

**INQUIRY INTO THE GOVERNANCE OF NSW
UNIVERSITIES**

Organisation: NSW Vice-Chancellor's Committee

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New South Wales Vice-Chancellors' Committee

Committee Convenor

Committee Executive Officer

5 December 2008

The Director
General Purpose Standing Committee No 2
Parliament House
Macquarie St
Sydney NSW 2000

Dear Ms Duffy

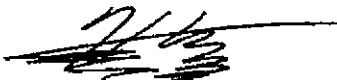
At the recent New South Wales Vice-Chancellors' Committee (NSWVCC) meeting, held on November 25, a motion was passed to endorse the following submission to the Governance of NSW Universities (Inquiry).

The NSWVCC agreed that its submission to the NSW Inquiry will reflect the position taken in the Joint Submission by the University Chancellor's Council (UCC) and Universities Australia (UA) to the Commonwealth Review of National Governance Protocols. The Joint Submission says, in essence, that:

- Governing bodies of universities should not be subject to more prescriptive requirements than apply to directors of bodies governed by Corporations laws';
- A 'one size fits all' approach to governance does not fit the Government objective of diversification of the sector; and that
- Each university's establishing legislation and its by-laws, taken in conjunction with the National Protocols, 'adequately cover the relationships between the governing body and management of the universities.'

As this submission by both Chancellors and Vice-Chancellors from all universities in Australia was made recently, the NSWVCC considered that the issues had already been dealt with carefully and comprehensively, and that the statements made in the Joint Submission do not warrant being revisited at this stage. It was also agreed, however, that individual universities may wish to respond to the Inquiry separately. A full copy of the UCC and UA Joint Submission is attached.

Yours sincerely



Ian Goulter
Convenor, NSW Vice Chancellors' Committee
cc NSWVCC members

NSWVCC MEMBERS:

Australian Catholic University•Australian National University•Charles Sturt University•Macquarie University•Southern Cross University•
The University of New South Wales•The University of Sydney•University of Canberra•University of New England•University of Newcastle•
University of Technology, Sydney•University of Western Sydney•University of Wollongong

**UNIVERSITY CHANCELLORS COUNCIL – UNIVERSITIES AUSTRALIA JOINT SUBMISSION
REVIEW OF NATIONAL GOVERNANCE PROTOCOLS**

This paper reflects views expressed at the joint meeting of University Chancellors and Vice Chancellors held in Canberra on 26 June 2007.

There was a strong consensus on some issues. For instance, it was felt that;

1. members of governing bodies of Universities should not be subject to more prescriptive requirements than apply to directors of bodies governed by Corporations laws;
2. it was not wise to apply a "one size fits all" governance model (that extends into areas of management), particularly when the stated object of the Government is to promote diversity;
3. more prescriptive and detailed protocols should be avoided when the added costs of compliance and reporting risked being inconsistent with the potential benefits.

The view of the Chancellors and Vice Chancellors is that the existing National Governance Protocols have worked well and that little variation is needed at this stage. The greater the detail, and the more prescriptive the requirements, the greater tend to be the costs of reporting. It would also be unfortunate if the protocols became so detailed that they militated against reasonable diversity.

Against that background, the following comments are offered in response to the questions posed in the Issues Paper.

3.1.1: How have the existing Protocols impacted or influenced good governance?

It is difficult to measure the effect of the existing protocols. Some Universities were already in conformity before their introduction. Others were not. It is clear, however, that the effect of the Protocols has been positive overall and has prompted improvements in a number of areas, including in some cases the induction and continuing instruction of members of governing bodies. They have also been helpful in clarifying the respective roles of governing bodies and the executive in the governance framework.

The introduction of the Protocols has provided a useful focus for discussions among Chancellors and Vice Chancellors on governance issues. Some would also give them credit for a renewed focus on risk management and the relations with controlled entities.

3.1.2: Has the requirement to comply with the existing Protocols had any negative or unintended consequences?

