MCEETYA

Review of Commonwealth National Governance Protocols

2007

Submission by
The National Institute of Governance

National Coordinator
of the
University Governance Professional Development Program
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1. Why is university governance important?

The University is no longer a quiet place to teach and do scholarly work at a measured pace and contemplate the universe as in centuries past. It is a big, complex, demanding, competitive business requiring large-scale ongoing investment. (OECD 2001)

For the first time in the history of “the university”, its systems of governance, which have enabled the sustainability of the institution for a millennium, faces significant, cultural shifting challenge.

The last fifty years has seen the Australian Higher Education sector grow to nearly one million enrolled students, nearly 90,000 staff, with combined sector annual income over $14.3 billion (DEST 2005). This sector includes amongst 39 institutions just four with annual incomes less than $100 million. This is the so called ‘massification’ era, which has seen the number of universities grow from just six since the Second World War (Figure 11). And it is international – similar trends exist for all major HE sectors worldwide.

As a result of such growth, twenty-eight of Australia’s universities are amongst the Business Review Weekly Top 1000 enterprises in Australia-New Zealand for 2006. The table below shows a sample of the household names with which our largest cultural institutions sit. As very large institutions in the Australian economy, the corporate governance of universities is now subject to as much regulatory attention as those comparable enterprises. And faced with the same challenges of sustainability at such a scale, best practice in corporate governance of private, not-for-profit and public sector organisations is viewed as a legitimate model for university governance.

The evolution of university governance is likely to be one of the defining characteristics of the transition into the ‘post-massification’ era in Higher Education.
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Table 11: Extract from Business Review Weekly Top 1000 Enterprises 2006.
2. History of ‘governance’

As a cultural, regulatory and academic concept, organisational or corporate ‘governance’ is relatively novel. The strong stock market correction and emergence of longer term global trends in financial markets in the late 20th century have forced governments to reconsider governance arrangements, many of which were “not long ago regarded as either excellent or at least as not presenting serious policy problems” (Kirkpatrick 2004).

Voluntary principles and changes to corporate law and regulation have focused, in the first instance, on questions to do with board composition and duties (including controlling conflicts of interest) in the judgement that this is the key institution where problems have arisen. In many ways it has also been an area where initiatives have been easiest to agree. (Kirkpatrick 2004).

A cursory investigation of companies involved in recent corporate failures and fraud reveal that they may have exhibited the trappings of good corporate governance, such as an audit committee, a statement of corporate governance practices in the annual report, and the existence of non-executive directors on the board… Outward compliance with good corporate governance principles is not sufficient guarantee of their effective operation. (JCPA 2000)

“most recent governance scandals had a wide array of relevant embedded problems cutting across fields, such as corrupt leaders, overhyped markets, short-term pressures, intentionally ambiguous accounting practices, dishonest financial analysts, weak internal audits [I would have added weak external audits], unscrupulous financiers and consultants, conflicted interests among board members, skill deficiencies, lax regulation, careless board supervision, improper board structure, perfunctory board processes, inadequate disclosure, misguided financial incentives, insufficient whistle-blower protection, autocratic, imperial CEOs, unethical cultures, and inadequate character assessment in leadership searches.”

That diverse list explains not only why the editors called on a wide variety of experts to cover their subject but also why attempts to legislate and regulate solutions to the current leadership and governance crisis are apt to miss their target. (Martin 2005)

Changes certainly have occurred, including: acceleration of the change to more external directors; fewer serial directors; separation of Chair/CEO roles; more young, female and diverse directors; a focus on auditor practices; and increasing shareholder activism (Coglianese and Michael 2006). One unforeseen consequence has been the increasingly widespread reports of pressure on the available talent pool to locate the numbers of directors required.
3. Performance

Since this first wave of regulatory reforms the focus of research, regulators and business press has shifted to performance. There is now a growing body of evidence confirming that corporate governance exert an important influence on growth prospects. The most fundamental task of any institution, and therefore its governing body, is to ensure its sustainability as a strong, viable, competitive, organisation against a background of a changing environment.

