



A Guide for New Clerks and Secretaries of Governing Bodies of Higher Education Institutions in the UK

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1 Introduction

1.1 This is the second edition of this Guide for governing body clerks either new to HE or new to their role, and updates the first edition produced in 2008. Its specific purposes are: to provide information on the role and responsibilities of the clerk; to identify a basic range of good practice in crucial areas; and to give guidance to clerks on the effectiveness of governance and how it can be enhanced. Hopefully it has been written in a readable way, providing signposts to further information, and containing self-challenge questions and short case studies to stimulate thought. The Guide is *not* intended to be exhaustive, and many of the issues raised are dealt with in more detail in the resources listed in Annex E. In recognising institutional diversity the text attempts to avoid being prescriptive, however there is a substantial amount of recognised good practice that most clerks will want to adopt.

1.2 In the last few years the governance of HEIs has been increasingly under the spotlight. Partly this has come about because of external factors, such as the implications for all corporate governance of high profile private sector failures, the publication of the numerous reports on governance (see Annex E), and the devolution of higher education policy to the four UK jurisdictions. Notwithstanding such external pressures, some of the most important developments have come from within the higher education sector, including: greater interest in governance in some HEIs; failures of governance in a small number of HEIs, the establishment of the Leadership Foundation for Higher Education¹ by all the UK funding bodies; and the work of the Committee of University Chairs² (CUC).

1.3 However, governance will continue to change over the next few years. As HEIs generally increase in size, become more competitive (and therefore take more risks), and become part of a global HE market, then the responsibilities of governing bodies will inevitably become more demanding. This is now generally recognised and the Code of Practice contained in the CUC Guide for Governors³ makes it clear that the governing body has unambiguous responsibility for all matters involving its institution. Both the Code and the Guide are the starting point for new clerks in understanding the formal arrangements about HE governance.

1.4 These challenges not only raise important issues for governing bodies but also for the clerk or secretary to the governing body whose job it is to undertake the 'company secretary' role. The details of this are explored in this Guide, but include providing a range of services involving administrative support, procedural guidance, advice on governance, and generally ensuring that the governing body is 'fit for purpose' in the way it meets its responsibilities. Indeed it is no exaggeration to say that whilst an effective clerk/secretary does not guarantee an effective governing body, it is impossible to conceive of an effective governing body without an effective clerk. However, although increasing guidance is available to support the work of governing bodies, to date there has been little available UK wide to support the work of new clerks⁴. This Guide for clerks is intended to fill that gap, and is primarily designed for clerks/secretaries who have been in post for up to one year - although it may also be useful for those who are more experienced as a reminder of key elements of their role!

¹ See www.lfhe.ac.uk/en/audiences/governance/index.cfm

² See www.bcu.ac.uk/cuc

³ Committee of University Chairs, *Guide for Members of Higher Education Governing Bodies in the UK*, at www.hefce.ac.uk/pubs/hefce/2009/09_14/

⁴ The Association of Heads of University Administration (AHUA) contains some members who undertake the role of clerk/secretary to their governing bodies, but many clerks are not eligible to be members. Also an earlier Guide for clerks for HEIs in Wales was produced with the encouragement of HEFCW.

1.5 In HEIs clerks to governing bodies are typically recruited through one of two routes: most are appointed internally (or from within the sector) and have previously held a senior administrative appointment in another role; as a result they understand HE, but may have had little preparation for the vast amount of administrative and procedural detail that the clerk has to face. Conversely some - a smaller number - may be appointed externally and have experience in the company secretary role but little understanding of HE.

Clarifications

1.6 Five clarifications and words of caution are required at the outset. First, the suggestions in this Guide are - of course - not mandatory, and it is for individual governing bodies and their clerks to establish and review their own working practices. For pre-1992 universities these will generally be defined in their own charter and statutes, and for most post-1992 HEIs guidance will be based on governing instruments derived from the Education Reform Act 1988 (as amended by the Further and Higher Education Act 1992). The term 'governing instruments' has been used generically in this Guide to refer to such documents, irrespective of how they are derived. The details of the governance arrangements as they apply to different parts of the HE system are described in the CUC Guide.

1.7 Second, where a clerk or governing body is uncertain about the propriety of a particular working practice, legal advice should be sought, having first taken account of the contents of this Guide and also the CUC Guide. All reasonable care has been taken to ensure the accuracy and appropriateness of the information provided, but specific legal or procedural questions can only be determined by reference to the specific context in which they occur.

1.8 Third, some terminology needs clarification. The term 'clerk' has been used for the person responsible for providing support and services to the governing body, although in some HEIs this person might be called 'secretary', 'registrar and secretary', 'director of corporate affairs', or 'director of administration'. For some the term 'clerk' may suggest a passive role concentrating on administrative processes, but that is not intended - see Chapter 2. Similarly the term 'governing body' has been used generically to include university councils, and courts in Scotland (but not in England!).

1.9 Fourth, there are increasing differences in the regulatory aspects of HE governance due to different policies and traditions within the four UK jurisdictions. In both Wales and Scotland there have been reviews of HE governance, leading in Scotland to a new governance code for HE being prepared at the time of writing. This Guide mainly concerns generic issues, but where significant jurisdictional differences of practice occur they are noted in the text.

1.10 Finally, the opinions expressed in this Guide are the collective views of the authors, and in no sense represent any formally agreed view of the HE sector. Thus, whilst the vast majority of clerks are likely to agree with most of the Guide's contents, there may be places where genuine differences of view exist, and where the practices of experienced professionals diverge. This may be particularly true in the answers to the case studies presented.

2 The Roles and Responsibilities of the Clerk

2.1 This section outlines the general roles and responsibilities of the clerk, identifies relevant good practice, and notes different ways that clerks undertake their jobs in HEIs. The starting point has to be the 2009 CUC Guide, which clearly states that "the secretary or clerk has a key role to play in the operation and conduct of the governing body, and in ensuring that appropriate procedures are followed"⁵. Since its publication, the CUC has produced an outline role description for the job of the clerk⁶, and for ease of reference this is attached as Annex B at the end of this Guide.

2.2 A clerk supports a governing body in various ways. One central aspect involves fulfilling the company secretary function, for which a clerk needs a grasp of the law and procedures applying to public bodies, a sound knowledge of what good governance means and how it can be achieved, and the tact and judgement to ensure that a governing body can operate effectively. The UK Corporate Governance Code which sets out recommended best practice with which the boards of all Stock Exchange listed companies registered in the UK should comply⁷ states that in the private sector: "All directors should have access to the advice and services of the company secretary, who is responsible to the board for ensuring that board procedures are followed and that the applicable rules and regulations are complied with". The same principle applies to higher education, although one difference is that a company secretary may also be a member of the board and this is not the position of the clerk in HEIs.

2.3 In addition, much of the clerk's work involves routine but essential administrative support for the governing body, including planning governing body business and reporting progress on the implementation of decisions. Governors act in a voluntary and unpaid capacity, and most have significant commitments and responsibilities elsewhere. It is, therefore, an essential task of the clerk acting as committee secretary to arrange administrative support to enable a governing body to function including timetabling and preparing meetings, commissioning and assembling papers, providing information, circulating agendas and minutes, and so on.

2.4 Although HEIs vary, the following key roles and responsibilities of the clerk apply to most institutions:

- To ensure the effective organisation and management of governing body business, including governing body committees. This includes - but is not restricted to - providing information to members in an optimal way and keeping a formal record of governing body proceedings.
- To provide authoritative guidance to the governing body about its responsibilities, including providing or obtaining relevant legal advice.
- To ensure that relevant procedures, rules, regulations and legal requirements are complied with and that the governing body does not unwittingly exceed its powers.
- To provide advice and support to individual governing body members as required, including through the provision of induction and development activities.

⁵ CUC, *Guide for Members of Higher Education Governing Bodies, 2009*

⁶ Available from the CUC web site at www.bcu.ac.uk/cuc/publications

⁷ The Code can be found at www.frc.org.uk

- To advise the governing body on how it can ensure it adopts good practice in all matters of governance, and can optimise its contribution to the institution's performance.
- To ensure that effective processes are in place to enable the governing body to fulfil its responsibilities in relation to all key areas of its work, for example ensuring financial sustainability, approving institutional strategy and measuring performance, oversight of effective risk management, and so on.
- To ensure that the governing body and its committees undertake regular reviews of their effectiveness, and are informed of the implementation of any outcomes.

2.5 Details of these responsibilities are dealt with in other sections of this Guide; however it is important to reinforce the point that the responsibility of a clerk in a modern HEI is not just concerned with the effective administration of business - important as this is. Rather, it should be proactive and involve providing support to the governing body and its chair on how the board can enhance its own effectiveness and overall performance. To do this the clerk needs to be familiar with developments in governance both inside and outside the higher education sector, and - ideally - will have a sound general understanding of what constitutes good practice in governance. As governance in HE becomes more diverse, the importance of this comparative perspective by a clerk increases, and good governance can longer be - if it ever was - simply repeating the practices of the past.

2.6 Higher education corporations are corporate bodies: that is they are legally authorised to act as a single person with an identity separate from those of its individual members. While the clerk needs to establish and maintain a close working partnership with the executive, the governing body chair and committee chairs (and occasionally advise individual governors), his or her ultimate responsibility is to the corporate body of governors.

Independence

2.7 To be effective, a clerk must be independent thus ensuring that all governing body members can have confidence in the processes of governance, even when there are disagreements about policy or action. A clerk must also be able to stay independent of the management of the institution even when he or she may be a member of the senior management team. It is therefore important that everyone involved understands that the clerk is responsible to the governing body and not to the vice-chancellor/principal, and that there must be appropriate working and reporting arrangements to reflect this.

2.8 As noted in the CUC Guide, it is "incumbent on the governing body to safeguard the clerk's ability to carry out his or her responsibilities". If the clerk is to carry out the role properly, a relationship of trust must exist with the governing body, who must be confident that the clerk will not disclose confidential matters. Equally, a clerk may, on occasion, need to give unwelcome advice and governors should trust that this is properly considered, and given in their and the institution's best interests. All this means that a clerk must enjoy the full confidence of the governing body, and that the appraisal of his or her performance in that role should be undertaken by the chair - although the views of the vice-chancellor/principal would usually be sought. Unfortunately, this is not always the case, and in some institutions the task is undertaken directly by the vice-chancellor/principal.

2.9 A question which follows is: should any governing body business should ever be confidential from the clerk? There are important issues here of propriety, public confidence, and the trust between the governors and the clerk. Except in respect of a clerk's own conditions and remuneration and other matters in which a clerk's involvement is an issue, it is - in general - unwise for a governing body to exclude the clerk from any of its business, as advice cannot then be given on whether any proposed action is proper for a public body and the governing body may inadvertently act unlawfully or wrongly.

2.10 Additionally, a question of public confidence could arise from the suggestion that governors, or a committee of governors, are meeting secretly. If a decision were to be made without the clerk being present, the governors might be open to claims of wrongdoing. Such claims are more easily refuted if the process can be seen to have involved the clerk, and if decisions are properly recorded.

The Nature of the Clerk's Role

2.11 Because of the nature of the clerk's role it needs to be undertaken by a senior and experienced person, with a close understanding of the key business of the institution. He or she also needs to have sufficient knowledge, expertise and standing to carry authority on governance issues with senior colleagues and governors. Where problems with governance have occurred in HEIs one contributing factor has often been that the clerk did not have such credibility, and was therefore unable to act effectively.

2.12 Within higher education the role of the clerk is undertaken in three main ways:

- a) As part of the role of a senior appointment responsible for all aspects of administration (sometimes called registrar and secretary) one of whose roles is to provide coordinated support on governance throughout the institution, and who usually is a member of the senior management team (SMT). This approach is common in pre-1992 universities but can also be found elsewhere. The strength of this approach lies in the integration of the clerk's role with other administrative and governance services, which enables effective coordination of information for a governing body. Conversely, the clerk's membership of the SMT (as head of the administration) may present a potential role conflict, particularly when the executive - for whatever reason - does not want to encourage an active role for the governing body on a particular issue.
- b) Where the role of the clerk is shared with another senior management portfolio, for example director of corporate affairs. This approach is most usually found in post-1992 HEIs and some colleges of higher education, where the comprehensive registrar and secretary model was not adopted. The same potential advantages and drawbacks apply as in (a), although their practical impact depends largely on the mix of portfolios concerned. One generally undesirable combination is combining the role of clerk with that of director of finance, as an institution may not be able to demonstrate the necessary independence of the clerk (and therefore the governing body) in relation to financial matters. Where the appointment is combined with other duties, it is essential for the two roles of clerk and member of staff to be clearly differentiated. Each should be the subject of a separate job description or separately identified in a combined role description.

- c) Where the role of the clerk is not combined with any other jobs and may be undertaken part time - in some cases being contracted out to external providers. This is the position in a number of smaller institutions, and has been encouraged in further education. It became popular following the Nolan Report (see Annex E) which emphasised the need for independence in governance arrangements. Although this approach ensures independence, in a part time capacity it also runs the risk of weakening the clerk's role as he or she cannot always be an effective member of the core institutional networks through which information is shared. In practice, clerks in such roles may tend to emphasise the administrative aspects of the role and may find it difficult to give the necessary high level guidance and support to governors.

2.13 Except where a part time and/or independent clerk is employed, potential conflicts of interest are bound to occur, and should be dealt with responsibly. For example, senior postholders often carry responsibilities that require them to present reports at governing body or committee meetings, and occasions may arise when it is difficult to combine this with the role of clerk. Arrangements will also be required to resolve any conflicts of interest arising from a clerk's line management relationship with the vice-chancellor/principal or other senior colleagues. All involved should be aware of possible conflicts of interest, and it is the clerk's responsibility to discuss them openly with the governing body chair.

2.14 Issues of independence and potential role conflict can only be addressed effectively if open and transparent processes are in place, and if good working relationships are established with the chair of the governing body, the chairs of the senior committees, and the vice-chancellor/principal - see Chapter 3.

Job Requirements and Appointment

2.15 Because of the need for independence, the appointment of the clerk must be made by the governing body, who - self-evidently - should appoint someone capable of carrying out the role, and who is credible with members. In determining capability, each governing body will need to agree the role it expects its clerk to fulfil and the level of service it requires. The template provided by CUC (see Annex B) is a useful starting point for institutional discussions, but should not be adopted uncritically. The governing body should also agree the job description, the wording of any advertisement and the level of remuneration offered. After appointment, matters concerning performance review, discipline or dismissal of the clerk should also be a matter for the governing body.

2.16 The skills and experience which a new clerk requires will normally include the following:

- It is essential that the clerk should have the knowledge, self confidence and status within the institution to enable him or her to act independently and to be credible with both senior officers and members of the governing body.
- In-depth familiarity with senior committee work and procedures either as a member or as a clerk/secretary to a senior committee.
- Knowledge of the higher education system, its funding, and the regulatory requirements of the funding and professional bodies.
- An understanding of the legal framework within which the governing bodies of HEIs operate.
- An appreciation of the ethical issues relating to the conduct of those in public life.

- Sound and proven organisational ability, good interpersonal and communication skills, and the ability to write accurately and succinctly.
- 'Political' skills and awareness of organisational dynamics at a senior level.

2.17 It is for the governing body to decide how it proposes to select a candidate, but it will usually delegate the task to a selection panel. Typically this might consist of the chair of the governing body, the deputy chair (or the chair of at least one committee), and the vice-chancellor/principal, all of whom will have to work closely with the successful applicant.

What Can Go Wrong?

2.18 Most governance in HE is at least satisfactory, and some is very good. However, there have been cases where things have gone wrong, and no doubt there will be more. Where a clerk has cause for concern he or she has to intervene through discussions with the governing body chair, the vice-chancellor/principal, and in extremis by going to the appropriate funding body. There are a number of texts on HE governance which provide examples of governance breakdowns and the lessons that can be learned (see Annex E), and in summary, some of the critical features they identify that can lead to dysfunctional governance include:

- An over dominant head of institution, sometimes supported by the governing body or a subset of governors.
- Ambiguity in governance and management structures.
- A lack of transparency by the senior managers team leading to poor decision that harms the interests of the institution.
- Poor internal audit processes, and a lack of regard for the role of the audit committee in monitoring institutional assurance processes.
- A lack of understanding by the governing body or the executive of the managerial capacity of the institution to deliver change, or unwillingness to invest appropriate resources to bring about change.
- Disregard for academic matters, or the exclusion of an academic 'voice' in important decision-making by the governing body.
- The failure of due process, such as the implementation of decisions or exceeding powers.
- An over-optimistic or naive governing body, particularly in challenging financial times.

2.19 The clerk is central in addressing such issues, however in doing so he or she must be prepared not simply to act as a servant of the governing body, but as a spokesperson for good governance within the institution. This means alerting the governing body where action is required, and ensuring that advice is provided.

2.20 Governance crises are one thing, but there are more common problems which the clerk may also need to address, with the support of the governing body chair. For example, inadequate participation or a lack of preparation by members, difficulties in the governing body fully engaging with key areas - most commonly in the development and measurement of institutional strategy, and in ensuring that board members act corporately with a shared and collective view rather than seeing

themselves as individuals⁸. Whilst it may primarily be the responsibility of the chair to deal with many of these kinds of issues and to set the 'cultural tone' of the governing body, it is certainly within the remit of the clerk to shape how this is delivered, and exert influence on the style of governance displayed by the board. Looking beyond the governing body, difficulties may also be caused by tensions in the relationship between senior managers or the SMT and the governing body.

Self-Challenge Questions

- 1 As a clerk do you have an accurate and up-to-date job description which, if necessary, separates your role as clerk from any other duties that you may perform? If so, is it explicit in defining your reporting relationships on governing body issues?
- 2 Are all members of your governing body clear about your role, and the support and services that you provide to them? If not why not?
- 3 Are you confident that your knowledge of developments in governance (both inside and outside higher education) is such that you are in a position to provide reliable and up-to-date advice and information to your governing body?
- 4 Is the appraisal of your performance as clerk undertaken by the chair of the governing body, and if not, why not?

⁸ For a research based discussion of these issues see Chait, R. P., W. P. Ryan, et al. (2005) *Governance as Leadership: Reframing the Work of Nonprofit Boards*. Hoboken, John Wiley & Sons Inc

3 Relationships

3.1 Governing body effectiveness depends heavily on a sound working relationship and good communication between the clerk, the governing body chair, the vice-chancellor/principal, and - more generally - the members. All play significant roles in ensuring that the governing body operates well. Without good relationships the clerk's effectiveness will inevitably diminish, and a lack of confidence - and perhaps even trust - may result. Such relationships also have a strong influence on how a board behaves and carries out its business. The interpersonal relationships between the chair, the head of the institution and the clerk - what David Llewellyn (in a useful paper for clerks) has called the "triadic network" - are therefore crucial⁹. Where relationships are positive this will usually be evident to a board and open, robust, and (constructively) challenging discussion may result. Conversely, where relationships are poor, discussion at a board may be much more guarded, cautious and ineffective.

The Chair

3.2 As the CUC Guide confirms, the chair of the governing body is responsible for its leadership and is accountable to all stakeholders for its effectiveness. It is also the chair's responsibility to ensure that the governing body conducts its business with efficiency and integrity, and to do this the chair needs the active support of the clerk. The relationship between the two is therefore crucial, and depends on a number of factors including: their personalities; the style of the chair; the extent of his or her personal and work commitments; and the availability of administrative support that the chair may have in other roles. Therefore from an early stage the clerk should try to establish what kind of support a new chair requires.

3.3 In supporting the chair, at a minimum the clerk will need to ensure:

- Regular communication between the two.
- Effective and regular three way communication between the chair, the vice-chancellor/principal and clerk.
- Approval of agendas and associated papers, and a clear structure for meetings.
- Approval of draft minutes.
- Dealing with the chair's correspondence.
- Briefing the chair, usually by pre-meetings.
- Dealing competently with other aspects of the administration of the board, thus building credibility with the chair.

In HEIs where the chair has a particularly large workload and spends substantial time on institutional business, the clerk may also be in the position of supervising office and secretarial functions, although such a workload is not necessarily a good thing.

3.4 From time-to-time specific issues arise where the chair and clerk must work closely together. For example, the clerk may have an important role in supporting the process for the appointment of a

⁹ Llewellyn D, *The Role and Influence of the Secretary in UK Higher Education Governing Bodies*, Leadership Foundation for Higher Education, 2009 page 2 (see www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm)

new vice-chancellor/principal (in being the secretary to the appointing panel), and a close working relationship, based on mutual trust, between chair and clerk will be particularly important.

The Vice-Chancellor/Principal

3.5 The need for effective and regular communication also applies to the relationship between the clerk and the vice-chancellor/principal, and the clerk is an important conduit for communication between the executive and the governing body. If the governing body is to act as a 'critical friend' to the executive, a key element of effective governance is that both parties are aware of each other's needs and concerns, and the clerk must ensure that the vice-chancellor/principal has prior knowledge of, and input to, all governing body agendas and issues arising. This is important in building trust between the parties.

3.6 To do this the clerk needs to ensure:

- That there is regular communication between the vice-chancellor/principal and the clerk on all matters relating to governance.
- That the vice-chancellor/principal is aware of the information required by governors and the timescales involved.
- That the governors are aware of issues that the vice-chancellor/principal needs to place before the governing body and the timescales involved.

3.7 As David Llewellyn has pointed out the clerk may have a significant role in managing the new relationships following the appointment of a new chair or head of institution, and in ensuring that a new equilibrium is achieved between those involved¹⁰. This might extend to acting as a trusted intermediary where relationships between the chair and head of institution are resulting in conflict.

Senior Management

3.8 Senior managers also have a responsibility to ensure that the governing body and its committees are kept informed of all relevant matters, for example the strategic direction of the institution; monitoring information that the governing body needs to receive (including KPIs); decisions that the governing body may be asked to take; and progress reports on key developments or risks.

3.9 In doing this senior managers will work directly with the chair, the vice-chancellor/principal and chairs of the various sub-committees, but the clerk will have an important co-ordinating role to ensure that the information required is provided in a timely and efficient way. Not all senior managers may have sympathy for the role of governors and, where they fail to produce information on time or in the required form, the clerk will need to pursue the issue on behalf of the board.

Members of Governing Bodies

3.10 Although much of the time of the clerk is devoted to working with the chair and the vice-chancellor/principal, support needs to be provided to the governing body as a whole. Any governor

¹⁰ Llewellyn D, *ibid*

should have access to the services of the clerk, and should be able to obtain assistance or advice about any aspect of their responsibilities. Hence the clerk needs to build relationships with all members, and be proactive in helping governors understand the nature and challenges of their role. This includes arranging an induction programme, on-going training and development and briefings. Of course, in addition to the support provided by the clerk and senior managers, there is an expectation that governors will keep themselves informed about key developments concerned with their role.

Stakeholder Bodies

3.11 Normally, the clerk will act as the correspondent of the governing body when in contact with stakeholder bodies such as the funding councils, the Privy Council, and so on. The governing body also needs to be made aware of relevant activities of these bodies, their reports, and their involvement in matters directly concerning the institution.

3.12 In particular, the clerk is likely to be heavily involved in any form of institutional review or audit which the funding council may conduct from time to time. Although the processes involved vary between the four funding councils, where such review occurs it is commonly the role of the clerk (on behalf of the governing body) to provide support for it, including providing information and finding space for any meetings to take place.