Not of any significance. They have increased the costs to Universities of compliance. However, to this point, Chancellors and Vice Chancellors have not seen this as a matter of major concern. Any significant increase in detailed requirements might alter this situation.

3.1.3: Are there other factors and influences that impact on governance practices which ought to be addressed in the Protocols?

Chancellors and Vice Chancellors did not believe so! As mentioned above, it was felt that members of governing bodies of Universities should not be subject to requirements more stringent or prescriptive than those applying to directors of companies generally. The question was raised (without conclusion) whether it would be better to subject Universities to the Corporations Act rather than have separate legislation. One public university (ACU) is already subject to the Corporations legislation.

A couple of suggestions for minor extension (clarification) of the existing Protocols are offered later in this paper.

3.1.4: How have the existing Protocols been instrumental in guiding and shaping institutions' own effective governance structures and relationships?

Overall, they have been useful although, as stated above, a number of Universities were already compliant before the protocols were introduced. See also 3.1.1.

3.1.5: How have the existing Protocols addressed the concerns about university governance raised in the "Higher Education at the Crossroads" and the "Meeting the Challenges: the Governance and Management of Universities" papers?

Without seeking to attribute cause and effect, Chancellors and Vice Chancellors would argue that, to the extent those documents identified actual deficiencies in university governance, such deficiencies have been addressed and rectified since the introduction of the protocols. The degree of compliance attests to this.

3.1.6: How have the Protocols contributed to the overall sustainability of individual higher education providers?

Just what is meant by "sustainability" in this context is not immediately apparent. On the interpretation given to the word by Chancellors and Vice Chancellors (the capacity of Universities to remain academically and financially viable in the medium term), it is not clear that the "sustainability" of institutions has been affected. However, in theory, if institutions are better governed, they are more likely to avoid situations that pose a danger to sustainability. To that extent, it might be said that the protocols have contributed to an improved defensive structure.

3.1.7: How have the Protocols contributed to improving the performance of individual higher education providers?

Individual institutions would need to respond to this question. Discussions at the meeting of Chancellors and Vice Chancellors suggested that the protocols had contributed to a better understanding of respective roles in the governance structure. Thus it might be said they have contributed to better governance practices. However, "improved performance" depends on more than this. Importantly, it depends on outcomes.

3.1.8: Has compliance with the existing Protocols enhanced the reputation of individual higher education providers?

It is not clear that this is so. Perhaps more time is needed to make a judgement.

3.1.9: Have individual institutions developed their own governance practices and procedures sufficiently to satisfy the spirit of the Protocols?

The evidence suggests this is so. That evidence includes the discussions among Chancellors and Vice Chancellors; the AUQA results and the degree of annual compliance. It is accepted that there may be a difference between compliance *with the words* and compliance *with the spirit* of the protocols. Enquiries of Chancellors and Vice Chancellors suggest that Universities have been taking the governance issue very seriously and have been focusing on the spirit, not just the words.

3.1.10: Do the Protocols need to be improved? How could this be achieved?

Refer to the introductory remarks. Chancellors and Vice Chancellors, at their meeting, were of the view that the present protocols were "about right". The way Universities are established under the most recent State legislation plus the existing Protocols seemed about right. Apart from a couple of minor additions (see later), no major changes were favoured at this stage. It could be useful to defer any further review of the Protocols until, say, 2010.

3.2.1: Are these existing Protocols adequate for defining the role, responsibilities and activities of governing bodies and the duties and obligations of individual members?

The overwhelming consensus is that the existing protocols adequately deal with the role, responsibilities and activities of governing bodies and the duties and obligations of individual members. The legislation establishing the various universities also contributes to this adequacy. A more detailed, prescriptive, approach could be counterproductive, militating against the object of diversity and adding unnecessarily to compliance/reporting costs.