The real challenge for directors isn’t regulatory compliance - its high performance. To achieve it, they need to systematically examine their purpose, tasks, talents, information, and agenda. (Nadler 2004)

In the private sector world, the fundamental aim of any private sector business is financial sustainability in its changing market place. (Allan 2006)

This focus on regulation rather than performance has arisen despite the fact that more value is lost through strategic mismanagement than through fraud and malpractice. (Young 2006)

This places strategic thinking at the heart of good governance practices, in balance with compliance.

Recommendation 7: The guidelines should be amended to make it clear that the board’s responsibility goes beyond the “adoption of a strategic planning process”. The board should be responsible for contributing to the development of strategic direction and approving a strategic plan that takes into account an identification of business opportunities and business risks. It should oversee and monitor management’s systems for managing business risk. And it should regularly review, with management, the strategic environment, the emergence of new opportunities and risks, and the implications for the strategic direction of the company. (JCCG 2001)

Make strategic leadership more like a continuous stream of ideas, discussions, learning and actions. Effective Boards streamline routine reporting and governance compliance to enable them to focus on the evolution of strategy and of performance against key strategic projects and milestones. A crucial part of this is the strategic 'memory' of the Board in understanding past actions and commitments, current performance and future developments. (Young 2006)
4. Compliance with Prescriptive Rules

There is extensive academic and regulatory evidence that closed systems of compliance, with penalties and/or incentives, lead to “tick-box” culture, and provide limited incentive for improving governance and organisational performance.

Rules are typically thought to be simpler and easier to follow than principles, demarcating a clear line between acceptable and unacceptable behavior. Rules also reduce discretion on the part of individual managers or auditors, making it less likely that their judgments will be motivated by a desire to achieve personal gain at the expense of investors or the public.

Despite the virtues of rules, in practice rules can be more complex—and, hence, even more murky—than principles. As lawmakers try to address every conceivable eventuality, the rulebook becomes harder to understand and harder to follow. Moreover, even simple and clear rules can be manipulated. An effective planner can use the exact wording of the rule to structure transactions in ways that comply with the letter of the law but circumvent its underlying purpose. (Conglianese 2004)

In addition, there has been a tendency for disclosure to degenerate into boilerplate – to become less meaningful as well as less complete. (JCCG 2001)

There is little value in a checklist approach to corporate governance that does not focus on the particular needs, strengths and weaknesses of the company. (ASX CGC 2006)

Universities’ compliance of the (National Governance) Protocols has been assessed in 2004 and 2005. All universities were found to be either compliant, or compliant subject to their completing implementation of changes arising from legislative amendment before 30 September 2006. The compliance assessment entails an examination of whether required actions have been taken and criteria have been met. It cannot measure behaviours and the extent to which good practices have been embraced. [my emphasis] (Walters 2006)

The National Governance Protocols are one of two requirements for compliance for additional Commonwealth funding, the other being the Higher Education Workplace Relations Requirements (HEWRRs). In recent months the Commonwealth government has conceded that compliance with the rules of each requirement has not implied compliance with the spirit of each.

I am concerned that there is a belief that meeting the bare minimum requirements of the National Governance Protocols is enough. It is not enough! The Protocols were established to provide an incentive for universities to significantly improve their governance - not for universities to only meet minimum expectations. It was not an invitation to accept the lowest common denominator. (Bishop 2006)

All universities were compliant with the HEWRRs last year and received incentive payments of $151 million in 2006 and $240 million in 2007. However, some university staff have complained they are not being offered genuine choice and that some universities are offering AWAs that are identical to the conditions of the collective agreement. (Bishop 2007)
5. Governance Culture

As awareness of the limitations of regulatory compliance encouraging better practice has grown, attention has turned to what is, and how to encourage, a good governance culture and hence good corporate culture following “the tone from the top”.

