of the document. An example would be the use of 'truly exceptional'. Under the normal application of 'comply' (or 'apply') or 'explain', the explanation would normally relate to something that is straightforwardly 'exceptional'.

### **The Governing Body: Primary responsibilities**

We suggest that the opening description should be restated as a role to ensure the 'effective governance' of the institution, rather than the 'effective management'. We note that the former term is used in the current code, but the reference is embedded in the supporting guidelines.

**Paragraph 1.3:** We note the requirement ('must') for an annual plan that identifies those aspects of the strategic plan being implemented in the year in question. We note that this provision is included within the supporting guidelines of the current Code ('should') but consider that it is up to individual governing bodies to agree how best to plan and monitor the implementation of the institutional strategic plan.

**Paragraph 7:** Our comment earlier concerning those institutions also constituted as Companies applies.

**Paragraphs 9 and 10:** We would subscribe completely to the requirement for governing bodies to ensure that the Institution operates with high levels of social responsibility. However, we are concerned at the specific requirements to exemplify that commitment. Aspects of those set out in paragraph 9 are included in the University's Outcome Agreement concerning the use of public funds. The adoption of the Fair Work Framework is voluntary, and is properly a matter for individual institutions. As a general point, we consider that reference to specific frameworks or initiatives compromises the currency of the Code.

**Paragraph 11:** We note the requirement that the statement on primary responsibilities has provisions relating to approving the mission and strategic vision of the Institution, its strategic plan, key performance indicators (KPIs) and annual budgets, 'ensuring that they have due regard to the interests of students and staff'. The current Code provides that they have due regard to 'ensuring the interests of stakeholders'. We believe that the provision in this section might be widened to include the range of stakeholders and communities with whom institutions work, and to whom they are required to demonstrate good governance.

**Paragraph 12:** We note the requirements to publish a broad summary of the responsibilities that the governing body delegates to management, its committees and the academic board. Such provision would be set out in an institution's governing instruments and published widely. This comment applies to the provisions in **paragraphs 13 and 14** also.

### **The Governing Body: Membership**

**Paragraph 17:** We note the reference to the HE Governance (Scotland) Act 2016 (by law). As the Act specifies the membership requirements of university governing bodies, and provides for an election process to be conducted in accordance with rules made by the governing body of the institution, we consider that decisions on the appropriate balance of

academic and non-academic staff representation is a matter of decision for governing bodies.

**Paragraph 18:** The requirement to provide an explanation in the annual report of 'any increase in the size of the governing body' is a new one. While no explanation has been provided in the draft code for this addition, it is assumed that it is to counter the removal within the revised Code of any reference to a maximum size of governing body (the current code suggests that a governing body of no more than 25 represents good practice). We question the inclusion of this provision as it implies measurement against a benchmark.

**Paragraph 20:** We welcome the maintenance of the provision concerning terms of office, and that exceptions may be permitted. We note the introduction of a new provision in the latter, which is that it 'must be fully explained'. As the paragraph suggests simply that longer terms of office 'should be avoided', the requirement to 'fully explain' appears overstated.

**Paragraph 21:** We note the comments concerning formulation of eligibility rules for election to the Senior Lay member position in the context of the suggested limitation to a single term of office where a person has already served for a substantial period on the governing body. We support the suggestion that decision on this is a matter for the governing body.

### **Responsibilities of Governing Body Members**

**Paragraph 24:** We welcome the strengthened wording in relation to members' obligations not to act as if delegated to do so by a particular constituency, and the explicit reference to charity legislation.

**Paragraph 28:** We are concerned that the provision that 'no committee should be restricted to lay members only' has the potential to be misinterpreted. The revised code states that no category of membership of the governing body should be excluded from membership of any committee 'by virtue of the category of the governing body member'. We recognise the intent in the wording, but we consider that there is the potential nevertheless for this paragraph to be interpreted as providing for non-lay membership of all committees. In the case of an Audit Committee, such a provision would be counter to best practice. This would be in contradiction of best practice as set out in the CUC Handbook for Members of Audit Committees in Higher Education Institutions (section 2.2.4), which advises that:

'The governing body should endeavour to ensure that all audit committee members are independent and objective. Employees of the institution and the chair of the governing body are generally not considered independent, and should therefore not be members of the audit committee.'