Other Relationships

3.13 The clerk also typically undertakes routine correspondence on behalf of the governing body from staff, students or members of the public. For this reason it is helpful for the clerk's name and contact details to appear on published lists of governors' names on the institutional website and in the major publications.

3.14 In fulfilling this role it is important for the clerk to note that he or she is not only undertaking an administrative task, but rather is contributing to building a relationship with the individual or group concerned. If the governing body is to avoid being a remote group unknown to most staff and students, it is important that the clerk (after discussion with the chair) takes responsibility for building better communication and relationships. Where this involves the press and media, the clerk will obviously want to take advice from whoever is responsible for public relations in the institution.

Self Challenge Questions

- 1 As clerk, how would you characterise your working relationship with (a) the chair of the governing body (b) committee chairs (c) senior members of the executive? What - if anything - might be done to enhance the working relationships?
- 2 As clerk, how would you characterise your working relationship with individual members of the governing body? Where working relationships are weak with some members, what can you do to strengthen them?
- 3 As clerk, how would you characterise the general understanding of the role of the governing body in your institution? Where it is limited, what might be done to enhance it?

Case Study 1: Relations with the Executive

Your vice-chancellor thinks that what he describes as the current 'fashion' for governance has been over-emphasised, and in meetings with the executive he makes it clear that he does not want to encourage the governing body to play a more active role than has traditionally been the case. This has caused a number of small conflicts with the board, and as a result his relationship with the chair of the governing body is starting to become a little strained. In a private discussion with you, the vice-chancellor has made it clear that as clerk you should not seek to encourage the governing body to become involved in discussions that - in his view - go beyond its remit. How do you respond, and what action - if any - do you take?

Case Study 1: Suggested Action

Clearly there are numerous sensitivities here. As clerk your primary responsibility is to the chair and the governing body, and the vice-chancellor may need to be reminded of this. This may include pointing out that you cannot do the job of the clerk effectively unless you are able to support directly the work of the governing body. Of course, it will be necessary firstly to assess the vice-chancellor's objections since these may be legitimate concerns, for example about the governing body seeking to influence executive management decisions or being too heavily involved in operational matters.

If the objections are unreasonable because the vice-chancellor is expressing concerns about the governing body's legitimate interests then this must be challenged appropriately and sensitively. A tripartite discussion between the chair, the vice-chancellor and the clerk might help to define boundaries. Ultimately, in extreme circumstances, the chair and the governing body as a whole will need to take the necessary action to resolve the situation.

4 Governing Body Membership and Appointments¹¹

4.1 Getting and retaining the 'right' people as governing body members is a crucial part of the role of the clerk. A board simply cannot be effective if it does not have members of suitable calibre, and as the demands on governance increase then a real challenge is getting 'good' governors. Some HEIs find it relatively easy to recruit high-calibre governors, others do not - partly because of local, or specific institutional factors. However, recruiting good governors is only half the challenge, and ensuring that their contribution is used effectively is just as important. Therefore for the clerk issues concerning board membership are not just procedural, but rather getting the 'right' people in the 'right' roles and then (with the support of the chair) maximising their potential contribution.

4.2 Formally, appointments and membership issues are usually dealt with by a nominations committee, and typically, this will be chaired by governing body chair, and the membership will comprise other lay members and some senior members of the institution probably including the vice-chancellor/principal. The clerk is usually the secretary. The role of the nominations committee is to find and recommend new members to the governing body (other than elected staff members - see below) and, in some cases, to recommend allocating members to committees.

The Size of Governing Body and Categories of Membership

4.3 The size of a governing body has been a matter of much debate, and in 2004 the CUC Guide suggested that 25 members was a "benchmark of good practice". However, many boards are now smaller than this with the average size in post-1992 HEIs being 18-20 and the smallest 14. The more important issue which underpins the discussion about size is one of purpose and effectiveness, for example a governing body which has a strong representational membership and a substantial sub-committee structure may need more members than one which has a minimal sub-structure. Even though not a 'hot topic' the debate about size is likely to continue, and even in the new smaller boards many independent members still find governing bodies to be too big to be effective. Hence the trend in board size is likely to continue downwards, with implications for the time and workload of members.

4.4 Typically membership consists of internal members (staff and students) and independent external or 'lay' members. Some boards continue to have members drawn from local authorities and other stakeholders (although this is becoming less common) and others recruit alumni. Where members are drawn from a particular group, it is an important principle that they do not represent that group but must act according to their own consciences and accept collective responsibility. There should be a majority of non-staff members, the exact categories of membership being defined in an HEI's governing instruments. Typically in most post-1992 HEIs the number of staff and student members will be small, but it may be substantially larger in pre-1992s (for details see the CUC Guide).

Terms of Office

4.5 Each member should be appointed for a fixed term as specified by governing instruments, usually three or four years. Reappointment for one more term is permissible but not usually

¹¹ *Some of the content of this chapter may not apply to Scotland if the recommendations of the 2012 Scottish Review of HE Governance are implemented.*

automatic, and a nominations committee should make a conscious decision about continuation in each case. Reappointment for a third term is discouraged and may even be forbidden. (The CUC Guide advises that continuous service beyond two terms of four years or three terms of three years is not desirable.) The exception is where a member has served for a few years, and then takes up office as chair of a committee or the chair of the governing body. In this case, an extension to the end of the natural run for the new role, if permissible under governing instruments, is obviously appropriate. Retiring members can, of course, still be used in an ambassadorial role without being governors.

4.6 The rules for elected members will probably also specify how many times in succession they can stand, and sometimes there is a provision for a fallow period before re-election.

Independent Members

4.7 It is crucial for governing bodies to recruit independent members of suitable experience and capability, and without them there is little chance of a board being fully effective. For many HEIs this is a challenge, and involves the clerk spending a substantial amount of time on recruitment issues.

4.8 Many governing bodies and their nominations committees now use systematic and transparent processes to recruit members, including a 'skills matrix' to identify both the competencies and skills needed to be an effective board member: for example, a qualified accountant for the audit committee as well as senior level financial experience for the finance committee. Boards will almost certainly want at least one lawyer and also experience in a range of disciplines such as property, public relations, HR, and increasingly IT. By matching existing members against such a list, areas where there are gaps can be identified and dealt with¹². Where a skills matrix indicates the retirement dates of members this allows for succession planning. Clerks should ensure that role descriptions exist for independent members, along with others for the chair, the vice chair and the chairs of any major committees, and might wish to take into account the templates produced by the CUC¹³.

4.9 However, it is important to ensure that potential recruits not only have suitable professional skills but also the motivation, personality and time to be effective governors. Simply appointing a prominent local professional business person or accountant does not mean that he or she will have an understanding of - or empathy with - higher education, and therefore be an effective board member. As governance becomes increasingly important, one of the crucial roles of the governing body will be to ensure that core academic values are maintained, and from the outset prospective governors need to understand and support such values whilst also being constructively challenging.

4.10 Many institutions are also trying to ensure that governing body membership is diverse in all ways, and reflects the communities from which their students and staff are drawn. For example, with a majority of female students in many HEIs and increasingly large numbers of students from ethnic minorities and from overseas, many institutions are trying to move away from the traditional male dominated governing body composition, although doing so presents the clerk with additional challenges so long as board membership is largely drawn from those who have the time to give (mainly, but not exclusively, the retired).

¹² For more ideas on this, see the Office of the Commissioner for Public Appointments (www.ocpa.gov.uk) or the Cabinet Office guidance on public appointments.

¹³ See www.bcu.ac.uk/cuc/publications

4.11 For all these reasons, most governing bodies recognise that transparency is important in governor recruitment, and are being more thoughtful about recruitment and selection methods including using an increasingly rigorous selection exercise. There is still some reluctance to put people who are volunteering and have already proved themselves in their chosen field through the sort of process expected for a salaried position, but for many applicants the job will appear more worth having, the harder they have to work to get it. Of course, having recruited such members, the onus is on the clerk and the governing body then to use their experience and resources effectively.

4.12 HEIs adopt recruitment techniques appropriate to their local situation, but common methods include: newspaper advertising (local or national depending upon institutional need); advertising in specialist professional publications; advertising in specialist community publications, for example those read by specific community groups; through the register of public appointments; through links with partner organisations (eg companies seconding experienced managers to a governing body); the use of the institutional website, with links to other relevant websites; using alumni; through existing governing body members, staff and students; through 'open' evenings and similar events; and by using 'headhunters', although in most HEIs this is only done for the most senior governing body roles.

4.13 Notwithstanding such approaches, it would be unwise to ignore entirely the informal recruitment processes of yesteryear. Existing members understand what is involved and it is possible that they will have tested in some other walk of life the abilities of the people they recommend. These are often people who would not have responded to an advertisement but have been convinced by the personal enthusiasm of their proposer.

4.14 One issue that may emerge is the desirability of appointing very high profile independent governors, with very limited time to spend on the role. Practice varies here, with some HEIs requiring all governors to attend a minimum number of meetings and committees, whilst a few have in the past been happy to allow a very prominent 'name' to attend only occasionally in return for the benefits that might accrue. However, as boards get smaller and their responsibilities increase, this latter approach becomes more difficult. It may also have adverse effects on the dynamics of a board when such a person does attend. Rather, it is usually better for such individuals to be given a different ambassadorial role for the institution, perhaps as a member of a small but 'high-powered' advisory group which does not confuse a 'PR role' with governance, or as a member of court where this exists.

4.15 Underpinning current recruitment processes is a significant debate: should the existing voluntary principle for governing body membership continue? As the workload on governors increases and as more lay member positions on public bodies attract payment or an honorarium, the fact that HEIs do not as yet pay fees to board members may stand in the way of attracting the best candidates. Evidence about whether this is actually the case is sketchy, although the CUC does survey its members from time to time and their current view is that the large majority of governing body chairs do not - for the moment - want to introduce remuneration. However, it is likely that some HEIs will do so, and some have taken powers to remunerate although only one has introduced it - only to revert to a non-remunerated position. At least two institutions remunerate their chairs because of the workload falling on them. For clerks this is a developing area, not least because of the possible implications of charity legislation which places restrictions on charities remunerating trustees.

4.16 What is clear is that remuneration would almost inevitably change the nature of governance, and that the 'value added' of the governing body would be much more closely examined. A clerk considering the benefits and drawbacks of payment must not, therefore, assume that it is just a question of offering payment and that everything else will stay the same; rather any remuneration must be seen as an outcome of a particular approach to governance that an HEI may want to adopt.

4.17 In some HEIs (particularly but not exclusively pre-1992s) some independent members have been drawn from stakeholder organisations (for example local authorities) that have their own methods for selecting nominees. Views on the desirability of such membership vary, and whilst once widespread, it is - in general - declining as smaller boards are introduced. Although some HEIs have found it useful to retain such members (for example providing links to the local authority), many others have found they may lack the commitment of other governors, and that categories of membership based on the traditional 'stakeholder' model of governance do not fit well with approaches that emphasise governing body effectiveness. Where such membership still exists the clerk can encourage the nominations committee to do what it can to influence the process in order to ensure suitable candidates, and some nominating bodies are happy for the HEI to make suggestions.

4.18 A particular category of member popular with some HEIs (mainly pre-1992s) is having places specifically set aside for alumni. The benefits tend to be strong institutional identification and an associated motivation to participate to the full. Conversely, alumni members may have a rather traditional view of the institution in relation to its strategic development. The selection of former students can be challenging, and where they are elected (the typical process) this may not necessarily result in effective members. It may also be time consuming, and the organisation of a full election can be an onerous and costly business not necessarily producing good 'voter turn out'. Alternative approaches include using an existing alumni organisation, or the nominations committee inviting applications from alumni. The position can be also be advertised through alumni mailings with candidates invited to apply as for any other role. One vice-chancellor - Malcolm Gillies - has written a paper on this issue which clerks may find useful to read, although his conclusions are contentious¹⁴.

Internal Members

4.19 There are two kinds of internal member: staff and students. Typically, staff members will be either *ex officio* (ie they are there because of the position they hold within the HEI), or will be drawn from specific constituencies. Practice varies between HEIs, but there are two typical constituencies:

- Members of the academic board/senate, who in many institutions will occupy a number of governing body places. They will usually be elected by the body concerned, and the process will often be the responsibility of the secretary to the academic board/senate.
- Membership based on staff groupings including part or all of academic, administrative and ancillary staff. Traditionally, in most institutions these have involved elections, which have often been the clerk's job to organise. However, more HEIs are now involving the nominations committee in making a choice of staff governor(s) based on names coming forward on either an elective or nominated basis.

¹⁴ Gillies M, *University Governance: Questions for a New Era, HEPI 2010* at www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

4.20 There are numerous issues about the roles of staff governors and the benefits and drawbacks of their participation. On the one hand they can be an invaluable source of institutional information, and in ensuring that the governing body has to take account of the realities of organisational life. On the other hand there are real potential conflicts of interest, and some internal governors can find it difficult to act as 'critical friend' to the executive when they are being managed by them. In some HEIs elected governors are closely associated with trade union or staff association membership, and although in the past guidance has been given by some of the main trade unions that officials should not be governing body members this does not appear to have been widely followed.

4.21 Students are the other category of internal governor. In most cases, the president of the students' union will be a governor ex officio but, if there is more than one student member, the other(s) will usually be either another student union officer or be elected. The clerk will typically not get involved in such elections other than to check that appropriate processes have been used. Institutional experience of student membership varies widely, and much depends on the quality of the individual. An informed student member can be helpful to a board (and is often appreciated by independent members), but one who seeks to politicise discussions or doesn't accept corporate conventions (including confidentiality) can be unhelpful. The introduction of student fees in part of the UK has reinvigorated the debate about student board membership in their role as customers. The review of governance in Scotland (see Annex E) has also refocused attention on the role of student and staff governors, although its proposals for greater engagement are highly contentious.

Committee Membership

4.22 Where committees exist (see Chapter 5) a role of the clerk will be to ensure effective membership through the nominations committee. Most HEIs will have some committee membership requirements defined, such as the need for financial experience on the audit committee, for a majority of lay members on the finance committee (where one exists), and in most post-1992 institutions there is a proscription on staff and students being members of finance and staffing committees.

4.23 The audit committee must be constituted as defined by the funding councils' financial memorandum. In England, this requires at least three members, none of whom may have executive responsibility for the day to day management of the institution. They must not serve on the institution's finance committee or equivalent except with specific permission of the funding council, and at least one of them must have recent and relevant experience in finance, accounting or auditing.

4.24 Some HEIs encourage the chair and/or vice-chair of the governing body to attend all committees. This can be a helpful way to enhance communication between committees but is time consuming for them. Where this happens, clerks need to be clear about whether they are full members of the committee and therefore count towards the quorum. In addition, the clerk can find a mushrooming group of people wanting to attend important committees. For example, some senior managers may believe that their presence is essential even though they are not members, and a way to eliminate or, at least, reduce this is to define who may attend in the terms of reference.

4.25 Where committees require people with particular skills that are not available on the governing body, they can be invited to sit on a committee without being board members. Such co-option is an attractive option where willing volunteers who may not have the time for full governing body

membership can contribute in a specific area. It is also a useful way of getting to know people who might make good governors in due course.

What New Members Need to Know Before and Upon Appointment

4.26 Whatever selection process is used, it is critical that the potential members understand the expected level of commitment, and that this should not simply be expressed in terms of the hours spent on meetings. For example, if governors are expected to attend social functions or engage in fund raising this should be stated explicitly. The amount of time involved varies widely between institutions, although 15-20 days appears to be typical of the sector and may be greater in some institutions. Officers (most notably the chair of the board) will, of course, usually spend substantially more time than this. Certainly it is difficult to see that members can be effective if only a few days a year are spent on governing body business. This process should be two way, and HEIs should expect potential independent members to undertake due diligence of them.

4.27 In addition to ensuring that detailed briefing discussions take place between the chair, the clerk and prospective new members, there is also a plethora of publications by the CUC, the Leadership Foundation and others to explain the role of board members, and some HEIs provide free copies of the Times Higher newspaper. In addition, new members must have the chance to familiarise themselves with the financial statements, the corporate strategy, and other key institutional publications. They will need to fill in a register of interests form (see Chapter 7). And then there are the all important comfort factors such as parking permits, expense claim forms, and, above all, the calendar of meetings. Such activities are the first steps in an induction programme which all new governors should be expected to undertake - see below.

4.28 Where the HEI is a registered charity, board members will have responsibilities and disclosure requirements as charity trustees (see Chapter 8). In some institutions, board members are also trustees of endowment funds. In this case, new members must understand what this means and be provided with guidance from the Charity Commission on their duties and responsibilities.

4.29 It is useful to ask new members to give a brief summary of their careers and skills, which can be published on the internet, in the annual report and so on. This is helpful for staff and others, and as a public relations tool to show the quality of input into the governing body.

Induction, Training and Development

4.30 No matter how skilled and experienced governors are, it is unlikely they will make their best contribution without some training and development, and the CUC Guide recommended that HEIs should make a budget available to provide such activities. Independent members are likely to need support in understanding the application of governance to the specific context of higher education, and internal members may need support in developing their understanding of the main resource areas for which the governing body is responsible as well as in taking a more strategic view than they are probably used to. A few institutions run such programmes internally, but most use external providers, for example the Leadership Foundation for Higher Education¹⁵. Where this occurs governors should be

¹⁵ For details see www.lfhe.ac.uk then follow the governance link

encouraged to report back useful outcomes of the sessions they attended, and clerks might adopt a standard process to ensure that the impact of training on the governing body is maximised. In addition to formal training, some governing bodies have a mentoring system whereby more senior members act as a guide to new members.

4.31 At the very least all new members, including new staff and student members, should receive induction training which should cover at least: the governance structure and the role of governing body members; understanding the corporate strategy and plans; the history and culture of the institution; the financial strategy; the estate and infrastructure strategy; audit, risk, and the role of the governing body in performance review; the HR strategy and current HR issues; research and enterprise; understanding academic governance; development and external relations; and student affairs and understanding the educational character.

4.32 An additional form of briefing practised in many HEIs is having presentations before each governing body meeting on some aspect of the institution's business. Visits to departments and informal lunches/dinners with staff can also be organised to brief the governing body.

4.33 Two particularly useful sources of information for all governors are provided by the Leadership Foundation: a governance website¹⁶, and a set of publications in the 'Getting to Grips' series¹⁷. Ten of these are available on: finance, audit, HR, estates, risk, academic and student issues, internationalisation, research and knowledge transfer, IT, and a generic one for new governors.

Understanding the Institution

4.34 Many HEIs are trying to encourage governors to get to know the institution so that they are more informed about the culture and context in which decisions are taken. Pre-meeting briefings, tours, rotating meetings around different campus venues, presentations on current topics, the use of intranet sites, and informal meetings (perhaps over dinner) with senior managers are all ways in which this is being done. Some HEIs also engage governors by giving members a portfolio or a specific part of the institution with which to link.

4.35 This 'twinning' simply means that each member focuses on one aspect of the institution's business or community, and develops a level of expertise so that he or she can speak on it with more authority. It is an attractive idea and can be effective, but it also has potential problems. Engagement with a particular business area can lead to confusion about the boundary between governance and management, with the temptation for some members in specialist roles to stray too far towards management. Similarly where governors are twinned with a particular part of the institution, there is a danger that staff might seek to use their twin as a spokesperson and not all governors may recognise or resist this. Accordingly, if operating such a system the clerk must ensure that the advantages of such an approach are achieved, and potential drawbacks avoided. The main issue for the clerk is that whatever systems are adopted, getting governors to understand the institution is an important preparation for engaging in governance.

¹⁶ See www.lfhe.ac.uk

¹⁷ See www.lfhe.ac.uk/en/audiences/governance/index.cfm

Self Challenge Questions

- 1 As clerk, looking at your governing body is the membership optimal in providing the skills, knowledge, experience and motivation that the board needs to be wholly effective? If not, what action might you propose to the chair?
- 2 To what extent do your governing body members feel that their skills and experience are appropriately utilised by the board? If you don't know, why not?
- 3 How effective is the development that is provided for your governing body members? What are the barriers to take-up and participation, and what action do you take to address them?

Case Study 2: Diversity of Membership

You have several forthcoming vacancies for external members of your governing body. In discussing how to deal with this, a couple of current members have said that more should be done to recruit high quality external board members from diverse backgrounds. Do you agree with them, and as the clerk what action might you take?

Case Study 2: Suggested Action

There are several issues here. Formally, it is the role of the nominations committee to nominate potential members to the governing body, although the governing body itself has a responsibility to oversee the effective application of the institutional equality and diversity policies. It should therefore seek to recruit lay members from as diverse backgrounds as possible, but always on the basis that they also have the necessary skills and expertise that the governing body is looking for. It is the responsibility of the nominations committee to monitor the skills and background of members to ensure that a balance is achieved, and the clerk should advise accordingly.

In terms of good practice, the clerk should be encouraging the nominations committee to use a range of methods to identify potential members in an equitable way. These include the use of skill sets to determine the competencies and characteristics that are sought in potential members; a proactive policy of succession planning; recruiting members by using means appropriate to the characteristics and skills sought (for example, by placing adverts in specific publications); as well as seeking nominations from a wide range of contacts who have links with the institution.

5 Corporate Governance Structures

Corporate Governance

5.1 The most generally accepted definition of corporate governance is in the UK Corporate Governance Code¹⁸, which describes corporate governance as the system by which companies are directed and controlled. Higher education has no separate all-embracing definition but the CUC Guide sets out the functions of corporate governance as undertaken by governing bodies in both pre- and post-1992 institutions, including acting as the legitimate authority for the decisions. The Guide and the individual governance documents of each institution are the prime focus for the clerk ensuring systems, structures, rules and procedures for making decisions, safeguarding assets and managing liabilities are maintained.

5.2 Corporate governance provides the framework in which governance in the whole organisation operates. Such a framework needs to be 'transparent' in the sense that processes are widely known within the institution; that there are appropriate checks and balances on the conduct of the affairs; and that such processes have the confidence of the key stakeholders both within the institution and in the wider public domain.

5.3 While the institution has a legal persona, the implementation of effective corporate governance is generally the responsibility of the governing body with such legal capacity and delegated powers being conferred on a chief executive, or executive board or committee or even to subsidiary bodies and individuals, depending on the organisation's constitution and schemes of delegation.

5.4 In most modern HEIs considerable decision-making responsibility is delegated to institutional managers, although the degree of decentralisation and delegation varies considerably across the HE sector and is often dependent upon the size and scope of activity of the institution. This means that effective corporate governance relies not only on the governing body, or vice-chancellor as chief executive, but also on a range of other delegated bodies and individuals. The key to corporate governance in such a diverse sector therefore depends not only upon clear governance documents (charter and statutes in pre-1992s and instrument and articles in post-1992s), but upon a properly articulated and transparent accountability structure with clear and unambiguous protocols for making and reporting decisions. The role of the clerk in developing and maintaining these structures and protocols is vital to the corporate governance process.

5.5 The distinction between governance and management is an important factor to be grasped by the clerk irrespective of which approach to structure a governing body adopts. As in all organisations tensions can arise because of differences in perceptions between the roles of governors and those of the senior managers with executive authority. Historically in many HEIs the governing body were sometimes thought of as the equivalent of shareholders in a public company meeting occasionally to hold the business to account but never seriously engaging with strategy, monitoring institutional performance, or the scrutiny of management, and as a result governors were often kept at arms-length. Clearly this model is incompatible with the accepted definitions of corporate governance and

¹⁸ www.frc.org.uk

the CUC Code of Governance (introduced in 2004), and there needs to be a clear understanding from everyone about their respective roles, and the boundaries between governance and management. This will largely fall to the clerk.