“I hope you will agree that the most important first step for a board grappling with the issues of corporate governance is not debating the issues of structure. Rather, it is defining the parameters of an inviolate corporate culture by answering simple questions: What kind of moral compass do we want guiding this corporation? What ethical standard do we want imbedded in this corporation’s DNA? How will we demonstrate it in our every action? How can we protect the long term interests of our investors?” William H. Donaldson, the most recent chairman, Securities and Exchange Commission (SEC) (Martin 2005)

Not only is disclosure preferable to regulation as a tool to change behaviour, it is also appropriate. The evolution of capital markets has clearly shown that disclosure instils discipline and increases efficiency. With regard to corporate governance, we see two important benefits of disclosure. First, disclosure can provide examples of good practice that can assist boards that are looking for ways to become more effective. Second, a requirement to disclose against guidelines can modify behaviour by forcing boards to focus explicitly on their roles and responsibilities and how they are being discharged. (JCCG 2001)

The best practice recommendations are not prescriptions. They are guidelines, designed to produce an efficiency, quality or integrity outcome. This document does not require a “one size fits all” approach to corporate governance. Instead, it states aspirations of best practice for optimising corporate performance and accountability in the interests of shareholders and the broader economy. If a company considers that a recommendation is inappropriate to its particular circumstances, it has the flexibility not to adopt it – a flexibility tempered by the requirement to explain why. (ASX CGC 2006)

The challenge of encouraging a governance culture has been acknowledged by the Federal Minister for Education, Hon. Julie Bishop:

“What the Australian Government is seeking to bring about is a change of culture within university governing bodies. While there has been much movement in the right direction, cultural change cannot be expected to occur overnight because it involves shifting attitudes, and attitudes can be notoriously hard to shift.” (Bishop 2006)
6. Commitment to governance in Higher Education.

One example of governance culture that stands out in word and deed is the commitment of funding, quality and peak bodies in Higher Education in the United Kingdom to work together to improve the governance of institutions.

The Institute has interviewed the principles of the Higher Education Funding Council for England (HEFCE), Committee of University Chairmen (CUC), and Leadership Foundation for Higher Education (LFHE). Both the financier and the recipients share a passionate commitment to improving university governance, motivated by the shared vision of reduced regulation.

On the one hand, for institutions, high standards of their own governance leads to reduced accountability burden, as the regulators financial and management audit regime focuses on those institutions at greater risk and limits to an absolute minimum the work carried out elsewhere.

On the other hand, visibly higher standards of institutional governance allow the regulatory bodies:

- to reduce workload (and hence cost) associated with institutional regulation by risk-based targeting of financial audits and the move towards “single conversation” interactions with institutions;
- to improve regulatory efficiency by sharing freed capacity with quality, research and charity regulators;
- to build “stakeholder confidence”, particularly with responsible government departments, by showcasing good university governance practices.

This joint commitment to improving university governance has produced an extensive list of resources publications and events emerging from projects funded by the regulatory body to fulfil the needs of the sector identified by the peak body (including the establishment of the Leadership Foundation itself).

These include (but are not limited to) the “Guide for Members of Higher Education Governing Bodies in the UK” and its revisions, incorporating the “Governance Code of Practice” in 2004, and more recently:

- “Report on the Monitoring of Institutional Performance and the Use of Key Performance Indicators”; and
- Templates for the Role Descriptions members, chairs and clerks (secretaries) of governing bodies;

following demand identified in the CUC’s 2006 survey of governance practices.
7. Lessons from corporate sector

In scale and complexity universities are at least as demanding as enterprises in the corporate sector. Therefore there is much that can be learnt from the private sector in terms of institutional sustainability and performance. What they share with organisations in the public and not-for-profit sectors is a mission as their base for existence, which cannot be changed in the interest of profit, and hence corporate practices cannot be appropriated wholesale but must be adapted to purpose.

That said, there are many areas of private sector governance and management that appear to have relevance to our largest cultural institutions (Allan 2006):

- There should be real induction – not just two or three sessions, but an intensive induction over six to twelve months and ongoing, with regular exposure to executives and stakeholders. An overload of paper is not the answer.

- In the private sector world, the fundamental aim of any private sector business is financial sustainability in its changing market place. This is where the private sector can probably make its most helpful, critical but supportive, contribution helping to guide the university into private sector ways, because private sector: never stands still; plans ahead, but remains flexible; thinks strategically; measures risks; seeks advice; invests for the future.

