The following set of comments relating to the National Governance Protocols for Higher Education Providers not listed in Table A of the HESA are submitted by the Australian College of Theology (ACTh).

The College was represented at the Information Forum held at UTS on Friday 13 July and welcomes the opportunity to respond to the Issues Paper (May 2007).

3.1 Contribution of the National Governance Protocols to good governance

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

In the context of the ACTh these Protocols have largely set the pattern in the reformulation of the governance arrangements of the College. The role of the governing body and the responsibilities of the members have been embraced in the drafting of a new constitution for approval during 2007 and implementation in 2008.

The creation of an appropriate system of delegations will have significant benefit in the ACTh under its new constitution.

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

Protocol 5 requires:
A majority of the members must be external independent members who are neither enrolled as a student nor employed by the higher education provider.

In attempting to comply with the requirements concerning the composition of the governing body in documentation submitted to NSW DET we found they had a more stringent requirement than set in this protocol. For registration of a higher education institution in the state NSW DET requires that a majority of members not be from among the “owners”, a requirement that appears to be derived from good governance in companies. In the case of the ACTh this means that our new constitution must comply both with the NSW DET registration guidelines and the National Governance Protocols with respect to satisfying what both define as “external independent”.

Perhaps there should be further consideration given to the definition of “external independent” that results in consistency of definitions.

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

In the construction of the new ACTh Constitution in the context of the Corporations Act consideration was given to including all of the responsibilities listed in Protocol 2. It was recognised that a number of the matters in Protocol 2 were already part of the obligations on the Board of Directors under the Act and that others could be embraced by resolution of the Board when established. This meant that in the new ACTh constitution only a small number of the matters in Protocol 2 are explicitly listed.

In addition, the ACTh has embraced in its new constitution the need for a single Academic Board with maximum oversight of the academic matters in the College.

3.1.5 How have the existing Protocols addressed the concerns about university governance raised in the Higher Education at the Crossroads and the Meeting the Challenges: the Governance and Management of Universities papers?
3.1.6 How have the Protocols contributed to the overall sustainability of individual higher education providers?

While the Protocols provide some detail contributing to the overall sustainability of the ACTh, its move to be a company limited by guarantee places clearer legal obligations on the governing body to work for the sustainability of the College.

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

This will be assessed in the ACTh over the next few years.

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

In the ACTh this will be assessed over the next few years.

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

By adopting a constitution sufficient for registration as a company limited by guarantee the ACTh has committed itself to governance practices and procedures with legal consequences. These practices and procedures comply in large part with the Protocols, with the Protocols providing detail for the general principles in the constitution.

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

Improvement to the protocols may be achieved by blending in the principles embraced by a company under the Corporations Act and attaching the relevant legal implications. Also, as part of induction and professional development program for members of the governing body, attendance at a training program for directors would seem beneficial.

3.2 The role and composition of the governing body

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

Apply Section 2D.1 of the Corporations Act Sections 180–193 to universities and non-company HEPs for equity with private HEPs which are companies.

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

The ACTh in its new constitution has adopted a base size of nine (9) with the ability to co-opt up to two (2) further members. The obligation to always have a majority of independent members is embraced, together with the requirement to have at least one with expertise in each of the following areas: finance, commerce, senior higher education administration. Given the ACTh is Australasian in coverage, there is potential for members of the governing body to come from most states of Australia and from NZ, with consequent expense for travel and accommodation.

Perhaps it is not the maximum size that is a matter for the ACTh but rather the minimum size. A board of 9 to 11 seems like about as small as might be reasonable to embrace the range of stakeholders associated with a HEP and the necessary range of expertise.

Given the majority of the ACTh Board must be independent of the organisation and other features of the constitution concerning the composition of the ACTh Board, particularly with all positions filled by election, it will be difficult for any academic staff or students to gain a position.
Another concern is the way in which committees of the governing body are constituted. If they are constituted totally by members of the governing board, the size of the board would need to be big enough to distribute members equitable across these committees to prevent overload of work, particularly if membership of the governing body is voluntary. If, on the other hand, the committees of the governing body are composed of a chairman from the governing body and members drawn from outside the governing body, then the size of the governing body could be quite small. This latter approach, along with other processes, would give the governing body the benefit of consultation beyond its number.