3.2.2 Is the maximum size of governing bodies appropriate? What would be an ideal size?

With few exceptions, the view of Chancellors and Vice Chancellors is that the size of governing boards is an issue of secondary importance. More important is the blend of skills, experience and motivation among members and the method of their appointment. Most Chancellors and Vice Chancellors felt that open election was not consistent with securing the optimal skills mixture. It was noted also that many elections of student or staff members were decided with just a handful of electors casting votes. A preferable system might be to have nominations for these positions in a transparent and consultative manner, with the final selection being made by the governing body, taking account of skills, experience and motivation. Some felt it was not necessary to prescribe a particular system in the Protocols, but Universities should have flexibility in choosing the method of selection that best suited their circumstances.

As to the most desirable size of a governing body, there was a range of views among Chancellors and Vice Chancellors. In general, it was felt that the present maximum of 22 is acceptable, particularly as it is possible for Universities to have a smaller number if that were to suit their circumstances better (some already have a governing body smaller than 22). It is important that Universities should have flexibility in this regard. Apart from the Protocols, the enabling legislation should provide for this flexibility.

3.2.3: Is the maximum term of appointment for board members appropriate? What would be a reasonable maximum term?

The proper length of term for a member of a governing body is a vexed question. The existing Protocol represents a balance between the need to renew and refresh governing bodies on a continuing basis, while retaining special skills and experience where appropriate. At least one University has a provision that sets two terms of four years as the norm, but allows for one extra term if resolved by the governing body. Further extensions are not allowed. That means an absolute maximum of 12 years. Such a provision could pose difficulties for some regional universities which may have less access to qualified potential members.

It is noted that the Issues Paper refers to "good practice models" which suggest shorter terms than 12 years and less scope for exceptions. We are not aware of such "good practice" models. Most studies seem to produce ambiguous conclusions about length of term of board members.

The general view among Chancellors and Vice Chancellors is that the present Protocol is acceptable. However, since the contribution of particular members of governing bodies is not strongly correlated with the length of their service, the preference would be for governing bodies to be able to decide on this issue without being trammled by a particular maximum.

3.2.4: Is there a need for the Protocols to provide additional requirements or guidance on the skill mix required for an effective governing body?

No! The existing protocols go about as far as is sensible in setting down needed skills. Further detail seems to be neither warranted nor sensible.

3.2.5: Should representatives of staff and students be included in consultative rather than governing bodies?

This is not a matter on which there was a clear consensus. Some Chancellors and Vice Chancellors believe that governance without the direct participation of students and staff would be inconsistent with the objectives of a university; some others believe students need to be involved but not staff (other than the Vice Chancellor and Chair of Academic Senate); still others would happily operate without either group being represented and would prefer to deal with student and staff concerns through other consultative arrangements. Similar differences exist on the question of alumni representation. The question whether such members should be elected or appointed (after appropriate nomination procedures) is covered in 3.2.2.

3.2.6: Is the role of a Secretary important to a governing body? Should the role be separated from that of the senior university administration?

This question could be seen as misunderstanding the network of relationships that make up the governance of a university (or any other body). The primary relationship is between the governing body, under the chairmanship of the Chancellor, and the Vice Chancellor as the Chief Executive Officer and principal agent of the governing body in executing its policies and strategies. The role of the Secretary is to assist the Chancellor in arrangements for meetings of the governing body, committee meetings etc and also to work with the Vice Chancellor in ensuring that the outcomes of governing body deliberations are properly conveyed to those involved.

The short answer to the questions posed is: Yes, the role of the Secretary is important but it would be neither appropriate nor desirable to separate the role from that of the senior university administration. The Secretary is, and must be, part of the Vice Chancellor's staff. There has been much written on the "split personality" of people like the secretary or the internal auditor, both of which have executive functions (answerable to the Vice Chancellor) as well as responsibilities direct to the governing body (normally through the Chancellor).

3.2.7: Should the Protocols recognize the role, responsibility and powers of a Secretary? What should they be?

Following from the previous question, it is not considered necessary or helpful to recognize the role, responsibilities or powers of a Secretary in the Protocols. The role will vary from institution to institution and that is quite proper.

3.2.8: Should the Protocols cover the relationships between the governing body and key management roles in the institution?

