

*Chapter 2*

## **Higher and Further Education**

45. Higher and further education have gone through enormous changes in recent years. The number of full-time students in higher education has risen from 200,000 in the sixties to over one million today. Where there were 25 universities in the 1960s to cater for them, there are now well over 100. The universities founded in the sixties and once called 'new' are now a familiar part of the education scene. The term 'new university' is now applied to the former polytechnics and (in Scotland) centrally-funded institutions which became universities as a result of the Further and Higher Education Act 1992 and the equivalent measure for Scotland. The 1992 Act also gave full independence from local government to further education colleges (a term which we will use to include tertiary and sixth-form colleges) which were similarly faced with the requirement to provide more student places. The government has greatly increased the funding for both sectors, but available resources have not kept pace with the growth in student numbers. Efficiency savings and competition for funds have become an integral part of the management of further and higher education institutions.

46. At the same time there has been a blurring in the established categories of institution. The governance structures of the former polytechnics, reflecting their past history, were reflected in those of further education corporations. Some further education colleges offer substantial amounts of higher education; partnerships between further education colleges and universities continue to develop; and outright mergers to create institutions offering both further and higher education are now mooted. The advantages and disadvantages of these changes are not for us to consider, except insofar as they affect, or might affect, standards of conduct. We deal in this chapter with standards in further and higher education together, although we take account below of the different cultural traditions that underpin the ethos of the university, and consider what they mean for structures of governance and regulation.

### *General Standards of Conduct*

47. The firm view of our witnesses and those who wrote to us was that standards of conduct in higher and further education were generally very good. The changes which have taken place over the last few years have been implemented with good will by voluntary governing bodies and highly professional staff who have had to adapt institutions to new circumstances under considerable pressure. The consequence of the changes has been to place greater burdens and demands on the expertise of the unpaid volunteers who serve on governing bodies.

48. In contrast to the unsung contributions of the majority of excellent governors, a few cases in which problems have arisen have received a good deal of critical comment. In recent years, there have been difficulties over standards of conduct in respect of governance and the handling of public money in two colleges of further education (Derby Wilmorton and St Philip's, Birmingham), and two new universities (Huddersfield and

Portsmouth). Michael Shattock, who led the investigation into Derby Wilmorton, pointed out to us that moving to independence had been a considerable challenge for some further education colleges, particularly those that were small, lacking in management expertise, and emerging from a tradition of tight local authority control. Baroness Perry commented that some new universities had found the 'headiness of autonomy a little intoxicating'. All our evidence, however, suggests that we are dealing with isolated cases that indicate no deep-seated trend. In the circumstances of challenge and change outlined above, the 'failure rate' has been creditably small.

49. We have received a considerable quantity of evidence from individuals about the difficulties and harassment that they or other employees in higher and further education have faced when raising issues of concern. It is outside our remit to investigate individual cases, and it would be unfair to form conclusions about the reliability of information which is necessarily incomplete. Yet some of the material we received was disturbing. Universities and colleges are institutions under considerable financial and administrative pressure. This has the potential to create conflicts between their educational and scholarly functions and their need to generate income and act more commercially. Many governing bodies seemed to us to be well aware of this danger and of the need to encourage open and consultative management methods, which are fully in accordance with the traditions of educational bodies, especially universities.

50. Representative and funding bodies have been swift to offer advice on good practice. The Committee of University Chairmen (CUC), representing the chairs of university councils, has produced a *Guide for Governing Bodies of Universities and Colleges in England and Wales*<sup>1</sup> for the higher education sector, with the co-operation of the English and Welsh funding councils. The section on conduct of business is at Appendix 1. The Further Education Funding Council for England (FEFCE) has published a similar document for further education, the *Guide for College Governors*<sup>2</sup>. Both are models of good sense and good advice, and we have taken them into account. More recently, the Welsh Office has produced its *Guide for Governors of Further Education Colleges in Wales*<sup>3</sup> with support from the Welsh Funding Council. We were also particularly impressed by the formidable range of advice and material produced by the Association for Colleges and the Colleges Employers Forum setting out best practice on matters of conduct. An example is given at Appendix 2. Similar material is being produced by the Association of Scottish Colleges and the Scottish Higher Education Funding Council (SHEFC). Much progress has been made.

## *The Basic Structure*

### *Institutions of Higher Education*

51. For our purposes, institutes of higher education can be divided into two categories: 'old' and 'new'. This is a crude distinction, as there has been something of a convergence of culture and practice since the distinction between universities (old) and polytechnics (new) was abandoned. Systems of governance remain, however, fundamentally different. Old universities are governed by charters or occasionally by Acts of Parliament, and their governance structures vary greatly in detail. Typically, however, they are governed by councils with a majority of lay members but on which academic staff are strongly

represented; smaller numbers of non-academic staff and students are also members. Normally they also possess a court, a large representative body which may have nominal ultimate authority over the university. The chief executive of the institution is most often called the vice-chancellor or principal (the chancellor being largely an honorary figure). The structure in Scotland is similar but some of the terminology is somewhat different. For convenience we will use the term 'governing body' to cover English councils, Scottish courts and boards of management etc throughout.

52. New universities are mainly former polytechnics which became universities in 1993 with the power to award their own degrees. In England and Wales their governing structure is determined by statute (Schedule 7A of the Education Reform Act, 1988, as inserted by Schedule 6 of the Further and Higher Education Act, 1992) and so is much less variable than that in the old universities. New universities are governed by a board of between 12 and 24 members (and the principal unless the principal declines to be a member). Up to 13 members (described as 'independent') are drawn from those who have experience in industry, employment, commerce, or a profession. They must constitute a majority. Up to two governors may be teachers and up to two students; between one and nine may be co-opted members, and at least one of these must have experience in the provision of education. There are also colleges of higher education which are not universities but which are funded by the higher education funding councils. Their structures of governance are similar to those of new universities. It may be noted that elected members of a local authority are not eligible for service on the governing bodies of new universities unless co-opted as individuals.