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

For HEPs not listed in Table A of the Act there is no maximum term specified in the Protocols. The ACTh’s new constitution sets the term of office of members of the governing body at three (3) years with eligibility for re-election. There is currently no limit on the total length of membership of the Board by any member. Continuity and experience on the Board may be matters to be considered when the new constitution begins to operate. Notice will need to be taken of the experience in universities that board members are able to contribute best after one term of membership of the board. Perhaps, while election remains the only initial process for gaining membership of the ACTh governing body, the ACTh will consider a maximum term of membership of 9 or 12 years.

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

For Higher Education Private Providers (HEPPs) which don’t have direct links with a university, in addition to the requirement for the governing body to have at least one member with financial expertise and at least one member with commercial expertise, the Protocols might oblige HEPPs to have on the governing body at least one member with senior administrative experience in the public higher education sector.

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

Staff and students should be able to be elected to the governing body, be represented on consultative bodies, and by definition of composition have representation on the academic board and its sub-committees, and on as many other possible committees as the governing board may deem appropriate.

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

For private HEPs registered as a company limited by guarantee under the Corporations Act the Secretary is a prescribed role in the organisation and on the governing body with duties as assigned by the governing body.

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

If, as the preamble to the previous and this question suggest, it is DEST’s view that Secretary should be “independent of management”, it would be beneficial for the Protocols to detail DEST’s perception of the role, responsibility and powers of a Secretary.

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

Rather than mandating relationships, the Protocols might provide guidelines of good practice in this area, permitting institutions work out in their context the relationship that works for them.
3.2.9 Should the Protocols contain explicit guidance on the devolution of management responsibilities to the Vice Chancellor/CEO.

Protocol 2 includes reference to “an appropriate system of delegations”. Surely this provides a basis for auditing the explicit devolution of management responsibilities to the Vice Chancellor/CEO of a HEP. What delegations are given will vary among institutions but that they are resolved and recorded by the governing body is the important thing.

3.4 Accountability

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

The Protocols set down the areas of institutional activity to be evaluated by the governing body. Perhaps against each activity a minimum set of performance indicators might be provided, along with suggestions of additional indicators. The governing body would be expected to review progress in the various areas regularly on at least the minimum set of indicators, and over time begin to address the additional indicators.

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

At the level of the governing body auditing focuses on the state of finances of the institution. Yet the major activity of the institution is academic. Although it may report through the Chair of the Academic Board to the governing body, the mandated establishment of an Academic Audit Committee under the Academic Board seems just as important as a financial audit committee, if not more so for the reputation and sustainability of the institution. Monitoring what is happening in the academic committees, teaching and research units of an institution is likely to contribute to the sustainability and improvement of an institution, making it more attractive to prospective students and staff.

There is still the issue of who determines administrative organisation and practice and monitors effectiveness to ensure improvement in that area and to whom does that person report in a transparent fashion. Is this to be left to the oversight of the CEO, or should the Protocols at least set some reporting requirements in place.

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

Guidance might be provided by the Corporations Act as provisions there apply to members of the Board (the governing body).

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

Again, guidance might be provided by the Corporations Act as provisions there apply to members of the Board (the governing body).

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

Areas to be monitored and in each area a minimum set of indicators might be set as requirements, with guidelines for further areas and indicators to be incorporated in the evaluation process over time.

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

The independence of action of an Audit Committee set up by the governing body should be a matter for the governing body. Guidelines to the Protocols may well be helpful to spell out the implications of various terms of reference for an Academic Audit Committee.

3.4.7 Should an audit committee be required to have an independent chair?
Again this should be a matter for the governing body. It seems reasonable for the chair to at least be an “external” member of the governing body. For the audit committee to be independent of the governing body seems unnecessary and inappropriate.