No! This detail should not be in the Protocols. The Protocols need to be read in conjunction with the enabling legislation of the relevant university and its by-laws. Chancellors and Vice Chancellors are of the view that, taken together, these documents adequately cover the relationships between the governing body and management. Understanding these relationships is further reinforced by induction arrangements for new members and on-going instruction. Further detail in the Protocols is not necessary and would not be helpful.

3.2.9: Should the Protocols contain explicit guidance on the devolution of management responsibilities to the Vice Chancellor/CEO?

No! This is much better handled through education and experience. Trying to set it down in protocols is likely to be a futile exercise.

3.3.1: Do the Protocols need to be improved to encourage a stronger role for governing bodies in guiding institutions in a more diverse higher education sector? If so, how could this be achieved?

The consensus view of Chancellors and Vice Chancellors is that further changes to National Governance Protocols are not needed to encourage a stronger role for governing bodies in a more diverse higher education sector. Paradoxically, the more detailed and extensive are the protocols, the less diverse is the sector likely to become. Greater diversity, and governance appropriate to furthering diversity, is more likely to be encouraged by direct intervention through budgetary allocations than by variations to governance protocols.

3.4.1: Do the existing Protocols provide sufficient guidelines for the accountability of the institution through the oversight of performance by the governing body?

The Protocols, when read with the enabling legislation, by-laws etc provide excellent guidance on the responsibilities and relationships of members of a governing body.

With regard to the governing body itself, it may be argued, however, that the single sentence in Protocol 4 on the assessment of the governing body's performance (and the performance of its individual members) could be expanded with benefit. One possibility would be to shift that sentence into a new Protocol 4(a) and expand it along the following lines:

"On a regular basis, at least once each two years, the governing body shall assess its performance, the performance of its members and the performance of Committees of the governing body. The Chancellor shall have responsibility for organizing the assessment process, drawing on external resources if necessary. On an annual basis, the governing body shall also review its conformance with these Protocols and identify needed skills and expertise for the future."

3.4.2: Do the Protocols need to be enhanced to provide for improved accountability?

See comment above on Question 3.4.1.

3.4.3: Do the existing Protocols provide sufficient guidelines for the fiduciary responsibilities of members of the governing body?

The consensus view is that Protocols 2, 9, 10 & 11 are adequate for this purpose.

3.4.4: Should the Protocols include any additional provisions relating to the accountability of members?

It is not felt that additional provisions are required.

3.4.5: Would the Protocols be improved with the provision of additional guidelines and requirements on the role of the governing body in risk management?

See answer to Question 3.4.3. The existing Protocols appear to cover these responsibilities adequately.

3.4.6: Would accountability be enhanced by requiring the Audit Committee to be a responsibility of the governing body?

It is normal in most organizations to have a Committee of the governing body with responsibilities to report to the governing body on audit-type matters and risk management. Sometimes, when the governing body is small in number and there are no executive members on it, the Audit Committee role may be assumed by the governing body as a whole. However, when the governing body includes one or more executive members, possible conflicts of interest arise which require that the detailed audit/risk management role is played by a Committee of the governing body.

In the case of Universities, having an Audit Committee of the Board is driven by two factors, which will vary from institution to institution. One is the presence on the governing body of the Vice Chancellor, the Chair of Academic Senate and other staff members. Another is the need to have the appropriate expertise and qualifications available to play the audit/risk management role effectively. This may require the secondment of experienced non-members of the governing body.

It needs to be remembered that the role of the Committee is to carry out the detailed work and report to the full governing body. It is a filter, not a point of final determination. In other words the Audit Committee is already "a responsibility of the governing body" in a very real way.

3.4.7: Should an audit committee be required to have an independent chair?