53. In Scotland, in common with other former centrally-funded higher education institutions, the new universities have their own Orders of Council under Section 45 of the Further and Higher Education (Scotland) Act 1992. These are based on a common model. However, their governance allows for variations from institution to institution. Not all new Scottish universities emerged from local authority control: most were directly funded by the Scottish Office. Typically, however, their structure gives more room for the representation of academic and non-academic staff and students, and requires at least one governor to have experience of local government.

54. The constitutions of Oxford and Cambridge are dissimilar to those of other universities (they have, for example, no lay members on governing bodies and make decisions through a system of direct academic democracy). We make no recommendations specifically about them as a review of their governance would require a separate study. Our general recommendations on openness, whistleblowing, and independent review are however relevant to Oxford and Cambridge. We did not consider the federal element of universities such as London and Wales, although our recommendations are applicable to their constituent institutions.

### *Further Education*

55. The vast majority of the 530 or so further education institutions are independent corporations brought into being under the 1992 Act. Their governing bodies strongly resemble those of new universities, being between 10 and 20 in number. Of these at least

half (up to 14) must be 'business' governors. One business governor is nominated by the local Training and Enterprise Council. The remainder are 'independent' governors, defined in much the same way as for new universities. Of the other governors, up to two may be members of staff; one may be a student; two may be nominated by organisations thought by the governing body to be representative of the local community; and the principal is also a member if he or she decides to be. Up to five governors may be co-opted. Local authority members and employees are eligible to serve only if co-opted, and a limit of two is placed on their number. There is provision for up to two parent governors in sixth form colleges.

56. In Scotland, the restriction on local authority membership of the Board of Management does not apply, and indeed the language of the statute encourages the college to seek local authority expertise (Further and Higher Education Act (Scotland) 1992, Schedule 2). Representation of staff, both academic and non-academic, and students, is mandatory.

### *Funding and Regulation*

57. Virtually all higher and further education institutions in England, Wales, and Scotland receive public funds through funding councils which are executive non-departmental public bodies. Scottish colleges of further education are funded directly by the Scottish Office.

58. Universities are not dependent solely on the funding councils for public resources, although the largest proportion of public funding for English universities in England, for example, is provided by HEFCE. In 1994–95, its funding represented 42.5% of English universities' total income and few, if any, institutions could survive without it. Its functions are to distribute public funds to the institutions, to account for their use, to promote value for money and the proper use of public funds, and to advise the Secretary of State on the funding needs of higher education. Other public funding is provided mainly by local authorities (although the money is provided to them by central government) in the shape of tuition fees (12% of total income), and by the research councils (5%) for the pursuit of specific research activities. Many other public bodies have contractual relationships with universities to carry out training or research.

59. In further education, the English equivalent figures are that some 70% of college income is derived from HEFCE, and approximately another 14% from other public sources (including EU funds).

60. Although HEFCE's role is primarily that of funding, in practice its remit goes wider, because of its role in promoting value for money and the proper use of public funds. HEFCE has co-operated in the production by the Committee of University Chairmen of the Guide mentioned in paragraph 50. It can attach conditions to funding which relate to governance, as it has done in respect of the disclosure of severance payments and use of audit committees. The role of HEFCE's audit service has reflected this wider remit. Routine audits not only enquire about the management of public funds but look at the health of governance and management in institutions and at the extent of compliance with guidance such as that from the CUC. In individual cases of financial misconduct, the Council has intervened to secure a satisfactory outcome.

61. The Secretary of State has a limited regulatory role in higher education. The Secretary of State was responsible for the legislation establishing the new universities, and made the first appointments to their boards. For older universities, whether operating under royal charter or under statutory articles of governance, changes to their governance rules have to be approved by the Privy Council, which takes advice from the Department for Education and Employment. The Secretary of State does not, however, have the power to appoint people to governing bodies, nor to dismiss them. Only the governing body itself can dismiss members. The Secretary of State is also specifically excluded by the Further and Higher Education Act 1992 (Section 68) from intervening in course content, academic appointments or admissions policies. Nevertheless it is clear that through the agency of the funding council, the Secretary of State can exercise considerable indirect influence over the sector.

62. It is perhaps worth noting here that the system of quality inspection in higher education is quite different from that in other sectors. The Quality Assessment Division of HEFCE does not employ inspectors on a permanent basis, and in effect provides peer-group assessments of teaching in individual subjects rather than evaluations of the performance of an institution as a whole. The auditing of quality assurance systems is the separate responsibility of the Higher Education Quality Council (HEQC), controlled by the Committee of Vice-chancellors and Principals (CVCP) and the Standing Conference of Principals (SCOP). The efficiency and effectiveness of this system has been frequently criticised by institutions, and the creation of a combined body is under discussion.

63. Although principally a funding body, the Further Education Funding Council for England (FEFCE) plays a substantial role in governance. It has published the standard guide for college governors (paragraph 50) which advises on all aspects of governance. It has also published guidance on the role of the clerk to the governing body. FEFCE also has an inspectorate which assesses institutions' academic performance and comments on, and grades, the governance and management arrangements which a college has in place, in a more wide-ranging manner than in higher education.