- It is not unseemly to generate a surplus in the HEI world: it is an imperative and whilst the private sector would not countenance anything below 10%, at the least, the HEI world should be aiming at 6-8% improving. HEFC’s 3-4% not enough. Without it, how can a HE invest in its future?

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8. Unresolved issues in post-massification universities

a. University Membership

In any governance model, of corporate ownership or association membership, all governing bodies act on behalf of, and on the basis of a relationship of trust with, the legal/moral owners or the members of an enterprise. Then governors, being essentially part-time, entrust the daily management of the enterprise to an executive (whether an individual or a team)

Hence the primary accountability of a governing body is to the ‘owners’ of the enterprise. This is explicitly recognised in corporate governance regulation, e.g. “Respect the rights of shareholders and facilitate the effective exercise of those rights” (ASX CGC 2006, Principle 6), although this is generally the most neglected relationship, most in need of strengthening, in the triangle of owners, governors and managers (Montgomery 2003).

Who ‘owns’ the university? Legally or morally? Most, if not all, Australian universities define a university membership in statutes if not their enabling Acts, similar to the following:

A University, consisting of:
1. a Council,
2. Convocation,
3. the professors and full-time members of the academic staff of the University and such other members or classes of members of the staff of the University as the by-laws may prescribe, and
4. the graduates and students of the University,

is established by this Act.

What are the consequences of such statements? How does a council, collectively and individually, assess and apply such statements? What relationship(s) do or should we expect as ‘members’, or at least constituent elements of, the statutory university corporation? Are those relationships fundamentally different to those of shareholders in a Corporations Law corporation? (Considine 2004)

Moreover older Australian universities, and especially all universities in Victoria, are explicitly established as “a body corporate and body politic” – meaning what in theory or practice is today unclear.
b. Governance support

The most underestimated people are the company secretary. How well the papers are prepared determines how well the decisions are going to be made. (Roberts 2002)

The role of the Clerk or Secretary to the governing body is pivotal. (CUC WP 2000)

In Australia there is no standard role definition of the secretary to the governing body. Usually the role is formally held in conjunction with other offices of the university (university secretary, registrar, Director of Governance Unit), and frequently the actual task of Council secretary is delegated to another officer. It is unusual if the Council secretary is appointed by, and held accountable to, the governing body itself.

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). (CUC template 2006)

The Institute has conducted a survey of governance practices of non-educational organisations in the BRW Top 1000 list in Table 11 that are of comparable size to Australian universities based on annual revenue. The data regarding time spent in meetings of the governing board are illustrated in Figure 22 and Figure 33. The Boards of 67% of respondents meet nearly/at least monthly, and nearly all Boards meet for a minimum of three hours.

Figure 22: Analysis of Board meeting frequency in NIG’s Top 1000 survey.
The Institute’s survey asked questions about the annual costs of governance including

- Remuneration of Board members (average $0.5m)
- Meetings (average $49k)
- Governance staff (average $115k)
- Recovery of requested legal advice (average $28k)
- Recovery of requested information ($13k sole respondent)
- Professional Development training as individual members ($18k)
- Professional Development training as a single team ($23k)

Analysis of these is complicated by every function being serviced in-house and unaccounted for by at least some respondents. The internalisation of governance costs is also a typical of universities. Also some organisations do not explicitly budget for professional development of governors separate from governor remuneration.

By the most reductive analysis, these enterprises expend:

- $1,354 per Board per $m revenue
- $171 per Board member per $m revenue

These factors give approximate ranges for governance budgets of $100-400k for the smallest institutions to $1.6-4.5m for the largest. Accounting for the difference in sizes between university and corporate governing bodies an appropriate budget would be somewhere within these ranges.

This is not a call to remunerate members of university governing bodies (although that trend is already well established with at least four Victorian universities), but to ensure adequate support for university governors to fulfil their duties to optimum performance by explicit (and transparent) governance budgeting.