In this context, it is not clear whether "independent" means not a member of the governing body; or independent in the sense of not being an executive, staff member or student of the University. If the latter, it would be normal and preferable for the Chair of the Audit Committee (sometimes called the Audit and Risk Management Committee) to be "independent", to avoid potential conflicts of interest. If the former interpretation is the correct one, it needs to be remembered that the Audit Committee is a committee of the governing body. So, preferably, the Chair of the Audit Committee should be a member of the governing body. If a member is not available with the requisite skills and experience, it is acceptable to have an external (seconded) Chair. However, this should normally be seen as a second best alternative. Someone who is not a member of the governing body has the disadvantage of not being as fully aware of the activities, risks, policies, strategies of the University.

3.4.8: Should the Protocols be expanded to cover the relationships between the governing body and the sub-committees within the institution?

It is not clear what "sub-committees" are in mind. Most universities have committees of the Board e.g. the Audit Committee; the Academic Senate; perhaps a Finance or Investment or Capital Works Committee. They are governed by a charter established by the governing body and their decisions are subject to guidelines established by, or to decisions of, the governing body. There may also be other committees or councils which are not committees of the governing body but are part of the executive functions of the university. For these the charters etc would be established by the Vice Chancellor subject to any policies established by the governing body.

The answer to Question 3.4.1 favours an addition to the present Protocol 4, which includes the responsibility to review regularly the performance of committees of the governing body. Beyond this, it is not clear that there are any deficiencies which require treatment in expanded protocols.

3.4.9: Would the inclusion of additional provisions and requirements improve overall accountability?

If legislation in some jurisdictions does not cover the need for a governing body to approve the annual accounts there would be no objection to adding that to the sub-clauses in Protocol 2.

"Whistleblower" provisions seem to be adequately covered by Protocol 7, given that the codified provisions for grievance procedures need to be submitted to "the relevant ombudsman or the equivalent relevant agency".

Mechanisms for reviewing performance of the governing body are covered in the response to Question 3.4.1.

3.4.10: Would the inclusion of additional provisions and requirements such as these provide greater guidance to institutions on the role and operation of the governing body?

Responses to earlier questions cover some of the aspects of this question. In other respects, the consensus view is that detailed specification as implied in the question would not be appropriate. Such detail is best left to governing bodies as part of their deliberative processes.

3.4.11: Are there any other provisions that the Protocols should contain in relation to the governing body and its individual members in matters concerning accountability?

This has already been largely dealt with in the answer to Question 3.4.1. Otherwise, the existing protocols, in conjunction with enabling legislation etc, seem to deal adequately with accountability.

3.5: (i) Do the existing Protocols encourage continuous improvement of governance arrangements?

(ii) Should the Protocols include further guidance for governing bodies on the regular review of their performance, such as reporting outcomes?

(iii) Would the inclusion of additional provisions and requirements improve the Protocols?

The three questions under this heading may be considered together. It is the view of the Chancellors and Vice Chancellors that the existing protocols play a role in encouraging continuous improvement of governance arrangements. As suggested earlier there is a case for expanding Protocol 4 to deal a little more explicitly with the assessment of performance (group and individual) of governing bodies. Reporting the outcome of such reviews is not favoured. It is not considered that this would improve the process. Given human nature, it could even have the opposite effect.

3.6: Are there useful clarifications that could be made to any of the existing Protocols or the overall presentation of the Protocols.

Since the present list appears to be reasonably comprehensive and well understood, the consensus view is not to make changes for essentially "cosmetic" reasons.

3.7: Are there any other matters within the terms of reference or relating to the Protocols generally that have not already been mentioned on which you would like to comment?

A number of Chancellors and Vice Chancellors have drawn attention to existing arrangements for the audit of University accounts. Two particular issues are the requirement to use the state Auditor General and the need to adhere to two, sometimes conflicting, sets of reporting requirements to meet State and Commonwealth demands. Greater consistency in the respective reporting requirements and greater flexibility in the choice of Auditor would be welcomed by many Universities. This is not necessarily a matter for the Protocols; it is more related to legislative requirements and the demands of the respective government departments.

There are no other matters on which the Chancellors and Vice Chancellors, collectively, wish to comment. There may, of course be matters which individual Chancellors or Vice Chancellors, or particular Universities, may wish to raise.

24 July 2007