64. The Secretary of State has power to remove some or all of the governors of a further education college if FEFCE finds that mismanagement has taken place, and to alter the instrument of government. The Secretary of State also has a general power to intervene under Section 68 of the Education Act, 1944. In the two cases where mismanagement of a college has been formally investigated, the Secretary of State has acted on the basis of inquiries conducted by FEFCE, and these inquiries have gone well beyond financial matters. The role of the Secretary of State and the funding council is therefore much more direct and extensive for further education than for higher education.

65. Broadly similar arrangements for funding and regulation apply in Scotland and Wales. In Wales the Higher and Further Education Funding Councils are jointly managed. In Scotland, the supervision of further education is the responsibility of the Scottish Office itself, while universities and other higher education institutions are funded by the Scottish Higher Education Funding Council (SHEFC).

66. The above represents necessarily a summary and simplification of a complicated picture: the guides referred to in paragraph 50 above give more details, but the variations do not affect our recommendations.

### *The Appointment of Governing Body Members*

67. Governing body members are all unpaid volunteers with the exception of those who serve by virtue of their office (mainly chief executives). We were impressed by the extent to which arrangements for identifying and appointing new members already reflected the best practice which we indicated in paragraphs 24–27 above. Nomination or search committees with formal terms of reference, preparing person specifications to achieve a balance of skills, and approaching potential candidates, seemed to be common, and there is a useful statement of good practice in the CUC Guide (paragraphs 4.29–4.30).

68. We asked in the consultation document, ‘Issues and Questions’ whether the presence of independent members on the nominations committee, or outside supervision of the process, might be necessary. Some institutions have already considered this, in one form or another. Others felt that the involvement of an outside scrutineer ‘would be neither economical nor proportionate’. There may be more occasion for this sort of structure in colleges and new universities, to deflect the criticism that governing bodies might become too inward-looking because of their power of self-perpetuation.

69. Some of our evidence implied that universities generally experienced little difficulty in attracting suitable candidates to serve on governing bodies; that was the view of the Committee of Vice-chancellors and Principals (CVCP) among others. On the other hand, the Institute of Education commented that ‘it is a challenge to find suitable people to serve on governing bodies — but this is a challenge to which universities must respond’. One option, for both colleges and universities, was to advertise — a method supported by the National Audit Office. There were mixed views on this. Southampton Institute had advertised in the local press and had ‘been most impressed by the calibre of applicants’. Others were much less sanguine. The truth may be that advertising has to be understood in its widest sense, extending to newsletters and publicity materials, not merely paid-for space. There is also a useful symbolic aspect to advertising: it emphasises the organisation’s openness and willingness to listen to public views.

70. Attracting good candidates to serve on further education college governing bodies was ‘a very difficult proposition’ said Walsall College. However, when we visited Basildon College, we were impressed by the formal system by which nominations were sought from companies which had large numbers of employees as students. Developing systems of this kind may reduce the difficulty of finding people to serve on governing bodies. In general, vacancy levels are low at present, suggesting that further education colleges are surmounting any problems.

71. At present, although in principle remuneration may be paid, the Government has made it clear that in practice only expenses are permissible. This approach, said the University of Aberdeen, ‘effectively restricts membership to the self-employed, or to those with considerable autonomy and discretion over their working patterns’. One or two

voices were raised in favour of the payment of governing body members, at least in part to alleviate these difficulties. NATFHE suggested that a system of allowances based on those available to jurors might be helpful. These voices were drowned out by the strong commitment of most to the voluntary principle.

72. There is some variation in the terms of office permitted to governors. In Scotland, a ceiling of 12 years service (in portions of not more than four years) is laid down for new universities and colleges. In England and Wales, no such ceiling applies, although further education governors serve for specified terms of up to four years. The CUC guide suggests that two terms of four years or three of three should be the norm (4.31). Although there are good arguments in favour of requiring people generally to step down after a set period, there will always be exceptional governors whose loss would be felt very keenly. It seems to us on balance to be more important to specify the length of each term of office, followed by a thorough reappointment process, than to lay down maxima. *'Too strict an emphasis upon rotation in membership of Council might ... mean, for example, that we would be deprived of very supportive expertise for which no local replacement was available'*, thought the University of Wales, Lampeter. We consider this further in Chapter 6.

### *Categories of Member*

73. In England and Wales, but not Scotland, a peculiarity of the 1992 Further and Higher Education Act under which new universities and further education colleges operate, is that, at least in theory, they may be prevented from appointing otherwise suitable candidates because of the stipulation that the 'independent' members have to come from the business and professional community. Moreover, the independent governors normally have the right to renew their number without reference to the rest of the governing body. A further requirement restricts the role individuals who are local councillors can play by specifying that they may only serve on governing bodies as co-opted members even if they have a business or professional career. The Association of University and College Lecturers commented that this could lead to 'a club of independent governors, isolated from the workforce and unfamiliar with [its] operation'. Some letters we received from individuals confirmed that this might be a danger in some colleges, although we received no evidence that it was typical.

74. The intention of the legislation to enhance the calibre of governing bodies is not at all questionable, and in practice, the categorisation of members can in any case be circumvented. The Association for Colleges and the Colleges Employers Forum told us that the rules could be interpreted flexibly, allowing membership 'which may be social as well as economic in its character'. Sir Peter Swinnerton-Dyer said that the legislation was 'only intermittently taken seriously', and even the DfEE acknowledged that it 'was open to a fairly wide interpretation'. In our view, that is helpful in practice, although it does not give us much confidence in the effectiveness of the legislation. We believe that best practice in appointing members of governing bodies is to select on the basis of merit and skills, with as little categorisation as possible, although we recognise that different traditions (eg in some older universities) do exist. The legal stipulations, and in particular the bar on local councillors serving on the governing bodies of new universities and further education colleges (unless as co-opted members), may have been justified in the context of a fresh

start for the sectors, and in general we accept the view that membership should be a matter of the personal contribution an individual can make. Restrictions on appointments, including those on individuals who happen to be local councillors, should however be removed. The restrictions now seem to have outlined their usefulness, and to be suitable for amendment when opportunity offers.

