

Governance during the pandemic and beyond ...

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19 October 2020

Please note: the information contained in this legal update is correct as of the original date of publication.

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Setting the agenda

The Governing Body's work over the coming weeks and months could probably be helpfully divided into three phases of work:

1. reacting to the crisis.
2. recovering from the crisis.
3. responding to the new landscape – it is likely that there will be a new reality rather than a moment in time where we go back to how things were before the crisis. Governing Bodies clearly have a critical role supporting leadership teams navigate the new reality.

The challenges presented by the pandemic will inevitably result in all of us facing a number of crises over the coming months and so Governing Bodies may find themselves managing different phases in relation to each of these crises as they arise. This is going to make it difficult to ensure that the right level of focus is given to each issue during Governing Body meetings.

Setting the agenda and determining priorities over the coming months is certainly not going to be an easy task.

It must also be remembered that the executive team will be grappling with an evolving situation, frequently updated government guidance and expectations for the sector in an environment where there are many “unknowns”, “unknown unknowns” and limited prior experience to rely on in terms of both reacting and recovery to the crisis. There is no existing roadmap that Governing Bodies can use; together with leadership teams they will have to make decisions based on imperfect information.

Governing Bodies can, however, make sure that they reflect properly on what they have learnt and put that into practice going forward.

How effectively does our governance help our institution learn?

There could be a lively debate on the question, what universities are for? That said, a focus on capturing and generating knowledge and then sharing that knowledge is a key pillar.

Given this, it is perhaps worth reflecting on whether your governance systems and practices identify, promote and support organisational learning?

To do this - pause and consider, how effective is your institution as a learning organisation? In particular:

- how does governance play a part in helping your institution learn and how can you make it even more effective?

- how effective is your Governing Body at 'systems thinking' and how can you make it even more effective?

If you are interested in this theme and learning more about the concept of the learning organisation then beyond the experts on this topic in your own institution, externally there are several proponents of the model but one, in particular, that is popular is Peter Senge's *The Fifth Discipline*.

A key concept of his approach is to think circular and not linear – so systems, not event thinking. Systems thinking involves looking at patterns in an organisation by taking a holistic viewpoint rather than small unrelated manageable parts. Senge uses an elephant metaphor to get across his message. When you split an elephant in two, you do not have two small elephants which you can take care of. You can only take care of the one complete elephant. An organisation is like a living organism and should, according to Senge, be managed as one.

An agenda item that reflects this approach would be to look at what plans you have in place for the Governing Body to reflect on the institution's response to the pandemic and help bring systems thinking into each of the three phases of the response to the pandemic?

We highlight below two specific areas of recent development that will assist you when reflecting on your own governance arrangements.

Schemes of delegation matter

Schemes of delegation may not sound exciting but they have given rise to two Court of Appeal decisions this year.

The case of Bloomsbury Institute vs the Office for Students will be of wider interest to institutions but it is a salutary reminder of the importance of having a well-prepared scheme of delegation in place that is followed in practice. It should also serve as a prompt to check whether decisions are delegated under the scheme to the most appropriate place.

You may recall that OfS refused to allow the Bloomsbury Institute onto its register of providers. OfS won in the first instance in March but it subsequently lost on appeal in the Court of Appeal (judgement was published in August). A key limb of the case centred on the OfS' scheme of delegation and about the difference between policy matters and administrative/operational matters. In particular, who applied the thresholds that made numbers "of concern", "of significant concern" or "of no concern" – the OfS board (and its quality sub-committee) or OfS staff? In other words, were all of the decisions about numbers and splits and thresholds a policy matter, or mere operational detail? On appeal the Court determined that these decisions all "fall well on the policy side of the line".

This case is similar to a recent decision relating to the Charity Commission for Northern Ireland. In February, the Court of Appeal delivered its judgment in the case of McKee & Others v Charity Commission for Northern Ireland, upholding a legal challenge to the delegation of decision-making powers by the Commission to members of staff. The case addressed a technical point of law, namely that all Commission orders and decisions must be made by the Board of Commissioners or a committee to include Commissioners with delegated authority, rather than Commission staff following manuals approved by Commissioners.

New Code of Governance

Effective governance clearly involves a curious mind and continuous development. It is therefore to be welcomed that the Committee for University Chairs recently published the new Higher Education Code of Governance following its review of lessons learnt and developments since 2014.

It can be tempting with new codes or guidance to take the document on face value. Possibly you may decide to benchmark how your Governing Body performs against the new Code. These steps will inevitably be helpful but it is also an ideal opportunity for your Governing Body to pause, learn and reflect on your own governance arrangements – in theory and in practice. What were the factors that led to the additions and changes in the Code? What is your own experience in the last six years? What challenges do you see bubbling up in the future hinted at in the Code? Should our Governing Body be looking to make changes to react to the new Code and/or our own observations?

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