Review of the National Governance Protocols:

Issues Paper

Response from Christian Heritage College

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1. Contribution of the National Governance Protocols to good governance

Christian Heritage College is not in a position to make an assessment of the contribution of the National Governance Protocols to good governance across the higher education sector as a whole.

In relation to private higher education providers, it would appear that the National Governance Protocols have had only a limited impact on Non Table A providers, as the protocols presently apply only to a small number of institutions in receipt of grants under the Commonwealth Grants Scheme (CGS).

At the level of an individual institution, such as Christian Heritage College (CHC), it can still be difficult to isolate the specific impact of the protocols. As with several other institutions, the requirement of incorporation separate from its parent organisation in order to achieve HEP status, led to CHC’s incorporation as a public company limited by guarantee. As a result, CHC and like institutions have come under the Corporations Law, and the demands of this jurisdiction have had a marked impact on their governance.

The Corporations Law establishes the legal responsibilities of directors, including their fiduciary duties. The responsibilities of directors is still a developing area of law, as recent high-profile cases attest, and institutions like CHC will be paying close attention to these developments because of their potential impact on the legal liabilities of directors.

In terms of guidance on corporate governance and directors’ duties, there is no lack of expert advice available through publications, consultancies, and from organisations such as the Australian Institute of Company Directors and the ASX.

While the National Governance Protocols do reflect in part the ASX governance principles, it is likely that, overall, the legal requirements of their new corporate status as companies limited by guarantee have had a much greater impact on the quality of governance than the National Governance Protocols themselves have had.

2. Expanding the scope of the National Governance Protocols

Two questions arise in relation to the scope of the National Governance Protocols: firstly whether the protocols covering non-Table A providers should be extended to cover all private providers as a condition of HEP status, and secondly whether the scope and requirements of the Table A protocols should be broadened in their application to institutions already subject to them.
(a) Likely effects of expansion to cover other private providers
Given the comments above on the greater effects of the Corporations Law on private provider governance, there would seem to be no significant improvement in corporate governance to be gained by a wider application of the protocols. Most HEPs are already subject to the Corporations Law. Conversely, wider application of the protocols will run into difficulties due to the increasing diversity of corporate identities and structures (such as for-profit providers) which are to be found when the net is cast more widely in this sector.

A prime concern of private providers is the potential to be caught between contradictory governance requirements of the Corporations Law and the National Governance Protocols.

Private providers are also concerned about the possibility of conflict or duplication between the protocols and state regulatory requirements. This is a real possibility as the intent of state requirements appears to be to make institutions which are companies more like universities in their governance, whereas the proposed expansion of the protocols appears to be intended to have the opposite effect.

(b) Widening the scope of the protocols
The suggestion of strengthening the fiduciary responsibilities of council members sounds good in theory. It is suggested that this would make universities more like companies in their governance. To some extent the existing protocols already reflect such thinking.

However directors’ duties in the corporate sector are not just principles; they have the force of law and encompass a range of civil and criminal penalties. Moreover, as noted above, the duties of directors remain a developing area of law, and are hammered out over time in the parliament and in the courts, and are thus codified in both statute and case law.

The question in relation to wider protocols is therefore whether it is envisaged that these would have the force of law and be enforceable by civil and criminal penalties. One could foresee that members of university councils would face a highly confused situation as to whether the wider protocols had legal force or not, to what extent, under what circumstances and so on. It is likely that these matters would need to be tested in the courts. If they did not have legal force, it is questionable whether they would have any practical effect in improving corporate governance. If they do have legal force, there are implications for legal risk being attached to staff, student and community membership, and also the question of remuneration which recognises the level of legal risk incurred. Private providers already find some reluctance on the part of staff and students to serve on governing bodies because of the legal obligations incurred in becoming a director of the company.

3. Specifying management roles
From a private provider perspective, detailed specification of management roles raises three particular concerns. Firstly, it has the potential to confuse management and governance. Secondly it has the potential for conflict between requirements and obligations imposed by the Corporations Law and those imposed by the protocols. Thirdly, it will run into difficulty if it attempts to impose a “one size fits all” model of governance. There are many orders of magnitude separating the largest university and the smallest private provider, as there are
between the largest and smallest companies. However, in addressing boards’ responsibilities for legal compliance, the corporate world has had the benefit of centuries of development of precedents, yet has spawned entire professions and whole industries specifically focused on legal compliance. While compliance has public benefits, it also represents a significant impost on the cost of doing business. There is a fine judgement call to be made on the degree of specificity which might possibly enhance governance and that which generates high compliance costs without tangible benefits.

It is likely that there would be greater benefit from expanding access to university governance training, and engaging public and private providers in an ongoing dialogue about higher education governance than from attempting to specify the detail of governance and management structures.

In summary the objective of enhancing the role of the governing body is to be welcomed, as is the goal of ensuring a degree of national consistency in higher education governance. However it is important that consistency does not impose uniformity, but rather promotes diversity which reflects individual institutions’ history, mission and circumstances.

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