NATIONAL TERTIARY EDUCATION UNION
SUBMISSION TO THE REVIEW OF THE
NATIONAL GOVERNANCE PROTOCOLS

AUGUST 2007
1. INTRODUCTION

The National Tertiary Education Union (NTEU) represents the industrial and professional interests of over 26,000 academic and general staff employed in Australian higher education institutions. The Union welcomes the opportunity to provide comments on the Joint Committee for Higher Education (JCHE) review of the National Governance Protocols (NGP).

NTEU agrees that good governance is crucial to the effective operation of Australia’s higher education sector, particularly given the rapidly changing political, legal and financial environment that universities now operate within. NTEU strongly supports efforts to improve the management and regulation of Australian universities and the higher education industry generally and through this safeguard their educational missions and the substantial public funding investment in them.

Given that the NGP were first introduced as part of the Backing Australia’s Future package in 2003 and were only implemented in 2004, the Union believes insufficient time has lapsed for the JCHE to be able to draw any clear and systemic conclusions about the success or otherwise across the sector.

Although it is difficult to pinpoint the impact of the NGP on universities’ operations with any accuracy, clearly some aspects have been useful and have contributed to improvements in certain governance practices in some universities.

While there is merit in some of the changes being considered in this review, on the whole the changes being put forward represent an overly prescriptive one size fits all approach to the complex issue of university governance. This cuts across the legislatively enshrined independence of universities. Many of the changes suggested in the Issue Paper run counter to the rhetoric espoused by the Federal Government about the need for a more diverse higher education sector and the reduction in the administrative compliance burden for universities.

Amending and expanding the NGP is also problematic given that they are based on a number of flawed assumptions that have not been adequately examined. These flawed assumptions, which also underpin many of the changes being contemplated as part of this review, include:

- That it is possible to enforce good university governance through legislative means.
- That smaller governing bodies are more effective than larger ones, and that problems in university governance are due mainly to structural factors such as size and composition.
- That external appointments to governing bodies add more value to an institution than internal members.

The following submission will seek to deal with the broader issues relating to the NGP as well as commenting on some of the specific propositions put forward in the Issues Paper.

Overall, the Union believes that too little time has lapsed since they were established for the JCHE to contemplate making significant enhancements to the NGP.
The existing NGP are adequate to define the roles and responsibilities of university councils. If the JCHE is to agree on changes then these should be in the form of broad based principles, the interpretation and implementation of which should be flexible and left to the discretion of individual institutions.

Importantly, compliance with the NGP, whatever changes are suggested by the JCHE should not be tied to Commonwealth funding.

2. HAVE THE NGP CONTRIBUTED TO BETTER GOVERNANCE?

Given all the changes that have taken place in higher education over the last few years and the generally slow turnover of governing body membership, it is difficult to isolate the particular impact that the NGP have had. The Union would be keen to know what research the Commonwealth has undertaken in this area and what evidence it has to support its argument about the need for further changes.

Clearly some aspects of the current NGP have been useful and contributed to improvements in the management and operation of universities. These benefits mainly relate to those aspects of the NGP that have sought to encourage institutions to clearly articulate the respective roles and responsibilities of governing bodies. These include:

- The emphasis in Protocol 6 that institutions must adopt systematic procedures for the nomination of prospective members of the governing body for those categories of members that are not elected.
- The stipulation in Protocol 7 that institutions must codify their internal grievance procedures and publish them.

Other areas of the NGP that have been useful are the stipulation in Protocol 4 that each governing body must make available a programme of induction and training for members, and the emphasis in Protocol 10 on overseeing and monitoring controlled entities and significant commercial activities of universities. This latter point is one area in which the Union believes there may be a role for the JCHE in providing more guidance to institutions, although this is complicated by the ongoing debate over the rationalization of Commonwealth-State responsibilities for higher education.

There is some evidence that, at the time that the NGP were being formulated, universities were already implementing many of the desired changes. As such, it is questionable whether there was a need for Commonwealth Government interference. In some institutions, the NGP have merely formalized changes already underway. Other aspects of the NGP, such as the stripping back of staff and student representation, has not been productive and has been contentious at some institutions.