Corporate Governance Structures

5.6 As noted in Chapter 4, the size of a governing body in the HE sector has been a topic of considerable debate over the years, and there has been a trend towards smaller boards. However, even a governing body of say 16 to 25 members meeting, typically, four or five times a year, cannot by itself fulfil the range of responsibilities in the detail required to ensure that the institution is well governed. As a result governing bodies have typically adopted one of three responses: a sub-committee system to focus on particular areas of business; a 'lead governor' system; or meet as a full board but with substantially more meetings. Each is summarised below.

5.7 The structural relationship between the governing body and the academic board/senate is an important issue for the clerk, and is further considered in Chapter 10. The formal status of the academic board/senate in relation to the governing body varies: in many post-1992s it is an established body under the governance documents with a clear set of responsibilities and reporting relationships; however, such a standard position does not exist in many pre-1992s.

5.8 So far as the governance structure is concerned every governing body *must* have:

- An audit committee (this is required by the financial memorandum with the funding councils). Since governing bodies have explicit responsibility for health and safety, value for money, equal opportunities, risk management etc, a committee to look at compliance issues is essential and this is frequently - although not always - combined with the audit function.
- A nominations committee (or similar title) dealing with appointments to the governing body, committee memberships, and possibly a brief for reviewing board effectiveness including training and development.
- A remuneration committee (or similar title) to agree the terms of employment and salary of the vice-chancellor/principal as head of institution and other senior staff that may be determined. The role of the clerk varies here: in many HEIs the clerk will provide both advice and secretariat services, but other approaches include the head of HR playing an active role especially where the remit of the remuneration committee extends to the terms and salaries of other staff.
- In addition the governing documents of individual HEIs may require a number of sub-committees (often ad hoc) to deal with employment issues of academic staff eg grievance, redundancy, discipline etc.

5.9 The most typical approach in HEIs is for there to be a system of sub-committees reporting to the board of governors which gives detailed scrutiny to specific areas, and such a sub-committee structure will often include: a finance committee (or similar); some form of planning or strategy committee (which may be combined with a finance and general purposes function); a staffing or HR committee; an estates or physical facilities committee; a development committee; and perhaps a committee concerned with third stream income. However, there are widespread differences in arrangements, for example in many pre-1992 universities there is no finance committee but rather a

governing body position of 'treasurer' who takes a special interest in financial matters and advises the governing body. In the past institutions often had large sub-committee systems, but in many HEIs the numbers have reduced substantially to a core of around 4 - 6 sub-committees. For the clerk what is important is that the committee structure has clearly defined terms of reference and is fit for purpose, complying fully with any regulatory requirements.

5.10 The sub-committee system has been favoured as a convenient way of providing time to give appropriate scrutiny to governance issues, of providing substantial opportunity for discussion and consultation, and also of engaging the experience of governors (particularly external ones) without requiring too great a time commitment. Critics of sub-committee systems (particularly extensive ones) regard such systems as typically slow, often disjointed, and encouraging a 'rubber stamping' approach by a governing body.

5.11 To counter such criticisms a relatively small number of governing bodies, particularly those smaller in size or with a particular subject area focus, have in the past few years eliminated their sub-committee system and instead appointed 'lead' governors responsible for a defined area of activity. The advantage for the governing body as a whole as well as the institution is a much more flexible structure, and that the governor can be fully immersed in his or her brief and can bring to bear a professional expertise to good effect. However, critics argue that the lead governor system can confuse governance with management, and therefore be potentially divisive. It is also clear that the system can only work effectively if lead governors have sufficient experience and expertise and are credible with the senior management they are paired with. The system also needs careful coordination so as to avoid differential levels of scrutiny across the delegated briefs.

5.12 The third approach of eliminating sub-committees but increasing the number of governing body meetings is also in increasing use, particularly in boards that (for HE) have a small membership. In this approach the governing body acts rather like a private sector board meeting every four to six weeks. The advantages are much greater coordination and governor engagement, but the time commitment of members also increases quite substantially. This approach can lead to quite a high performing board, but is very dependent on the quality of membership, and such boards cannot afford to have any members who do not fully engage.

5.13 Governors (particularly chairs) sometimes ask which of these three approaches works best, but there is no easy answer. Everything depends on factors such as: the culture of the institution and how governance is understood; the quality and experience of governors; the relationship between the board and executive; the quality of senior management; and the professionalism of the clerk. Moreover, committee structures have a habit of 'furring up', and either may not work optimally or may continue long after their business purpose has ceased to be relevant. To avoid this, the effectiveness of each committee should be reviewed regularly. At the very least, the committee should be required annually to review whether it has met its objectives and terms of reference, whether the membership is still appropriate, and whether the information flows and reporting relationships remain effective.

A Statement of Primary Responsibilities and Role Descriptions

5.14 The CUC Guide advises the production of a statement of primary responsibilities (SoPR) and offers a useful template. Despite the cumbersome title, a SoPR fulfils several important purposes, and

outlines what is expected of the board and its members, their responsibilities and liabilities, and serves as a framework in the event of a dispute with a governor. Clerks should ensure that such a document exists and that all members are aware of it on appointment. Although the CUC template is useful, ideally in developing the SoPR clerks should start from 'first principles' (including the financial memorandum) to ensure it is 'tailor made' to each HEI.

5.15 Related to the SoPR (although usually not technically part of it) is the provision of guidance on the liabilities of members, as new governors will certainly ask. The general view is that, provided governors act honestly and diligently, they will not be personally liable for any actions that follow. However, the final test of this belief is in the courts. Some institutions buy public liability insurance for their governors whereas others believe such insurance would be invalid if tested in court. This argument says that liability will only arise where governors have acted negligently and, in this case, the insurers might deny responsibility.

Terms of Reference, Delegated Powers, and a Schedule of Delegation

5.16 Almost all HEIs recognise the importance of being explicit about who has the power to take what decisions, and thereby to help ensure both transparency and accountability in decision making. One way to do this is to have a schedule of delegation, and this is now generally accepted as good practice in governance. A new clerk will need to review the existing schedule, and amend as required getting governing body approval for any changes.

5.17 Insofar as this concerns committees, each one must have a formally approved set of terms of reference. These should set out: its purpose; the specific decisions it must make or advice it must give and to whom; what powers are delegated to it by the governing body; where and how often its work will be reported; the membership of the committee, specified by category and the quorum.

5.18 In determining terms of reference, the clerk should bear in mind that committees can advise, recommend and/or make decisions and can also require people or other committees to do likewise, but carrying out the decision is the work of management and it should always be clear who is expected to implement each decision and when. If all the terms of reference of committees are gathered together in one manual, together with the schedule of delegation, it is easy to see where duplication or gaps exist and the clerk can then make recommendations for action.

5.19 The schedule of delegation is a list of all the main decisions that need to be made, which individual or committee is responsible for each decision, and what the limits on action are. It takes effort to produce but, by identifying where key decisions are most effectively taken, the governing body can ensure that both committees and individuals are clear about the full extent of their responsibilities. Some items that would fall into a schedule of delegation may appear in the financial regulations instead, but the concept is much broader than merely financial controls.

5.20 Typically, the schedule will also include decisions about: budgets; who can sign contracts to what level; where admissions decisions are made; who can open a bank account in the institution's name; who makes appointments and sets salaries; tendering procedures; how investment/divestment decisions are made; who grants licences for intellectual property etc. The schedule needs to be

reviewed regularly to ensure it reflects what really happens, and staff should be encouraged to draw the attention of the clerk to any omissions or confusions.

Governing Body Reporting Requirements

5.21 For clerks an important aspect of corporate governance is ensuring institutional compliance with the reporting requirements of external bodies, particularly the funding bodies. The list of potential tasks is long, and each of the four funding bodies informs the HEIs in its jurisdiction of their requirements. This issue of the nature of accountability, its reporting, and the costs of doing so (the so-called accountability 'burden') has been much discussed between HEIs and stakeholder bodies in order to try and ensure 'better regulation'. The consequences of non-compliance can be severe, for example the financial penalties suffered by some HEIs in England who inaccurately reported their student numbers in 2010. Accordingly, this is a crucial area for the clerk.

5.22 All four UK HE funding bodies require assurance that their funds are being used appropriately and that the risk management, internal controls and governance within the institutions receiving the funds are robust. The financial memorandum between the funding bodies and individual institutions, together with audit requirements and codes of practice are two of the key documents. There is increasing variation in the methods used by the funding bodies to assure themselves of institutional compliance, and this is likely to grow given that HE is a devolved activity. Accordingly, clerks in institutions in the four UK jurisdictions should consult their own funding body in order to get information on the arrangements that apply to them.

5.23 Each funding body expects the board of governors to be ultimately accountable for ensuring that risk is appropriately managed in their institution, and although this is delegated to management the board does need to ensure that effective procedures are in place to manage risk and that an overarching risk management strategy has been agreed. Moreover it needs to confirm its approval with relevant external bodies including insurance providers, and this is often done as part of the internal controls statement within the institution's accounts. The clerk needs to ensure that the appropriate reports are considered by the governing body to enable them to undertake this assessment.

5.24 In most institutions the audit committee will first receive risk management reports from senior management, and these will be considered by the governing body in some form. In doing so the governing body must be aware of the key risks facing the institution, the likelihood of their occurrence, and the potential and estimated impact if they do. Key risks should be considered by the governing body at least on an annual basis, and the board should approve the institution's overall risk strategy or policy. While risk management is directly linked to areas such as health and safety and business continuity, responsibility for these may not be under the stewardship of one single senior manager or committee and, therefore, the clerk should ensure that the governing body is receiving the reports it requires across the related areas¹⁹.

¹⁹ Further information on the recommendations for English institutions from HEFCE can be found in "Risk Management in Higher Education: A Guide to Good Practice" prepared by PricewaterhouseCoopers and "Managing Academic Risk: Quality Risk Management in Higher Education" (see www.hefce.ac.uk/publications). Additionally, there is a range of public sector guidance available and a number of institutions have based their risk management policies on HM Treasury's "Orange Book" published in October 2004, which contain a clear and concise description of an effective risk management process that could be used as a reference for clerks when aiding the governing body.

5.25 Since the requirement for enhanced risk reporting by the funding councils HEIs have become better equipped at managing and reporting risks. That said, there is still a great deal that can be learned as to how risk management can be a positive management tool rather than an overly bureaucratic 'tick-box' exercise. While a range of individuals within the institution are involved in risk management (and their roles and responsibilities should be made clear in the institution's risk management strategy or policy), the clerk should ensure that the governing body is receiving the information it requires in order to be confident about the assurance it needs to give to external bodies, and also that it is aware of the potential implications of any decisions which it needs to make.

Commercial Activity and Third Stream Income

5.26 All HEIs have commercial activity and it is often substantial. As this may be inconsistent with the charitable objectives of the institution or need to be handled in a tax efficient way, such activity might be routed through a subsidiary company. If they are wholly owned subsidiaries, they will be the responsibility of the governing body, and in some HEIs a separate committee exist to oversee such activities. All the UK funding bodies provide guidance for institutions in the use of related companies. In addition, increasingly HEIs are trading in international markets and registering business entities in other states. The complexity of law and regulation in jurisdictions outside the UK makes it vital that the clerk obtains expert advice for the governing body before setting up a subsidiary overseas.

5.27 Advising on appropriate governance in commercial ventures is a challenge for many clerks, who will frequently face pressure on such issues as the financial freedoms that should be exercised by commercial ventures; how audit requirements should relate to those for the institution as a whole; the extent of delegated authority from the governing body; how institutional risk (of all kinds including reputational) can be mitigated; and how the need for swift decision making by commercial ventures fits with the timetable of the governing body. The crucial issue in all of this is that agreed and robust structures for undertaking and monitoring this activity by the governing body should be in place.

The Students' Union

5.28 Under the 1994 Education Act, all HEIs in England and Wales (and post-1992 universities and designated HEIs in Scotland) are obliged to provide a students' union and are responsible for its financial probity, its democratic processes, and procedures for complaints handling. The governing body must approve the constitution, keep it under review, and have in place a memorandum of agreement about how the union and the governing body will interact. The HEI often provides the bulk of the revenue funding to the union and should receive its audited annual report and accounts. The institution must also ensure that union elections are run on a fair and democratic basis and this hands-on monitoring is often a role for the clerk to undertake on behalf of the governing body. It is important that the institution maintains close working relations with the general manager of the union as well as the elected officers so that the governing body can be assured that everything is in order.

5.29 As a result of the Charities Act 2006, the status of many students' unions in England and Wales changed. Students' unions ceased to be exempt charities and most became registered charities in their own right, appointing trustees to oversee their own corporate governance arrangements. This change in company structure and charitable status has not diluted or removed the obligations of the

Education Act 1994. The CUC and NUS have jointly produced the definitive guide on the role of governing bodies in relation to students' unions which all clerks should be aware of²⁰.

The Privy Council

5.30 The Privy Council has an important role to play when a governing body wishes to make changes to its charter or instruments and articles of government. However, its role is currently under review following the decision to partially 'de-regulate' the previous requirement where approval had to be obtained for all changes. This greater flexibility provides the possibility of governing bodies being able to make changes to their governing documents without the need for Council approval. The current position is fluid, and new clerks should check the detailed requirements on the Council website, and seek legal advice. The AHUA will also be able to advise as will other clerks from similar HEIs.

Self Challenge Questions

- 1 As clerk, looking at the challenges facing your institution in the next three to five years, how appropriate is the current governance structure to deal with them, and what changes would you recommend to your chair?
- 2 How effective is the relationship between the governing body and its main committees, and how much unnecessary duplication of committee discussion occurs at board meetings?
- 3 Does your governing body have an up-to-date and comprehensive schedule of delegation? If not, why not, and what does this suggest - if anything - about possible weaknesses in governance arrangements?

Case Study 3: Pre-Meetings

Several external governors have suggested that all external members should meet privately before board meetings without other members present. They think that it would enable them to explore some of the tricky questions that they find it difficult to raise in the full meeting with others present. As clerk what recommendation would you give to them and why? If elected staff members also wished to meet separately before meetings would your recommendation to them be the same, and if not, why not?

Case Study 3: Suggested Action

At a practical level it may be impossible to prevent groups of members meeting separately, but the practice should generally be discouraged by both the clerk and the chair. Members should be reminded that the governing body should always seek to act corporately and with transparency, and although they may be appointed by specific constituencies, they are not delegates of any body, section, person or interest. As such, members should always be seen as acting in the best interests of the governing body (and the institution) as a

²⁰ See www.bcu.ac.uk/cuc/publications

whole. Formally, external members can only meet for specific items without staff/student members and the clerk must always be present, an example being to receive reports of the remuneration committee.

The same advice should be given to internal members, ie it is the properly constituted board that has the authority not other groups unless specially specified. The governing body should also be able to demonstrate that a full and frank exchange takes place, and that sufficient challenge is part of their role and responsibility as members. Having said this, there may be occasions when such meetings help to clarify issues and may assist in resolving potential problems. The key here should be to be quite explicit that such a meeting has no formal status, and cannot take decisions.

Case Study 4: Risk

Your governing body receives reports at each meeting based on your institution's risk management system. However, getting some senior managers to provide reliable data for the risk register is difficult, and there is a view amongst some senior managers that risk management is a bureaucratic process suitable only for big issues such as new buildings or big projects. As a result there have been times when in your view the information that you have presented (as clerk) to the governing body has been less satisfactory than it should have been. You have raised this informally with senior managers, but the general response is that they are too busy and in any case the relevant committees keep in touch with the issues. What action - if any - do you take, and why?

Case Study 4: Suggested Action

One of the key responsibilities of the governing body is to be assured that risks are being effectively identified and managed, and this should appear in the statement of primary responsibilities. It is also a requirement of the funding bodies. In practice, your action as clerk is likely to depend upon the previous involvement of the governing body, the robustness of the existing risk register, and so on. If this is not fully embedded, as clerk you might seek to contact senior managers indicating the governing body's legitimate interest in (and responsibility for) risk. It may be necessary to draw the vice-chancellor/principal into these discussions and identify any reasons for concern ie that transparent management of risk is a requirement and is reviewed every year by internal audit. As such, it is very important and will be subject to critical comment if not properly managed and reported.

If this action is unsuccessful then you should consult with the chair of the governing body and/or the chair of the audit committee and encourage him/her to discuss the issue with the vice-chancellor/principal, or failing that to seek a resolution from the governing body to the effect that regular reports on risk management must be provided. Such reports may be via the relevant sub-committees but the process should be transparent.

6 The Management of Business

6.1 Although the clerk is central to the management of governing body business it is ultimately a matter for the whole board. However, the chair is entitled to look to the clerk for advice and support in the planning and management of business and to liaise with the vice-chancellor/principal and senior management. The role of the clerk in the management of business has both a private and a public face. In private the clerk may be influential in ensuring (with the chair) that the governing body is well positioned to consider the 'right' issues at the 'right' time, that is to create the conditions whereby the board can be effective. However, the public face of the clerk is more restrained although nonetheless important.

6.2 At meetings of the governing body and its committees, the clerk must ensure probity in the conduct of business, compliance with the law and with the governing body's own procedures. This aspect of the clerk's role is largely non-participative in that he or she should generally not express opinions or intervene in discussion, unless he or she also carries responsibility for an item as a member of senior management and is reporting to the governing body in that capacity. The clerk should, however, offer advice when questions of probity, compliance, or procedures are under discussion, and must intervene when the governing body is at risk of acting inappropriately. The clerk may also advise the chair prior to any ruling being made on the interpretation of standing orders, and may be responsible for presenting to the board issues concerning governance.

The Cycle of Business

6.3 The timescale of governing body and committee meetings should be drawn up in such a way as to accommodate the key elements of the annual cycle of decision-making and monitoring. Any possible tensions between the annual academic year and the financial year should be considered (eg, the audit committee's annual report will typically be based on the financial rather than academic year). To develop an annual cycle the clerk must be aware of the expectations of the governing body and its committees for regular reports. In particular, it is recommended that the governing body determines from time to time the nature and frequency of their requirements for management and financial information. This is helpful in: ensuring that during the year governors have an appropriate overview of matters relevant to their responsibilities; regulating and rationalising the overall demands made on senior management for information, reducing the number of ad hoc requests for data; and facilitating the forward planning of agendas.

6.4 The clerk should identify those items that need to be part of the annual responsibilities of the governing body, for example the approval of the annual budget, annual accounts, audit reports, key institutional risks and the strategic plan. Items mentioned elsewhere in this Guide such as the completion of a statement of primary responsibilities, the register of interests and the schedule of delegation need also to be incorporated into the timetable of business. The clerk should be aware of any actions where the governing body's approval is required, and will need to know what decisions have to be taken by the board and cannot be delegated to senior management (for example, an institutional agreement to amend the terms and conditions of its employees).

6.5 To aid in the planning of meetings, the clerk may map any regular agenda items against the meetings of the governing body within the year at which each item will be considered. This has the benefit of highlighting how and when its responsibilities are being met as well as any gaps or weak points. Additionally, this provides a clearer map of what business is considered at which meetings and may be a useful tool when undertaking an effectiveness review of the governing body.

6.6 The forward planning of meetings of the governing body is essential in order to:

- Ensure that the sequence of meetings will allow the board to take key decisions at the appropriate time to support the institution's strategic development and meet its statutory responsibilities.
- Allow the senior management to plan the preparation of papers for consideration by the governors.
- Give members of the governing body adequate notice of when meetings will be held.

6.7 An annual timetable of meetings for the governing body and its committees should be drawn up by the clerk (with necessary consultation) and approved by the governing body well in advance of each academic year. Once approved, the timetable should not be changed without good reason and adequate notice. In order to increase the availability of governors the clerk may present a schedule of meetings on a rolling basis, to ensure that at least one year's notice is provided of meeting dates and locations. Thought should be given by the clerk to the location of the meetings as it may be beneficial to hold meetings on different sites so that members become familiar with the institution's facilities.

The Agenda and Circulation of Papers

6.8 The governing instruments of the institution (particularly the standing orders) typically include provisions for calling meetings and possibly the notice to be given and how far in advance the agenda and papers should be received. The difficulty of achieving the required timetable, particularly if all papers are to be circulated with the agenda, should not be underestimated. There will be pressures to delay circulation because papers are not ready, or because current events lead to suggestions for changes at a late stage. The following steps may be helpful in managing these pressures:

- Issuing to senior management a timetable for submitting papers to the clerk, making it clear that late papers are not normally acceptable (and wherever possible, the clerk should be notified at the earliest stage if a paper may potentially not be received by the deadline).
- Ensuring at the agenda planning stage that the authorship of papers due to come forward is clear and, where possible, providing a reminder to the author of the deadline approximately a week in advance.
- Agreeing protocols for clearance of papers before they can be circulated.
- Ensuring that any housestyle for papers is complied with by authors.
- Careful consideration in advance of how 'information overload' can be avoided through the careful preparation and structuring of documents.

6.9 Late or tabled papers can lead to ineffective use of time, though it may be difficult to avoid the very occasional need for additional circulations when urgent matters arise. The clerk should, however, resist the late circulation of papers to members wherever possible, particularly if they are substantive

or complex documents or if they contain any controversial items. It may be the case, however, that the agenda and the majority of papers can be circulated well in advance of the meeting and that a second circulation of a smaller number of items follows. Papers typically should be received by the governing body at least one week in advance of the meeting.

6.10 The effectiveness with which the business of a meeting is managed depends significantly on the agenda, which should be drawn up by the clerk in consultation with the chair and the vice-chancellor/principal and approved by the chair. The agenda should draw on the work described above, and if a forward planning matrix has been compiled this could be rolled forward and updated in the light of any changes to the institution's strategic developments.

6.11 A succinct, carefully drafted agenda, which is informative and circulated in good time along with written notice of the meeting, is invaluable in ensuring the effective management of business. The agenda should make clear:

- The matters to be considered.
- The supporting papers attached (or to follow).
- Whether matters require a decision, or are for discussion, information or ratification.
- Any items which are confidential to members of the governing body only (noting the point made elsewhere in this Guide that these instances should be limited).

6.12 Between the circulation of papers and the meeting, the clerk will need to arrange for briefing the chair, who may also wish to have an annotated version of the agenda or a set of briefing notes from the clerk for use at the meeting.

Procedures for the Conduct of Business

6.13 All governing bodies benefit from rules that determine how meetings are conducted. General procedures will often be covered in the governing instruments and more detailed rules (for example, standing orders) should be drawn up and agreed. The standing orders (which may be reviewed annually) should be given to each member on appointment, and should be the basis on which the meetings are conducted. Governing bodies should look to the clerk to assist in drawing up their standing orders, and subsequently the clerk should advise on the interpretation and application of the rules as necessary during meetings. The clerk should also be responsible for regularly auditing and reviewing the standing orders and making recommendations for their amendment. Standing orders or agreed procedures usually cover at least the following seven points.