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

If this question relates to the governing body and its sub-committees, then guidelines could be helpful in providing possible strengths and weaknesses of various forms of relationship between the governing body and its sub-committees. But which form to adopt in a particular institution must be left to the governing body of that institution. It is important that the terms of reference of the various sub-committees of the governing body do not impinge on the role of administration in the institution – the sub-committees might formulate and resolve policy (in consultation with administration) but must leave the administration to implement the policy.

If this question relates to the governing body and sub-committees within the institution, like the Academic Board and its committees, the Protocols might mandate reporting responsibilities between the Academic Board and the governing body and provide guidelines concerning the academic organisational structure and the relationships among the Board and its various committees. Recorded delegations will clarify the relationships.

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

Consistency of governance across the nation might be enhanced best by firstly applying the accountability obligations on company directors to members of HEP governing bodies. Then it would be beneficial to have guidelines spelling out the strengths and weaknesses of various models for delegation of key responsibilities. Concerning mechanisms for reviewing and reporting on its own performance, governing bodies would benefit from areas for consideration and minimum sets of indicators in each of those areas.

There would be benefit from the establishment of a protocol for external evaluation of governing bodies. This would provide the possibility of comparison based on consistent definition of terms – areas for evaluation might listed with various indicators in each area. In this way compliance with at least the requirements under the protocols could be covered, with opportunity to indicate when and where guidelines have been adopted.

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

Again, the Protocols should set the essential areas for evaluation and in each area a minimum set of indicators; then guidelines for other areas and indicators for consideration for future adoption.

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

A review of the Corporations Act may reveal other provisions of benefit to universities and other HEPs that are not companies.

3.5 Continuous improvement

3.5.1 Do the existing Protocols encourage continuous improvement of governance arrangements?

The second sentence of Protocol 4 requires the governing body at regular intervals to assess its performance, suggesting that should any deficits be identified they would be redressed. The period between such assessments should be more than one year and perhaps occur in two stages during the period of tenure of members of a governing body –

(a) a minor assessment mid-term reviewing progress against the outcomes of the previous major assessment and determining actions/settling goals for the remainder of the term; and
(b) a major assessment completed by the middle of the final year of tenure reviewing progress against the previous major assessment and the mid-term actions/goals, and suggesting actions/goals for the next governing body.

3.5.2 Should the Protocols include further guidance for governing bodies on the regular review of their own performance, such as reporting the outcome?

There may be benefit in providing guidelines suggesting areas for evaluation and possible criteria (performance indicators) within those areas upon which to base the evaluation. Perhaps the governing body might be required to include a summary of the outcomes of assessments and proposed consequential actions in the annual report following an assessment.

3.5.3 Would the inclusion of additional provisions and requirements improve the Protocols?

If additional material is included, guidelines to governing bodies among which they may choose for application in their institution would be more beneficial than requirements.

3.6 Improving the form and clarity of the National Governance Protocols

3.6.1 Are there useful clarifications that could be made to any of the existing Protocols or the overall presentation of the Protocols?

If guidelines are to be added to requirements, let the obligation to comply with (essential) requirements and the discretion to choose among (desirable/optional) guidelines be declared. This approach may be beneficial for recognising the diversity of approaches needing to be adopted by governing bodies according to their various circumstances, setting some essential criteria for establishment, character, and practice and providing guidance as to various approaches and/or foci for action.

3.7 Other Issues

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

Governance is a matter not only for these Protocols but also for the Protocols related to the HE Approval Processes. There would be great benefit if the governance requirements were aligned in the various protocols in use at Federal and State levels.

This lack of alignment is further underscored by the fact that non self-accrediting HEPs undergoing a quality audit under the HESA 2003 find that the Quality Audit Factors devised as a guide for such audits expect governance arrangements to be consistent with the Protocols.

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Dr Mark Harding
Dean

Dr Ken Wade
Quality Manager

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