Whatever changes are made to the NGP, the key point to emphasis is that they are best done through cooperation and dialogue between the various players in the higher education sector, rather than tying predetermined changes to funding. The latter approach, if it is to be repeated, will merely result in the compliance culture so derided by the current federal Education Minister.

The considered view of many in the sector, including researchers in university governance, is that you cannot legislate for good governance and that attempts to do so will only result in a one-size fits all, rigid approach that will not be responsive to
the existing diversity in the sector. Nor will this approach be effective in building the
capacity of university governing bodies to deal with the complexity of the issues
facing the sector. Recent research in this area (Rytmeister, 2007) proposes that key
determinants of strategic capacity in governance include:

- an inclusive and participative culture that values members’ contributions,
- governing body confidence in the probity and competence of the Vice-
  Chancellor, and
- complementarity of expertise, knowledge and experience (internal and
  external) amongst governing body members.

None of these determinants can be legislated into existence; all depend on the
interactions and relationships between the members of the governing body and not
the prescriptions of protocols.

3. THE SIZE AND COMPOSITION OF GOVERNING BODIES

The size and composition of governing bodies is the most controversial and, from the
Union’s perspective, the most politicized aspect of the current review.

The size and composition of governing councils should be a matter for universities
themselves to determine based on the institution’s unique mission, attributes and
environment, the specifics of which cannot be legislated.

NTEU believes that JCHE should recommend the retention of the current upper limit
on the number of members of a university governing body (question 3.2.3) and
should in no way recommend a compromise number based on an arbitrary figure.

**Does the size of a governing council matter?**

The Federal Government places particular emphasis on the size of governing bodies.
In announcing the development of the NGP in 2003, then Education Minister,
Brendan Nelson targeted the size of university governing bodies as being a major
issue. His successor, Julie Bishop, has displayed a similar zeal for this issue.
Addressing a conference in October 2006, she stated: “It is worth considering
whether it would be preferable to have a smaller governing body with advisory bodies
comprising those representing specific interest groups.”

She went on to say “I don’t think the limit of 22 in the National Governance Protocols
has gone far enough. Good practice models suggest that 10-15 members is the ideal
size for such a body – large enough to benefit from a diversity of viewpoints while
small enough to facilitate effective decision-making. My inclination is to have a limit of
14 that must continue to have a majority of external independent members who are
neither enrolled as a student nor employed by the higher education provider. Specialists
can be invited for particular information or additional perspectives on
issues.”

The federal Government’s continued pre-occupation with the size and composition of
university governing councils is all the more frustrating because it does not appear to

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1 Transcript of speech to National Conference on University Governance, Canberra, October
10, 2006

2 Ibid
be backed up by any research or detailed statements to support it. It certainly does not correspond to the size of university councils in other nations, which vary in size from 26 members at the University of Oxford to 17 at Yale University.

While it is true that large meetings have the potential to make discussion difficult, all governing bodies have established a number of committees, in which the more detailed discussion of issues, performance, risk, finances, strategy and selection of governing body members take place. This is regarded as an efficient and effective way to operate, allowing not only close scrutiny of university performance but also the development of good working relationships between governing body members and senior management.

As the role of governing body members other than ex officio members is essentially voluntary (only Victorian universities pay their external governing body members, and this is only a token amount rather than at the level of a commercial director's fee), most Chancellors are careful to share committee work amongst the membership in order to prevent anyone from becoming over-burdened. Smaller governing bodies would put this efficient and effective way of organising governing body business at risk as members committee workload would need to increase substantially.

One of the arguments presented by advocates of smaller governing bodies is efficiency and “nimbleness” in decision-making. However, several studies have demonstrated an inverse relationship between university governance “efficiency” (time taken to process information and make decisions) and effectiveness (ensuring sustainable and viable operations of the institution) (Kezar & Eckel, 2004). This is largely because of the complexity of universities as institutions and of the environment in which they operate.