6.14 *Chairman's action:* The governing body should define the circumstances in which the chair is authorised to act on its behalf between meetings, and the arrangements for subsequent recording in the minutes. It should also decide whether to authorise the vice-chair to act when the chair is absent. There may be specific powers which the governing body wishes to delegate which can be identified in advance, but there may also be unforeseen circumstances in which the chair may need to act in between meetings. In either case arrangements should be agreed and included in standing orders wherever possible. It is advisable that in unforeseen circumstances, arrangements should not permit the chair to act on his or her own but to consult with a specified number of the other governors. Chair's action may be required in respect of matters which are judged too urgent to await a meeting of

governors, although if significant the option exists of calling a special meeting. Action by the chair should only be taken if delaying a decision would disadvantage the institution or it is in some other way unavoidable. The clerk should be directly involved on each occasion and should be expected to advise on and ensure the appropriate use of agreed procedures. The board, having authorised its chair to take action between meetings, has to accept corporate responsibility for any action taken. A full report should be made as an item on the agenda of the next governing body meeting.

6.15 *Special meetings:* It may be desirable to establish rules governing calling of special meetings, for example, the notice required and the need to define the precise business. Special meetings can normally be convened by the chair or by written request from a specified number of governors. In either case, if the chair decides that the matter is urgent, normal provisions on notice of the meeting can be waived. Special meetings of governors should only deal with the particular business for which the meeting has been called. The agenda will therefore consist only of apologies for absence and the item in question, and normal rules concerning quorum (if any), taking of minutes and so on apply.

6.16 *Agenda Items:* the arrangements for members to ask for items to be included on the agenda and the amount of notice required should be specified in standing orders.

6.17 *Involvement of non-governors:* the governing body's policy on attendance at meetings by non-governors (such as the executive or other staff and professional advisers) should be made clear.

6.18 *Attendance:* criteria might be established for determining an acceptable attendance record of members, whether committee attendances or other meetings will be taken into account, and the circumstances in which a governor might seek the governing body's permission to be absent.

6.19 *Debate:* any rules concerning the way debates are conducted, resolutions are made and the authority of the chair applied may be specified.

6.20 *Urgent business:* the governing body is not obliged to include an item for any other business on its agenda, as this can lead to issues being raised without notice, often at the end of a long meeting. If such an item is to be included, the clerk may recommend a rule that requires such matters be declared at the start of the meeting and/or be restricted to urgent matters. If governors are to be precluded from raising other business, there will need to be a way of dealing with urgent matters that have arisen since the agenda was circulated.

Quorum

6.21 Rules about whether a quorum is required in governing body meetings vary. Where it is required the rules are frequently set out in the governing instruments, and apply not only at the start of a meeting but also at any point during it as the numbers present change. Thus the clerk needs to monitor attendance throughout a meeting. If a meeting becomes inquorate or if the requirement for a majority of independent members to be present is not met, the clerk should immediately inform the chair and the meeting should normally be ended, as decisions made by an inquorate meeting would be invalid and subject to challenge. However, depending on the nature of the unfinished business, it is possible for the meeting to agree to continue informal discussions and seek confirmation of any proposed decisions by circulation or at the next meeting. It is also open to the chair to call a special

meeting to undertake the outstanding business. If the requirements for sufficient independent members to be present is not met, the chair (advised by the clerk) should inform the meeting so that the independent members present can exercise their right to have decisions deferred.

Voting

6.22 In practice, it is unusual for all decisions in UK governing bodies to be taken by a formal vote, as it is intended that decisions are normally reached by consensus following a full debate. Therefore, unless there are occasions requiring a formal vote stipulated in governing instruments, the chair would normally ask the board for agreement to the proposal in question and only call for a vote either if there is a clear expression of dissent or if it is a matter of particular significance.

6.23 A member of the governing body may request a vote on a particular issue, and if a formal vote is taken, the clerk should record the number voting for and against in the minutes (as well as any abstentions). It is for the governing body to decide the circumstances in which a secret ballot should be held or in which the names of those voting for or against a proposal should be recorded. Aspects of voting procedure not dealt with in the governing instruments might usefully be covered by standing orders. Whether or not a recorded vote has taken place, a dissenting governor should have the right to have his or her disagreement recorded in the minutes.

6.24 Governing instruments normally require that no resolution of the governors can be rescinded or varied at a subsequent meeting unless its reconsideration appears on the agenda. A decision cannot therefore be overturned simply as part of discussions of matters arising from the previous minutes. Not only must the subject appear as a substantive item on the agenda, but also a proposal to vary or rescind a previous decision must be indicated. It may be appropriate for the governing body's standing orders to specify the procedures through which governors may propose such reconsideration.

Minutes

6.25 The minutes of a meeting are the formal record of proceedings, and hence their accuracy is essential to the proper conduct of governance. As well as being the governing body's formal record, the minutes (apart from specific confidential items) are normally available to staff and students and, as such, are an important means of communication in the institution. There are no circumstances in which the governing body should take a decision without it being minuted.

6.26 Well-drafted minutes normally have the following characteristics:

- An emphasis on recording the outcomes of discussion, and not on giving a full account of it, except where dissent is recorded or to give reasons for decisions which are controversial or of major significance.
- They are comprehensible to anyone (whether or not a governor) who was not at the meeting.
- They differentiate formal decisions from matters where no decision was reached or called for.
- They record (by specific reference to the title or reference number) any documents circulated or tabled in support of each item.
- They include a list of all those present distinguishing between governors and non-governors.

6.27 Particular care must be taken on confidential items which should be minuted separately, although there may be a cross-reference in the main minutes. Subject to freedom of information disclosure rules, circulation of the confidential minute and associated papers should be restricted to those governors entitled to attend the meeting concerned, and care should be taken about who is present at subsequent discussions when the minute is available.

6.28 It is for the governing body or committee to agree (at its next normal meeting) the minutes as a true record. Draft minutes may be made available as soon as approved by the chair and are the basis on which action proceeds, and implementation of decisions should not normally await approval of minutes. It follows that both the accuracy and the early availability of draft minutes are important to the progress of business. Whether or not draft minutes have been agreed in advance by the chair of the meeting, other members may challenge their accuracy and propose changes when approval of the minutes is considered. Any change is subject to agreement by the majority of the governors present at the meeting considering draft minutes.

6.29 The signed copies of governing body and committee minutes should be stored in a secure place under arrangements which prevent unauthorised alteration. As the formal record of the governing body's business they may need to be referred to in future. For example, questions might be raised by agencies such as auditors or legal advisers in the event of legal action or judicial review. They are also required for internal and external audit purposes.

Outstanding Business

6.30 The clerk will need to establish arrangements in between meetings for monitoring progress on actions arising from the business both of the governing body and its committees, and ensuring that the needs of governors are being dealt with (for example, by issuing action checklists). Those individuals or committees identified within a meeting to take further action should be specifically notified by the clerk as soon as practicable following the meeting (in addition to receiving the relevant minute of the meeting), and these items should be incorporated into the agenda for the relevant future meetings of the governing body.

Self-Challenge Questions

- 1 Does your governing body set a timetable of its meetings at least one year in advance, and is there a clear understanding as to what must be considered at each meeting to meet statutory and external reporting requirements?
- 2 Is the governing body receiving the information required in order to be confident about the assurance of the institution's governance, internal controls and risk management it is required to provide to external bodies?
- 3 How appropriate is the information load falling on your governing body members, and can anything be done to improve it?
- 4 Is there a consistent 'house style' for the production of all minutes and papers and is it consistently adopted institution wide? If not, why not?

Case Study 5: Minutes

The minutes of your governing body do not normally identify the contributions made by individual members, and generally try to record agreed action rather than summarising at length discussions that take place. However, one fairly new member consistently requests that his personal views are noted in the minutes, particularly where he disagrees with the majority view. At your suggestion the chair of the governing body has discussed it with him and tried to persuade him to change his mind, but he continues to insist that you as clerk to the governing body should note his personal views in the minutes. What action should you take and why?

Case Study 5: Suggested Action

The individual should be reminded by you as clerk (or perhaps in a meeting with the chair with the clerk present) that the governing body takes decisions on a 'corporate' basis, and that while the comments of members should be reflected in the minutes the views of individuals are not normally recorded. If necessary this approach could be reconfirmed by the governing body. It is quite usual to record contra-opinions in minutes but it is not usual to record the names of individuals. Where a vote has been taken (perhaps on a particularly contentious issue) and an individual insists on having his/her objection noted this could be allowed. If the member still refuses to accept this and does not wish to accept the agreed procedures, the nominations committee should consider whether membership should be continued. If the governing body has a system for appraising the contribution of members then this issue should be raised by the chair (as appraiser) during that discussion.

Case Study 6: Late Committee Papers

Members of your governing body (including the chair) sometimes complain about papers being circulated at short notice or even tabled. In considering what might be done about this, you are aware that in some HEIs there is a policy that no late papers are ever presented except in unusual circumstances. As clerk, what do you see as the advantages and drawbacks of this approach?

Case Study 6: Suggested Action

It is important to have some rules, agreed by the governing body, about the submission of late papers. In general, late papers should be strongly discouraged but a total ban may be unhelpful to the governing body's effectiveness in dealing with issues that genuinely come up at short notice. Ideally, the chair and clerk should have some discretion in the matter, and there may need to be discussion with the vice-chancellor so that an assessment of the importance of the item in question can be made. If the item is of such magnitude that an urgent but detailed scrutiny is required the chair might consider calling an extraordinary meeting. What is not acceptable - and should never be encouraged - is the regular tabling of late papers, particularly when they concern important issues. Such a practice is almost guaranteed to make the governing body feel that it is a 'rubber stamp', and therefore lead to potential tension with the executive.

Case Study 7 The Volume of Information

There are frequent observations by your governing body members about the volume of information that they have to digest for board meetings. Thinking of your own board procedures, as clerk what actions would you suggest be taken to ensure that both the amount and the nature of the information presented to governing body members is optimal?

Case Study 7: Suggested Action

Making information digestible is a corporate matter and cannot be achieved by the clerk alone. However, an institutional forum for committee secretaries allows general guidance to be agreed and is a good way of achieving consistency. The use of a cover or summary sheet is also helpful in making papers easier to digest and assess. There are various formats for the cover sheet but most record the author(s), a summary, a brief description of risks and benefits and the action required by the governing body. This allows individual governors to assess how much of the detail they need to absorb.

Increasingly, clerks are using a range of approaches to try and manage the information flow, including: structuring the agenda which typically helps to provide a framework whereby the amount and nature of information can be considered, for example separating matters for report, discussion, and information, and circulating bulky information items as appendices where appropriate; using the institutional intranet for governors to circulate appropriate information; using presentational methods such as 'traffic lights' to highlight key issues. Of course, if handled inappropriately the reduction of information to governors might also lead to complaints!

7 Ensuring Propriety and Transparency

7.1 Although HEIs are not public bodies in the strict sense, they are generally in receipt of public funding and are therefore not only required to act within the powers set out in relevant legislation and in their governing instruments, but also behave in a manner broadly consistent with public expectations. As part of their ultimate accountability (either to the UK Parliament or to the Parliament or Assembly of the relevant devolved administration) there have been cases of senior officers and/or members of governing bodies of HEIs being called to account for their actions before select committees. The National Audit Office (or equivalent in Wales, Scotland and N Ireland) has also conducted investigations into the conduct of HEIs on a number of occasions and reports have been published²¹.

7.2 It follows that each governing body and its clerk needs to be aware of the importance of public accountability in the overall conduct of business and in particular in terms of the way in which decisions are reached. The clerk has a particular responsibility for advising governors on such matters, for ensuring that issues relating to the conduct of business are properly considered by the governing body, and for ensuring propriety.

Conduct

7.3 The public nature of the governing body's role, its financial accountability through the relevant funding bodies to devolved administrations and/or ultimately to Parliament, its stewardship of substantial public funds, and not least the good name of the institution and the interest of its students, all demand very high standards of conduct in exercising its functions.

7.4 The CUC Guide outlines the general rules and conventions for the conduct of governing body business. It would be advisable for the clerk to ensure that current practice has been mapped against the CUC Guide and drawn to the attention of the governing body. The extent to which each HEI meets the requirements of the Guide is always likely to form a significant part of the focus of any audit of governance undertaken by both an HEI's own auditors and those of the funding councils. The clerk may wish to consider drawing up a formal code of conduct which makes clear reference to how the CUC Guide is being addressed.

7.5 The clerk alone cannot ensure a high standard of conduct. It is a collective responsibility of all governors and a leadership responsibility of the chair. However, the clerk does have a responsibility to raise with the chair matters where he or she feels that standards of conduct conflict with the governors' own code or fall below what might be expected from those serving on public bodies. The clerk also has a responsibility for ensuring that governing bodies properly consider recommendations on the conduct of their business arising from reports, circulars and guidelines issued by bodies such as the National Audit Office, the Public Accounts Committee, the HE funding councils and other funders (eg the research councils), documents issued by government departments, CUC, UUK or Guild HE as relevant. In addition, an institution's own external auditors will often publish guidance on best

²¹ See www.nao.org.uk

governance practice. The clerk should draw such documents to the attention of the governing body, and propose recommendations for updating current procedures where required.

Personal Interest

7.6 A key tenet of public service (and of the 'Nolan Principles' - see Annex E) is that governors should act with integrity and transparency, and above all, must serve the interests of the organisation and not their own. Every new governor and all relevant senior officers should be required to file with the clerk a list of their interests, which should be kept up-to-date. This should include employment, non-executive directorships, investments and any other activity of themselves or their close family that could in any way colour their judgement on decisions affecting the institution. At meetings the board needs to have an agreed process for how governors with a declared interest should behave. This varies but it may include the governor concerned not taking part in discussions on the item, and/or not voting on it, and/or ceasing to be counted towards the quorum necessary for taking a decision. Individual governors may be best advised to withdraw from the meeting, but are not obliged to do so except in specific circumstances identified in the governing instruments. The declaration of an interest by a governor during the course of a meeting should always be recorded in the minutes.

7.7 It can be difficult to know what exactly should be included in a register of interests. For example stocks held through a unit trust are not relevant but individual holdings of more than 2% certainly are. The best advice is: if in doubt, put it in. This register should be updated annually and stored safely by the clerk. Although it does not have to be published good practice suggests this would be helpful and at the very least it must be available for inspection if questions are raised. Because the register may not cover all eventualities, it is good practice, in addition to the register, to require members to declare an interest at the beginning of a meeting or particular discussion, if appropriate. Declaring an interest does not necessarily disbar the member from taking part in the discussion or voting - this will be for the meeting to decide - but it does ensure that everyone knows on what basis they are participating.

7.8 Governors, and the clerk on their behalf, must also guard against conflicts of interest that arise outside formal meetings. The areas of greatest vulnerability are those involving the invitation and consideration of tenders and awarding contracts. The provisions of the Bribery Act 2010 are relevant here and it is important that clear procedures (drawn up in consultation with its external auditors and approved by the governing body) are included in the institution's financial regulations for the issue, receipt, opening and consideration of tenders and for the award of contracts above a specified value. Those procedures should establish whether there is to be governor involvement at any particular stage, and make specific provision for the exclusion of anyone (including members of staff) who may have a financial or other personal interest.

Confidentiality and the Freedom of Information Act

7.9 Governing instruments usually provide for governing body and committee discussions to be confidential when necessary, and also when an existing or prospective member of staff or student is mentioned by name. Such matters should be separately minuted, and every governor receiving the minutes is also bound by confidentiality. Any breach which comes to the attention of the clerk should be reported to the governing body.

7.10 In designating any documents or other information as confidential the clerk needs to take account of the UK Freedom of Information Act and Data Protection Act (and, for institutions in Scotland, the different provisions of the Freedom of Information (Scotland) Act). In particular, the governing body will need to be advised by the clerk whether, in response to a request for information, any exemption from disclosure to the public under the Act applies. Information can only be lawfully withheld where such an exemption applies and, for some exemptions, the institution must also consider where the greater public interest lies before applying the exemption. Ultimately, an individual can complain to the Information Commissioner where it is believed that information has been unlawfully withheld. It is then for the Commissioner to determine whether the information will be released or not. Documents, such as minutes, may be 'redacted' to protect the exempt information within them, but even heavily redacted information will have to be released where non-exempt meaningful information remains.

7.11 It follows that although some matters may be regarded as 'confidential', the intention should be that, as far as possible, governors' business is a matter of public interest and therefore open to scrutiny. Sometimes, governing bodies will wish to keep some financial, property and personnel issues confidential, however the need to be cautious about such requirements remains. It may be appropriate for governing bodies to establish criteria in discussion with their legal advisers about how decisions on confidentiality may be made. The Nolan Committee recommended that institutions follow best practice in limiting the use made of commercial confidentiality and being as open as possible. It also recommended the publication of an annual report setting out key information about the institution, including information about its governance, and this has become a funding body requirement which is subject to audit.

7.12 The clerk should consider how the annual report is to be made widely available, and the extent to which it might form part of any open meeting of the governing body. The expectation that such open meetings take place (or the equivalent) is included in the CUC Guide. Increasingly annual reports are placed on the websites of HEIs.

7.13 The requirements for the publication of agendas, minutes and non-confidential papers are set out in the governance instruments of most HEIs. The clerk is responsible for making sure that these are met and that access to relevant papers is available to staff and students. Increasingly there is an expectation that papers and agendas should be available on the HEI websites, and this should form part of an institution's publication scheme under the Freedom of Information Act.

Resolving Difficulties

7.14 As this Guide makes clear, the clerk has a responsibility to advise on proper procedure and - if necessary - to intervene when a governing body may be acting inappropriately or beyond its powers. The assumption is that the advice of the clerk will generally be respected and accepted if correct. New clerks may find it helpful to seek advice from other clerks in similar HEIs if in doubt. The CUC is also willing to advise, as are legal advisers and auditors.

7.15 There may be occasions when a clerk (particularly a new clerk) feels that his or her advice is being disregarded or over-ruled, and that the proper conduct of the governing body is being put at

risk. If, exceptionally, matters reach this stage, the clerk should make every effort to resolve the matter within the institution, and to be certain that the reasons for concern are understood. Depending on the nature of the problem and the response received, the clerk may have to take some or all of the following steps to ensure that the issue raised has been considered adequately:

- That the reasons for the concern have been put in writing and sent to the chair and vice-chancellor/principal.
- That the chair of the audit committee has been informed if the issue is relevant to that committee's terms of reference.
- That the clerk has reported his or her concern to a meeting of the relevant committee or the full governing body and asked for this to be recorded in the publicly available minutes.
- That the institution's auditors (internal or external as appropriate) have been consulted.

7.16 As indicated above, the clerk should also obtain legal advice if there is disagreement about whether an action may be unlawful, and should be free to do so within appropriate financial limits. In such cases, the governing body may choose to seek further legal advice, for example from legal counsel if it considers the issue is important enough.

7.17 In the unlikely event that no action results from this sequence of steps and if the grounds for concern still present a threat to the proper governance of the institution, the clerk should seek advice from the relevant funding council and report such advice to the governing body. However, this is a rare course of action, and is unlikely to be experienced by most clerks.

7.18 It should not be the case that any such steps taken in good faith by the clerk would constitute grounds for disciplinary action under the institution's disciplinary procedures.

The Conduct of Governors

7.19 Although rare, it does occasionally happen that governors do not live up to the standards and expectations of the position. Most commonly, they simply fail to attend sufficient meetings, but other matters of concern include not declaring interests, not acting in the best interests of the institution, or bringing it into disrepute. In some cases governing instruments may list the grounds for reviewing the conduct of board members, and action may also be taken under the statement of primary responsibilities. It will be for the chair of the governing body to start any proceedings by meeting the member, but if a solution cannot be found, or the 'offence' is such that removal is the only option, a formal process needs to be followed by or on behalf of the board, with the normal rules of natural justice applying. These include giving all evidence in advance of any hearing, and the governor having the right to state his or her own case and contradict the allegation. There must also be a right of appeal, considered by a different panel. The clerk will usually administer these processes. Issues concerning performance review are considered in Chapter 10.

Whistleblowing

7.20 Public interest disclosure (PID often called 'whistle-blowing') is an important process and arises from the recommendations of the Nolan Committee and the Public Interest Disclosure Act 1998. Each HEI should have a clear policy or procedure in place and guidance can be found in the CUC

Guide. It is likely that the clerk will have a role in most instances where a PID is made. If the clerk is in any doubt about a PID or the procedures, he or she is strongly advised to seek legal advice. PID is often a difficult and sensitive process for all those concerned, and it is important that there is a robust and transparent framework for the consideration of any PID and that the steps are followed meticulously by those appointed to consider the case.

Student Complaints and Appeals

7.21 The quality of the student experience is a priority for all HEIs and the way in which student complaints, academic appeals and discipline are handled represents an important element of that experience. The clerk is likely to be involved in these matters and therefore should be aware of the institution's procedures. Good practice guidance on all three can be obtained from the Office of the Independent Adjudicator for Higher Education (OIA)²². Processes should be thorough and fair, but not unduly longwinded. They will usually include at least two stages to allow the student to appeal against the original decision: the first should be carried out as near to the point of impact as possible (eg the head of department, the exams office etc), and it is unlikely that the clerk will be involved other than to keep a formal record of incidents (there may be a requirement to report incidents and statistics to the governing body) or to give advice. If an issue cannot be resolved, then a second stage is likely which will become increasingly formalised and may involve a panel or tribunal (sometimes with the clerk as secretary).

7.22 At this more formal stage, the clerk must ensure that the event is conducted under the relevant procedure and according to the rules of natural justice, that is to say 'no surprises' with appropriate records kept. All parties must have access to all information in advance, and have ample opportunity both to put their case and to answer points made by other parties. The clerk must do everything possible to remain neutral, and if pressurised to give guidance to the person representing the institution, it would be advisable to find someone else who can assist, perhaps a senior member of the academic administration who is familiar with the procedure and regulations involved.

7.23 When the institution's internal procedures have been completed, if a student is dissatisfied with the outcome of their complaint or appeal etc they have the right to appeal to the OIA. The OIA insists on having a single point of contact in each institution and this is likely to be either the clerk or a complaints officer. If the clerk is the point of contact, he or she must issue all students who have gone through the full internal process with a 'completion of procedures' letter. The letter should set out clearly the right of such students to refer their case to the OIA, the deadline for referral, the issues that have been considered and the university's final decision. The OIA's review will focus on this final decision. It therefore makes sense to draft the letter carefully and the OIA have issued guidance on what information should be included in the completion of procedures letter. Once the OIA has decided whether or not it will review a particular case it will inform the institution. All letters will come to the institutional contact and responses will be sent through the contact, even though the content of the responses may need to be provided by someone else.

7.24 In most cases the OIA will simply review the institution's handling of the process, so provided agreed procedures have been followed and a comprehensive record of the process exists the appeal

²² See www.oiahe.org.uk

should not be too onerous. Where the adjudicator decides to review the decision further information may need to be supplied. A specific point to look out for is that the review should not stray into areas outside the original internal hearing. Applicants sometimes try to introduce new arguments at this point, and as this may not be immediately obvious to the adjudicator the institutional contact needs to discuss this with them.

Self-Challenge Questions

- 1 Do all members of your governing body and senior members of your institution comply with all relevant aspects of propriety in relation to governance, including the declaration of interests?
- 2 As clerk, how familiar are you with the implications for governance of the Freedom of Information Act, the Data Protection Act, the Bribery Act and the Public Interest Disclosure Act?
- 3 Is information on 'whistleblowing' procedures widely available within the institution, and if not how do members of staff know about their rights and responsibilities in this area?
- 4 How effective is the student appeals mechanism within your institution, and is the governing body able to monitor trends in the number of complaints and in the numbers deemed justified or partly justified by the OIA?