As currently expressed, the Code would appear incompatible with accepted good practice. On that basis, we would recommend rewording to emphasise that committee membership is based on an assessment of skills and experience, rather than category of membership, but subject also to generally accepted principles of good governance.

**Paragraph 31:** The new requirement for governing body members to register gifts and hospitality requires further clarification. As currently expressed, the requirement is too onerous. It should cover only gifts or hospitality offered to the individual in their capacity as a member of the governing body of the institution.

**Paragraph 32:** We do not consider it is necessary for the Code to include reference to specific legislative requirements, but that it should simply state that the governing body is responsible for ensuring compliance with all relevant legislative and regulatory requirements. This would apply to other references within the document eg **paragraphs 33 and 34.**

**Paragraph 33.** Again, we do not consider that the Code should specify the manner in which the governing body monitors compliance as part of its duties. For those institutions that have an Equality and Diversity Committee reporting directly to the Court, such monitoring is achieved through regular reports of the Committee.

**Paragraph 34:** We consider that it is for individual governing bodies to establish institutional Key Performance Indicators in line with individual institutional strategic priorities, and in light of other institutional arrangements in place for monitoring the achievement of equality and diversity goals.

**Paragraphs 36-40:** We welcome the statements set out in these paragraphs.

### **Effectiveness**

**Paragraph 47:** We consider that the current Code sets out more coherently the rationale behind this particular requirement when it states that the governing body should 'ensure that the institution engages effectively with its diverse stakeholders'. We do not consider that holding an annual stakeholder meeting necessarily promotes such engagement. We would not wish to see this particular event as a specific requirement. We would note that those institutions constituted as Companies are required to host an Annual General Meeting.

**Paragraph 50:** This paragraph states that the papers considered at meetings 'should be made available on the institution's website or intranet, unless this would breach confidentiality or would not be in the interests of the Institution'. This is a departure from the current code, which states only that papers should be made available to staff and students, save where it is necessary to observe confidentiality, or it would not be in the interests of the institution or the public to do so.

**Para 54:** We note and accept the provisions relating to internal review of effectiveness of the governing body. We consider that the statement that the academic board must also conduct effectiveness reviews 'in the same way' introduces a confusion in relation to the externally facilitated review. Where the Senate is established by the governing body, and considered a body of the governing body, we would expect the externally facilitated review of the governing body to extend to the academic board.

### **Key roles**

**Paragraph 60:** States that the Chair may delegate duties to other members of the governing body, but must do so with the consent of the governing body and with due regard to the Chair's statutory responsibilities. Such provision should also be in line with the institutions Scheme of Delegation, and in line with the institution's Standing Orders, as appropriate.

**Paragraph 64:** Statements on appraisal of the Chair are welcome.

**Paragraph 65:** Given that the appointment of the Senior Lay members is provided in legislation, this paragraph should simply state that each Institution must establish rules and procedures for this election that comply with the requirements of the Higher Education Governance (Scotland) Act (2016).

**Paragraph 73:** Agreed in principle, but flexibility is required on the mechanisms by which the performance of the Principal is assessed. This must take into account and be consistent with other processes and procedures for determining (senior) pay.

**Page 18, Section 7:** Legal Responsibility for the upholding of academic freedom is vested in

the governing body.

### **Committees and Academic Board**

**Paragraph 86:** This paragraph suggests the Principal is excluded from formal membership of the Remuneration Committee but should 'attend' meetings, except when his/her remuneration is discussed. For a number of institutions, the Principal is a member but withdraws when there is discussion of his/her remuneration. We would suggest that the key issue is that the Principal is not present when there is discussion of his/her remuneration.

**Thank you for responding to the Review**