

Submission
No 25

INQUIRY INTO THE GOVERNANCE OF NSW UNIVERSITIES

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**Submission to NSW Legislative Council General Purpose Standing
Committee No 2: Inquiry into the governance of NSW Universities**

Arc @ UNSW Ltd Student Representative Council

Arc @ UNSW Ltd (Arc) is the student organisation at the University of New South Wales. Arc's activities include retail, entertainment, student development, training and volunteering, clubs and societies, legal advice services and the Student Representative Council of the University.

The Arc Student Representative Council provides this submission to the Standing Committee to suggest areas of investigation or review relating to the governance of the University of New South Wales. This submission set out areas in the legislative provisions which are unclear or require review.

This submission provides comments in relation to the Committee's terms of reference.

By way of background, the *University of New South Wales Act 1989* (NSW) establishes that the Council is the Governing Authority of the university and has functions imposed/authorised by the Act. The Council of the University is allocated decision making powers under the *University of NSW By Law* (2005). While the bulk of decisions are made within the Academic Board or a delegated committee or body of Council, it is Council which formally approves decisions and promulgates university policy.

The Committee's terms of reference are responded to below:

1. Any apparent lack of clarity in the roles of governing bodies and Vice Chancellors and the consequential opportunities for conflict

(a) Delineation of roles of Council and Vice Chancellor

The Vice Chancellor of the University of NSW is the “principal executive officer” of the University under section 12(3) of the *Act*. While the powers and responsibilities of the University Council are comprehensively set out in the *Act*, the responsibilities of the Vice Chancellor are located in the *By Law*.

Under the current legislation it would appear the Council serves a similar function to a Board of Directors, however its decision making responsibility is considerably greater, allowing for a wide involvement in university matters, if it so chooses.

It is possible the role of the Vice Chancellor and the University Council overlap in certain aspects. At the broadest level, the roles appear quite similar.

Under Clause 6 of the *By Law*, the vice chancellor is required:

to manage and supervise the administrative, financial and other activities of the university.

Under section 15 (1A) of the *Act*, the University Council:

- (a) acts for and on behalf of the University in the exercise of the University’s functions, and*
- (b) has the control and management of the affairs and concerns of the University, and*
- (c) may act in all matters concerning the University in such manner as appears to the Council to be best calculated to promote the object and interests of the University.*

The Vice Chancellor may (under Clause 6(e) of the *By Law*) carry out the functions of the Council which Council chooses to delegate.

Recommendation

To clarify the extent of the roles, it is recommended the Committee consider whether the scope of the functions which Council may delegate to the vice chancellor can be clarified and if so indicate the areas of delegation (whether this be by exhaustive list or subject area).

(b) Status of Vice Chancellor as “presiding member” and resulting powers and duties

Part 2 (5) of the UNSW *By Law* provides that a Vice Chancellor is a member of

(a) every committee constituted by any by-law or rule or any resolution of the Council, and

(b) every board and faculty in the University.

And that

3) The Vice-Chancellor may preside at any meeting of any such committee, board or faculty and has all the rights and powers of the presiding member of any such committee, board or faculty.

Regulation 6 of the *By Law* comprehensively sets out the functions of the Vice Chancellor, but does not address how a Vice Chancellor is able to carry out presiding member functions, or to what extent or under what circumstances they should. The role of a “presiding member” within the university has been a matter of some debate¹, but the role itself is not defined in the *Act*, *By Law* or any other document of the University. It is also noted that the Chancellor also has presiding member rights at these same decision making forums of the university, and this may be a further potential “consequential opportunity for conflict” (see discussion at Point 5).

Recommendation:

It is suggested that the role requires definition and scope, as the *By Law* gives the Vice Chancellor presiding member status at any decision-making meeting other than Council. It is suggested the wider the scope and power of the role, the greater the consequential opportunities for conflict exist.

2. Any apparent lack of clarity in the delineation of duties of governing bodies and the Chancellors

¹ See for example Agenda Item 5.3, White Attachment B “Thoughts on the role of the Presiding Member”, UNSW Academic Board 3 February 2009

The lack of a clear definition of the roles of chancellor within UNSW means that it is difficult to delineate between duties of the governing body and chancellor.