Case Study 8: Whistleblowing

A senior member of staff raises issues with you as clerk about the conduct of another senior member of staff. Both are senior postholders who are directly appointed by the governing body. What would you do?

Case Study 8: Suggested Action

As the clerk, your role is to receive the 'whistle-blowing' allegations and advise members of the governing body about how the issue should be handled. First, you will need to ensure that you are fully aware of the whistleblowing procedures of your institution. Having done that (and assuming they are consistent with the following), you will need to advise the governing body chair about the case, and having done so seek his/her approval that the vice-chancellor should be informed (in general terms). You may need to seek legal advice, notifying the chair and the vice-chancellor that you intend to do so. If the whistleblowing allegations concern the chair of the governing body, then the clerk is usually the designated contact to receive them and may be required to refer such cases to the relevant HE funding council. In such cases legal advice should certainly be taken and the chair of the audit committee advised.

Case Study 9: Declaration of Interest

The governing body for which you are the clerk has to nominate a lay governor to a panel to appoint the university's legal advisers. This is a potentially lucrative contract and the governing body has invited a member with a legal background to join the assessment panel. Prior to the panel meeting, the lay governor has mentioned to you that his son-in-law is a lawyer in one of the firms being assessed, though he is not part of the team appearing before the panel. Is this a significant potential conflict of interest, and if so what do you do?

Case Study 9: Suggested Action

Most issues that arise around conflicts of interest and the need to declare them are relatively straightforward, and can be addressed by the clerk pointing out the issue to the governor concerned. However, complications can arise when a family member rather than the individual governor is involved. In this case, as the clerk you should advise the lay member that there is a potential conflict of interest, and that, despite the fact that the son-in-law is not directly involved, it would not be unreasonable for a member of the public to assume that if the panel appointed the firm in question then the assessment may not have been impartial. If the lay member does not agree, you should speak to the chair to advise him/her of your concern, and ask him/her to explain that the lay member should not serve on the panel. You will need to find a new external adviser. Managing a potential or perceived conflict is as important as managing an actual conflict.

8 The Law and the Governing Body

8.1 The CUC's Governance Code of Practice states that "The governing body is responsible for ensuring the effective management of the institution and for planning its future development. It has ultimate responsibility for all the affairs of the institution". It follows that the governing body is charged with responsibility to ensure that systems are in place for meeting all the institution's legal obligations, including those arising from contracts and other legal commitments. In fulfilling this obligation it can be expected that, as a minimum, the clerk should advise on:

- The constitution and legal status of the institution and its constituent parts, particularly to verify the legal capacity to undertake proposed actions.
- The broad legal regulatory and statutory framework within which the institution operates - including where necessary European and international obligations.
- Securing specific legal advice (or identifying who secures such advice) to address issues, risks and challenges.

8.2 In undertaking these roles, the clerk is checking that the governing body acts within its powers and complies with its legal obligations. The activities of governing bodies are subject not only to those laws concerning their own powers and conduct, but also to other applicable legislation and regulation, such as charity law, health and safety and equality and diversity. The clerk may also need to oversee on behalf of the board, the due diligence checks of other third parties with whom the institution contracts.

8.3 The clerk cannot be expected to be a legal expert acquainted in detail with the full range of the law, but like a good lawyer the clerk should know where to look, who to refer to, and - from time to time - seek legal advice for the board before it takes or authorises decisions. A wide range of material is now available (see Annex E), and sector bodies such as AHUA, UUK, and JISC Legal have produced (sometimes in collaboration with law firms) information on a range of legal topics. Whilst access to these source materials is vital, the clerk should have or quickly acquire a reasonable grasp of the law in the key areas set out below.

8.4 The starting point for the clerk is to recognise that the actions of the governing body are subject to the main principles of administrative law and can be challenged in the courts through the process of judicial review. The concept of administrative law, which effectively regulates the way public bodies (including HEIs for this purpose) behave in exercising their powers, is based not on legislation as such but on case law accumulated over many years. A brief summary of some general principles which the clerk may need to bring to the attention of governors includes:

- Public bodies must act only within their powers. To this end, their members must know what their powers are and be confident that they are being used for the right purpose.
- The delegation of powers may be allowed within the organisation but not to another body unless specifically provided for in the legislation.
- Where the exercise of particular powers requires procedural steps before a decision can be taken (such as consultation with those affected), such action must be taken and adequate time and information must be provided.

- Public bodies must act reasonably; that is, they should never come to a conclusion that no reasonable body could have reached.
- The reasons for any decisions that may not be obvious should be clear and must be recorded.
- Any member of the body who may be regarded as having a personal or conflicting interest that could lead to bias in decision-making should not be involved in that decision.
- In making decisions, governors must take account of the legitimate expectations of those affected, in addition to any statutory or contractual rights.

Constitutional and Education Law

8.5 The clerk needs to understand the framework within which the institution operates, and have a working knowledge of the corporate origins that help to define its current legal status and mission, whether as a chartered, incorporated and/or statutory institution. It is easy to get drawn into provenance and history, but for the purposes of this Guide it is sufficient to acknowledge that "higher education institutions are legally independent corporate institutions that have a common purpose of providing learning and teaching and undertaking research" (see CUC Guide). Having a working knowledge of the law and statutes which underpin the constitutional status of the institution and the statutory frameworks around which education is delivered and research is conducted is essential.

8.6 Whilst the majority operate broadly as public bodies with charitable status, HEIs also operate as businesses, and increasingly higher education is acknowledged as an area of the law *sui generis*, that is of its own kind, unique, evolving...and peculiar! As this law develops there may be inevitable uncertainties, so the clerk should always be in a position to source professional legal advice or opinion for and on behalf of the institution. For these purposes it is important that the clerk makes full use of networking opportunities to be able to identify those firms and individuals with appropriate knowledge and expertise to fulfil those institutional needs.

8.7 In addition to legislation and common law, all UK HEIs have their core constitutional documents approved by the Privy Council (charter and statutes for pre-1992 HEIs and instrument and articles for post-1992 ones). The clerk must be fully conversant with them including any amendments, bye-laws, formal interpretations, ordinances and schedules. Governing bodies may propose modifications from time to time and the clerk will be the person who, on behalf of the governing body, will liaise with the requisite authorities to effect lawful change to those constitutional documents.

8.8 The Secretary of State (or the ministers of the devolved administrations) has certain powers to give general directions to the higher education funding councils and to require information and advice from them. The councils in turn place conditions on the payment of grant to institutions, primarily by means of financial memoranda. Through their audit services the funding councils review the compliance of institutions with the financial memorandum and appropriate codes of practice. The audit services also review the institutions' regulations and procedures to ensure that there are appropriate controls and observance of good practice.

Charities Legislation

8.9 Almost all institutions in the sector have charitable status but the arrangements for the regulation of charities vary between England and the devolved administrations. Following the passing

of the Charities Act 2006, HEFCE was designated the 'principal regulator' for all HEIs in England²³. In Wales the Charity Commission itself is the regulator, and different arrangements apply to charitable bodies in Northern Ireland and in Scotland (where the role is performed by the Office of the Scottish Charities Regulator, set up by the Charities and Trustee Investment (Scotland) Act 2005). In England, the Charities Act 2011 now consolidates the provisions of the antecedent charities acts. In England and Wales, charitable status for HEIs will have been granted in one of two ways:

- *Registration as a charity:* HEIs which were established by trust deed and those which are companies limited by guarantee are registered as charities by the charity commissioners, who ensure that the institution's aims are charitable, and that they are stated in the founding documents (for example trust deed or memorandum and articles of association). The commissioners exercise powers of supervision over registered charities although some charities which are companies are exempt from some procedures.
- *Exception as an exempt charity:* institutions incorporated as higher education corporations are established as charities exempted from registration under the Charities Acts. The charity commissioners do not have direct supervisory powers over exempt charities, and accounts do not have to be submitted to the commission but the funding councils have been given regulatory responsibility to ensure that institutions that are exempt charities conduct themselves in accordance with the law as if directly accountable to the charity commissioners.

8.10 Governors of a higher education corporation or an institution run as a company limited by guarantee are also trustees of the charity, whatever the status of that charity, whereas governors of HEIs established by Act of Parliament are board members of a public body. Explicit duties fall on charity trustees and clerks should be aware of how they apply in the specific case of their own HEI.

8.11 Issues that the clerk and the governing body need to bear in mind in relation to charitable status include the need to:

- Apply institutional property and income only for recognised and defined charitable purposes.
- Demonstrate the legal requirements for public benefit associated with charitable status.
- Act only within their legal powers. If in doubt as to whether actions contemplated may take them outside the law, the governing body should seek expert advice.
- Take particular care in organising the trading activities of the institution, as these may not be regarded as charitable.
- Manage and protect the property of the institution.
- Report instances of fraud.
- Maintain and publish a list of trustees.
- Maintain a statement of primary responsibilities - including statements in compliance with the public benefits tests.
- Since 31 January 2011, each exempt charity HEI has been required to have on its website a 'gateway page' linking to core information about its status as a charity.

²³ See www.hefce.ac.uk/whatwedo/reg/charityreg/goodpracticeguidanceforinstitutionsascharities

Notwithstanding the different arrangements about charity legislation in the UK jurisdictions, the HEFCE website has useful generic information for all clerks about charity legislation and HE, including a guide to good practice on charitable issues²⁴. The Office of the Scottish Charities Regulator has also issued extensive guidance²⁵ which is available on its website.

Company and Commercial Law

8.12 HEIs that are constituted as companies limited by guarantee (and any specifically incorporated subsidiaries) are subject to company law. In practice, many of the procedural requirements placed on boards of directors by the Companies Acts are also placed on governing bodies by the Education Acts and institutional founding documents. The clerk, however, should not assume that all aspects of company law are fully covered by compliance with the Education Acts.

8.13 The accounting and auditing policies for companies will need to comply with the Companies Acts. For subsidiary companies, it is important that management and activities are set up and kept at arm's length from the institution whilst, particularly for the wholly-owned subsidiaries, ensuring that there is appropriate representation of and accountability to the governing body. The appointed directors and particularly the institution's audit function will generally assume the prime responsibility for legal compliance in this area, although the clerk will need to have a clear map of such accountabilities and may need to remind key parties of their responsibilities. If the clerk is also company secretary, he or she must establish and retain a clear differentiation of roles, and be alert to any possible conflicts of interest that may arise. As commercial activities increase the governing body (and therefore the clerk) will need to be more alert to the governance issues raised.

8.14 The Companies Act 2006 substantially reformed company law, but this was mainly by way of modernising and simplifying due process and reporting to Companies House. The Act enables companies (should they so resolve) to:

- Rely on electronic (including web) communications.
- Operate with only one member, ie one named director and no company secretary.
- Adopt unrestricted company powers as laid down in the statute, instead of specific objects detailed in the memorandum of association.
- Relax the use of shares and the control of share capital.
- Simplify formal decision making and meeting procedures, with AGMs and unanimity for written resolutions no longer being required.

8.15 Reciprocal to this, companies are now obliged to identify their registered company details in their electronic communications and information, and ensure clearer acknowledgement, acceptance and accountability by director(s) in accordance with the new statutory statement of directors' duties. Within the Act there are details regarding such matters as takeover provisions, and transparency for audit appointments and financial reporting which in specific circumstances might impact upon particular HEIs constituted as companies, or upon wholly-owned or joint venture subsidiaries.

²⁴ See www.hefce.ac.uk/whatwedo/reg/charityreg/goodpracticeguidanceforinstitutionsascharities

²⁵ See at www.oscr.org.uk

8.16 In addition to the core functions of providing HE, institutions are extensively engaged in other overtly commercial activity both within the UK and increasingly overseas. For all these purposes the clerk needs to have an awareness of contract and commercial law, consumer law and regulation, intellectual property law and financial service regulation. For an institution's international activities, the ability to recognise the need for, counsel and where necessary source advice applicable to businesses operating in other jurisdictions is an essential requisite.

Law of Contract and the Use of the Corporate Seal

8.17 While the Companies Act has dispensed with the obligation for a registered company to have a seal, most HEIs are not registered companies and retain an obligation to have a corporation seal. This is used to execute any document recognised as a deed. Deeds tend to be complex, including all land property transactions and other agreements where a so-called 'consideration' (usually a payment) was not being made or where the consideration did not demonstrate that a contractual bargain had been reached. As HEIs have significant delegations it is often useful to retain a procedure for application of the seal for important transactions, such as all property matters, substantial investment decisions, powers of attorney, partnerships and non-routine licences and registrations. The ceremonial use of the seal on certificates and the like is also a useful control. For the clerk the key issues here are: to have a clear protocol in place for the use of the seal (agreed by the governing body), to take responsibility for the seal's safekeeping and for making arrangements for documents to be executed under the seal, and for reporting to the board its uses.

Equality and Diversity Law

8.18 The Equality Act 2010 replaced previous anti-discrimination law, consolidating it into a single act. The general duty requires HEIs, overseen by the governing body, to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act; advance equality of opportunity between people from different groups and foster good relations between people from different groups. Governing bodies must consider these three aims of the general duty when making decisions as employers and education and service providers especially when developing, evaluating and reviewing policies; designing, delivering and evaluating educational and other services and commissioning and procuring services from others. The Act also imposes specific duties upon HEIs, most notable of which for the purpose of this Guide is to ensure that equality objectives are published and pursued and that prescribed equality information is published and updated annually. While the fulfilment of these corporate obligations may be allocated elsewhere in an HEI, the clerk will have a role on behalf of the governing body to ensure it receives information on these extensive and prescriptive reporting obligations. The Equality Challenge Unit provides substantial guidance on the legal and good practice implications of the legislation²⁶.

Intellectual Property Law

8.19 Intellectual property rights, very broadly, are rights granted to creators and owners of works that are the result of human intellectual creativity. The main intellectual property rights are: copyright, patents, trade marks, design rights, protection from passing off, and the protection of confidential

²⁶ See www.ecu.ac.uk

information. There are a number of issues here for governing bodies, including: institutional policy on rights and intellectual property; policy on rights in relation to collaborative research with either HE or non-HE partners; commercialisation policy; and more broadly the obligations of transparency under freedom of information legislation. Clerks should familiarise themselves with those issues which are certain to be matters of internal debate and to exercise the governing body. The JISC Legal Service provides a useful source of information on the implications of IT for intellectual property law²⁷.

Health and Safety

8.20 Worthy of particular attention is corporate liability in respect of the health, safety and the welfare of the institution's staff, students and visitors. The governing body carries significant responsibilities under the Health and Safety at Work Act 1974, and subsequent regulations. These relate to the institution's staff (as their employees), students, and members of the public using its buildings. The clerk may find it helpful to note that this advice underlines the need for governing bodies to satisfy themselves that:

- The institution has a written statement of policy on health and safety, approved by the governing body.
- Management responsibility for health and safety issues is clearly designated, with the establishment of a health and safety committee.
- Those with such designated responsibility in the institution are aware of, and have access to, relevant regulations, advice and training.
- The governing body regularly considers health and safety issues through agreed reporting structures.

8.21 The Corporate Manslaughter and Corporate Homicide Act 2007 altered the law on corporate culpability for a death and provides that an institution can be convicted if it can be proven that there was a gross breach of duty of care by 'senior management' - which includes the governing body - instead of just one individual as was previously the case. In addition to the prospect of unlimited fine, this Act also extended the principle of naming and shaming organisations convicted of such deaths by ordering the organisation to publish the fact of a conviction, notwithstanding the inevitable reputational damage and opprobrium that might flow from such continued publication.

The Bribery Act

8.22 The 2010 Bribery Act introduced substantial penalties for individuals or institutions found to be in breach of the Act, which includes senior officers of any HEI whose staff or agents were found guilty of an offence undertaken anywhere in the world. Beyond the obvious application concerning procurement issues within the UK, this is important for governing bodies in relation to internationalisation where the widespread use of agents for recruiting overseas students places institutions at risk. Potential penalties may not only involve individuals, but were an HEI found liable it might have implications for continued charitable status, as well as its status with the UK Border Agency. Accordingly, the clerk needs to ensure that the governing body understands the issue, and has appropriate processes in place.

²⁷ See www.jisclegal.ac.uk

Other Relevant Legislation

8.23 It is not possible in a Guide such as this to cover all the areas of law which may possibly touch upon the role of the clerk. In terms of compliance, clerks need to be aware of the principal areas of law which may arise in conducting governing body business, as well as having a basic understanding of the common law areas of contract, tort and relevant statute law. The clerk might also want to identify the prime source of advice and key senior managers in respect of: employment law, human rights law, planning and property law, public health and environmental law, data protection and information rights law, procurement (where EU legislation and the debate around institutions' public or independent status is most complex), education quality and standards (noting the regulatory role of the QAA), and international law especially relating to transnational activity, research and enterprise.

Legal Advice

8.24 The advice offered in this Guide is intended to assist in providing an initial brief to the new clerk in applying the law relating to their responsibilities and those of the governing body. Together with the CUC Guide and information provided by the respective funding council, it should help to answer many points that will arise during the normal course of governors' business. However, self-evidently it is not intended to be an authoritative interpretation of the law, and if there is any doubt about a correct course of action, independent legal advice should be sought.

8.25 When legal advice is required the clerk should have authority to seek it directly from the institution's legal advisers up to authorised expenditure limits. The clerk should also identify who else is authorised to seek such advice, any limits on cost and/or source of advice, and the expectation in terms of keeping governors informed when advice is sought. There is a surfeit of legal and sector advice across the whole range of the law as it relates to HEIs. The clerk may find that the main problem is distilling the essentials (in terms of rights and responsibilities) from a mass of cases, policy guidance, strategic direction and procedural regulation. To help clarify the areas in which legal advice might be required a new clerk might want to draw up a simple matrix of areas of the law, types of university activity most affected, key responsible persons, and key sources of legal advice (both internal and external).

Self Challenge Questions

- 1 As clerk, in what areas do you think you need to strengthen your own knowledge of legal issues?
- 2 Does your governing body comply with all the main legal and regulatory requirements falling upon it, and what is your evidence?
- 3 If you are a new clerk, how do you ensure that you are confident in the advice received from the existing legal advisers to your institution?

9 The Clerk and Academic Governance

9.1 The roles and responsibilities of the clerk in relation to academic governance vary quite widely in the sector, and it is difficult to be prescriptive about good practice. There are two main reasons for this which are discussed below: first, the involvement of the clerk in academic governance varies widely, particularly between pre and post-1992 universities; second, in many HEIs there is, in practice, a lack of a consistent definition of what constitutes academic governance which inevitably affects how it is undertaken and who is involved.

9.2 Despite these differences, there are several important issues that all clerks need to be aware of. These relate to the governance framework for academic delivery, academic quality assurance and academic planning, which takes the clerk into the now familiar territory of standards, regulations and strategy. The clerk's role in this area is likely to include: trying to ensure an effective relationship between the governing body and the main academic decision making bodies (usually senate/academic board and their committees); ensuring clarity in the role of the governing body in determining matters with significant academic content; encouraging the governing body to support core academic values (including academic freedom); and providing advice on how the effectiveness of academic governance can be assured. All these - and others - are addressed below.

9.3 Depending upon institutional arrangements there are typically two different roles that the clerk will have in relation to academic governance. First, in many HEIs (particularly but not exclusively in pre-1992 universities) the clerk - often in the capacity of a registrar and secretary or similar position - will provide secretarial and support services for both the governing body and the senate/academic board. This integrated approach to the role has a number of advantages, most obviously that the clerk is able to ensure an optimal flow of business. Second, the position in most other institutions where the clerk only supports the governing body, and the servicing of the senate/academic board is undertaken by others. One of the challenges for clerks who operate under this approach is ensuring that effective communication is maintained between the governing body and the academic committees, and that the danger of the two bodies being cut off from each other is avoided.

9.4 A further complication for the clerk in fulfilling either of these roles, is whether the senate/academic board is formally a sub-committee or not of the governing body. This is often the case in post-1992 institutions, and therefore a clear reporting relationship should exist, even if a clerk may not be responsible for ensuring its provision. However, even where no formal reporting relationship exists, it is important to ensure a satisfactory flow of information.

What is Meant by Academic Governance?

9.5 New clerks will find that there are a number of different uses of the term 'academic governance' within higher education, which will help to shape their responsibilities in this area. If they are lucky there may be a relatively consistent usage within their own institution: however this cannot be assumed! Across the higher education sector as a whole there are at least three different 'understandings' of the term in common use:

- a) *Academic governance is about responsibility for key academic issues such as determining curriculum, course approval, and ensuring standards.* This is the narrowest definition and is widely used in the post-1992 HEIs and colleges and also in some pre-1992s. It focuses attention on the issues which are at the heart of the academic enterprise, that generally the governing body does not (and should not) get involved in. Of course, some HEIs using this definition may still wish to consult their senates/academic boards on major academic policy issues, but this should not be confused with responsibility, which in post-1992s is clearly with the governing body who have a responsibility for "determining educational character".
- b) *Academic governance is about all substantial aspects of governance which directly involve the academic life of the HEI.* This is the broadest definition, and much wider than that in (a). It is most often found in those universities where a strong sense of academic collegiality exists, and where the culture of academic participation in decision making remains strong. In such institutions the senate is likely to be involved in a very wide range of decision making, and what is 'academic' may be determined quite liberally. The interaction between the governing body and the senate may be a matter of some sensitivity, and the role of the governing body in relation to relevant academic matters may, in practice, be small or even non-existent.
- c) *Academic governance is about what senate/academic board and their committees actually do.* This is a broader definition than (a) but narrower than (b). It arises because in practice in many HEIs the actual roles of the senate/academic board have changed considerably in the past few years, even though their formal responsibilities as defined in governing instruments may not have changed. Particularly in some pre-1992 universities this means that although a senate may still have wide ranging powers they are, in fact, rarely used. As a result the responsibilities of these bodies vary widely even in quite similar universities. It also means that in some institutions there may be significant differences of understanding about the roles of key academic committees.

The Role of the Governing Body in Academic Governance

9.6 This is one of the most difficult areas of governance, often compounded by a lack of clarity about what academic governance actually means. A frequent concern of many external governors is that they often have little information provided to them about the main outputs of the institution: teaching and research. In many HEIs the governing body has had - in practice - little role in academic governance, apart from (usually but not always) receiving the minutes of the senate/academic board. Indeed there are numerous examples where even academic decisions with significant potential resource implications (for example, closing a department or faculty) have been made without reference to the governing body. However, this is now changing in most HEIs, and the formal responsibilities of the governing body for oversight in this area are increasingly being implemented in practice. For a more detailed discussion of the role of the governing body in this area see the LFHE/CUC publication 'Getting to Grips with Academic Standards, Quality and the Student Experience'²⁸.

9.7 There are at least two clear elements to such developments: first, the statement in the Governance Code of Practice in the 2009 CUC Guide that the governing body has "unambiguous and

²⁸ See www.lfhe.ac.uk/governance/govpublications/academicstandards.pdf

collective responsibility for overseeing the institution's activities", and second, the formal requirement in the articles of post-1992 universities and most colleges of higher education that the governing body has responsibility for "determining the educational character" of the institution. Against this background it is now difficult for any institution to argue that its governing body should have no role at all in academic matters. Moreover, in the last few years the changes in student funding and the increased importance of ensuring student satisfaction have meant that almost all governing bodies have an active interest in this area, and that the boundaries between what is - and what is not - a governing body matter have changed. All the UK HE funding bodies now make the assumption that governing bodies have an active interest in this area.