In calling for explicit governance budgeting for corporate boards, Montgomery and Kaufman noted that providing American directors with independent funding would extend the practice established in the Sarbanes-Oxley Act that requires audit committees to have funds for hiring auditors and advisors (Montgomery 2003).

Figure 33: Analysis of Board meeting duration in NIG’s Top 1000 survey.
c. Stakeholder Communications

Communicate with confidence: It is important to communicate and promote the company's long-term strategy to the investment markets and opinion formers with confidence. The Board is not responsible for what a multitude of investors think. But the Board IS responsible for using all its experience and skills to develop and monitor the implementation of strategies that will make the enterprise a sustainable wealth creator, to the benefit of all stakeholders. (Young 2006)

Corporations are required or encouraged to promote timely and balanced disclosure of all material matters concerning the company, communicate effectively with shareholders, and demonstrate their commitment to appropriate corporate practices to stakeholders (ASX CGC 2006). By contrast a significant proportion of the university community is ignorant of their governing body’s significance as decision makers.

The Institute’s Top 1000 survey investigated practices communicating Board decisions to shareholders and staff as the two primary stakeholder groups. The data is illustrated in Figure 44 and Figure 55. Significantly in both cases individual communications from the Chair or CEO are frequently a significant part of the Board’s communication strategy, whereas Board minutes are not.

![Governing Body communication with Shareholders](image)

Figure 44: Analysis of the communication significant Board decisions to shareholders.

![Governing Body communication with Staff](image)

Figure 55: Analysis of the communication significant Board decisions to staff.

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d. Governor Knowledge

This is one of the most difficult areas of what has become known as ‘soft’ governance:

An effective board is one that … adds value in the context of the particular company’s circumstances. This requires that the board be structured in such a way that it … has a proper understanding of, and competence to deal with, the current and emerging issues of the business. (ASX CGC 2006)

There was widespread recognition that as a non-executive one is necessarily at an informational disadvantage to the executive, and that, as a result, the conduct of the chairman is decisive in creating the conditions for non-executive effectiveness. (Roberts 2002)

In this example there is no straightforward translation from private sector experience to university governance, as strictly speaking there is only one ‘executive’ member, the Vice Chancellor. Staff and student members and Chairs of Academic Board bring views to the governing body about their respective areas of expertise, but do not have managerial responsibilities, and are just as often “information disadvantaged” as external members.

Especially with the transition in corporate Boards to majority and super-majority ‘independent’ members, strengthening the capacity of a board to engage in mature constructive relationships with management has emerged as a key issue.

A Culture of Open Dissent: Perhaps the most important link in the virtuous cycle is the capacity to challenge one another’s assumptions and beliefs. Respect and trust do not imply endless affability or absences of disagreement. Rather, they imply bonds among board members that are strong enough to withstand clashing points of view and challenging questions. (Sonnenfeld 2002)

Recommendation 5: The outside board members should meet at every regularly scheduled meeting without management and under the chairmanship of the “independent board leader”. (JCCG 2001)

Conversely, it is desirable that the university’s senior executive is present at Council meetings to answer questions and receive a “tough grilling” (Bishop 2006). This should not be seen as exceptional, nor political in the sense of a “vote of no confidence” in the Vice Chancellor or management. “Dissent is not the same thing as disloyalty” (Sonnenfeld 2002) and it is ordinary in the private sector for a CEO decision to be overturned by a Board – indeed it would be indicative of an overly cautious management if they didn’t do so occasionally.

Maintaining individual and collective knowledge and skills to support a robust culture is continuous:

The pace of change is so rapid, and the complexities of modern business are increasing so quickly, that continuing education and lifelong learning are as critical for directors as they are for anyone. This is particularly true in light of the high turnover rates noted above, and the age profile of current directors, which suggests that high turnover rates are likely to continue. Neither ego nor embarrassment should get in the way of equipping oneself to the best of one’s ability, in order to do as good a job as possible. (JCCG 2001)
e. Strategic Estate Management