The fact that the chancellor is a member of the University Council (its governing body) and generally presides at Council meetings does not of itself create a problem of delineation of duty. It is recommended that a more precise definition of the role of Chancellor is created within the *By Law*.

3. Identification of the roles and responsibilities of the Vice Chancellor, the governing body and the Chancellor in relation to the formation of University policy and grievance procedures, and the communication of such policies to the student body

Section 15 (1B) (i) of the *Act* provides that a function of Council is “to ensure that the University’s grievance procedures, and information concerning any rights of appeal or review conferred by or under any Act, are published in a form that is readily accessible to the public”.

This is a function which the Council may delegate, and does delegate to the Policy Management Unit of the University. The responsible officer for the Grievance Policy is the Deputy Vice Chancellor (Academic).

It is noted that the Vice Chancellor is responsible for supervising “the discipline of the University...with powers to impose penalties” under Clause 6(c) of the *By Law*. The University of New South Wales has a set of Student Misconduct Rules, as well as a staff Code of Conduct, a Code of Conduct for Responsible Practice of Research and other documents setting out the obligations of members of the University. It is common for misconduct allegations and grievances and appeals to overlap. Although the procedure documents are produced by the same Policy Management Unit, the enabling legislation provides that Council and the Vice

Chancellor are responsible for the two types of policy although there can be significant overlap.

The Arc SRC understands that a new Complaints Policy is to be released and an amended Student Code of Conduct and discipline policy is being developed, but information about the way in which these procedures will be communicated to the student body has not yet been released.

Communication of policies to the student body

It is noted that Protocol 7.5.55 of the National Higher Education Governance Protocols provides that a Table A Higher Education Provider is to “codify its internal grievance procedures and publish them with information about the procedure for submitting complaints to the relevant ombudsman or the equivalent relevant agency.” Universities frequently have well developed grievance procedures, however these may not always be well publicised to students. In addition, the right of a student to seek external review is commonly not mentioned in a university grievance procedure.

Recommendations

- (i) The responsibility for the dissemination of information about “grievances” and university misconduct should be the responsibility of only one body within the university.
- (ii) As the grievance procedures and misconduct rules are created under the By Law, it is suggested that Section 28(2) of the Act may require clarification, as it currently provides that “by laws and rules having same force and effect” although notes that a by law prevails to the extent of an inconsistency.
- (iii) It is suggested that all university enabling legislation and all complaints and grievance policies be examined to ensure that:

- (a) sufficient reference is made to the role of the NSW Ombudsman as an external complaints body, and;
- (b) some explanation is provided by the university within the policy explaining the grounds on which a complaint to the Ombudsman is available.

4. The appropriateness of changes in the duties and responsibilities of governing body members

Not necessary to respond

5. Opportunities for governing bodies and chancellors to intervene in the responsibilities that more properly lie with the Vice Chancellor as Chief Executive Officer

It is suggested that the concerns raised above regarding the status of a presiding member may allow a chancellor to intervene in matters more properly lying with the Vice Chancellor if presiding member powers were exercised.

It is noted however that the Vice Chancellor is *ex officio* a member of University Council, and directly reports to Council which in turn oversees the performance of the Vice Chancellor.

Regulation 5(7) of the By Law appears to confirm that the Chancellor and Deputy Chancellor retain precedence as does the Council. Regulation 4(2) provides that The Chancellor has “presiding member rights” at faculty meetings and any committee or board established by Council.

Each university faculty elects its own presiding member in addition to the presiding members of the other university agencies. The expression “all the rights and powers of the presiding member of any such committee, board or faculty” is

unclear, as such “rights and powers” have been exercised differently by faculty and committee presiding members.

Recommendation

The Committee should consider whether Part 2 (4 and 5) of the UNSW *By Law* creates an inconsistency or lack of clarity in the roles of the Chancellor, Deputy Chancellor and Vice Chancellor.

It would be useful to obtain clarification of the term “presiding member” and the rights and powers the university seeks to confer on such a role, and consider whether this term needs to be clarified in the establishing legislation for all universities. If legislation does not prescribe the scope of the role, a university should be required to set out how it defines the role and communicate this through its by laws or rules.

6. Current and future mechanisms for reviewing the performance of chancellors and governing body members

See comments at (7).