9.8 As a result, in most HEIs the governing body - and therefore the clerk - now have numerous interests in academic governance and associated student issues. Although these may vary between institutions, in most cases they are likely to include ensuring that:

- Those aspects of governance concerned with wholly academic issues are dealt with effectively and in a manner that has the confidence of the academic community.
- Processes and reporting mechanisms are in place to monitor that the desired student experience is delivered, although the governing body would normally want to take advice from the senate/academic board on what the indicators for this should be²⁹. One specific issue arising is the amount of information about the student experience and academic quality that is presented to the governing body. Practice on whether information such as QAA reports and the results of the national student survey are provided to governing bodies varies widely, but increasingly HEIs are making this information available. Indeed some clerks produce a special paper for the board which includes the QAA executive summary, a brief internal commentary, and report on key recommendations for action. Some audit committees also receive such information in order to take a more generic view of audit.
- Approval is given to the academic strategy of the institution on the advice of the executive and - where appropriate - the senate/academic board, and that its achievement is monitored.
- An appropriate financial policy exists in relation to issues such as student fees, and the development of the academic infrastructure.
- Those areas for which the governing body is explicitly responsible are informed by academic needs, for example, that the HR strategy takes account of the requirements of academic delivery.
- The 'standard' governance disciplines of ensuring effective audit and risk management are applied to academic activities, and that governors are informed of the results.
- That the HEI has a coherent internationalisation strategy that takes realistic account of academic and student issues.
- The responsibilities of the governing body for some aspects of the conduct of student affairs are effectively undertaken, for example maintaining a code of practice setting out procedures for meetings held on the institution's premises and the conduct of those expected to attend.

9.9 In ensuring that the specific responsibilities of the senate/academic board are exercised effectively, attention will focus on core academic issues such as determining curriculum, course content, assessment, course approval and validation, and other strictly academic matters. It is an

²⁹ See the CUC Report on the Monitoring of Institutional Performance and the Use of Key Performance Indicators, 2006 at www.bcu.ac.uk/cuc/publications

important principle that governing bodies should - in normal circumstances - *never* intervene in such matters, as they lie at the heart of academic freedom, and the clerk should advise accordingly. However, the governing body should ensure that appropriate processes are in place to carry out academic governance in these areas in a robust and transparent way.

Relationships Between the Governing Body and the Senate/Academic Board

9.10 In many HEIs there will be major issues for the clerk to deal with in ensuring clarity in the interaction between the governing body and the senate/academic board. There may be sensitivities here, with some academic staff feeling that any move towards a greater involvement by the governing body in academic matters may be a potential threat to the participative systems of decision making that they may have operated in the past.

9.11 In practice, relationships between these two bodies vary widely in different institutions. In some cases there may be almost no interaction at all, and the only form of contact may be the minutes of the senate/academic board going to the governing body (their minutes may not go the other way), coupled with some joint membership - most notably the vice-chancellor/principal. Conversely, in other cases there may be substantial joint working, for example through mechanisms such as: joint committees, joint awaydays on relevant topics, external members of the governing body attending senate/academic board meetings as observers, and so on. Because of the information load on governing body members it is probably unrealistic to expect them to read senate/academic board papers for information, although some clerks produce a short summary which outlines issues which are not recorded in the minutes.

9.12 In providing suitable information flows between the governing body and the senate/academic board, the clerk will need to address numerous issues of detail. New clerks will inherit existing arrangements, and in the short term will generally want to continue them. However, a change of clerk might be a useful time to explore with the chair of the governing body and the executive whether existing information flows between the two bodies (both formal and informal) are optimal, and if not what changes might be made. A new clerk should not, however, assume that all senior managers welcome greater engagement between the governing body and senate/academic board, and where such a position is taken it may be best to address it through an effectiveness review (see Chapter 10).

9.13 For most institutions, a partnership approach to academic governance is likely to be most productive, which emphasises the separate responsibilities of the bodies concerned but also the need for close collaboration if effective academic governance is to be achieved. In such circumstances, most clerks regard it as one of their roles to ensure that lay members of the governing body are informed about academic issues and - at a minimum - have opportunities to get to know and understand the institutional culture so that they can appreciate the nature of academic governance. Particularly in post-1992 HEIs governing bodies may struggle to understand the operation of the academic board, as the limited representation of staff can mean that academic issues and opinions are not fully heard.

9.14 These kinds of issues are leading a number of institutions to devise new forms of dealing with academic matters, which bridge the traditional academic and non-academic responsibilities of the governing body and senate/academic board. Joint committees are probably the most widespread way

of doing this (although some HEIs resist them for removing accountability from the governing body), but there are other approaches - for example, one university has introduced an education committee as a sub-committee of its governing body (with academic staff members), as a focus for the development and monitoring of its education strategy. Such innovations are likely to become more common in the future.

Ensuring Effective Governance in Relation to FE

9.15 For the small number of HEIs which receive funds directly from the FE funding bodies for teaching FE students, there is a small - but significant - additional issue of academic governance in ensuring compliance with regulatory requirements (including OfSTED in England). In general, governing bodies in further education colleges are expected to have a more direct involvement in academic affairs than is typical in higher education, and these expectations also apply to FE students enrolled in HEIs. In such institutions the arrangements which apply for ensuring effective academic governance for HE provision may not be suitable for FE funded work.

9.16 In those institutions affected, clerks will need to be alert to the issue and ensure that specific arrangements are in place to satisfy the funders. A common mechanism for trying to address the problem is to establish a separate FE sub-committee of the governing body, but this alone may not resolve all difficulties as the relationships (and potential conflicting responsibilities) between such a sub-committee and the academic board may also need to be addressed.

Effectiveness Reviews of Academic Governance

9.17 For many clerks the issues described above will come together in relation to ensuring that effectiveness reviews of academic governance are undertaken. Although a small number of HEIs have done this in the past, new impetus was provided by the Code of Governance Practice in the CUC Guide which recommended that a review of effectiveness of the senate/academic board and its committees should be undertaken. The wording of the proposal does not suggest that this should necessarily be undertaken by the governing body, but rather that the governing body should ensure that it is done.

9.18 Although reviewing some of the basic business processes of the senate/academic board should not be a problem for most HEIs, conducting more fundamental reviews of effectiveness will be a challenge for many. There are numerous issues for clerks to consider here, and some of the complications include:

- Most notions of effectiveness are based on the achievement of intentions or defined objectives and seek to measure impact. However, some aspects of academic governance may not be well defined. Any HEI wanting to undertake a review therefore has to answer the question: what do we mean by effective academic governance and/or what is an effective senate/academic board?
- Assessing effectiveness based on the formally defined duties of senate/academic board and committees may be difficult because of differences between their terms of reference and their role in practice.

- Some of the main benefits of senates/academic boards are informal, ie they act as 'sounding boards' and provide opportunities for consultation. How can the effectiveness of these be measured?
- The size of senates/academic boards varies widely. For very large boards is it necessary to think about effectiveness of governance arrangements in a different way?

9.19 Some of these questions are challenging and may require some rigorous - and perhaps uncomfortable - thinking within institutions, in which the clerk should be centrally involved.

Self-Challenge Questions

- 1 How is the term 'academic governance' understood in your own institution?
- 2 Are the formal responsibilities of the senate or academic board in your institution actually carried out in practice?
- 3 Do members of the senate/academic board, the governing body, and the executive all have a shared view of the way that academic governance is carried out? If not what are the implications for governance and your role as clerk in the institution?
- 4 How effective are the relationships between the governing body and the senate/academic board in your own institution? In what ways - if any - could they be improved?
- 5 Do members of your governing body get enough information on academic matters to enable them to meet their responsibilities?

10 Reviewing the Effectiveness of Governance: the Role of the Clerk

10.1 The last few years have seen much greater interest in the issue of governing body effectiveness, indeed this Guide is one aspect of that. In this final chapter, the role of the clerk in helping to review effectiveness is considered and some practical steps suggested. However, it is not intended to be a full account of all issues in board effectiveness, rather an introduction for the new clerk; further information is contained in the sources cited in the Bibliography in Annex E of which probably the most important are two joint publications by the LFHE and the CUC: 'What is an Effective and High Performing Governing Body in UK Higher Education?'³⁰ and 'A Framework for Identifying Governing Body Effectiveness in HE'³¹. The issues briefly considered below include: a summary of why interest in governance effectiveness has developed; the growth of the role of the governing body in measuring performance, and the implications for the clerk; how effectiveness can be defined and the implications for conducting effectiveness reviews; and lessons that can be learned from how HEIs have gone about conducting effectiveness reviews to date.

Why Has Interest in Governance Effectiveness Occurred?

10.2 There are several reasons why interest in governance effectiveness has grown, including:

- The impact of private sector failures in corporate governance, and the need for higher education to respond to the many subsequent reports and the UK Corporate Governance Code³² (see Annex E).
- The general growth of a concern about accountability and value for money in the use of public expenditure.
- The approach of governments to 'modernise' the public sector, and the need for HEIs to be seen to be responding to that policy.
- The increase in competitive pressures on HEIs (local, regional and global) leading to an increase in risk.
- That the traditional distinction between academic and non-academic governance is breaking down, as more issues have resource or risk implications (including reputational risk) with a consequent increase in the work of the governing body.
- Pressure from all the UK HE funding bodies.

10.3 One factor not included in this list is the consequence of previous poor governance, and views on this differ. Although in the past HE has generally had a good record of avoiding major governance failures, it is clear that the occasional failure of governance (see 'What Can Go Wrong?' in Chapter 2) has made the funding bodies nervous about aspects of governance, a view inevitably reinforced by a very small number of HEIs being seen to be 'at risk'.

³⁰ Schofield A, (2009), LFHE and CUC, 'What is an Effective and High Performing Governing Body in UK Higher Education?' at www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

³¹ LFHE and CUC, (2010), A Framework for Identifying Governing Body Effectiveness in HE at www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

³² See www.frc.org.uk

10.4 Nevertheless, it would - in general - be a mistake to argue that further work on governance effectiveness is unnecessary, and there are numerous examples where problems have occurred even though all those involved thought that existing arrangements were satisfactory. For example, the QAA has been critical of the governance arrangements in some overseas franchises in HEIs where other aspects of governance were robust. It is also clear that there are examples of relatively ineffective governance in the sector where governing bodies have not fulfilled their strategic and oversight responsibilities to the full, even though the institution concerned remains financially sound. In other words, one test of governance effectiveness is not whether an HEI has had problems in the past, but whether arrangements are robust enough to ensure (as far as possible) that it won't have problems in the future in an increasingly competitive environment.

10.5 It is important for clerks to note that such developments are not just occurring in the UK, but that enhancing governance is of international interest. For example, some 52 countries³³ are reported to have codes of practice for company governance, encompassing a range of legal systems and cultural and political contexts. In Australia a national framework for governance in higher education has been established and all institutions now comply with its provisions. There has even been discussion of an international standard for university governance proposed by the OECD. In the USA, tighter legal regulation on private sector boards was introduced in the Sarbanes-Oxley Act, and US universities have taken steps to meet Sarbanes-Oxley provisions. The US Association of Governing Boards of Universities and Colleges (AGB) has published a statement on board accountability³⁴, which contains guidelines on fiscal, academic and other responsibilities, and a set of self-assessment questions for board activity including ways in which Sarbanes-Oxley provision is being met.

The Governing Body and Performance Measurement

10.6 In November 2006 the CUC produced a report on key performance indicators (KPIs)³⁵ which explicitly recognised the responsibility of governing bodies for monitoring the measurement of institutional performance. In many HEIs the clerk will, therefore, have a key role in ensuring that KPI data is presented to the governing body in an agreed format, so the CUC report is essential reading. From an effectiveness point of view one of the crucial outcomes of the KPI report is that it is now explicit that any review of effective governance must include how a governing body has met its responsibility for institutional performance measurement. Of course, some boards have used KPIs for this purpose for some while, but in others performance measurement has primarily been the domain of senior university managers with the governing body perhaps discouraged from looking too closely at the issue of how overall institutional performance could be enhanced.

10.7 There is - correctly - no suggestion in the CUC report that the governing body should be involved in the detail of data collection, nor that their role should conflict with the management responsibilities of the executive, but rather that "governors will be conscious that they can only exercise responsibilities by working in partnership with the executive officers of the institution....based on a clear understanding of the different roles (and mutual inter-dependence) of governors and executives".

³³ www.ecgi.org/codes/all_codes.php

³⁴ See www.agb.org

³⁵ CUC, *Report on the Monitoring of Institutional Performance and the Use of Key Performance Indicators, November 2006*, www.bcu.ac.uk/cuc/publications

10.8 In summary, the CUC report suggests up to ten areas where governing bodies need to determine KPIs: institutional 'sustainability'; academic profile and market position; the student experience (including the quality of learning and teaching); research; knowledge transfer; financial health; estates and infrastructure; staffing and human resource management issues; governance, leadership and management; and institutional projects. In all cases the intention is to develop institutionally specific indicators which are central to the achievement of strategy and mission, and where possible for the KPIs to focus on output or outcome measures. What is explicitly *not* proposed is the use of indicators for public purposes, or for national inter-institutional comparisons. Indeed, there is widespread concern about the media producing 'league tables' of aspects of institutional performance, irrespective of the statistical reliability of the data or the methodological difficulties of doing so.

10.9 The development of such KPIs and the involvement of the governing body raises a number of interesting challenges for the clerk, including the amount of detail provided to boards and the extent to which often highly specialised information can be presented in a succinct and helpful way to board members. To do this, a number of HEIs are using approaches such as the balanced score card, often coupled with so-called 'traffic light' systems whereby coloured indicators are regularly provided in board papers to enable members to see at a glance how specific indicators show performance.

How Can Effectiveness Be Defined?

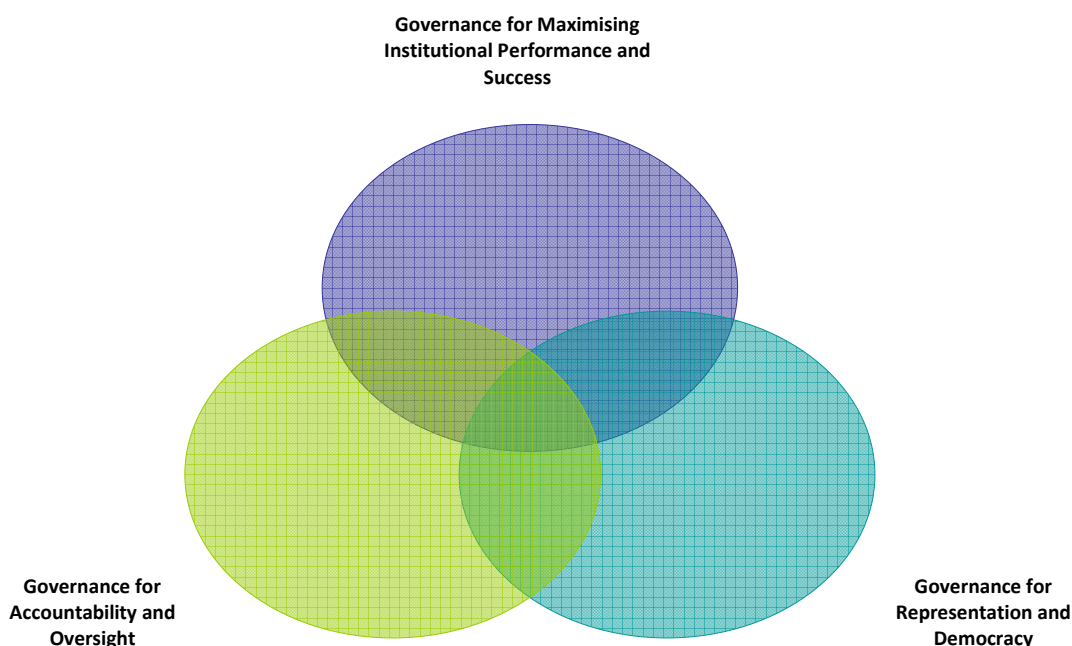
10.10 It would be relatively easy for the clerk to recommend reviewing governance effectiveness simply against the guidance produced by the CUC and other sector bodies, and take a 'tick-box' approach to complying with their requirements. But would that mean that the governing body was really effective in practice, particularly in terms of its particular role within the institution? In any case, there is a danger in a mechanistic view of equating effectiveness with complying with external requirements or codes rather than addressing internal needs and responsibilities. The clerk must therefore ensure that there is a balance maintained between using relevant guidance and ensuring that institutional requirements are met. But underpinning such issues is a basic question: what does a really effective governing body look and feel like?

10.11 Unfortunately for the clerk there are no straightforward answers, although a substantial amount of work has been done in UK HE in the last few years to answer the question (mainly by the LFHE and CUC). Perhaps the first thing to note is that much of the concept of 'effectiveness' is situation and time bound. In other words, the context of the institution, the membership of the governing body, the business it is considering, and many other factors, all have a role to play. It is therefore important for members of the governing body, and those working with them, to think about what 'effectiveness' means to them. It can also be helpful to discuss the concept to reach some broad agreement and understanding before trying to conduct effectiveness reviews. New clerks should also recognise that whilst there is a general consensus amongst the HE funding bodies and key stakeholder groups about the approach to governance in HE, there are some significant dissenting voices who think that there are dangers in adopting what might be seen as 'private sector' approaches.

10.12 The second issue is that the concept of board effectiveness is very much related to the key roles that the governing body plays and how this is understood within an HEI. Although all undertake their responsibilities as defined by the main regulatory documents, in practice governing bodies in HE

operate in different ways. These tend to come about for three different reasons: tradition; the personal preferences of the governing body chair or head of institution or both; or a deliberate decision of a governing body to adopt a particular way of working.

10.13 The following diagram³⁶ identifies three main types of governing bodies in UK HEIs based on their primary purpose, and has been found useful by some boards in identifying their key role. All three purposes are legitimate within appropriate settings, but they may not be consistent with each other and in times of significant change may actually conflict. They can be represented as follows:



10.14 Governance for 'Accountability and Oversight' as depicted in the diagram has traditionally been the dominant (although not sole) purpose of governance in much of HE. This includes ensuring compliance with legal and regulatory requirements but goes much further to include general oversight of the head of institution and executive.

10.15 Governance for 'Maximising Institutional Performance and Success' is the dominant (although not sole) purpose of good governance in the private sector, and most writing about board effectiveness is based on this purpose. It does, of course, include oversight of the executive but goes much further into an active role in developing and monitoring institutional strategy and everything associated with it. As noted above, many HEIs are moving in this direction and see this as the primary purpose of their governing bodies, a move not only encouraged by a competitive HE market place, but also by specific initiatives such as the adoption of KPIs.

³⁶ Schofield A et al, (2009), *A Review of Governance and Strategic Leadership in English Further Education*, Association of Colleges and the Learning and Skills Improvement Service

10.16 Finally, governance for 'Representation and Democracy' is the dominant (although not sole) purpose of governance in many social organisations, and here the focus is on engagement, participation and democracy, and much academic governance is based on this ideal. Staff and student participation are the most obvious manifestations of this in HEIs, and the issue has been emphasised by the recommendations of the Prondzynski review in Scotland³⁷.

10.17 Although in real life governance is obviously more complex than represented in the diagram, numerous issues follow from this typology:

- Where there is a lack of shared purpose there is a danger of governance becoming ineffective, which may be particularly acute in the area of the diagram where the three circles overlap.
- Implementing each approach has substantially different implications for governance structure, board size, membership, the definition of board effectiveness, and so on. For example, governing bodies mainly for oversight purposes can be quite large, whilst those substantially engaged in monitoring institutional performance tend to be smaller.
- The primary purpose of governance may vary under different circumstances, for example oversight may be generally appropriate in times of stability and where a board has justified confidence in the executive, but not in different circumstances.

It follows that clarifying the key role and primary purpose of a governing body is increasingly important as the basis for any substantial enhancement in the effectiveness of governance.

10.18 Once the primary role of the governing body has been determined then an agreed basis for determining effectiveness has been created. To help HEIs the LFHE and CUC have developed a governing body effectiveness framework which enables institutions to 'map' the most important factors which determine effectiveness³⁸. This map is based on three main factors: first, all the enabling structural and process issues which create the foundation for effectiveness (effective membership etc); second, healthy working relationships and board dynamics; and third a range of possible outcomes by which board effectiveness really adds value. It is suggested that new clerks look at this framework and consider which of the many factors involved are most relevant to their own board.

10.19 In practice, the processes underpinning the work of the governing body are generally relatively easy to review in terms of effectiveness because the clerk is invariably responsible for the management of governance within the institution. Less easy are issues of relationships, but their importance to the dynamics of board decision making means that greater attention needs to be paid to 'how boards work' rather than 'what boards do'. Of course, this may be challenging for the clerk who has to work with, but remain independent from, other members of the governing body and even be prepared to act in the interests of the institution if things go wrong. The message here is that clerks cannot create really effective processes without considering their impact on the people that have to work with them. A considered and questioning approach to the operation of governance is therefore required if the clerk is successfully to get behind, and understand, some of the contributing factors to governing body effectiveness. In doing so, a clerk might benefit from some independent perspective.

³⁷ von Prondzynski F, *Report of the Review of Higher Education Governance in Scotland, 2012*
See www.scotland.gov.uk/Resource/0038/00386780.pdf

³⁸ The Framework is available at www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

Conducting Governance Effectiveness Reviews

10.20 All of the above suggests that getting the most from effectiveness reviews of governance is not easy, and that the clerk needs to be very clear about what is required. Two separate but related decisions need to be considered with recommendations for action made to the board: what purpose is an effective review trying to achieve and what methods should be used? In general, it is a mistake to choose methods before purpose, for example to issue a questionnaire or employ an external consultant without clarifying what is needed.

10.21 Faced with the potential difficulties of engaging in effectiveness reviews, it may be useful for the clerk to reflect on how other HEIs have gone about the task. The recommendation in the CUC Guide that governing bodies should undertake regular effectiveness reviews (at least every five years) has given rise to some interesting developments, and in England HEFCE have strongly encouraged an external element to reviews in order to provide an independent perspective. Almost all HEIs have now conducted at least one effectiveness review of their governing bodies (and most have done more), and some of the lessons learned³⁹ are that:

- The value of effectiveness reviews appears to vary between HEIs. In general, it seems that those institutions where the clerk and the board have thought deeply about it and have a commitment to enhancing governance have benefited most. Conversely some HEIs that have conducted relatively superficial reviews report little resulting benefit.
- In their first round of reviews most HEIs concentrated on the processes of board meetings (information flows, etc), and only more recently have some started to review the performance of boards and ask fundamental questions about their role and value.
- Where benefits have been reported the main ones have been: clarifying the role and responsibilities of governing bodies; changing the size and nature of board membership; improving the conduct of business; enhancing the nature and presentation of information; enhancing the strategic role of boards; and encouraging support, training and induction of board members. Given the initial focus on process issues these benefits are not surprising.
- Many HEIs have used surveys of board members, but the value of these has been mixed depending upon survey design, the types of questions asked, and the willingness of participants to be constructively critical. Surveys based on members' satisfaction may be useful, but satisfaction can also be a poor measure of effectiveness.
- In second or subsequent reviews there appears to be more use of external advisers who may be able to probe in more depth than could be done in an internal review.
- Depending upon the nature and outcome of effectiveness reviews there is a danger of 'review fatigue'. Although the CUC recommends a review not less than every five years, in a time of rapid change for governance some HEIs may choose to undertake them more regularly. Informal evidence suggests that review fatigue is minimised when they are undertaken in a considered and purposeful manner.