While on the subject of university finances, governing bodies might need to take a more proactive role in looking at the management of assets. My department's Institution Assessment Framework data has suggested that some universities may not be making enough provision for maintenance, and that in time they may face significant costs to bring their facilities up to a satisfactory standard. The National Governance Protocols could be strengthened to require the governing body to approve a strategic asset management plan. (Bishop 2006)

This is one area where the Australian Government has explicit evidence, based on IAF data provided by universities, that institutional performance can be improved by an additional Protocol. Deferred maintenance involves capital maintenance which has been delayed and not performed when it should have been or when it was scheduled. According to DEST, based on data provided by universities the estimated amount of maintenance deferred is increasing. For 2005, the total value of deferred maintenance was estimated at $1.56 billion:

- 10.8% of the total $14.3 billion total revenue of the sector for 2005,
- an increase of 23.1% on estimated amount for 2004, and
- 4.9% of the total replacement value of assets.

DEST estimates that expenditure of around $918 million would be required to bring the level of deferred maintenance back to an acceptable upper limit of 3%. Ideally, there should not be a continuing level of deferred maintenance over the long term.

By comparison, Strategic Estate Management has long been an explicit component of responsibilities of UK university governing bodies:

1.9 The governing body is responsible for oversight of the strategic management of the institution’s land and buildings. As part of this responsibility it should consider, approve and keep under review an estate strategy that identifies the property and space requirements needed to fulfil the objectives of the institution’s strategic plan, and also provides for a planned programme of maintenance.

7.1 The governing body is responsible for oversight of the strategic management of the institution's land and buildings, with the aim of providing an environment that will facilitate high-quality teaching and learning and research. After employee costs, those of managing estates and property represent the largest item of HEI expenditure. It requires long-term planning for capital development and the effective maintenance of existing properties, while having to comply with increasingly onerous legislation. (CUC 2004)
f. Financial accountability and control

There will always be accountability requirements – with more than $7.8 billion of taxpayers' money paid by the Australian Government to the higher education sector each year that is only fair. But if the Government can be confident that universities are responding to the diverse educational and research needs of the nation, there is less need to prescribe requirements to universities. A high standard of governance is a key component of this quality assurance. (Bishop 2006)

Virtually all academics will subscribe to the thesis that freedom in research and teaching is the fundamental principle of university life. The need for accountability is acknowledged in principle but the extent to which it should extend and the manner in which it should be exercised may be disputed in practice. Accountability is required not only in the use of resources but in the quality and comparability of courses and degrees. Ideally, the Governing Body (in whatever name it exists) is the forum in which both the intellectual freedom and the public accountability of the university can be ensured. (O’Brien 2006)

As these quotes show, despite over twenty years of ‘massification’ of Higher Education and the growth of universities into billion dollar enterprises, financial accountability and control is still a contested area in university culture. Perhaps it will continue to be an issue of continuous balance for university governors.

Legally the issue is simpler:

The Board is ultimately responsible for the system of internal control. Boards will normally delegate to management the task of establishing, operating and monitoring the system, but they cannot delegate their responsibility for it. (Stock 1999)

The Board should set appropriate policies on internal control and regularly assure itself that appropriate processes are functioning effectively to monitor the risks to which the company is exposed and that the system of internal control is effective in reducing those risks to an acceptable level. It is essential that the right tone is set at the top of the company - the Board should send out a clear message that control responsibilities must be taken seriously.

The Board, however, does not have sole responsibility for a company’s system of internal control. Ultimately responsibility for the internal control system rests with the Board, but all employees have some accountability towards implementing the Board’s policies on risk and control. This reflects the ‘top down, bottom-up’ nature of a sound system of internal control.

While the ‘tone at the top’ is set by the Board, it is the role of management to implement the policies adopted by the Board. In fulfilling its responsibilities, management should identify and evaluate the risks faced by the group – for consideration by the Board - and design, operate and monitor an appropriate system of internal control.
9. Assessment of the National Governance Protocols

As national coordinator of the University Governance Professional Development Program (UGPD), the National Institute of Governance (NIG) had the opportunity to observe the impact of the National Governance Protocols through its research and professional development training activities in this sector.