**R3. Appointments to the governing bodies of universities and colleges should be made on the basis of merit, subject to the need to achieve a balance of relevant skills and backgrounds on the board.**

*Staff and Student Representation*

75. There seemed from our evidence to be a mixed picture in respect of student and staff representation on governing bodies. Representation was universal in old universities and nearly so in new universities, although not compulsory: the CVCP told us that only two institutions in the HE sector did not have such representatives. The view of many institutions was that 'the contribution made by staff and students is invaluable and ... any attempt to deny membership to either group would reflect adversely on the credibility of the board'. We would add that it would also weaken the critical scrutiny of management decisions which is an important part of maintaining standards of conduct.

76. In further education bodies, staff representation was common (90% of bodies according to a NATFHE survey), student representation less so, except in Scotland where it is compulsory. In England, the FEFCE felt that 'as long as the college operates efficiently and effectively', staff and student representation was outside their remit. Others suggested that students might be too young and too occupied in gaining a qualification to act as effective members of governing bodies. Much the same might be said, of course, of university students who, though not much older, seem to be effective members of their governing bodies.

77. Our evidence was that the most effective governing bodies operated as a team, and worked through sub-committees which reflected their overall composition, allowing for exceptions where there was a clear conflict of interest. Some governing bodies took a less optimistic view: one college said 'that the presence of staff and students seriously impedes this [ie commercial and businesslike] aspect of corporate business.' The experience of other governing bodies seemed to show the opposite, and reflected the essential point that universities and colleges cannot be treated as businesses pure and simple, and that staff members and students are not merely employees and customers, but participants in a collegiate body with rights as well as duties. This is reflected in the CUC Guide (4.32).

*The TEC/LEC Representative*

78. The legislation also stipulates that the local Training and Enterprise Council (TEC) or Local Enterprise Company (LEC) in Scotland, must always enjoy the right of representation on to the governing body of a further education college. This is a well-intended effort to ensure co-ordination between local employers and colleges, but it does raise questions of propriety. Apart from the practical question of the extent to which a given TEC/LEC can be regarded as a body representing all local business interests, there seems to us to be an obvious potential conflict of interest for the TEC/LEC nominee: the college may well be a substantial provider of training under contract to the TEC/LEC, putting the TEC/LEC



governor in a difficult position, even if he or she is careful not to act as a representative. We do not by any means wish to see links between colleges and local employers weakened, and a college governing body may well want to have a TEC/LEC representative on a voluntary basis; but automatic representation on the governing body denies governing bodies the right to choose.

**R4. The automatic representation of the TECs and LECs on college governing bodies should be ended.**

## *Structures of Governance*

79. Higher and further education offers two main models of governance: the old universities, and the new universities and further education colleges. Both have their strengths, and we heard from witnesses who had found one or the other more effective.

*“There have been a small number of well-publicised cases in the recent past of what appears to have been improper behaviour on university Governing Bodies. In the cases I have seen reported it has been where the Governing Body is small and either lacking in, or capable of excluding, staff and student participation. This creates a situation in which there can be improper collusion between a small group of lay members and the Chief Executive. I would commend to you the practice in the older universities, where the Governing Body is usually made up of a number of groups which, while pursuing a common purpose, can act effectively as checks and balances upon each other. The lay members represent the general public interest and provide experience from their own walk of life and a check on any tendency towards academic narcissism. The Vice-Chancellor and Pro-Vice-Chancellors are the professional executive concerned with providing a lead in strategic and operational matters. The Register and other senior administrative officers are independent, in a sense, of all other groups and have special duties towards the legal framework within which the university operates. The academic members are vital in ensuring that a proper academic ethos is maintained and that there is no collusion between the senior executive members and lay members. It is true that a body as diverse and, in some cases, as large as the Councils of the older universities may lack something in executive bite. It does, however, operate very effectively in upholding the principles to which your Committee has drawn attention.”*

UNIVERSITY OF NEWCASTLE

80. The strength of the older universities lies in the representative nature of their councils and their commitment to collegiate government and consultation, given expression by the powers of the academic-led senate. The smaller governing bodies and less autonomous academic boards of new universities and further education colleges offer the potential for swifter and more responsive decision-making, but may encourage an ‘us and them’ division between staff and management. On the other hand, smaller governing bodies create a sense of personal ownership and responsibility on the part of members which may make them more effective in setting the institution’s strategic framework and commenting on the proposals of senior management.

*“While it is aware there has been some, often justifiable, disquiet about the way in which a small minority of higher education institutions have been governed and managed, the Board believes that the framework of government established under the Education Reform Act 1988 and subsequently amended as a result of the Further and Higher Education Act 1992, is basically sound. The setting of a maximum number for membership, the requirement that the majority of members should be in the independent category and should have a background in industry, commerce and the professions, and the flexibility which exists for the appointment of representatives of staff and students and for the co-option of individuals with specific expertise have resulted in the establishment of a body which can operate effectively and efficiently and which can represent the wider interests of the public and those of the University.”*

UNIVERSITY OF HERTFORDSHIRE

81. It would be neither wise nor practical to be prescriptive. Many of the institutions we are dealing with have evolved systems of governance over a lengthy period, in some cases centuries, and it would require evidence of substantial misconduct to justify a recommendation for sweeping change. Schematic distinctions between old and new are artificial and fail to take account of the interchange of culture and people that goes on all the time. The institutions that gave us evidence emphasised that they were by no means complacent. We hope that our recommendations and comments will provide a catalyst to enable them to review their practices and procedures, however good their record has been.