10.22 Assuming that the clerk and the HEI are committed to a robust and constructive effectiveness review, the clerk needs to ask him or herself what specific aspects of effectiveness need to be

³⁹ *CHEMS Consulting: A Report to the CUC on: Good Practice in Six Areas of the Governance of HEIs, October 2004. Chapter 9 pp 76-89. Available from www.bcu.ac.uk/cuc/publications*

reviewed and why, and then make a recommendation to the board chair. A starting point for this might be to use the LFHE-CUC effectiveness review framework mentioned above. Only by being clear about what is to be reviewed can HEIs create the conditions whereby governance is seen to be 'fit for purpose'.

10.23 Once the scope of a review has been determined, there are two other key questions to address: what data sources should be used, and who should conduct the review? So far as the first question is concerned the following data sources are typically available in undertaking effectiveness reviews and many can be used in combination with others. There is no 'best method', and what approaches to use largely depends on the purposes selected above and the time/cost involved:

Data Sources	Typical Advantages	Typical Drawbacks
1 Effectiveness questionnaires to governors	<ul style="list-style-type: none"> - Relative ease of use. - Standardised responses allow statistical analysis and give a sense of the breadth of issues. - Mainly useful for 'straightforward' issues. 	<ul style="list-style-type: none"> - Lack in-depth analysis. - Typically ask about governor satisfaction which may be a poor guide to effectiveness. - Not often useful for 'complex' issues.
2 Effectiveness questionnaires to an executive about the governing body	<ul style="list-style-type: none"> - Relative ease of use. - Standardised responses allow statistical analysis. - Mainly useful for 'straightforward' issues. 	<ul style="list-style-type: none"> - Lacks in-depth analysis. - Not often useful for 'complex' issues. - Below VC level an understanding of governance is not always well formed.
3 Workshops/ focus groups	<ul style="list-style-type: none"> - Relative ease of use. - Resource and time efficient. - Builds on existing teamwork. 	<ul style="list-style-type: none"> - Some key issues may be too sensitive to be discussed. - Existing relationships in a board may make this difficult. - Tendency towards 'group think' in identifying issues. - Needs to be undertaken by someone with suitable skills and experience.
4 One-to-one interviews	<ul style="list-style-type: none"> - Flexibility and depth. - Essential for 'complex' or challenging issues. - Neutrality when undertaken by someone independent. 	<ul style="list-style-type: none"> - Time consuming. - Tends not to provide standardised responses if these are required. - Needs to be undertaken by someone with suitable skills and experience.
5 360° reviews	<ul style="list-style-type: none"> - May combine 1-3 above. - When done electronically can be resource efficient. 	<ul style="list-style-type: none"> - May combine 1-3 above. - Undeveloped within HE partly because of the difficulties and sensitivities involved.
6 Documentary analysis, internal audit reports and similar	<ul style="list-style-type: none"> - Basic foundation for reviews providing useful data on process and compliance issues. 	<ul style="list-style-type: none"> - Tend not to be performance oriented. - Tend to be based on previous practice rather than future need. - Tend to be based on generalised

		<p>notions of 'good' practice rather than innovation.</p> <ul style="list-style-type: none"> - What documents record is usually only one small part of the governance story.
7 Comparisons with other institutions/ benchmarking	<ul style="list-style-type: none"> - Potentially provides valuable comparative data. - Needs to be accompanied by one of the other data sources. 	<ul style="list-style-type: none"> - Difficulty of obtaining data, including selecting comparators. - Interpreting qualitative comparative data.
8 Analysis of recent key board decisions	<ul style="list-style-type: none"> - Looks at strengths and weaknesses of outcomes in practice. 	<ul style="list-style-type: none"> - Needs to be undertaken by someone with suitable skills and experience - neutrality may be useful. - May be sensitive where major problems are reviewed. - Some boards and board chairs do not like 'looking back'.

10.24 So far as the issue of who conducts the review is concerned, notwithstanding the guidance of HEFCE in England that an external input is desirable, the main choices typically are:

Who Undertakes the Review?	Typical Advantages	Typical Drawbacks
Governing body chair	<ul style="list-style-type: none"> - Speed and convenience. Other advantages depend on the chair. 	<ul style="list-style-type: none"> - Lacks independence. - Tends to personalise the review process. - Unlikely to be sensitive to issues caused by the chair.
Governing body review group	<ul style="list-style-type: none"> - Speed and convenience. Other advantages depend on the group. - Can be helpful in developing a self-reflective approach to governance. 	<ul style="list-style-type: none"> - May lack independence. - Members may be perceived to have set opinions (eg on board size etc). - Likely to need extensive support by governing body secretariat.
Internal audit	<ul style="list-style-type: none"> - Knowledge of institution. - Availability. 	<ul style="list-style-type: none"> - Only as good as the auditors! - May be too focussed on compliance and process. - If review outcomes are contentious it may compromise their ongoing internal audit role. - Possible cost if internal audit is undertaken by an external firm.
External adviser/ consultant	<ul style="list-style-type: none"> - Independence. - Potential expertise in conducting similar reviews, and sector wide knowledge of practice. - Other advantages depend on the 	<ul style="list-style-type: none"> - Possible cost. - Need to ensure careful selection, and that adviser expertise exactly matches board requirements.

	individuals selected.	
Senior figure from another HEI (eg a board chair or senior administrator)	<ul style="list-style-type: none"> - Independence. - Status and credibility. - Other advantages depend on the individual selected. 	<ul style="list-style-type: none"> - May have strong personal views or experience of only one type of HEI which limit applicability of advice. - Need to ensure careful selection, and that adviser expertise exactly matches board requirements.

The Future

10.25 A number of potentially difficult issues concerning governance in HE generally remain to be tackled, and will increasingly be highlighted by effectiveness reviews. These include but are not limited to:

- In some HEIs a continuation in the reduction in the size of governing bodies and the desire to introduce smaller high performing boards that would be closer in operation to those of private sector companies. In general, those taking this view find the current membership of boards too large for effective meetings, and also see the membership of staff and students as a constraint on taking a rigorous strategic view of institutional sustainability. However, although potentially more efficient in operation, such boards run the risk of a lack of independence from the executive, and may require consideration of whether additional checks and balances need to be introduced, for example some kind of second tier body.
- Coupled with this is the issue of whether the voluntary principle for external board members should be abandoned and remuneration of some kind introduced. Although the idea is not currently favoured within most HEIs (and may raise issues about the ability of board members to serve as charitable trustees), in the long term it may be almost inevitable in relation to the workload and responsibilities involved, and is likely to change significantly the character of governing bodies.
- Any substantial restructuring of HE (whether planned or due to market forces) raises the issue of institutional mergers and collaboration, and whether governing bodies are able to exercise effective leadership in ensuring that a vulnerable HEI acts proactively either in its own best interests or in those of the community it may serve.
- Conversely, challenges to future effectiveness reviews are likely to come from those who argue a completely opposite position from those who want smaller boards, and question the extent to which boards with a majority of external members can ever be informed enough to provide an adequate check on a misguided or overambitious executive.

These are difficult and challenging issues that clerks may have to assist their governing bodies to address.

Self-Challenge Questions

- 1 As clerk, how much do you know about the development of modern approaches to governance in other sectors, and the possible impact on governance in higher education?

- 2 How rigorous have been the effectiveness reviews of governance conducted in your own HEI, and did they get to 'the heart' of issues concerning the performance of the governing body and committees? If not, why not?
- 3 For the next effectiveness review of governance, what will you recommend to your chair might be done differently from before, and why?
- 4 What are the main obstacles - if any - that you see in relation to substantially enhancing the effectiveness of your governing body?

Case Study 10: A Proactive Board?

As clerk to the governing body you are content that the board is meeting all its formal regulatory and compliance responsibilities, but you are concerned that it may not be involved as much as it should be on issues concerning strategy, measuring performance and general institutional development. However, neither the vice-chancellor/principal nor the chair of the governing body seems particularly worried about this. As clerk, what options do you have for taking your concerns forward, and what are the advantages and drawbacks of each?

Case Study 10: Suggested Action

As clerk you have a responsibility to the governing body as a whole and you should continue to voice your concerns. Ideally, you should seek separate meetings with the chair and the vice-chancellor/principal to discuss the issue. At these meetings you should point out the advice in the CUC Guide and the relevant HE funding body, and the possibility that the operation of the board may not meet expected standards if the agenda items do not sufficiently encourage engagement with key strategic and development issues. You should also point out that best use is not being made of the expertise offered by the board members. Depending on the response of the vice-chancellor/principal a joint meeting might be held with the chair (which he/she should be briefed about first). The advantage of speaking to the vice-chancellor/principal first is to ensure that he/she does not feel the clerk is criticising senior officers or suggesting 'weakness' without discussing such matters first. If you fail to persuade the vice-chancellor/principal, then you need to remember that your primary responsibility is to the chair, and you would need to discuss the resulting issue with him/her. Overall, a useful outcome would be to obtain their joint agreement to having the matter discussed by the governing body itself. An 'awayday' devoted to discussing the strategic framework might be seen as a less 'threatening' approach to dealing with this issue.

Case Study 11: The Use of Time and Skills of Board Members

A couple of relatively new external members of your governing body have mentioned to you that they don't think their time and skills are being used effectively. They have observed that too much of their time is spent in unproductive meetings and on topics where they have no knowledge, and conversely too little time is spent in areas where they can use their expertise to best effect. As clerk looking at your own governing body overall, how true is this assertion about the membership (and particularly the external membership) in general?

Case Study 11: Suggested Action

It is quite common for individual governors to feel that their time and skills are not being used as effectively as they might, and in deciding what action to take it is important to clarify the reasons for this. For example, their discontent may stem from governance processes that are ineffective, and where the governing body spends too little time talking about important issues, and too much time on detail. In such circumstances there is a need for the governing body to review its effectiveness, and ensure that the time of its members is better used.

However, even on well run governing bodies such feelings may exist, and one typical response to this is that members are given an opportunity to serve on sub-committees that better suit their skills. This should be considered by the nominations committee as part of its annual assessment of governor skills and expertise. Another response is for the chair, on behalf of the governing body, to ask individual members to take a particular interest in specific areas of activity eg finance, estates, innovation etc, and to be prepared to speak about these at meetings of the governing body. However, it is important that individual governors do not become spokespersons or apologists for their area of engagement as this could affect their independence and their ability to remain detached from executive management.

Annex A: Suggested Case Studies Answers

Below are various short case studies of possible issues that a new clerk might face. Readers might spend a few minutes on each and note down what action they propose. Suggested answers are given on a subsequent page. (Note: the case studies have also been included at the end of each chapter of this Guide, in order to facilitate ease of use in the electronic version.) The suggested answers have been provided by a group of experienced clerks, but inevitably remain open to debate, and are not prescriptive, rather to encourage reflection in the context of substantial diversity of practice in HEIs

Case Study 1: Relations with the Executive

Your vice-chancellor thinks that what he describes as the current 'fashion' for governance has been over-emphasised, and in meetings with the executive he makes it clear that he does not want to encourage the governing body to play a more active role than has traditionally been the case. This has caused a number of small conflicts with the board, and as a result his relationship with the chair of the governing body is starting to become a little strained. In a private discussion with you, the vice chancellor has made it clear that as clerk you should not seek to encourage the governing body to become involved in discussions that - in his view - go beyond its remit. How do you respond, and what action - if any - do you take?

Case Study 2: Diversity of Membership

You have several forthcoming vacancies for external members of your governing body. In discussing how to deal with this, a couple of current members have said that more should be done to recruit high quality external board members from diverse backgrounds. Do you agree with them, and as the clerk what action might you take?

Case Study 3: Pre-Meetings

Several external governors have suggested that all external members should meet privately before board meetings without other members present. They think that it would enable them to explore some of the tricky questions that they find it difficult to raise in the full meeting with others present. As clerk what recommendation would you give to them and why? If internal members (ie those elected from staff) also wished to meet separately before meetings would your recommendation to them be the same, and if not, why not?

Case Study 4: Risk

Your governing body receives reports at each meeting based on your institution's risk management system. However, getting some senior managers to provide reliable data for the risk register is difficult, and there is a general view within the executive that risk management is a bureaucratic process suitable only for big issues such as new buildings. As a result there have been times when in your view the information that you have presented (as clerk) to the governing body has been less satisfactory than it should have been. You have raised this informally with senior managers, but the general response is that they are too busy and in any case the relevant committees keep in touch with the issues. What action - if any - do you take, and why?

Case Study 5: Minutes

The minutes of your governing body do not normally identify the contributions made by individual members, and generally try to record agreed action rather than summarising at length discussions that take place. However, one fairly new member consistently requests that his personal views are noted in the minutes, particularly where he disagrees with the majority view. At your suggestion the chair of the governing body has discussed it with him and tried to persuade him to change his mind, but he continues to insist that you as clerk to the governing body should note his personal views in the minutes. What action should you take and why?

Case Study 6: Late Committee Papers

Members of your governing body (including the chair) sometimes complain about papers being circulated at short notice or even tabled. In considering what might be done about this, you are aware that in some HEIs there is a policy that no late papers are ever presented except in unusual circumstances. As clerk, what do you see as the advantages and drawbacks of this approach?

Case Study 7: The Volume of Information

There are frequent observations by your governing body members about the volume of information that they have to digest for board meetings. Thinking of your own board procedures, as clerk what actions would you suggest be taken to ensure that both the amount and the nature of the information presented to governing body members is optimal?

Case Study 8: Whistleblowing

A senior member of staff raises issues with you as clerk about the conduct of another senior member of staff. Both are senior postholders who are directly appointed by the governing body. What would you do?

Case Study 9: Declaration of Interest

The governing body for which you are the clerk has to nominate a lay governor to a panel to appoint the university's legal advisers. This is a potentially lucrative contract and the governing body has invited a member with a legal background to join the assessment panel. Prior to the panel meeting, the lay governor has mentioned to you that his son-in-law is a lawyer in one of the firms being assessed, though he is not part of the team appearing before the panel. Is this a significant potential conflict of interest, and if so what do you do?

Case Study 10: A Proactive Board?

As clerk to the governing body you are content that the board is meeting all its formal regulatory and compliance responsibilities, but you are concerned that it may not be involved as much as it should be on issues concerning strategy, measuring performance and general institutional development. However, neither the vice-chancellor/principal nor the chair of the governing body seems particularly worried about this. As clerk, what options do you have for taking your concerns forward, and what are the advantages and drawbacks of each?

Case Study 11: The Use of Time and Skills of Board Members

A couple of relatively new external members of your governing body have mentioned to you that they don't think their time and skills are being used effectively. They have observed that too much of their time is spent in unproductive meetings and on topics where they have no knowledge, and conversely too little time is spent in areas where they can use their expertise to best effect. As clerk looking at your own governing body overall, how true is this assertion about the membership (and particularly the external membership) in general?

Suggested Case Study Answers

Case Study 1: Suggested Action

Clearly there are numerous sensitivities here. As clerk your primary responsibility is to the chair and the governing body, and the vice-chancellor may need to be reminded of this. This may include pointing out that you cannot do the job of the clerk effectively unless you are able to support directly the work of the governing body. Of course, it will be necessary firstly to assess the vice-chancellor's objections since these may be legitimate concerns, for example about the governing body seeking to influence executive management decisions or being too heavily involved in operational matters.

If the objections are unreasonable because the vice-chancellor is expressing concerns about the governing body's legitimate interests then this must be challenged appropriately and sensitively. A tripartite discussion between the chair, the vice-chancellor and the clerk might help to define boundaries. Ultimately, in extreme circumstances, the chair and the governing body as a whole will need to take the necessary action to resolve the situation.

Case Study 2: Suggested Action

There are several issues here. Formally, it is the role of the nominations committee to nominate potential members to the governing body, although the governing body itself has a responsibility to oversee the effective application of the institutional equality and diversity policies. It should therefore seek to recruit lay members from as diverse backgrounds as possible, but always on the basis that they also have the necessary skills and expertise that the governing body is looking for. It is the responsibility of the nominations committee to monitor the skills and background of members to ensure that a balance is achieved, and the clerk should advise accordingly.

In terms of good practice, the clerk should be encouraging the nominations committee to use a range of methods to identify potential members in an equitable way. These include the use of skill sets to determine the competences and characteristics that are sought in potential members; a proactive policy of succession planning; recruiting members by using means appropriate to the characteristics and skills sought (for example, by placing adverts in specific publications); as well as seeking nominations from a wide range of contacts who have links with the institution.

Case Study 3: Suggested Action

At a practical level it may be impossible to prevent groups of members meeting separately, but the practice should generally be discouraged by both the clerk and the chair. Members should be reminded that the governing body should always seek to act corporately and with transparency, and although they may be appointed by specific constituencies, they are not delegates of any body, section, person or interest. As such, members should always be seen as acting in the best interests of the governing body (and the institution) as a whole. Formally, external members can only meet for specific items without staff/student members and the clerk must always be present, an example being to receive reports of the remuneration committee.

The same advice should be given to internal members, ie it is the properly constituted board that has the authority not other groups unless specially specified. The governing body should also be able to demonstrate that a full and frank exchange takes place, and that sufficient challenge is part of their role and responsibility as members. Having said this, there may be occasions when such meetings help to clarify issues and may assist in resolving potential problems. The key here should be to be quite explicit that such a meeting has no formal status, and cannot take decisions.

Case Study 4: Suggested Action

One of the key responsibilities of the governing body is to be assured that risks are being effectively identified and managed. In practice, your action as clerk is likely to depend upon the previous involvement of the board, the robustness of the existing risk register, and so on. If this is not fully embedded, as clerk you might seek to contact senior managers indicating the governing body's legitimate interest in (and responsibility for) risk. It may be

necessary to draw the vice-chancellor/principal into these discussions and identify any reasons for concern ie that transparent management of risk is a requirement and is reviewed every year by internal audit. As such, it is very important and will be subject to critical comment if not properly managed and reported.

If this action is unsuccessful then you should consult with the chair of the governing body and/or the chair of the audit committee and encourage him/her to discuss the issue with the vice-chancellor/principal, or failing that to seek a resolution from the governing body to the effect that regular reports on risk management must be provided. Such reports may be via the relevant sub-committees but the process should be transparent.

Case Study 5 : Suggested Action

The individual should be reminded by you as clerk (or perhaps in a meeting with the chair with the clerk present) that the governing body takes decisions on a 'corporate' basis, and that while the comments of members should be reflected in the minutes the views of individuals are not normally recorded. If necessary this approach could be reconfirmed by the governing body. It is quite usual to record contra-opinions in minutes but it is not usual to record the names of individuals. Where a vote has been taken (perhaps on a particularly contentious issue) and an individual insists on having his/her objection noted this could be allowed. If the member still refuses to accept this and does not wish to accept the agreed procedures, the nominations committee should consider whether membership should be continued. If the governing body has a system for appraising the contribution of members then this issue should be raised by the chair (as appraiser) during that discussion.

Case Study 6: Suggested Action

It is important to have some rules, agreed by the governing body, about the submission of late papers. In general, late papers should be strongly discouraged but a total ban may be unhelpful to the governing body's effectiveness in dealing with issues that genuinely come up at short notice. Ideally, the chair and clerk should have some discretion in the matter, and there may need to be discussion with the vice-chancellor so that an assessment of the importance of the item in question can be made. If the item is of such magnitude that an urgent but detailed scrutiny is required the chair might consider calling an extraordinary meeting. What is not acceptable - and should never be encouraged - is the regular tabling of late papers, particularly when they concern important issues. Such a practice is almost guaranteed to make the governing body feel that it is a 'rubber stamp', and therefore lead to potential tension with the executive.

Case Study 7: Suggested Action

Making information digestible is a corporate matter and cannot be achieved by the clerk alone. However, an institutional forum for committee secretaries allows general guidance to be agreed and is a good way of achieving consistency. The use of a cover or summary sheet is also helpful in making papers easier to digest and assess. There are various formats for the cover sheet but most record the author(s), a summary, a brief description of risks and benefits and the action required by the governing body. This allows individual governors to assess how much of the detail they need to absorb.

Increasingly, clerks are using a range of approaches to try and manage the information flow, including: structuring the agenda which typically helps to provide a framework whereby the amount and nature of information can be considered, for example separating matters for report, discussion, and information, and circulating bulky information items as appendices where appropriate; using the institutional intranet for governors to circulate appropriate information; using presentational methods such as 'traffic lights' to highlight key issues. Of course, if handled inappropriately the reduction of information to governors might also lead to complaints!

Case Study 8: Suggested Action

As the clerk, your role is to receive the 'whistleblowing' allegations and advise members of the governing body about how the issue should be handled. First, you will need to ensure that you are fully aware of the whistleblowing procedures of your institution. Having done that (and assuming they are consistent with the following), you will need to advise the governing body chair about the case, and having done so seek his/her

approval that the vice-chancellor should be informed (in general terms). You may need to seek legal advice, notifying the chair and the vice-chancellor that you intend to do so. If the whistleblowing allegations concern the chair of the governing body, then the clerk is usually the designated contact to receive them and is may be required to refer such cases to the relevant HE funding council. In such cases legal advice should certainly be taken and the chair of the audit committee advised.

Case Study 9: Suggested Action

Most issues that arise around conflicts of interest and the need to declare them are relatively straightforward, and can be addressed by the clerk pointing out the issue to the governor concerned. However, complications can arise when a family member rather than the individual governor is involved. In this case, as the clerk you should advise the lay member that there is a potential conflict of interest, and that, despite the fact that the son-in-law is not directly involved, it would not be unreasonable for a member of the public to assume that if the panel appointed the firm in question then the assessment may not have been impartial. If the lay member does not agree, you should speak to the chair to advise him/her of your concern, and ask him/her to explain that the lay member should not serve on the panel. You will need to find a new external adviser. Managing a potential or perceived conflict is as important as managing an actual conflict.

Case Study 10: Suggested Action

As clerk you have a responsibility to the governing body as a whole and you should continue to voice your concerns. Ideally, you should seek separate meetings with the chair and the vice-chancellor/principal to discuss the issue. At these meetings you should point out the advice in the CUC Guide, and the possibility that the operation of the board may not meet expected standards if the agenda items do not sufficiently encourage engagement with key strategic and development issues. You should also point out that best use is not being made of the expertise offered by the board members. Depending on the response of the vice chancellor/principal a joint meeting might be held with the chair (which he/she should be briefed about first). The advantage of speaking to the vice-chancellor/principal first is to ensure that he/she does not feel that the clerk is criticising senior officers or suggesting 'weakness' without discussing such matters first. If you fail to persuade the vice-chancellor/principal, then you need to remember that your primary responsibility is to the chair, and you would need to discuss the resulting issue with him/her. Overall, a useful outcome would be to obtain their joint agreement to having the matter discussed by the governing body itself. An 'awayday' devoted to discussing the strategic framework might be seen as a less 'threatening' approach to dealing with this issue.

Case Study 11: Suggested Action

It is quite common for individual governors to feel that their time and skills are not being used as effectively as they might, and in deciding what action to take it is important to clarify the reasons for this. For example, their discontent may stem from governance processes that are ineffective, and where the governing body spends too little time talking about important issues, and too much time on detail. In such circumstances there is a need for the governing body to review its effectiveness, and ensure that the time of its members is better used. However, even on well run governing bodies such feelings may exist, and one typical response to this is that members are given an opportunity to serve on sub-committees that better suit their skills. This should be considered by the nominations committee as part of its annual assessment of governor skills and expertise. Another response is for the chair, on behalf of the governing body, to ask individual members to take a particular interest in specific areas of activity eg finance, estates, innovation etc, and to be prepared to speak about these at meetings of the governing body. However, it is important that individual governors do not become spokespersons or apologists for their area of engagement as this could affect their independence and their ability to remain detached from executive management.