There has been a slow but real shift toward a national, sector-wide governance community of about 800 university governance practitioners, led by the chancellors, who have now incorporated as a group as the University Chancellors Council. This has been matched by increasing national media attention on questions of governance as well as management in universities.

There has been a significant reduction in risk due to controlled entities and offshore operations, due in part to better identification of existing controlled entities and in part to a move towards stricter procedures for creating controlled entities. Acknowledgement of poor business models for some business-type activities led to good practice: closing lose-making operations.

In 2006 the UGPD Program conducted a survey of university governors’ responses to the National Governance Protocols (UGPD 2006, and included as an attachment to this submission). On the one hand the survey data showed greater than 80% thought their institutions well placed to satisfy the requirements of the NGP, and in general Australian universities were better placed in corporate governance than rhetoric might suggest.

On the other hand, the data suggests that university governing bodies are still more oriented to compliance than performance, and that satisfying the National Governance Protocols was not too formidable a task. Furthermore, individual comments reveal discrepancies or shortcomings, including (but not limited to):

- The overall prescriptiveness of the Protocols;
- The lack of definition of, as the main example, “controlled entities”;
- The limited definition of ‘expertise’ as financial;
- The difficulty of operationalising some Protocols (e.g. succession planning) in the external environment.
- The absent, or recent, knowledge of institutional responses to the Protocols.

The National Governance Protocols have been identified as a tool to change the culture of governance of Higher Education institutions (Bishop 2006). As such they have been good first step, leading to apparent compliance. Identifying actual compliance, external to the institutions and the Commonwealth Department, is impossible given the compliance reports are not publicly available. Hence in their current form do not easily stimulate or reveal a good governance culture.
**Recommendations**

The overall tenor of the Institute’s submission is that facilitation is preferable to regulation. Few of those issues discussed here can be resolved by imposition on a university or governing body culture by legislation, even where possible solutions may be understood. More often they are not, but must emerge from deliberation by these communities.

So second phase reforms of the National Governance Protocols need a shift in emphasis:

- From government, centralised, uniform, regulatory, prescriptive;
- To institutions, distributed and diverse, behavioural, accountable and responsive.

**Recommendation 1.** The benefits of the existing Protocols suggest that they should remain, subject to the findings of this review.

**Recommendation 2.** These benefits can be obtained in new areas where the Commonwealth or State governments possess the evidence of need, e.g. IAF data and strategic estate management. Otherwise extensions of the generally prescriptive formula of the Protocols should be restrained.

**Recommendation 3.** New benefits, in terms of the motivation towards a governance performance culture, are to be obtained by altering the processes around the Protocols, within a framework of transparency and accountability. This is simply implemented by:

  a. DEST and institutions publishing university compliance reports; and
  b. DEST publishing the government’s response to reports and the consequences.

**Recommendation 4.** The compliance reports should meet an “if not why not” standard to account for institutional diversity, equivalent to those promoted by the principles of corporate governance applied in the private sector in Australia and elsewhere. Combined with Recommendation 3 the governing body will be held accountable for their choices.

**Recommendation 5.** Further evolution in the development of professional practices of good governance are only likely to emerge from concerted deliberation of key questions such as those below by the whole community of university governance professionals including institutional governors and their governance staff, state regulators and Higher Education specialist governance professionals. Therefore it is recommended that consideration is given to how the Commonwealth and States can facilitate these discussions within the sector. Possible questions are:

**Question 1.** A key question raised by “transparency and accountability” is “to whom?” The Minister approves the Protocols compliance reports on behalf of the Commonwealth government as the largest single source of funds to the sector. However the Commonwealth government represents neither the legal nor moral owners nor other stakeholders of the public institutions, even in the broadest sense of Australian society as a whole.

**Question 2.** What lessons can be learnt from private sector governance and management?

**Question 3.** What are the common elements of the role of secretary to the governing body that are appropriate to Australian universities, and how can or should these be implemented?

**Question 4.** How would an appropriate governance budget be determined?

**Question 5.** How would an appropriate stakeholder identification and communication strategy be developed?
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