### *Responsiveness to the Community*

82. Solihull College told us that ‘FE corporations are to a great extent local bodies and it is important that their governance is largely rooted in local communities’. We agree. That does not mean that further education institutions wish to return to local authority control, although many of them had retained strong links with the local authority and had co-opted councillors on to their governing bodies. Leaving the local authority had, as many of our witnesses argued, given institutions a clearer focus on objectives and encouraged them to seek greater efficiency and value for money. That was the view of Sir Geoffrey Holland. He felt also that it had produced clearer lines of accountability. In the sense of upward accountability to the funding bodies and central government, we believe that to be true, but upward accountability is not the whole answer. As the legal firm Eversheds put it, ‘the national lines of accountability through FEFCE to the Secretary of State to Parliament, and, through the National Audit Office to the Public Accounts Committee are clear, but result in an accountability which is distant from the communities which the colleges serve.’ It is therefore important that they seek ways to emphasise their readiness to listen to the local community.

83. Many of the institutions which wrote to us were committed to be as responsive as possible to their local community. Best practice varies according to circumstances. In some cases the governing body has developed, as we noted above, formal systems of nomination to its membership which reflect the interest of the main local interest groups. Other

institutions hold open annual general meetings. It can be disheartening to organise such events and find that the number of those attending barely outnumbers the governing body; at Kendal College a more than respectable turn-out was achieved by personal invitations from the Chairman. Getting structures like this to work may take time, but it is time well spent.

84. We recognise that universities are simultaneously players on the regional, national, and international stage. On the other hand, advice from the CUC states that ‘ways should be found by which the public or the local community can comment on matters to do with the university that concern them’. Brighton University had persisted with open annual general meetings despite low turn-outs and had seen a healthy attendance and vigorous questioning at recent events. Cardiff Institute of Higher Education plans a register of interested groups which ‘will be formally invited to an annual meeting with the governors and chief executive.’

85. Older English universities frequently have courts, large representative bodies which contain local politicians and dignitaries, and which indeed may hold nominal ultimate constitutional authority over the institution. The University of Leeds told us that ‘the court plays a role of great value in institutions such as ours’ — indeed it appoints one-third of the governing body. Other comments were less positive, and depicted the court essentially as a decorative and public relations element in the university constitution (although courts may sometimes be asked to act to resolve internal disputes *in extremis*). That the basic conception has value is however demonstrated by the decision of the University of Middlesex (one of the new universities) to create an advisory court (see box) with one hundred or so members to act as a sounding board for the university and to comment on and question its policies. There is no doubt that any university, if it so wishes, can make active use of such a body to integrate itself most effectively within the local and regional community, and where such a mechanism does not exist, ‘some other means needs to be devised ... by which a mixture of local and other interests can make their views known’ (CUC).

### *Composition of Middlesex University Court*

#### **Board of Governors**

**Purpose** : *To support the University in the achievement of its stated objectives and to reflect upon its progress.*

**Membership** : *Membership will be by invitation of the Chancellor on the recommendation of the Nominations Committee and will be drawn from:*

- Those holding honorary awards of the University
- Governors whose term of office on the Board has been completed
- Members of the House of Lords having connections with the University
- Members of Parliament for local constituencies
- Leaders/Chief Executives of Local Authorities
- Influential members of local community
- Representatives of industry and commerce, arts and sciences
- Chair and representatives of the Alumni Association
- Such other persons as may be able to contribute to the work of the Court

**Chair** : Chancellor

**Vice-Chair** : Vice-Chancellor

**Secretariat** : Clerk to the Board of Governors

86. As education becomes a more competitive market, universities and colleges have performed better and more comprehensive information about themselves and their activities. From the point of view of propriety, this could be built on by encouraging a greater consistency in approach on the lines of company annual reports. For example, a list of members of the governing body, the corporate governance structure of the institution, policies on openness, a statement of objectives, and performance against key indicators (eg staff:student ratios, examination performance, standards of output, and so on) would enable both customers and community to gain a better idea of the institution and its goals. This is a matter on which the funding and representative bodies should discuss the provision of more coherent guidance across the sectors.

**R5. Individual universities and colleges should be encouraged to set out key information to a common standard in their annual reports or equivalent documents where they do not already do so. Material on governance should be included in the annual reports or equivalents of further and higher education institutions. Representative bodies should take the lead in promoting this with the support of the Funding Councils.**

## *Openness*

87. Trades union representatives who gave evidence to us complained that decision-making in some institutions had become confined to small sub-committees of 'independent' governors whose decisions were not subject to proper approval by the main governing body. The Association of University Teachers said that the result in some institutions was that 'nobody seems to have the smallest idea of why the decisions were taken'. Other evidence suggested to us that the culture of debate and question, so fundamental to teaching and scholarship (and equally helpful for high standards of conduct), continued to be taken very seriously in the vast majority of institutions. In our view it is not possible to detach that open tradition of academic life from the management of the institution without doing damage both to academic standards and to administrative propriety: the two are linked, and it is significant that secretive decision-making processes seem to have been a common feature on those occasions when things went awry (paragraph 48).

88. Thus, for example, we found that the majority of higher education institutions which wrote to us made not only board minutes, but papers and other ancillary material available to enquirers or placed them in the library. This signals a commitment to discussion and scrutiny which is essential. At Middlesex University the editor of the university newspaper was present at governing body meetings, and at King's College, London, the press officers of the university and students union were invited to attend. Further education colleges are required by regulation to make agendas, minutes, and papers available on request.