Annex B: CUC Template for a Role Description for Clerks to University Governing Bodies⁴⁰

"(Note: This template for a role description for the clerk of a university governing body is not intended to be prescriptive, nor should it be taken in its entirety as a statement of best practice, although it aims to incorporate current understanding of best practice. It is derived from material contained in the CUC Guide for Governors and from documentation submitted to the CUC in relation to the CUC's 2006 Governance Questionnaire. The document is best approached as a checklist of points which a university will wish to consider in developing a role description for the clerk of its governing body. All the points it contains should be reviewed and if necessary amended, and appropriate new material added in accordance with local usage before a role description is finalised and issued.)"

1 Appointment and Reporting

- a) The clerk to the governing body is appointed to that post by the governing body itself, and in accordance with the provisions (if any) of the university's legal instruments of governance.
- b) Irrespective of any other responsibilities the appointee may hold in relation to his/her responsibilities as clerk, the clerk is responsible solely to the governing body and reports direct to the chair of the governing body in relation to governing body business (ie the preparation of agendas, papers, minutes, etc).

2 The Business of the Governing Body

- a) The clerk is required to provide the governing body with authoritative guidance about its responsibilities under the charter, statutes, articles, ordinances and regulations to which it is subject, including legislation and the requirements of the funding council, and on how these responsibilities should be discharged.
- b) The clerk should ensure that new or revised responsibilities for the governing body (eg arising from new legislation) are drawn to the governing body's attention.
- c) The clerk has a responsibility to alert the governing body if he/she believes that any proposed action would exceed the governing body's powers or be contrary to legislation or to the funding council's financial memorandum.
- d) The clerk has sole responsibility for providing legal advice to or obtaining it for the governing body and shall be provided with a budget for that purpose, and for advising the governing body on all matters of procedure.
- e) The clerk shall ensure that all documentation provided to members of the governing body is concise and its content is appropriate.
- f) The clerk will also act as clerk to committees of the governing body (they should be listed) or be responsible for ensuring that adequate clerical support is provided to governing body committees, and shall be provided with a budget for that purpose.
- g) The clerk shall maintain the Register of the Interests of the members of the governing body and of any other persons from whom the governing body requires a statement of interests.
- h) The clerk shall be responsible for the custody of the University Seal and for its proper use.

⁴⁰ Available at www.bcu.ac.uk/cuc/publications

- i) The clerk shall be responsible for arranging an induction programme for new members of the governing body, and shall draw the attention of governing body members to training activities arranged by the Leadership Foundation and other appropriate providers.
- j) The clerk shall arrange for the re-imbusement to governing body members of the expenses they incur in carrying out governing body business, and shall be provided with a budget for the purpose.

3 Working Relationships and Conflict of Interest

- a) The clerk may combine the function of clerk with a senior administrative or management role in the university. He/she must exercise care in separating these two functions.
- b) If the clerk perceives any conflict of interest between his/her separate functions, he/she should report it forthwith to the governing body. If the governing body believes it has identified a conflict of interest of this nature, the clerk will be offered an opportunity to respond to any such question.
- c) The clerk will be required to form effective working relationships with the chair of the governing body and the vice-chancellor/chief executive of the university. The clerk is required to consult the vice-chancellor/chief executive and keep him/her fully informed on any matter relating to governing body business (other than in relation to the remuneration committee's consideration of the vice-chancellor/chief executive's emoluments).
- d) The clerk is required to advise the chair in respect to any matters where conflict, potential or real, may occur between the governing body and the vice-chancellor/chief executive.
- e) The clerk will be required to form effective working relationships with other senior managers in the university in order to facilitate the effective conduct of governing body business. (State if the clerk is a member of the university' senior management group or equivalent body.)
- f) The clerk shall make a full and timely disclosure of his/her personal interests in the Register.
- g) The governing body will safeguard the clerk's ability to carry out his/her duties.

4 Personal

- a) The clerk will have a strong personal commitment to higher education and the values, aims and objectives of the university.
- b) The clerk will at all times regulate his/her personal conduct in relation to the governing body and the university in accordance with accepted standards of behaviour in public life, embracing selflessness, integrity, objectivity, accountability, openness, honesty and leadership, and maintain confidentiality as appropriate.
- c) The clerk will participate in procedures established by the governing body for the regular appraisal/review of his/her performance as clerk. These procedures will be separate from procedures for the appraisal/review of any other responsibilities the clerk may hold.
- d) The clerk is required to maintain a high standard of personal and professional self development, and will be appointed by the university a member of the Association of Heads of University Administration⁴¹."

⁴¹ *Only relevant to AHUA members HEIs*

Annex C: CUC Template for a Role Description for Members of University Governing Bodies⁴²

"(NB. This template for a role description for members of a university governing body is not intended to be prescriptive, nor should it be taken in its entirety as a statement of best practice, although it aims to incorporate current understanding of best practice. It is derived from material contained in the Committee of University Chairmen's Guide for Governors and from documentation submitted to the CUC in relation to the CUC's 2006 Governance Questionnaire. The document is best approached as a checklist of points which a university will wish to consider in developing a role description for members of its governing body. All the points it contains should be reviewed and if necessary amended, and appropriate new material added in accordance with local usage before a role description is finalised and issued.)

1 Membership

- a) Members are expected to play an appropriate part in ensuring that the necessary business of the governing body is carried on efficiently, effectively, and in a manner appropriate for the proper conduct of public business. They are expected to make rational and constructive contributions to debate and to make their knowledge and expertise available to the Governing Body as opportunity arises.
- b) Members have a responsibility for ensuring that the governing body acts in accordance with the instruments of governance of the University and with the university's internal rules and regulations, and should seek advice from the clerk in any case of uncertainty.
- c) Members are required to accept collective responsibility for the decisions reached by the governing body. Members elected, nominated or appointed by particular constituencies may not act as if delegated by the group they represent, and may not be bound in any way by mandates given to them by others.

2 Standards

- a) Members have a responsibility for ensuring that the governing body conducts itself in accordance with accepted standards of behaviour in public life, embracing selflessness, integrity, objectivity, accountability, openness, honesty and leadership. They must at all times regulate their personal conduct as members of the Governing Body in accordance with these standards.
- b) Members must make a full and timely disclosure of personal interests to the clerk in accordance with the procedures approved by the governing body. They must as soon as practicable disclose any interest which they have in any matter under discussion and accept the ruling of the chair in relation to the management of that situation, in order that the integrity of the business of the governing body and its committees may be and may be seen to be maintained.

⁴² Available at www.bcu.ac.uk/cuc/publications

- c) Since the university is a charity, members have a responsibility for ensuring that the governing body exercises efficient and effective use of the resources of the university for the furtherance of its charitable purposes, maintains its long-term financial viability, and safeguards its assets, and that proper mechanisms exist to ensure financial control and for the prevention of fraud.

3 The Business of the University

- a) Members have a responsibility for ensuring that the governing body exercises control over the strategic direction of the university, through an effective planning process, and that the performance of the university is adequately assessed against the objectives which the governing body has approved.
- b) Members should endeavour to establish constructive and supportive but challenging working relationships with the university employees with whom they come into contact, but must recognise the proper separation between governance and executive management, and avoid involvement in the day-to-day executive management of the university.
- c) Members will be appointed by the governing body to at least one committee of the governing body and are expected to play a full part in the business of all committees to which they are appointed. (Where they are known, committee memberships should be listed, together with the number of meetings a year. All other events in the university's corporate life, such as graduation ceremonies, which the member is invited to attend, should also be listed.)
- e) Any arrangement for the member to act as formal signatory on behalf of the university, eg in connection with the use of the seal, should be stipulated.

4 The External Role

- a) Members may be asked to represent the governing body and the university externally, and will be fully briefed by the University to enable them to carry out this role effectively. (List any other committees or bodies which the member may be asked to join or attend in his/her ambassadorial role.)
- b) Members may be asked to use personal influence and networking skills on behalf of the university (the 'door-opening' role).
- c) Members may be asked to play a role in liaising between key stakeholders and the university, or in fund-raising. They will be fully briefed by the university to enable them to carry out this role effectively. However, this role in particular must be exercised in a carefully co-ordinated fashion with other senior officers and staff of the university.

5 Personal

- a) Members will have a strong personal commitment to higher education and the values, aims and objectives of the university.

- b) Members will at all times act fairly and impartially in the interests of the university as a whole, using independent judgement and maintaining confidentiality as appropriate.
- c) Members are expected to attend all meetings of the governing body and of committees if which they are a member, or give timely apologies if absence is unavoidable.
- d) Members must participate in procedures established by the governing body for the regular appraisal/review of the performance of individual members. Members should attend any induction activities arranged by the University and should participate in appropriate training events such as those organised by the Leadership Foundation, which will be drawn to their attention by the clerk. (Any particular training requirements, eg for equality and diversity training for members who may be involved in staff or student appeals, should be stipulated, and any mentoring arrangements should be described.)
- e) The likely overall time commitment required of members is XXX (for local determination, and may be expressed as days per week or month rather than an absolute total. Comment on the distribution of the commitment through the year may be helpful, as might a proviso about contact unexpectedly or at short notice.)
- f) Membership of the governing body is not remunerated, but members are encouraged to reclaim all travelling and similar expenses (including first class rail travel) incurred in the course of university business, via the clerk. Directors and officers liability Insurance is in place. (Here stipulate any other support for members which the university offers- use of an office in the university, clerical support, provision of a lap-top computer, etc.)
- g) The formal start date and duration of appointment, together with any other relevant considerations (eg is there a formal annual election process?) should be set out either in the role description or in an appointment letter. It may advisable to refer to any conditions under which the governing body may remove members from office.

Annex D: A Checklist and Schedule for the Core Tasks Required of Clerks

This Annex is only indicative and clerks may wish to adapt it to create a checklist and schedule for their own governing body, incorporating requirements of the institution within which they work. Key references are provided to further information and/or explanation within the Guide.

	Deadline or proposed timing	See reference(s) for related further information
<i>Annual Actions</i>		
Set calendar of meetings (ongoing rolling programme if possible).	July-Sept	p32 6.3-6.7
Issue letters of appointment or reappointment to members of governing bodies. (see also memberships and succession planning below)	July-Sept	p21 4.26-4.29
Induction for new staff members (at minimum annually) and plan training or briefings.	July-Sept	p22 4.31-4.33
Report memberships of governing body and its committees to the governing body and the register of interests, including anyone serving on the governing body or its committees.	Oct-Dec	p41 7.6-7.8
Review whether any changes should be proposed to the following and report to the governing body:	Oct-Dec	
<ul style="list-style-type: none"> • the statement of primary responsibilities, • code of practice on corporate governance, • schedule of delegation, • standing orders and • governing instruments 		p26 5.14-5.15 p40 7.5 p27 5.19-5.20 p34 6.13-6.20 p24 5.4
Review terms of reference of governing body, its committees and committee constitutions at first meeting of the year.	Oct-Dec	p27 5.16-5.18
Ensure consideration by the governing body of the HEI's financial strategy (or plan) and financial forecasts.	April-June	p28 5.21-5.22
Ensure the governing body considers the annual accounts, external audit management letter, normally the internal audit annual report and the audit committee annual report.	Oct-Dec	p28 5.21-5.22
Governing body should review the risk management strategy/policy and clerk should ensure key institutional risks are reported to the governing body. This may be linked to consideration of key performance indicators.		p32 6.6-6.8, Case Study 4
If relevant, ensure annual reports, approved by the governing body, are sent to Companies House and/or the charity regulator.		p48 8.9-8.15

<i>Ad Hoc Actions</i>		
Keep up-to-date register of interests and publish membership of the governing body.		p.41 7.6-7.8
Ensure succession planning for key governing body positions and identify upcoming vacancies to the board and/or its committees and ensure appointments to fill vacancies.		p.16 4.5-4.14 Case Study 2
Identify vacancies and consider appointment to positions appointed or approved by the governing body (eg chair of the governing body, principal/vice-chancellor – see the governing instruments).		<i>See each HEI's governing instruments.</i>
Ensure venue and arrangements for meetings are confirmed and that agenda and papers are sent out well in advance of meetings.		p33 6.8-6.11 Case Study 6
Ensure operation of agreed scheme of reimbursing expenses of governing body members.		
Normally, holding and ensuring appropriate application of the seal and maintaining a record of its use.		p51 8.17
Support governing body during any inspections or audits related to governance.		p14 3.12
<i>Periodic Actions</i>		
Ensure consideration of strategic plan and/or mission statement of the institution by the governing body.		
Undertake an effectiveness review of the governing body (at least every five years) and key committees.		p60 10.1-10.25 and p58 9.17-9.19
Ensure approval of the students union constitution per the 1994 Education Act.		p.29 5.28-5.29
Seek approval from the Privy Council for changes to the charter or instruments and articles of government		p29 5.30

Annex E: Bibliography and Other Sources of Information

In this Annex additional sources of information are presented on the role of the clerk and related issues of governance, including governing body effectiveness. There is no intention to be comprehensive, rather to identify key items and to provide information on other sources that contain useful material. Information is provided in five sections:

- Key practical sources on governance in UK higher education.
- Key practical sources on governance in other sectors.
- Other UK governance materials.
- International governance materials.
- Useful web sites.

Key Practical Sources on Governance in UK Higher Education

Clerks should be particularly familiar with the following key materials:

Committee of University Chairs, Guide for Members of Higher Education Governing Bodies in the UK, HEFCE Bristol 2009. See www.hefce.ac.uk/pubs/hefce/2009/09_14/ An important resource for clerks.

Committee of University Chairs, Handbook for Members of Audit Committees in Higher Education Institutions, HEFCE Bristol 2008. See www.hefce.ac.uk/pubs/hefce/2008/08_06/

Farrington D and Palfreyman D, The Law of Higher Education – 2nd edition. Oxford, Oxford University Press, 2012. An essential handbook for higher education governance work.

HEFCE, Model Financial Memorandum between HEFCE and Institutions, Bristol, 2010.
See www.hefce.ac.uk/pubs/year/2010/201019/ (for England – other jurisdictions have similar FMs)

LFHE and CUC, A Framework for Identifying Governing Body Effectiveness in Higher Education, 2010
See www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

LFHE and Equality Challenge Unit, Governing Bodies, Equality and Diversity: A Handbook for Governors of Higher Education Institutions, 2009.
See www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

Schofield, A. What is an Effective and High-Performing Governing Body in UK Higher Education. LFHE and CUC, 2009. See www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

SCoP, Getting to Grips with Being a Governor, London, 2006. A new edition is in preparation. There are also 8 *Getting to Grips* guides on various discipline areas (eg. finance, students) available on the LFHE Governance web site at www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

Shattock, M. Managing Successful Universities. Maidenhead, McGraw Hill, Society for Research into Higher Education & Open University Press, 2010. A very good read with a chapter on governance.

The web site of the Committee of University Chairs - (www2.bcu.ac.uk/cuc/publications) has a range of useful materials, including a template of role descriptions

There are, in addition, a number of other useful sources:

CHEMS Consulting, A Final Report to CUC on Good Practice in Six Areas of the Governance of HEIs, 2004. See www.bcu.ac.uk/cuc/publications

Committee of University Chairs and the National Union of Students, Supplementary Guide regarding the Role of University Governing Bodies in relation to Student's Unions, 2011.
See www.bcu.ac.uk/cuc/publications

Committee of University Chairs, Report on the Monitoring of Institutional Performance and the Use of Key Performance Indicators, 2006. See www.bcu.ac.uk/cuc/publications

Council of Church Colleges and Universities, A Guide to Governance in Church Higher Education Institutions, 2007. See www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

HEFCE, A Shared Strategy for Relationship Management between HEFCE and Institutional Governing Bodies, Bristol, 2011. See www.hefce.ac.uk/pubs/year/2011/cl122011/

Llewellyn, D. The Role and Influence of the Secretary in UK Higher Education Governing Bodies. LFHE, 2009. See www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm

Weale G, Empowering Managers, Assuring Governors: The Introduction of dual assurance at the University of Exeter, Perspectives Vol 14 No 2, 2010. See www.lfhe.ac.uk

Key Practical Sources on Governance in Other Sectors

Bingham K, Corporate Governance Handbook. Gee Publishing, London (ongoing subscription service).

Charity Commission, produces a wide range of information useful to clerks. See www.charity-commission.gov.uk.

Committee on Standards in Public Life (The Nolan Report), Second Report - Local Spending Bodies, HMSO London, 1996.

Committee on Standards in Public Life, Fourth Report - Review of Standards of Conduct in Executive NDPBs, NHS Trusts and Local Spending Bodies, HMSO London 1997.

Financial Reporting Council: UK Corporate Governance Code 2012, and associated guidance. This effectively replaces the *Combined Code on Corporate Governance.* See www.frc.org.uk

Monitor, The NHS Foundation Trust Code of Governance, 2010. See www.monitor-nhsft.gov.uk

Monitor, The Healthy NHS Board: Principles for Good Governance. See www.monitor-nhsft.gov.uk

NCVO, Good Governance: A Code for the Voluntary and Community Sector, 2010. London, National Council for Voluntary Organisations (www.charity-commission.gov.uk) This code is developed around six principles of good governance.

Schofield A, Matthews J and Shaw S, A Review of Governance and Strategic Leadership in English Further Education, 2009. See www.aoc.co.uk/en/college_governors/review-of-governance/

Other UK Governance Materials

Bargh, C., Scott, P. et al. Governing Universities: Changing the Culture. Buckingham, Society for Research into Higher Education and Open University Press, 1996. The last major academic/empirical exploration of UK university governance. Now a little dated, but some useful insights in the case studies into the roles of key players and decision-making processes.

Bennett, B. The New Style Boards of Governors - Are They Working? Higher Education Quarterly 56 (3) 2002. A study of corporate governance in a small number of post-92 institutions. Provides a useful list of effective governance factors and their use, via a documentary and survey analysis.

Brown R, The Governance of the New Universities: Do We Need to Think Again, Perspectives Vol 5 No 1, 2001

Gillies M, University Governance – Questions for a New Era, 2011
See www.hepi.ac.uk/files/UniversityGovernance.pdf

ICGGPS, The Good Governance Standard for Public Services. London, Office for Public Management Ltd and the Chartered Institute of Public Finance and Accountancy, 2004. An example of a different governance code which provides a framework for developing good governance with practical tips for the governing body to consider.

Mallin C A, Corporate Governance, Oxford: Oxford University Press, London, 2004

McCormick J, Achievement and Accountability: Report of the Independent Review of Higher Education Governance in Wales, 2011

Shattock M, The Lambert Code and Best Practice, Higher Education Quarterly, Vol 58, No 4, October 2004.

Shattock, M. Managing Good Governance in Higher Education. Buckingham, Society for Research into Higher Education & Open University Press, 2006.

Steele J and Parston G, Rubber Stamped: The Expectations and Experiences of Appointed Public Service Governors, The Office of Public Management, 2003.

von Prondzynski F, *Report of the Review of Higher Education Governance in Scotland*, 2012
See www.scotland.gov.uk/Resource/0038/00386780.pdf

Walker D, *A Review of Corporate Governance in UK Banks and Other Financial Industry Entities – Final Recommendations*, London, 2009

Warner D and Palfreyman D (eds), *Managing Crisis*, Open University Press and McGraw Hill, Maidenhead 2003

International Governance Sources

The Association of Governing Boards of Universities and Colleges in the USA has a range of interesting materials on governance. See www.agb.org

Boston, R. *College and Corporation: Institutional Power in the Enterprise University*. The Enterprise University: Power, Governance and Reinvention in Australia. S. Marginson and M. Considine. Cambridge, Cambridge University Press, 2000. This chapter provides a critical review of the role of governing bodies and the way that management sometimes works around them, rather than with them. The whole book is worth reading for those who want to know more about the Australian HE system.

Coaldrake P, Stedman L and Little P, *Issues in Australian University Governance*, 2003

Cornforth C, *What Makes Boards Effective? An examination of the relationships between board inputs, structures, processes and effectiveness in non-profit organisations*. *Corporate Governance* 9 (3): 217-227, 2001. Provides some useful information on the influence of board inputs, structures and processes on board effectiveness, and analyses some of these in a regression model. Some pretty obvious outcomes but they are backed up with data.

Holloway D, *Corporate Governance Disasters and Development: Implications for University Governing Bodies*. *Australian Universities Review* Vol 46, No 2, 2004.

Kezar, A. and P. D. Eckel, *Meeting Today's Governance Challenges: A Synthesis of the Literature and Examination of a Future Agenda for Scholarship*. *The Journal of Higher Education* 75 (4): 371-399, 2004. A really helpful round-up of the governance literature, very US-focussed but covers issues of efficiency, effectiveness, participation and leadership etc.

Nadler, D. A., B. A. Behan, et al., Eds. *Building Better Boards: A Blueprint for Effective Governance*. San Fransisco, Jossey-Bass, 2006. A book on corporate (company) governance which contains lots of information about board structures, leadership and processes.

OECD: *Education Policy Analysis, Chapter 3: Changing Patterns of Governance in Higher Education, 2003*. See www.oecd.org

Walters, C. University Governance. OECD Seminar on Governing Bodies of Higher Education Institutions: Roles and Responsibilities. Paris, OECD/IMHE, 24/25 August 2006. A paper presented at an OECD conference which sets out the national governance protocols used in Australia.

Useful Web Sites

A very important source of information, though principally intended for governors, is the Leadership Foundation governance web site – www.lfhe.ac.uk/en/audiences/governance/publications/index.cfm. In addition, the following may be helpful:

Association of Heads of University Administration	www.ahua.ac.uk
Charity Commission	www.charity-commission.gov.uk
Chartered Institute of Public Finance and Accountancy	www.cipfa.org.uk
Committee of University Chairs	www.bcu.ac.uk/cuc/
Companies House	www.companieshouse.gov.uk
Council for Industry and Higher Education	www.cihe.co.uk
Department for Employment and Learning Northern Ireland - DELNI	www.delni.gov.uk
FE governance	www.fegovernance.org
GuildHE	www.guildhe.ac.uk
Higher Education Funding Council for England - HEFCE	www.hefce.ac.uk ,
Higher Education Funding Council for Wales - HEFCW	www.hefcw.ac.uk
Institute of Chartered Secretaries and Administrators	www.icsa.org.uk
Institute of Directors	www.iod.com
Leadership Foundation for Higher Education	www.lfhe.ac.uk
National Council for Voluntary organisations	www.ncvo-vol.org.uk
Office for Fair Access - OFFA	www.offa.org.uk
Office of the Independent Adjudicator for Higher Education - OIA	www.oiahe.org.uk
Office of the Scottish Charities Regulator - OSCR	www.oscr.org.uk
Practical Governance Network - GuildHE	www.guildhe.ac.uk/en/associations/practical-governance-network-public.cfm
Privy Council (higher education page)	privycouncil.independent.gov.uk/work-of-the-privy-council-office/higher-education/
Scottish Funding Council - SFC	www.sfc.ac.uk ,
Universities and Colleges Employers' Association - UCEA	www.ucea.ac.uk
Universities UK	www.universitiesuk.ac.uk .

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