Unlike commercial corporations, universities do not have shareholders to which directors owe a fiduciary duty. Rather, the fiduciary duty of university governors is to multiple stakeholder groups, both internal and external, present and future. A small governing body simply cannot include the vast range of expertise and experiences needed to cope with this complexity, thus compromising effectiveness.

Smaller bodies may be quicker but they may lack the full picture of what is going on in relation to a particular decision and miss vital aspects of a problem. They may also be more susceptible to being captured by “group think” due to the relatively narrow spectrum of views expressed and the information available to them.

**Composition, expertise and effectiveness**

The reduction in the number of staff and students mandated in the first iteration of the NGP, as well as the elimination of Ministerial appointments by State and Territory Governments has already accomplished an overall reduction in the size of many governing boards. The corporatisation of governing bodies encouraged by the NGP has also meant that external appointments have been favoured, especially those with financial and commercial experience. These changes have occurred without reference to the many studies that have found little link between the broad composition and size of governing councils and their performance, except at the extremes, including a major 2003 study of New Zealand tertiary education governance.

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Student and staff members of governing bodies are now routinely excluded from serving on financial and commercial committees due to so called conflicts of interest. It is the Union’s experience as reported to us by our members, that staff who are critical of the functioning of their institution are not encouraged to speak out or, in some instances, have been faced with charges of serious misconduct on the basis that their comments might impugn the university’s market reputation.

These changes, mandated by the NGP have created a hierarchical rather than collegial system with clear divisions between senior management and everyone else. This has not been in the best interests of universities, due to the aforementioned need to maximise the use of both internal and external expertise, experience and knowledge in order to deal with the complexity of issues universities face.

The argument that smaller governing councils are more efficient and effective and, linked to this, the notion that external appointments add more value than internal ones, presupposes a number of false assumptions about how universities operate without examining their role in society and to whom they are accountable to.

The core function of Australia’s universities is to deliver teaching and learning that engages with advanced knowledge and inquiry and which has a commitment to promoting and defending academic freedom. Institutional autonomy and academic freedom are the defining values of universities and are a key requirement of the accreditation standard as self-accrediting institutions, enshrined in legislation. It is these functions that the Union believes define universities as working in the public good and which give the public a major stake in their operations, regardless of the exact percentage of public funding that they receive.

The governing body plays an important role in protecting, nurturing and ensuring the sustainability of these core functions. It must concern itself not just with how the institution allocates resources, but how the university defines its role and manages relations with all the various stakeholders concerned, including Commonwealth, State and Territory Governments, business, students, staff, alumni and the community. By definition this process represents a complex set of inter-relationships between the participatory element of relating and responding to the various stakeholders and the need to make high-level decisions relating to financial and resource allocation.

**External and internal members of governing bodies**

NTEU believes that there is no need for the NGP to provide additional requirements or guidance on the skill mix required for an effective governing body (Issues Paper question 3.3.4). The skills mix and mix of internal and external council members should be a matter for the institution to decide with the exception of broad principles already laid out in the NGP.

Related to this, we strongly oppose any suggestion that representatives of staff and students should be included in consultative rather than governing bodies (question 3.2.5). It is vital that an alternative internal perspective from that of the Executive management be brought to the table in governing body discussions and decisions.

The assumption that a majority of external members, equating to non-executive directors in corporate boards, is preferable to a broader based membership underpins much of the federal Government’s thinking about university governance. This is referenced to the Commonwealth’s own documents, particularly the documents prepared as part of the *Higher Education at the Crossroads Review*, in
which the Government asserted that there was evidence that some internal members had difficulty accepting their role as trustees as opposed to delegates.

The current Federal Education Minister’s desire to impose a corporate model of governance, including having a majority of councils members composed of external appointments, is also predicated on the belief that external members possess the necessary business acumen necessary to ensure universities operate in a more business-like fashion.