89. There will be occasions in which a degree of confidentiality is necessary. Universities and colleges operate in competitive markets. Sometimes their competitors may be commercial enterprises which operate with a high degree of secrecy, and requiring complete transparency would be unfair to educational bodies. Yet limitations on openness have to be carefully defined if they are not to act against the public interest. The Vice-

chancellor of the University of Central England identified three main areas of confidential material which seem to us to strike the right balance:

- matters relating to an individual member of staff or student
- matters relating to a commercial transaction, including a proposed acquisition or disposal of land which, if known, would disadvantage the university financially
- matters relating to a negotiating position with a trade union or legal advice which, if known, would disadvantage the university.

As he points out, information in the second two categories may well be commercially sensitive only for a specified period, after which the restriction can be removed. It would be helpful if governing bodies were to specify such time limits for each piece of confidential business.

90. Most further and higher education institutions which submitted evidence to us had set up registers of interests and were fully aware of the importance of having tight rules covering the declaration of interest in meetings. A recent FEFCE survey indicates, for example, that such registers existed or were planned in 90% of further education colleges which responded to the survey. Our firm view is that this practice must be universal, as the Further Education Funding Council for Wales wished, and that the register must be open to enquirers, as the CUC recommends. The Scottish Office requires colleges to disclose in their accounts those transactions in which a member of the governing body had a material interest, which is now part of generally accepted accounting practice in the private sector. Since there will undoubtedly be circumstances, especially in smaller communities, where an institution may have no alternative but to use the services of an organisation in which a board member has an interest, this form of disclosure is essential and should always be made.

**R6. Representative bodies, with the help of the funding councils, should produce a common standard of good practice on the limits of commercial confidentiality, and should encourage all institutions to be as open as possible subject to those limits. All institutions should have publicly available registers of interests.**

## *The Autonomy of Higher Education Institutions and Academic Freedom*

*'Freedom within the law to question and test received wisdom and to put forward new ideas and controversial and unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges that they may have at their institutions.'* — definition of academic freedom from the 1988 Education Reform Act, section 202(2).

91. There are few issues in higher education which stir such strong passions as academic freedom. Our purpose here is not to enter the general debate, but to deal with those

aspects of the question which are relevant to our terms of reference. The issue is much less sensitive in further education, although the legal protection given to academic freedom also applies in that sector. The autonomy of colleges vis a vis the funding councils also seems to be a less sensitive topic.

92. We believe that there is a clear distinction between the autonomy of a higher education institution *as an institution* and the freedom of an individual academic as defined in statute and quoted in the box above. The autonomy of an institution may be desirable (to encourage self-reliance and responsibility); it may be guaranteed by the law (as, for example, in respect of admissions policies and course content); or it may be traditional (although not everywhere or always). Yet we do not believe that there is an absolute principle that prevents the government, the funding council, or some other public body from attaching conditions to money given to a university. Although most universities rely on the public funds from the funding and research councils, or from tuition fees, it is true that they are independent bodies, and we have drafted our recommendations in that light, placing primary responsibility for implementation on representative bodies and institutions themselves. In reality, however, the freedom of action of institutions will be circumscribed by the extent of their dependence on public funds, and the public has a legitimate interest in their governance arrangements.

93. It is not an infringement of academic freedom if the funder decides subsequently that another initiative is more worthwhile and switches funding to that, unless of course the funder is seeking to suppress individual views or research. As Sir Peter Swinnerton-Dyer put it to us, '[academic freedom is] one of those motherhood phrases which is imported into arguments where it actually has no relevant place whatsoever ... [it] is not the right to be supplied with as much money as you think you need for your purposes.' The editor of the Times Higher Education Supplement, Ms Auriol Stevens, felt that academic freedom was critical to university life, but could remain valid only if narrowly drawn: 'the concept has been abused'.

94. Our witnesses acknowledged the proposition that the importance of the proper use of public money meant that accountability to the funding councils had to be strict. The councils themselves emphasised the critical difference between taking an interest in university governance in order to safeguard public funds, and regulating universities as an end in itself. Neither the Secretary of State nor the funding councils have the right to remove a member of a university governing body, a power which the Secretary of State does have in further education. A minority felt that such a power should ultimately lie with the Secretary of State or the funding council, because otherwise staff had no means of protection: 'there is no protection for whistleblowers, no court of appeal, no power of the Secretary of State or remit (or wish) of the funding body to check abuse within the institutions' (Association of University and College Lecturers). But it was clear that the majority of staff or institutions did not want to surrender their autonomy to a government quango or minister in that way, and we believe that our recommendations on whistleblowing and independent review may provide a way forward (paragraphs 41–43 and 101–112).

95. Governing bodies do have the power to purge themselves of dilatory or incompetent members, but this however can be, and has been, abused to remove critical voices from the governing body. It is not a power that should be exercised lightly, and it would be appropriate for it to be limited by some right of appeal (paragraph 112 below).

96. In practice, it seems that universities and funding councils have struck a practical bargain between the benefits of autonomy and the need for accountability. We agree with the maxim that 'the exact counter-balance to autonomy is accountability'. As HEFCE argued, that meant that universities could be required to act reasonably, not to misuse public funds, not to withhold information from HEFCE, and not to ignore probity, value for money, or good governance — all requirements that can be imposed without infringing academic freedom.