7. Protocols for addressing poor performance of chancellors and governing bodies

It is noted that the legislation makes no provision for this type of review, although it is noted that the University Council has established a Code of Conduct which provides for the following in the case of a breach:

“In the event of a breach of confidentiality or any provision of this Code of Conduct, Council may apply such procedures and take such actions as it considers appropriate in the

circumstances having regard to the nature and circumstances of the breach, its seriousness and consequences, and the requirements of law and procedural fairness.”

It is suggested that Council itself would be the forum for reviewing a chancellor or governing body member, as Council itself is the only body empowered to remove a member of the Council for breach of duty. There is no explicit statement of this review function, however.

Recommendation

Arc suggests the *Act* and *By Law* be reviewed, and existing processes for overseeing performance of the chancellor and governing bodies be examined to determine if an explicit statement of review protocols is necessary.

8. The representation on governing bodies, and their committees, of staff and students and the current and appropriate balance between external members and elected representatives

Section 9 of the *Act* establishes the constitution and membership of the University Council. The Arc SRC notes that there is a very small representation of current students on both University Council and Academic Board, as a percentage of the total membership.

University Council membership is as follows:

- Three official members (Chancellor, Vice Chancellor and President of Academic Board)
- Six ministerial appointments
- Four elected UNSW graduate members
- Four elected members of academic staff
- One elected member of non-academic staff

- Two student members, one of each undergraduate and postgraduate
- Two members appointed by Council

Academic Board membership comprises 56 members from the University, four of whom are students.

Recommendation

It is suggested that the opportunities for student representation on both of these bodies should be raised. The current National Higher Education Governance Protocols (Protocol 7.5.35) requires majority external membership of University Council, however there is scope for raising current student representation on this body by increasing the total membership to 22 (the maximum number allowed under the Protocols). The presence on the Council of UNSW graduate members should not be taken to represent the enrolled student body. It is suggested there is a need for wider representation of the current student body on Council, and this would not impact on the Council's function as governing body. The Standing Committee may also consider whether any review of the existing Protocols should be recommended to the Federal department to better balance the requirement for external oversight of the University with the representation of university members, particularly students.

9. Proposals for changes to various acts governing NSW universities and to the National Higher Education Governance Protocols to address any systemic causes found

This submission suggests that changes be considered in the light of the issues raised in the previous points. In relation to the Protocols, refer to point three in particular.

10 Any other related matter

Universities are public authorities subject to review by the Auditor General and the NSW Ombudsman, and the *UNSW Act* requires the university council to include in its annual report any action taken to implement any recommendations made in a report of the Ombudsman or Auditor General (section 16B). Universities are also subject to external review under (for example) anti-discrimination, privacy and freedom of information legislation at state and federal level.

It is less clear what scope these external review bodies have to review the internal decisions of universities relating to admission, granting of awards or disciplinary proceedings (with the exception of action under industrial law).

Section 38(2) of the *Administrative Decisions Tribunal Act* (1997) provides that a jurisdiction may not be conferred on the Tribunal to review a decision unless the Act or statutory rule under which the decision was made expressly confers jurisdiction. Section 5 of the *Administrative Decisions (Judicial Review) Act* 1977 provides that a decision must be made “under an enactment” and no provision of the *University of New South Wales Act* or *By Law* confers such jurisdiction. As such, when an aggrieved student seeks review of a decision externally they are likely to confront the problems identified in *Griffith University v Tang* (2005) 221 CLR 99. It is noted that the NSW legislation appears to provide wider scope for the kinds of decisions available to be reviewed by the Tribunal (the expression is a “decision of an administrator” rather than the narrower “decision of an administrative character”).

Recommendation

For a proper consideration of the governance of NSW universities to be made, it is submitted that a review be made of the jurisdiction of administrative tribunals to hear and determine certain questions arising from university decisions.

In particular:

(a) Should the Administrative Decisions Tribunal be granted express jurisdiction to review decisions made under the University Act or By Law?

(b) Is there scope to expand the role of the NSW Ombudsman to include review powers or determination powers along similar lines as the Financial Ombudsman Service?

Submitted by Charishma Kaliyanda on behalf of Arc Student Representative Council, University of New South Wales