NTEU believes that university staff have a right and a professional responsibility to engage with the governance of their institution. Staff participation in governance is critical to the ability of universities to work in public interest and defend principles of academic freedom, in so much as staff must be able to actively participate in the governance as part of engaging in debates concerning the effective operation of their institution. Critical here is the need for transparency and accountability of university governing bodies in fostering a climate that encourages freedom of expression and thought. This is a vital part of the accreditation process for access to university title and is enshrined in university foundation acts, as well as in Australia’s international obligations.

Elected internal members (staff and students) are not only a rich source of information about the university, but as members of key stakeholder groups, their perspective is critical to governing body deliberations. Their knowledge and experience of the university should be seen as valuable expertise related to the core activities of the institution, rather than the intrusion of an extraneous interest group.

It is the experience of our members that external members on governing councils greatly value the perspectives and knowledge that internal members bring to discussions. This is particularly as it is sometimes difficult for external members to question statements of fact by the management when they do not have a thorough understanding of the institution and how it functions. This is not to suggest that external members of university councils do not bring a wealth of experience, but they often have limited exposure to the institution and the impact of the council’s decisions within the institution, and to the higher education more generally.

The possibility raised in the Issues Paper that staff and students be included in consultative rather than governing bodies, increases the risk of councils being captured by ‘group think’ or missing important information or perspectives that should be brought to bear on decision making.

An effective university council should represent a variety of experiences, skills and backgrounds. The key issue, with which we do not disagree, is that while councils should be aware of such views, and may be influenced by them, they should not be answerable to the group that espouses them.

As council members, staff and students are obliged to operate in the best interests of the university as a whole, with that obligation to be observed in priority to any duty a member may owe those electing or appointing him or her. On the whole, elected members of governing bodies are fully aware of their obligations in this area. This should not preclude a council member, external or internal, from putting forward their views of what is in the best interests of the university. Conflict of ideas should not be thought of as conflict of interest.

The Union believes that it is essential that those staff and students who serve on governing bodies have the confidence of the university community and that this
confidence is best achieved by a fair and open election process. Appointment of staff and student members either by the Executive or the governing body itself would potentially serve to reduce the diversity of opinion available to the governing body or substantially undermine the confidence of the community in governing body decisions.

4. THE SCOPE FOR FURTHER ENHANCEMENTS

The Union believes that risk management is the one area where there is potentially scope for the NGP to play an expanded role, although this is complicated by the current debate about Commonwealth/State/Territory responsibilities for higher education.

Significant declines in Commonwealth funding over the last decade have resulted in universities being forced to supplement their financial resources from a number of other sources, such as increased tuition fees, particularly from international students, industry partnerships and the establishment of on and offshore commercial entities. While these activities are now crucial in helping universities to meet their core responsibilities of teaching, research and scholarship, they open them up to a myriad of risks, including legal and commercial risks, as well as challenges to academic quality and reputation in the process of delivering courses they are accredited to provide.

The recent events associated with the University of New South Wales withdrawing from their Singapore campus has focused the sector on the difficulties facing Australian institutions in the international market. Higher education is a global industry and Australia is one of the major players, with only the US, Britain and Germany having more international students. There are great financial risks associated with offshore projects whether in the form of programs offered in conjunction with overseas partners or the establishment of an offshore campus.

It is important to add that the risks are not limited to offshore projects. They also result from the high dependence of many institutions on overseas student fee income, varying between around 25% of income at institutions like Macquarie, RMIT, Curtin and UTS, and 46% at Central Queensland University.

The current NGP requires that the governing body oversees and monitors “the assessment and management of risk across the higher education provider, including commercial undertakings.” While bearing in mind the point made earlier in this submission about the difficulty of legislating good governance, JCHE may wish to consider what, if any, changes to the NGP could be made in this area, particularly relating to the complicated and growing area of offshore higher education activities. Particular thought could be given to how risk management, rather than being a separate activity, should become an integral aspect of all its operations. This might include, for example, specifying that council induction programs should include in-depth analysis of the strategic challenges, including international ones, facing the institution.

References