97. That view does not lead us to underestimate the true importance of academic freedom if properly defined. The right of individuals to pursue lines of research and publication which may be unpopular or controversial seems to us to be fundamental to the success of universities, reflected in the debates of senates and the like, as an academic institution. By extension, it has created a tradition of freedom of speech within a university which is an important check on impropriety. Comparisons with the requirements of confidentiality normal in a commercial business are misleading and misguided, as Sir Michael Davies observed in his visitorial report on University College, Swansea: 'the point is that neither the University of Wales nor the University College Swansea is a 'company' in the profit-making or any other sense. They are academic institutions.' He added that, when drawing the line between the exercise of proper academic freedom and unacceptable dissent, 'the fact that it is a line to be drawn in an adult academic world and not in a commercial jungle is of profound importance'.

**R7. Institutions of higher and further education should make it clear that the institution permits staff to speak freely and without being subject to disciplinary sanctions or victimisation about academic standards and related matters, providing that they do so lawfully, without malice, and in the public interest.**

### *Confidentiality clauses*

98. In Chapter 1 we discussed the importance for organisations of setting up a proper system of whistleblowing within the organisation. Yet cases of misconduct and maladministration involving a risk to public funds will occur from time to time. In some cases, the embarrassment to the institution has been such that disincentives to whistleblowing, in the form of confidentiality clauses, have been used.

99. In their report *Severance Payments to Senior Staff in the Publicly Funded Education Sector*<sup>4</sup>, the Public Accounts Committee observed that 'We are strongly opposed to the 'gagging' clause such as that which was included in the original severance agreement [at the University of Huddersfield]. Such a restriction should not be employed to prevent disclosure of the use of public funds'. We have come across instances in higher and further education of clauses in service and severance contracts which place extremely wide restrictions on the ability of staff to discuss with outsiders events within the body in which they work. There may of course be a place for restrictions of some sort in these contracts: genuinely confidential material may need to be protected and severance agreements may contain personal details which the individual would want to keep private. Yet it is against the public interest for confidentiality clauses to inhibit the disclosure of maladministration or the misuse of public funds.

100. The charity Public Concern at Work provided us with an extract from the standard contract for staff in new universities and colleges of further education. In part it reads:

*'15.3 Confidential information must be determined in relation to individual employees according to their status, responsibilities or the nature of their duties. However, it shall include all information which has been specifically designated as confidential by [the institution] and any information which relates to the commercial and financial activities of [the institution], the unauthorised disclosure of which would embarrass harm or prejudice [the institution].'*

101. We consider that this clause is unacceptably wide and will tend to inhibit staff from raising concerns in the public interest, even with the proper authorities. If clauses of this type are necessary, for example, to protect commercially sensitive details of a forthcoming purchase, they should contain a statement of a public interest exception, permitting staff to raise matters with the funding councils or some other outside person or body, such as the Visitor. Protecting institutions from embarrassment cannot be weighed in the balance with ensuring the proper conduct of public business.

**R8. Where it is absolutely necessary to include confidentiality clauses in service and severance contracts, they should expressly remind staff that legitimate concerns about malpractice may be raised with the appropriate authority (the funding council, National Audit Office, Visitor, or independent review body, as applicable) if this is done in the public interest.**

## *Independent Review and the Resolution of Disputes*

102. In our first report, we said that independent scrutiny of public bodies was one of the 'common threads' we had identified as essential to the maintenance of standards in public life and public confidence in those standards. It is not going too far to say that it is no longer sufficient for public bodies to take good decisions; they must be seen to do so, and be prepared to let an independent person or body review their activities if necessary. We have to consider how applicable this concept is to higher and further education.

103. Accountability for financial management already conforms to the model. The chief executive of each institution funded by the various funding councils is responsible on accounting officer lines for the proper use of public money, and has the duty to alert the funding council if decisions are taken by the governing body which are incompatible with the terms of the relevant financial memorandum. We conclude that financial misconduct or maladministration is fully covered by the accounting officer system. Where this fails to work, for example when accounting officers are themselves involved in the misconduct, our recommendations on whistleblowing should offer an additional safeguard.

104. A further safeguard is the role of the clerk or secretary to the governing body (registrar is also a common term in universities). University secretaries are the primary source of wisdom on the legal propriety of the university's actions, and have a responsibility to the governing body to advise it on such matters, and to indicate to it illegality or questionable behaviour on the part of the chief executive or senior management. That duty should not be affected by the likelihood that the secretary may report for management purposes to the chief executive.



105. FEFCE has recently produced very helpful guidance on clerking in further education (*A Guide for Clerks*<sup>5</sup>). It recommends that clerks should exercise a number of important functions relating to propriety, including maintaining a register of interests and advising the governing body on the lawfulness of its decisions. We recognise that the legal training and expertise available to clerks in smaller colleges may make that standard difficult to reach. We believe that governing bodies should however review their present arrangements in accordance with the Guide, and regard it as a standard of good practice which they should meet. We would also welcome any moves by clerks themselves to work together to improve their professional standards and exchange information about what can often be an isolated job at each institution. A similar guide might be helpful in the higher education sector.

106. A right of appeal in respect of student complaints is incorporated in the Further Education Charters. The Charters for Higher and Further Education state that students and potential students have the right to have their complaints dealt with by institutions. In the case of further education bodies, dissatisfied complainants may appeal to the funding council or appropriate Secretary of State. This right does not exist in respect of institutions of higher education under the higher education charter.

107. In many, although not all, old universities students and staff may take grievances to a 'Visitor' (there are no Visitors of this sort in new universities or in Scotland). The role of Visitor is commonly honorific rather than active, and is frequently delegated for day to day purposes to the Privy Council Office. There are universities whose Visitor is HM the Queen, another member of the royal family or a senior churchman, and a Visitor's representative acts in their place. In those infrequent circumstances in which a dispute develops (usually to do with some academic matter such as the award of a degree, or a question of academic standards) which cannot be resolved within the university itself, the Visitor's representative may be asked to settle matters, with the advantage that in defined circumstances the Visitor's jurisdiction may exclude recourse to the courts. It was the Visitor's representative who eventually settled the dispute over academic standards in Swansea. Visitors have had no jurisdiction over disputes about the employment of academic staff since the 1988 Education Reform Act (Section 206).

108. The visitorial system of hearing appeals is not by any means perfect. The process of appointing a Visitor's representative to investigate may be lengthy, visitorial law is complex, and the courts show an increasing disposition to intervene. Yet those institutions which have a Visitor offer their students and staff the right thereby to seek an outside judgement of their decisions, in line with the recommendation in our first report. Indeed, the University of Teesside (a new university) has appointed a Visitor to provide guidance for the University and advice to its board. The remit of this new office is still under consideration, and may well not echo precisely the role of the Visitor at an old university. It is however welcome recognition on the part of the University of the importance of an independent perspective.

109. In summary, we believe that the official channels for involving the funding bodies in the investigation of financial misconduct already exist, and will be strengthened by our recommendations on whistleblowing. Complaints from students and potential students are adequately dealt with under the Charter system, with the exception of those higher education institutions which have no Visitor. This is a gap which needs to be filled, either

by a general appellate body or in some other way. This is a matter for representative bodies and institutions of higher education to determine in detail.

**R9. Students in higher education institutions should be able to appeal to an independent body, and this right should be reflected in the Higher Education Charters.**

110. We have also to consider whether a new system is required to settle future cases similar to that at Swansea, and to do so in institutions which have no Visitor, or more quickly in those that do. It may be tempting to dismiss the whole subject by pointing out that cases of serious malpractice or dispute are few and far between. Yet systems of review are designed to deal with exceptional circumstances. The vast majority of institutions are well-run and have nothing to fear; indeed the existence of an independent system can be helpful in reassuring the public and the staff of an institution that the sector is not complacent about its high standards of conduct and is ready to protect them. It is, however, essential to look for a system of scrutiny that has a clearly-defined remit; involves minimum cost; and deters malicious or vexatious complainants.

111. Where serious cases of non-financial maladministration or failures in academic standards occur, of the sort which might presently involve the Visitor in institutions which possess the office, no convenient existing structure presents itself. Nor does it seem likely that a *full-time* ombudsman for further or higher education could be justified. Nonetheless, the right to approach an outside body when all internal avenues are exhausted is important enough to lead us to conclude that a solution must be developed. One suggestion put to us was that a standing panel of senior persons experienced but no longer involved in further or higher education administration, from which a conciliator or arbitrator might be drawn when required, might be constituted by the funding councils and the representative bodies. We see a good deal of merit in that suggestion, which would supplement the Visitorial system and provide an alternative for institutions without a Visitor.

112. The details of the system should be worked out by institutions, representative bodies, and funding councils in co-operation. We believe that the following guidelines would be helpful in that work:

- the main aim of the system should be to resolve disputes by conciliation and agreement
- the panel system should exclude personal grievances and those connected with terms of employment of individuals, decisions of promotion boards and so on
- the system would cover cases of maladministration and malpractice (financial and non-financial), those concerning academic standards and academic freedom, and the dismissal of governing body members
- under normal circumstances, the panel would become involved only when internal systems of dispute resolution had been exhausted. When both institutions and complainant agreed, however, a dispute could be referred to the panel at any stage for assistance. There could subsequently be no further use of internal machinery to pursue the dispute

- members of the panel would have access to records of other cases and precedents
- the panel should be able to decline to act if the dispute was not within its remit, properly lay with another representative body, or for some other good reason.

**R10. The higher education funding councils, institutions, and representative bodies should consult on a system of independent review of disputes. A similar process of consultation should be undertaken by the equivalent further education bodies.**

### *Membership of the Higher Education Funding Council for England (HEFCE)*

113. Concern has been raised with us about the alleged conflict of interest created by having chief executives (vice-chancellors and principals) of English higher education institutions on the board of HEFCE, even though their organisations are recipients of HEFCE funding. This is in contrast to the practice of the Scottish and Welsh funding councils, which have on their councils only chief executives of institutions which are not eligible to receive funds from them. We note also that vice-chancellors were not represented on the University Grants Committee, the predecessor of HEFCE.

114. The Department for Education and Employment and HEFCE itself are firmly of the view that proper safeguards to prevent any conflict of interest are in place. They also believe that HEFCE would not be able to function effectively without English vice-chancellors and principals on its board. We understand that the Secretary of State will however in future look at the merits of alternative members against the merits of the appointment of English vice-chancellors.

115. That is welcome. Nonetheless, it is not a healthy position if institutions which are not fortunate enough to have their vice-chancellor on the board of HEFCE believe that they are thereby disadvantaged. The practice of the old University Grants Committee, and of the funding councils in Scotland and Wales, indicate that the present English practice may not be as imperative as its proponents assert. The appointment to HEFCE of Scottish or Welsh vice-chancellors is worth further consideration.

**R11. The Secretary of State for Education and Employment should re-examine the practice of appointing vice-chancellors and principals of English institutions to the board of HEFCE to determine whether an alternative exists which avoids perceived conflicts of interest, and to ensure that existing rules protect against any potential conflict of interest as the Council is presently constituted.**

116. We are aware that the Further Education Funding Councils for England and Wales do have members who are principals of funded institutions. In contrast to the HEFCE practice, we have received no representations about this position. However it raises similar issues of perceived conflicts of interest and we believe that the Secretaries of State should also review the position with respect to those Councils.